

WHAT TO DO WHEN LITIGATION COMES KNOCKING: *ETHICAL & PRACTICAL CONSIDERATIONS*

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PRESENTERS



SHARI A. BRANDT

LEAD PARTNER, NEW YORK COMMERCIAL LITIGATION

PERKINS COIE LLP

- Shari's experience includes more than 25 years representing institutions and individuals in high-stakes matters, including white-collar criminal and regulatory proceedings, internal investigations, and complex commercial civil litigation.
- Shari has particular depth in defending matters before the Commodity Futures Trading Commission (CFTC) and U.S. Securities and Exchange Commission (SEC), as well as litigation, including class action litigation, alleging antitrust, securities laws, and Commodity Exchange Act violations relating to financial products.
- Recognized in Legal 500 and Chambers USA, Shari has been described by clients as "very client service oriented," "extremely smart, experienced, hardworking and thorough," noting as well that she is "responsive and strategic" and "does a great job with really complex cases."
- Shari previously clerked on the United States Court of Appeals for the Second Circuit and is the New York Office Litigation Lead.

PRESENTERS



ERIC J. WEISS

LEAD PARTNER, SEATTLE COMMERCIAL LITIGATION

PERKINS COIE LLP

- Eric's practice focuses on complex commercial, consumer, and class-action disputes—including enforcement of terms of service, breach of contract, violation of state consumer-protection laws, arbitration and mass arbitration, government investigations, and trial.
- In 2022, *Law360* recognized Eric as one of the nation's top lawyers under 40 years old in class-action litigation.
- A former federal law clerk, Eric is the Seattle Office Litigation Lead and serves as the co-chair of the Washington State Bar Association's Section on Antitrust, Consumer Protection, and Unfair Business Practices.
- Before practicing law, Eric was a staff sergeant in the U.S. Air Force with a Top Secret security clearance. Eric deployed to Pakistan in support of Operation Enduring Freedom and received several military honors.

PRESENTERS



SARAH LEUNG

GENERAL COUNSEL

WYZE LABS, INC.

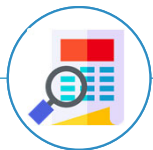
- Sarah leads Wyze’s legal and risk-management efforts.
- Sarah previously served as general counsel of Aristocrat Digital, a group of video game companies composed of Big Fish Games in Seattle, Product Madness in London, and Plarium Global in Tel Aviv. Earlier, Sarah was a business attorney at RealNetworks, Inc., and an associate at Heller Ehrman.
- Sarah is a regular speaker on critical matters of race, gender, diversity, and inclusion in business, leadership, and the law. She is a Trustee of Seattle Country Day School and previously served for many years on the Board of Directors of the Denise Louie Education Center, a multicultural early learning and family support organization for primarily immigrant and low-income families.
- Sarah lives in Seattle with her two children and their labradoodle, Langley.

WHAT TO DO WHEN LITIGATION COMES KNOCKING

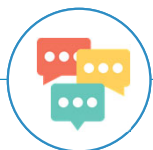
TOPICS



DOCUMENT PRESERVATION



GOVERNMENT INVESTIGATIONS



EMPLOYEE FACTS & PRIVILEGE



RETAINING COUNSEL

APPLICATION TO IN-HOUSE COUNSEL

ABA Rule 1.13: Organization as Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.



DOCUMENT PRESERVATION

DOCUMENT PRESERVATION



ISSUE LITIGATION HOLDS IN A TIMELY MANNER



ADVISE ABOUT OBLIGATIONS TO RETAIN EVIDENCE FOR LITIGATION



SPOLIATION MOTIONS ARE TOXIC

DOCUMENT PRESERVATION



ETHICAL RULES

- **Rules of Civil Procedure**
 - FRCP 26(g)(1) - Signature of attorney or party says complete after reasonable inquiry
 - FRCP 37(e) - Safe Harbor for ESI
- **ABA & Washington Rules of Professional Conduct**
 - Rule 1.1 - Competence
 - Rule 1.3 - Diligence
 - Rule 1.13 - Organization as Client
 - Rule 3.4 - Fairness to Opposing Party
 - Rule 5.3 - Responsibilities Regarding Non-Lawyer Assistance

DOCUMENT PRESERVATION



CASE APPLICATION

- **Timeliness**

- *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)
 - “Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”

- **Sanctions**

- *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132 (N.D. Cal. 2012)
 - “At issue is whether Samsung took adequate steps to avoid spoliation after it should have reasonably anticipated this lawsuit and elected not to disable the ‘auto-delete’ function of its homegrown ‘mySingle’ email system.”
- *Indus. Quick Search, Inc. v. Miller, Rosado & Algois, LLP*, 2018 WL 264111, (S.D.N.Y. Jan. 2, 2018)
 - Sue attorneys when legal holds were insufficient; attorneys should supervise clients when handling case documents.
- *N.V.E., Inc. v. Palmeroni*, 2011 WL 4407428, at *5 (D.N.J. Sept. 21, 2011)
 - “NVE acted with gross negligence in both failure to preserve evidence and collection and review. As to preservation, NVE’s counsel failed to institute a litigation hold.”
- *United States v. Suarez*, 2010 WL 4226524 (D.N.J. Oct. 21, 2010)
 - Adverse jury instruction regarding deleted emails.
 - Criticized U.S. Attorney's Office for failing to issue a litigation hold to FBI for seven months after onset of investigation.



COOPERATION WITH INVESTIGATIONS

HYPOTHETICAL: COOPERATION

- DOJ opens investigation into whistleblower complaint about a dangerous product. Company counsel conduct their own internal investigation and seek cooperation credit. Prosecutors provide company counsel a list of employees to interview during the internal investigation. Company counsel interview the employees and provide oral downloads from the interviews to the government.
 - Are the employees' Fifth Amendment rights breached?
 - Has the Company waived the privilege?



PRESSURE TO COOPERATE IN GOVERNMENT INVESTIGATIONS

- Cooperation with the government is an important path for companies under criminal or regulatory investigation to obtain leniency and potentially avoid corporate criminal liability.
- Cooperation is one of the few factors within the company's control.
 - **Justice Manual 9-28.700:** To obtain any cooperation credit, corporation must identify all individuals who were substantially involved in or responsible for the misconduct; and provide all relevant facts about individual misconduct to the DOJ.

NEW DOJ GUIDANCE

- Guidance issued by DOJ Deputy Attorney General Lisa Monaco in September 2022 stated:
 - To be eligible for any cooperation credit, corporations must:
 - Swiftly disclose all relevant, non-privileged facts about individual misconduct. This includes work-related communications on personal devices associated with relevant individuals.
 - Timely preserve, collect and disclose relevant documents located both within the US and overseas.
 - Not use data privacy laws, blocking statutes and other restrictions imposed by foreign law to “shield misconduct” from detection and investigation.

CONSIDERATIONS IMPACTING COOPERATION EFFORTS

- Retention of outside counsel
 - When and for whom
- Obligation to preserve, collect and produce documents
 - Includes communications on personal devices and ephemeral messaging applications
- Risks of “excessive” cooperation
 - Company waiving privilege over its internal investigation
 - Government “outsourcing” investigation to company counsel

USE OF PERSONAL DEVICES FOR BUSINESS

- \$2 billion in fines imposed by regulators on banks and brokerage firms for failing to detect that employees were using personal devices for business communications and failing to take steps to monitor and preserve those communications.
- Company policies prohibiting off-channel communications are frequently violated due to convenience or lack of clarity over what is a “business-related” communication.



FALSE STATEMENTS OR INCOMPLETE SUBPOENA RESPONSES

- Messages on personal devices may lead to:
 - Failure to preserve relevant communications
 - Spoliation
 - Incomplete subpoena and information request responses
 - Actions for false statements or obstruction of justice



WHAT IS BUSINESS-RELATED?

- Whether a communication is “business-related” may not be clear-cut.
 - “depends upon the facts and circumstances” (FINRA Reg. Notice 11-39)
 - may include:
 - Discussions about product offerings;
 - Discussions about securities prices and markets;
 - Timing of regulatory filings; and
 - Scheduling external meetings among people who do business together.
- Regulators consider each line of text to be a separate communication.

DOJ & SEC POLICY ON PRIVILEGE WAIVERS

- Cooperation credit does not require a privilege waiver.
- Prosecutors may not request a waiver (since 2008).
 - Exception for crime-fraud and advice-of-counsel defense.
- Cooperation credit requires attribution of all relevant facts to specific sources “where such attribution does not violate the attorney-client privilege.” (Justice Manual at 9.47.120.3(b)).
- Fraud Chief said Fraud Section practice is not to ask for specific attribution of witness statements (R. Zink May 16, 2019).
- If prosecutors violate this policy, counsel are encouraged to “raise their concerns with supervisors.”
- SEC Staff may not ask for privilege waiver without approval by Director or Deputy Director. (SEC Enforcement Manual Section 4.3)

RISK OF PRIVILEGE WAIVER

- Decision whether to read witness interviews in order to get maximum cooperation credit.
 - Helps Government understand "all relevant facts."
- Can result in privilege waiver.
- Company counsel routinely read interview memos or give “hypothetical proffers” while attempting to maintain that no privilege has been waived.
- Prosecutors and staff have come to expect these “downloads.”
- SEC Enforcement Directors publicly said that:
 - Companies are more likely to get more cooperation credit if they tell the Staff what witnesses “actually said” than companies that do not; and
 - “We’re not seeking a privilege waiver,” but “sophisticated counsel figure out a way to get us the information.” (SIFMA panel, March 2019)

PRIVILEGE WAIVED

- *U.S. v. Stewart* (S.D.N.Y. 2016): Disclosure of contents of privileged communications, as opposed to unprivileged *facts*, constituted waiver of privilege.
 - Court appears to have relied on language in letter stating, “Mr. Stewart *reported*...”
- *S.E.C. v. Vitesse Semiconductor Corp.* (S.D.N.Y. 2011): “Very detailed, witness-specific” oral downloads provided to the SEC constituted waiver of work product protection.
- *S.E.C. v. Herrera* (S.D. Fla. 2017): Law firm conducting internal investigation waived work product protection when it voluntarily gave the SEC “oral downloads” of interview notes.
 - Reading memorandum to government is the same as handing it over: “[N]o substantive distinction...between the... physical delivery of...notes and memoranda and reading or orally summarizing the same written materials...”

RISK OF “OUTSOURCING”

- What is “Outsourcing”?
 - Government investigation and company investigation become too intertwined.
 - Government directs the company's investigation too much.
 - Company does everything the Government asks.
 - Government doesn't conduct its own investigation.
 - Court could find that the company is an agent of Government.
 - Fifth Amendment issues for company witness interviews.
 - *Brady* implications for Government.

COOPERATION: KEY TAKEAWAYS

- Outsourcing:
 - Remember that all communications with DOJ could be discovered.
 - Don't ask Government, "What would be helpful?" (Ask for information.)
 - Tell the Government what steps company is taking.
 - Maintain own investigation plan.
 - Request subpoenas.
 - Memorialize corporate reasons for internal investigation and decision to cooperate.
- Privilege Waiver:
 - Summarize all relevant facts with detailed attribution to documents and public sources.
 - Avoid attributing specific facts to particular witness interviews.
 - Suggest witnesses for government to interview.
 - Avoid using decks or other handouts where possible.



EMPLOYEE FACTS & PRIVILEGE

EMPLOYEE FACTS & PRIVILEGE



REMEMBER PRIVILEGE BASICS



PROVIDE AN UPJOHN WARNING



BE CAREFUL WITH FORMER EMPLOYEES

EMPLOYEE FACTS & PRIVILEGE



REMEMBER PRIVILEGE BASICS

Attorney-client privilege attaches to the following:

- (1) communications;
 - (2) made in confidence;
 - (3) with the client;
 - (4) where legal advice of any kind is sought;
 - (5) from a professional legal advisor in his or her capacity as such;
 - (6) unless the protection is waived.
- *U.S. v. Christensen*, 828 F.3d 763, 802 n.18 (9th Cir. 2015).

EMPLOYEE FACTS & PRIVILEGE



BE CAREFUL WITH FORMER EMPLOYEES

NEWMAN V. HIGHLAND SCHOOL DISTRICT NO. 203, 381 P.3D 1188 (WASH. 2016)



- Washington has long recognized that attorney-client privilege protects communications between a corporation's lawyer and its agents, including non-management employees, involving the agent's acts or duties that may be relevant to the lawyer's work on behalf of the corporation.
- But the attorney-client privilege **does not cover communications** between attorneys representing corporate or government entities and **their former employees**, even in situations where the former employees' acts or omissions created the entity's liability.
- Note Exceptions.



RETENTION OF OUTSIDE COUNSEL

HYPOTHETICAL: RETENTION OF OUTSIDE COUNSEL FOR EMPLOYEES

- A whistleblower lodges a complaint alleging that a recall should have been issued on a company product, but company culture was to avoid using the “recall” word.
- Company counsel needs to speak with several employees and is also contemplating disclosure to regulator.
 - Can company counsel speak to the employee without outside counsel present?
 - Can company counsel offer to retain outside counsel for employees?



CONSIDERATIONS IN RECOMMENDING OUTSIDE COUNSEL TO EMPLOYEES

- Benefits of using same outside counsel for company and employees:
 - Cost effective to work with just one law firm
 - Improves flow of information
- Suggests to regulator and adversaries that there are no conflicts between company and employees
- Issues to consider before referring employees to outside counsel:
 - Conflicts of interest: Rules of Professional Conduct 1.7, 1.13; risk of conflict between clients; potential for lawyer disqualification
 - DOJ cooperation credit requirements to disclose all facts
 - Government or regulator's preference
 - Degree of risk and exposure to culpability
 - Individual's personality

COMMON QUESTIONS: RETENTION OF OUTSIDE COUNSEL FOR EMPLOYEES

- May you speak with employees without a lawyer present? Does it matter if employee is junior vs. senior?
- What do you say when employees ask: Is company counsel representing me? Do I need a lawyer? Can I speak directly to government?
- Should you recommend pool counsel or different counsel for each employee?
- May you tell outside counsel to reach out directly to an employee? Does it matter if employee is current vs. former?
- When are oral vs. written joint defense agreements appropriate?

INTERVIEWING EMPLOYEES

- *Upjohn v. United States*, 449 U.S. 383 (1981): When company counsel speaks with employees, counsel must provide "corporate Miranda" warning informing the employee that:
 - Company counsel represents only the company and not the employee individually;
 - The attorney-client privilege belongs to and is controlled by the company; and
 - The company may choose to waive the privilege and disclose what the employee says to a government agency or another third party.
- Risks of providing "soft" Upjohn warnings
 - *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009).
- Best practices
 - Make sure Upjohn warnings are appropriately given
 - Consider whether necessary for company counsel to sit in on interviews of company employees conducted by outside counsel
 - Risks of company counsel representing employees for some purposes and not others

POTENTIAL PROBLEMS WITH *UPJOHN* ADMONITIONS

- Failure to give an effective Upjohn admonition risks:
 - No corporate privilege attaching.
 - Violation of attorney's ethical obligations.
 - Joint representation of company and employee or other claim of privilege by employee.
 - A claim of privilege by the employee seriously compromises a company's ability to waive the privilege in a subsequent government investigation and to disclose information obtained during the internal investigation.
 - *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).
- On the other hand, many interviewers fear that an effective Upjohn admonition may cause problems as well:
 - Employees may be hesitant to provide candid responses.
 - Employees may be concerned that they need a lawyer or are in trouble.

HOW TO RECOMMEND OUTSIDE COUNSEL

- It is in the company's best interest to make sure employees have competent counsel.
- Recommending particular counsel to employee:
 - Company ensures selection of a lawyer who knows the business and subject matter.
 - No ethical prohibition, but should be transparent.
- Giving employee multiple options:
 - Employee may feel lawyer s/he chooses is truly independent.
 - If asked by regulator, employee can say s/he spoke with multiple people before selecting counsel.
- Be aware of potential unethical solicitation concerns when contacting former employees to recommend counsel.
 - *Rivera v. Lutheran Medical Center*, 899 N.Y.S.2d 859 (2d Dep't 2010).
 - NY Rule of Professional Conduct 7.3.

JOINT DEFENSE AGREEMENTS

- Agreement to pursue a joint defense strategy and share confidential information intending that the information be protected by attorney-client privilege.
- Interests of parties do not have to be in perfect alignment, but all members must share a substantially similar legal interest.
- Can be written or oral agreement.
- Agreement can be withdrawn from or modified.
- Need to notify others when withdrawing from the agreement.

KEY TAKEAWAYS: RETENTION OF OUTSIDE COUNSEL FOR EMPLOYEES

- Remember Upjohn
- Consider conflicts of interest early and often
- When recommending outside counsel, give several competent options
- Joint defense agreements require common legal interest

QUESTIONS?



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