CONFIDENTIALITY AND THE ORGANIZATION AS A CLIENT

A corporation is not a "person" that has a privilege against self-incrimination. One can therefore argue that a corporation should also not have an attorney-client privilege. However, the law has not developed that way. Business corporations and other organization clients have the protection of the attorney-client privilege, work product immunity, and the lawyer's professional duty of confidentiality. Yet the fact that the client is an organization rather than an individual raises some additional important issues that are considered in this problem. The problem closes with some critically important issues of limits on the duty of confidentiality when it collides with important interest of third parties.

FACTS

Your client, the Western Chemical Company, produces some of the country's best-known chemical fertilizers. The availability of those fertilizers is among the reasons American agriculture is the world's most productive. But fertilizers are composed of materials that are highly toxic. If even small quantities of those materials seep into a region's drinking water, for example, deaths from cancer over a ten-year period can be expected to rise by at least 5%. Thus, companies like Western Chemical are required to file detailed reports to the EPA about the quantities of such materials they have on hand, when and how they are converted into fertilizer, and the disposition of any unused materials. Filing an intentionally inaccurate report is a federal crime.

An employee in one of Western Chemical Company's regional offices sent a letter to company management claiming that, when a plant manager recently found he could not account for 10,000 pounds of a phosphate compound, the manager falsely reported the material had been sold to another company at a large profit. Western Chemical asked your firm to interview employees of its regional offices to determine whether the incident occurred and whether it was part of a larger pattern of deception.

As a result of your investigation, you concluded that the incident reported to the company probably happened. Indeed, you learned that a former assistant general counsel of Western Chemical had written a confidential memorandum authorizing the plant manager to file inaccurate reports "if you think you won't get caught." You also learned that the company's auditors did not discover that the purported sale of the compound was erroneous. Thus, they certified a report of company earnings that exceeded analysts' estimates and earned large bonuses for company managers.

Recently, International Chemicals offered to purchase Western Chemical. International's own general counsel has asked you for a copy of the report of your investigation, but the former officers of Western Chemical have refused to permit you to turn it over. Of course, the EPA would also like to see – but has not subpoenaed – a copy of your report and any supporting documentation, which would include the memorandum that purported to authorize deceptive reporting.

1. Will the results of your internal investigation be protected by the attorney-client privilege, the work product immunity, or both?

a. By far the leading case on the corporate attorney-client privilege is still *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

Upjohn makes and sells pharmaceuticals all over the world. In January 1976, accountants doing an audit of one of Upjohn's foreign subsidiaries found that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. Such payments were very likely a violation of U.S. law, and Upjohn's general counsel launched an investigation. Upjohn managers were directed to treat the situation as highly confidential and to cooperate fully in the investigation. Some received questionnaires that they returned to the general counsel; others were interviewed in person by inside or outside counsel.

In March 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire, but in November 1976, the Service issued a summons to Upjohn demanding all of its internal files relating to the general counsel's investigation. Upjohn said those files and reports were protected both by the attorney-client privilege and as work product.

The Court of Appeals ordered disclosure, finding that the investigation ranged far beyond senior management officials, that only interviews with the corporate "control group" could be protected by the attorney-client privilege, and that work product immunity did not protect corporations at all. The Supreme Court reversed, saying:

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.* * *
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> " * * * [Limiting protection to communications from a control group] overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.* * *
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> " * * * Middle-level-and indeed lower-level--employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.* * *
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> "The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. * * *
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> "The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. * * * Information, not available from upper-echelon management, was needed

to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. * * * Consistent with the underlying purposes of the attorney client privilege, these communications must be protected against compelled disclosure.

" * * * Here the Government was free to question the employees who communicated with Thomas and outside counsel. * * * While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. * * * `

b. *Upjohn* is also still the leading case on lawyer work product in the corporate setting.

"The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. This doctrine was announced by the Court over 30 years ago in Hickman v. Taylor, 329 U.S. 495 (1947). * * * The 'strong public policy' underlying the work-product doctrine * * * has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).

" * * * While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections.* * *

"The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. * * * [However,] forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes.

"Rule 26 * * * permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. * * * Rule 26 goes on, however, to state that `[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.' Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection.

"While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. * * * "

c. The Supreme Court's embrace of the corporate privilege has been significantly qualified in Europe. In Australian Mining & Smelting Europe Ltd. v. Commission, [1982] C.M.L.R. 264, the European Court of Justice held that in-house counsel are not sufficiently "independent" of their corporate colleagues to make communications with them legally privileged. The opinion was reaffirmed in Akzo Nobel Chemicals Ltd. v. Comm'n, 2007 WL 2693857, 4 C.M.L.R. 3 (Court of First Instance). Lest you think such European decisions will have no effect on your practice, think about how conflicting approaches to privilege

questions will affect internal investigations at multinational companies, for example, or advice-giving by U.S. in-house counsel to a client's European subsidiary.

2. In this problem, the former managers of Western Chemical--the ones who hired you to conduct the internal investigation--do not want you to turn your report over to new management. Who should control the privilege in a case like this one?

a. An individual client to whom you owe a duty of confidentiality is typically the only one who can tell you when the protection should be waived. When the client is an organization, ordinarily whomever is in charge of the organization at the moment controls the waiver. Thus, the basic rule is that neither the privilege nor the duty of confidentiality prevents successor corporate management from learning the content of discussions of former management with corporate counsel.

b. A trustee in bankruptcy may waive the privilege in the face of former management's opposition to revelation of their discussions with counsel. Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985).

3. What effect is there on assertion of the attorney-client privilege when organizations or individuals take a "we're all in this together" approach to the use of counsel?

a. Suppose the EPA has begun an investigation of several area fertilizer producers. You have been asked to represent Western Chemical in discussions with lawyers for Colorado Chemical, a nearby producer, about data each company has and possible positions to take during the investigation. Should the EPA be able to treat those discussions as unprivileged and question all participants in common-interest discussions about the content of their talks?

b. Ordinarily, defendants with a common interest may hold joint discussions at which they and the various lawyers talk freely with each other about matters relevant to their common interest. Any client who is part of that discussion or similar information exchange may assert the privilege just as it could if the client had been talking to its lawyer alone. See Restatement Third, The Law Governing Lawyers § 76; Hanover Insurance Co. v. Rapo & Jepsen Insurance Services, Inc., 870 N.E.2d 1105 (Mass.2007)(adopting common interest doctrine and citing Restatement §76)

4. What happens when the former friends have a falling out? If Colorado Chemical wants to take confidential minutes of the talks with Western Chemical to the EPA, may it freely do so?

a. Ordinarily, the answer is no. Colorado Chemical may waive the common interest privilege and disclose what it and its attorney discussed, but the privilege continues to apply to what you and your client, Western Chemical, said.

b. In Hunydee v. United States, 355 F.2d 183 (9th Cir.1965), for example, at a joint conference attended by two defendants (husband and wife) and their separate attorneys, the husband agreed to plead guilty of income tax evasion and "take the blame." But he went to

trial, and the government, over objection, had the wife and her attorney testify to what was said at this joint conference. The court held that it was error to admit the testimony. The joint conference was privileged to the extent it concerned a common issue and was intended to facilitate representation in possible subsequent proceedings.

c. If Colorado Chemical learns in the course of the discussions that Western Chemical has polluted Colorado Chemical's land, it may file a suit for damages and use against Western whatever may have been disclosed. Unless the parties have agreed otherwise in advance, the common interest privilege does not protect information disclosed by the participants in "subsequent adverse proceedings" between them. See Restatement Third, The Law Governing Lawyers § 76, Comment f.

d. In re Regents of University of California, 101 F.3d 1386 (Fed.Cir. 1996), cert. denied, 520 U.S. 1193, 117 S.Ct. 1484, 137 L.Ed.2d 695 (1997), involved patent litigation between Genetech, Eli Lilly and the University of California at Berkeley concerning recombinant DNA technology. Genetech and Lilly settled the claims between them, and Genetech then wanted to depose Lilly lawyers about discussions concerning prior art that the Lilly lawyers had with university officials earlier in the proceeding. The university had patented the process that the Lilly lawyers helped Lilly license. Both Lilly and the university had an interest in having the patent upheld, the Court reasoned, and the prior art discussions could affect the patent's validity. Because the university could assert a common-interest privilege with respect to those discussions, Genetech could not discover them.

5. If a single lawyer represents more than one defendant, she is likely to get confidential information from each. Does information from multiple defendants or shared in multilawyer conferences constitute "privileged" or "confidential" information of all of the client(s)?

a. Assume now that you represent *both* Western Chemical and Colorado Chemical. Each has told you things they would not tell the EPA. Do you need permission before you use the information to try to get a better deal for both clients? Is a secret still a secret once it is told to others?

b. McCormick on Evidence states the principle as:

> "When two or more persons, each having an interest in some problem or situation, jointly consult an attorney, their confidential communications with the attorney, though known to each other, will of course be privileged in a controversy of either or both of the clients with the outside world, that is, with parties claiming adversely to both or either of those within the original charmed circle. But it will often happen that the two original clients will fall out among themselves and become engaged in a controversy in which the communications at their joint consultation with the lawyer may be vitally material. In such a controversy it is clear that the privilege is inapplicable."

c. Furthermore, if one client tells the common lawyer something relevant to the

other client[s] in the joint representation, under traditional doctrine, unless the clients have agreed otherwise, the lawyer must disclose that information to the other clients even if the disclosing client would prefer that it be kept confidential. See Restatement Third, The Law Governing Lawyers §75, Comment d: "Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients."

d. The net effect of all this is to suggest that the decision of multiple defendants to adopt a common defense is not risk-free. The Commentary to Proposed (but not enacted) Rule 503 of the Federal Rules of Evidence, discussed in Problem 7, was also cautious. It said that in the "joint defense" or "pooled information" situation, the "better view" is not that one of the various clients "could prevent another from disclosing what the other had himself said," but rather that "if all resist disclosure, none will occur

6. Is the memorandum from the former assistant general counsel that purports to authorize the false reporting protected either by the attorney-client privilege or as work product?

a. Restatement Third, The Law Governing Lawyers § 82 states the rule this way:

> "The attorney-client privilege does not apply to a communication occurring when a client:
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> "(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
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> "(b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud."

b. In re BankAmerica Corp. Securities Litigation, 270 F.3d 639 (8th Cir.2001), cert. den. 535 U.S. 970, 122 S.Ct. 1437, 152 L.Ed.2d 381 (2002), summarizes what a party must show to rely on the crime-fraud exception. Under United States v. Zolin, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), the party must make a threshold showing that "the legal advice was obtained in furtherance of the fraudulent activity and was closely related to it." To do this, it must make a specific showing that a given communication was made in furtherance of the client's alleged crime or fraud. Indeed, the party seeking discovery must make this showing separately for each document or communication. If the threshold is met, the district court has discretion to conduct an *in camera* review of the allegedly privileged documents.

c. In re Richard Roe, Inc., 68 F.3d 38 (2d Cir.1995), involved a subpoena for legal records that the government argued "collectively have the real potential of being relevant evidence of activity in furtherance of a crime." The court quashed the subpoena. The claim was much too general and a "relevant evidence" test would leave virtually nothing protected. The crime-fraud exception "applies only when the court determines that the client communication or attorney work product in question was *itself* in furtherance of the crime or fraud." Further, there must be "probable cause to believe that the particular communication with counsel * * * was intended in some way to facilitate or to conceal the criminal activity." 68 F.3d at 40.

7. Putting aside attorney-client privilege and work product issues, would your duty of confidentiality under pre-2002 Model Rule 1.6 prevent you from voluntarily turning the memorandum over to the EPA?

a. Remember that your report and the memorandum clearly show that the company does not account for its chemicals well but they do not show what has happened to the chemicals. Yet, if the chemicals really have been illegally dumped and in fact get into the region's drinking water, the effects over the next decade could be catastrophic.

b. Before the 2002 amendments, Model Rule 1.6(b)(1) only permitted a lawyer to disclose "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." In this problem, even if you assume the worst, is your client *about to* commit a crime, or has it already done so? Are any deaths resulting from the client's acts "imminent," or simply made more likely to occur in the future?"

c. To what extent does Model Rule 1.6(b)(1), after 2002, increase your authority to disclose?" Does the new rule require that what you are disclosing must be an act of the client? Is your authority to disclose limited to criminal acts? Must the conduct occur in the future or only have future effects? Does the new rule require that the adverse effects occur within any particular time period? Model Rule 1.6, Comment [6], makes clear that the drafters dearly intended these changes."

8. When International Chemicals proposed to buy Western Chemical and wanted to see the report of your investigation of the company, would any privilege or other obligation prevent your disclosing it to International if Western would prefer that you not do so?

9. Should a lawyer face civil liability for a failure to warn third party about a potential or completed client fraud?

a. Restatement Third, The Law Governing Lawyers §67 tries to give lawyers some comfort in that regard:

"(4) A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or a third person, or barred from recovery against a client or third person by an affirmative defense based solely thereon."

What do you think of this disclaimer? Should courts give effect to it? Why or why not?

b. In the mid-90s, creation of a private remedy against lawyers who allegedly assisted their clients to commit securities fraud was dealt a significant blow in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994). The issue was liability of professionals who did not themselves make misrepresentations to investors but who "aided and abetted" clients who violated §10(b) of the Securities Exchange Act of 1934. The Supreme Court held that lawyers and others who themselves violate §10(b) can be held accountable, but

"aiding and abetting" a violation is not enough to make a lawyer liable for civil damages under the securities laws.

CONTACT WITH REPRESENTED AND UNREPRESENTED PERSONS

Lawyers frequently contact others on behalf of clients, often to obtain or deliver information, or to suggest solutions to contentious problems. It might initially seem odd that the law regulates these contacts, but concerns that lawyers might mislead an opposing party or interfere with that party's relationship with its own lawyer have carried the day. This problem first considers the regulation of such contacts in general. Next, it applies the rule to contacts with corporate employees. Then, it explores the standards governing contacts with officers and employees of the lawyer's own client. Finally, it considers the rule in a criminal context, asking whether police who are questioning suspects would be considered agents of the prosecuting attorney and whether national ethical rules should govern federal prosecutors rather than state standards in the states that issued the prosecutors' law licenses.

FACTS

Rapid Corp. has a fleet of trucks and couriers to deliver packages throughout the city. The company has made a standing offer to return the shipper's fee for any package not delivered within one hour. There is reason to believe that this policy causes Rapid's drivers and couriers to take dangerous chances.

One rainy Tuesday, President Mary Smith was standing across the street from the company headquarters. Barry Summer, an employee in the accounting department of Rapid Corp. happened to be standing beside her. Just then, a Rapid delivery truck came out of the headquarters building at a high rate of speed. It hit an elderly man, causing him serious injuries.

Before filing the complaint, Louis Lawyer, lawyer for the injured man, interviewed Barry Summer and the truck driver and took their statements about how the accident happened. Barbara Bentley, lawyer for Rapid Corp. was not told of those interviews or invited to be present. Now Lawyer has called Mary Smith and asked to interview her as well; Smith, in turn, has called Bentley who has told Smith to decline to be interviewed in any setting other than formal deposition.

Bentley herself now wants to investigate to find out what the facts surrounding the accident are. She wants to prepare for litigation and to formulate recommendations for possible changes of the one-hour guarantee. Indeed, she fears a grand jury may be convened to determine whether Rapid's guarantee of one-hour service can support a charge of criminal negligence. Bentley wants to talk to present and former employees of Rapid, both officers and nonofficers, who might know how the policy has affected safety. Smith, of course, would like to talk to the same people.

1. Attorney Lawyer just wants to question witnesses to an accident without the formality and expense of deposing them. What rules regulate his questioning?

a. ABA Model Rule 4.2 is the principal authority:

"In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order."

b. ABA Formal Opinion 95-396 (July 28, 1995) says that the ban on contact applies (1) in both criminal and civil cases, (2) to represented persons and not just parties, (3) lees clearly in the investigation phase of criminal cases prior to an arrest or charge, (4) only when the lawyer should know the other person is represented, (5) only to contacts related to the subject matter of the case, (6) even though the represented person initiates the contact, (7) until the representation of the person is in fact terminated, and (8) to contacts made by a lawyer's investigators, not just the lawyer personally.

c. Restatement Third, The Law Governing Lawyers §99 states the rule as:

"(1) A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in §100, unless:

"(a) the communication is with a public officer or agency to the extent stated in §101;
"(b) the lawyer is a party and represents no other client in the matter;
"(c) the communication is authorized by law;
"(d) the communication reasonably responds to an emergency; or
"(e) the other lawyer consents.

"(2) Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient."

2. Whom does the rule seek to protect? Is the concern that a persuasive lawyer will cause the represented person to take action disadvantageous to himself without understanding what is going on?

a. In Attorney Grievance Comm'n v. Kent, 653 A.2d 909 (Md.1995), a criminal defendant ("Accomplice"), represented by counsel, had pled guilty and agreed to testify against Kent's client in exchange for a reduced sentence. Lawyer Kent persuaded Accomplice to deny responsibility for the crime, to fire his separate counsel and to let Kent take over his case. The jury then acquitted Kent's original client. However, because of Accomplice's refusal to cooperate after he had already pled guilty, the court sentenced Accomplice to two life terms. Kent asserted that all he had done was zealously defend his original client, but the court found his conduct violated both Rules 1.7 and 4.2. The court disbarred Kent for his role in contacting and

misleading Accomplice.

b. Parker v. Pepsi-Cola General Bottlers, Inc., 249 F.Supp.2d 1006 (N.D.Ill.2003), involved Robert Gena, who was represented by counsel in a suit against Pepsi for employment discrimination. Pepsi subpoenaed Gena for a deposition in a related discrimination case. Pepsi's counsel served Gena personally with the subpoena and did not send a copy to Gena's attorney. When Gena arrived at the deposition and informed Pepsi counsel that he had not told his attorney about it, Pepsi's counsel neverthelessasked Gena questions pertaining to Gena's suit against Pepsi. The court found that Pepsi and its attorneys violated Illinois' version of Model Rule 4.2. The court barred Pepsi from using Gena's deposition testimony or any evidence obtained from it, required Pepsi to destroy all copies, summaries, and analyses of the testimony, and granted Gena attorney's fees for the motion.

c. State v. Harper, 995 P.2d 1143 (Okla.2000), involved an insurance defense lawyer who had dealt only with the plaintiff's lawyer until the plaintiff told the company she was going to fire her lawyer that very day. The defense lawyer then took a statement directly from her, telling her she could have an attorney present if she wished. Later, it turned out that she had not formally fired her first lawyer after all. The court found no evidence the defense lawyer knew the true facts and held that, in the absence of such knowledge, there is no violation of Rule 4.2.' Rule 4.2, Comment [81 supports this result.

d. Utah State Bar Ethics Advisory Opinion 98-07 (1998) examined whether a lawyer for the plaintiff in an accident may contact the adjuster for the defendant's insurance company directly. The opinion said that, in the period before the case is referred to a lawyer for defense, the answer is clearly yes. However, after the insurance company has hired a lawyer for the defendant, the question is whether the insurance company is also a represented party. If it is, the rule prohibits the lawyer from contacting it except through counsel. The opinion said that at a minimum, the insurance company has a "direct interest in the results of any litigation or settlement." Thus, the opinion concluded, the plaintiff's lawyer may only contact the insurance company through its counsel unless the plaintiffs lawyer knows that the insurance company does not consider itself to be represented by counsel in the matter.

Does this rule make sense to you? How would the lawyer know what the insurance company intended? If the defense lawyer files an appearance for the insured and not the insurance company, should that be enough to tell the lawyer what the insurance company thinks?

e. May a lawyer contact the in-house counsel of an opponent that is represented by outside counsel? ABA Formal Opinion 06 443 (Aug. 2006) says yes. Model Rule 4.2 presumes clients are unsophisticated, the opinion reasons, but lawyers will be unlikely to be able to take advantage of inside counsel. If a corporation asks that the lawyer only contact outside counsel, a failure to comply might violate Rule 4.4(a), but Model Rule 4.2 does no prohibit the contact.

3. May represented clients talk to each other without going through their lawyers?

a. State Bar of California, Formal Opinion 1993-131 (1993) gives the standard answer that the clients *may* talk; indeed, it says that failure to encourage such talks may forfeit opportunities to terminate disputes short of trial. The lawyers for each client may advise the clients before they get together, but, the opinion says, the communications must be those of the

clients, not the clients acting out the lawyers' "scripts" for them. What does no "scripts" mean? Aren't lawyers supposed to advise clients about how to act in all kinds of situations?

b. Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2002-3, on the other hand, says that a lawyer may advise a client what to say in the meeting between the clients. Opposing such coaching is "at odds with modern authority," the opinion says, citing both Restatement Third, The Law Governing Lawyers §99, Comment k, and Comment [4] to Model Rule 4.2.

c. In Holdren v. General Motors Corp., 13 F.Supp.2d 1192 (D.Kan 1998), plaintiff's counsel urged his client to talk about the case with other GM employees, including managers, who might offer favorable testimony at trial, and to get affidavits from them. The court recognized that clients may talk to each other without violating Rule 4.2, but it said plaintiff's counsel had "circumvented" Rule 4.2 in violation of Rule 8.4(a) by "encouraging" his client to obtain the affidavits. The court acknowledged that there was "no evidence" that the lawyer "knowingly or deliberately" violated the no-contact rule, but it enjoined further efforts to secure affidavits and required the plaintiff to turn over names of persons contacted and any evidence obtained thereby, so the court could determine which persons were protected against contact under the rule.

Do you agree with this result? Did the plaintiff's counsel "circumvent" the Rule or apply it? Look at Model Rule 4.2, Comment [4], which cites Rule 8.4(a) on a lawyer's not using another to do what the lawyer cannot do, but says that parties may communicate directly with each other and that lawyers may so advise them.

4. Should the prohibition against contacting corporate employees apply to former employees? Are they still part of the "person" that opposing counsel is forbidden to contact? Would the same concerns that underlie Rule 4.2 apply to contact with former employees as well?

a. Restatement Third, The Law Governing Lawyers §100, Comment g, says:

"Contact with a former employee or agent ordinarily is permitted, even if the person had formerly been within a category of those with whom contact is prohibited. * * * [However,] a former employee who, as the lawyer knows, continues regularly to consult about the matter with the lawyer for the ex-employer [may not be contacted] * * *."

b. In Camden v. Maryland, 910 F.Supp. 1115 (D.Md.1996), the plaintiff had filed a discrimination case against a university; the university's affirmative action officer was a nonlawyer who later left the school with some bad feelings and subsequently talked to the plaintiff's lawyer about the case. The court recognized that lawyers may contact most former employees of a represented firm, but said contact is prohibited with former employees who had "been extensively exposed to relevant trade secrets, confidential client information, or similar confidential information of another party interested in the matter." Id. at 1122. The defendant's former in-house manager of the case was someone the plaintiff's lawyer could not interview ex parte. See Rule 4.2, Comment [7]. As a remedy for this misconduct, the court disqualified the lawyer.

c. G-I Holdings, Inc. v. Baron & Budd, 199 F.R.D. 529 (S.D.N.Y. 2001), involved former employees of the defendant whose work had exposed them to privileged information and whom plaintiff's investigators wanted to interview. Because both the interviewers and former employees were lay persons who might inadvertently disclose the privileged information, the court issued a protective order under which the interviews could only continue if either (1) notice and the right of defendants' counsel to be present were given or (2) the interviews were conducted in the

presence of a special master who would determine whether any privileged information was being disclosed.

d. Muriel Siebert & Co. v. Intuit Inc., 868 N.E.2d 208 (N.Y.2007), declined to disqualify Intuit's counsel for interviewing a former Siebert official that the lawyer knew had substantial privileged and confidential information. The court made clear that "the right to conduct ex parte interviews is [not] a license for adversary counsel to elicit privileged or confidential information from an opponent's former employee." In this case, however, Intuit counsel expressly had told the former employee who they were and their role in the litigation, told him not to disclose privileged or confidential information, and told him not to answer any questions that might lead to disclosure of such information. Those warnings were sufficient to make the questioning proper.

5. Should different considerations apply when the issue is the lawyer's contact with officers or employees of a government agency?

a. Restatement Third, The Law Governing Lawyers §101, says that (1) the fact that the government agency has a general counsel's office does not ordinarily bar contact with employees or officials of that agency, (2) the no-contact rule applies to negotiation or litigation of a specific claim against the agency, but (3) the rule does not bar lawyer contact with agency officials with respect to issues of general policy.

b. ABA Formal Opinion 97-408 (Aug. 2, 1997) found that Model Rule 4.2 would cover contact by the lawyer for a private party in a dispute with a government agency, but it also found that Rule 4.2 has "an important exception based on the constitutional right to petition and the derivative public policy of ensuring a citizen's right of access to government decision makers." Rule 4.2 "permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy." In such cases, the opinion asserted, "the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials in order to afford them an opportunity to seek advice of counsel before deciding whether to entertain the communication."

c. Do you see anything in Model Rule 4.2 that supports the requirement of advance notice to government counsel? Does Comment [5] to Model Rule 4.2 give textual basis for the requirement? The ABA Committee reasoned that the requirement is necessary to allow the government official to consult counsel and learn where the boundary is between policy discussions and talk about the merits of the litigated case. Is that persuasive to you?

6. Now turn your attention to Barbara Bentley and her defense of Rapid Corp. Should we be concerned that she could overreach in her interviews of unrepresented persons like Summer and the truck driver?

a. The Florida Bar v. Buckle, 771 So.2d 1131 (Fla.2000), involved a criminal defense lawyer's telephone calls and letter to an unrepresented complaining witness. In an attempt to get her to drop the criminal complaint, he called her at home and sent her religious materials that the discipline referee found "objectively humiliating and intimidating." The court found

that the letter "essentially threatens to take away her job, her children and to expose her to ridicule, contempt, and hatred." The lawyer even threatened to raise questions about a prior murder in the complainant's family. This kind of intimidation, the court found, is "patently unfair and prejudicial to the administration of justice," but the only sanction it merited was a public reprimand.

b. How should professional rules be drafted to guard against such overreaching? Before the 2002 amendments, ABA Model Rule 4.3 said only:

> "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

Model Code of Professional Responsibility DR 7-104(A)(2) had said that a lawyer may not "give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

In 2002, the ABA moved that Model Code language from where it had been in Rule 4.3, Comment [1], into the black letter of Rule 4.3. Was that an important change? Compare Restatement Third, The Law Governing Lawyers §103.

c. In re Lawrence, 98 P.3d 366 (Or.2004) (en banc) (per curiam), illustrates the significance of the language in a state with rules still based on the Model Code. Lawrence was part of a six-person firm appointed to represent Warren Battle, a man accused of domestic violence. Lawrence became aware that the victim, Patricia Battle, wanted to have the charges dropped against her husband, but the district attorney's office had refused her request. Lawrence told the victim about a novel theory of constitutional law that Lawrence had developed under which the victim would charge the district attorney with violating her state constitutional right to drop the charges against her husband. Lawrence drafted an affidavit for the victim to this effect, without advising her to seek her own counsel. She also advised her what to say at a later hearing.

The Oregon Supreme Court held that in domestic violence cases, the "interests of an alleged batterer and the batterer's victim are inherently adverse," therefore triggering DR 7-104(A)(2) [Model Rule 4.3]. Although the rules do not define "advice," the court found that Lawrence's actions undoubtedly were encompassed by that term. Therefore, giving advice to an unrepresented person who had interests in conflict with those of Lawrence's client violated DR 7-104(A)(2). Do you agree? Did Lawrence's efforts likely impede or assist the victim, Ms. Battle, in achieving the result she wished?

7. How should Bentley handle the interviews with her client's officers and employees?

a. Should she take a "we're all in this together" approach? Should she instead advise the truck driver to obtain independent counsel? How about the vice president in charge of the truck maintenance facility? The board members who approved the on-time delivery guarantee? Look beyond Model Rule 4.3; does Model Rule 1.13(f) provide important direction as well?

b. Should Bentley become the lawyer for each of the corporate officers, directors and employees personally? At minimum, that would make them all "represented persons" and so the corporation could invoke the protection of Rule 4.2. Model Rule 1.13(g) would seem to permit such representation, but what problems would arise if Bentley chose that course?

c. United States v. Talao, 222 F.3d 1133 (9th Cir.2000), was a criminal action alleging that an employer had required workers to kick back a portion of their wages and had falsely- reported their wages and hours to the Labor Department. Defense counsel wanted to talk to the defendant's bookkeeper about her upcoming grand jury testimony, but the bookkeeper asked the assistant U.S. attorney to keep defense counsel away from her because she felt he pressured her to lie. She told the defense counsel that she did not want him to represent her. The bookkeeper then explained her employer's scheme to the prosecutors, the grand jury returned an indictment, and the defendants moved to dismiss it because the prosecutor allegedly had violated California Rule 2-100 (its counterpart to Model Rule 4.2).

The district court agreed that the prosecutor had violated the Rule, but refused to dismiss the indictment, and proposed instead to instruct the jury that it could consider the violation in assessing the witness' credibility. On pretrial appeal, the Ninth Circuit found no ethical violation and thus no need for any remedial instruction. The court explained that when a corporate employee comes forward to disclose corporate misconduct, there is a conflict between the corporation and the employee, so the corporation's lawyer cannot continue to represent both. The defense counsel cannot use Rule 4.2 to prevent the prosecutor's contact with that employee. Otherwise, the court said, "subornation of perjury" could be "cloaked by an ethical rule." Do you agree?

d. Look also at Rule 3.4(f), which allows Bentley to advise even employees who are not her clients not to talk to the other side if they will "not be adversely affected" by the refusal. Is that a better way for Bentley to proceed?

8. If Bentley is interviewing a witness who is an employee of her corporate client-but who is not her client-and the witness starts giving incriminating information that is helpful to Bentley's corporate client, must Bentley give *Miranda* warnings?

a. Restatement Third, The Law Governing Lawyers § 103, Comment e suggests the dilemma the situation presents:

> "Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the organization if the lawyer, even if unwittingly, thereby undertakes concurrent representation of both the organization and the constituent. * * * Among other consequences, the lawyer may be required to withdraw from representing both clients because of the conflict. * * * [However, t]he absence of a warning in such a situation will often be in the interests of the client organization in assuring that the flow of information and decision making is not impaired by needless warnings to constituents with important responsibilities or information. * * * "

b. W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir.1976), involved a corporation's antitrust action against one of its former employees and others. The employee moved to disqualify the corporation's law firm, alleging it had violated [Model Rule 4.31 when

corporate attorneys had earlier interviewed the employee. When this interview took place, counsel correctly identified the character and nature of their representation, but he did not disclose that earlier that morning a lawsuit had been filed naming the employee as a defendant. The court found no violation of the Rule. The employee had expressed a desire to be interviewed to help "clear the air." He was said to be sophisticated, "neither a callow youth nor a befuddled widow." As for not giving advice to unrepresented persons with interests opposed to the client's, the court said that the question was "close," but that even assuming a violation, disqualification of counsel was inappropriate and would unduly delay the proceedings. This is an old case; do you think a court should be as restrained about enforcing Rule 4.3 today?

c. ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-4.3(c) says: "It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel."

Do you agree? Does a lawyer's duty of loyalty to her client require that she take advantage of the ignorance of the employee she is interviewing?

d. How does Model Rule 1.13(f) deal with the issue? Does it give the lawyer any latitude to take advantage of such ignorance? Are Comments [10] and [11] to Model Rule 1.13 a little less absolute in their direction? See also Model Rule 1.13(g).

9. Now suppose the police want to interview the same group of company employees. Must they refrain from such interviews without permission of Bentley, the corporate counsel?

a. Look at ABA Prosecution Function Standard 3-2.7:

> "(a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.
>
> "(b) The prosecutor should cooperate with police in providing the services of the prosecutor's staff to aid in training police in the performance of their function in accordance with law."

Does this provision in effect make police the agents of the prosecuting attorney for purposes of Model Rule 4.2 when they conduct questioning?"

b. Consider United States v. Thomas, 474 F.2d 110 (10th Cir.1973), cert. denied 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973), where the court held that, even though the defendant had waived his *Miranda* rights:

> "[O]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant may not be offered in evidence unless the accused's attorney was notified of the interview which produced the statement and was given a reasonable opportunity to be present. To hold otherwise we think would be to overlook conduct which violated both the letter and the spirit of the canons of ethics. This is obviously not something which the defendant alone can waive.

> "A violation of the canon of ethics as here concerned need not be remedied by a reversal of the case wherein it is violated. This does not necessarily present a constitutional question, but this is an ethical and administrative one relating to attorneys practicing before the United States courts. * * * The enforcement officials are agents of the prosecuting party, and in the event use is made of information secured by interviews of the nature which here took place, short of its introduction in evidence, the problem will be dealt with in the proper case." 474 F.2d at 112.

Should the *Thomas* analysis be applied in a typical state system where the state's attorney, usually a county officer, has no direct control over the police, typically a city agency?

c. State v. Miller, 600 N.W.2d 457 (Minn.1999), involved interviewing corporate employees during a surprise search of the corporate offices that prosecutors had coordinated. The employees were not under arrest and were told that law enforcement officials were "simply gathering information." Miller, whose statement was involved in this case, had faxed the search warrant to his attorney when it was served, so investigators knew he had counsel. Indeed, the lawyer appeared at the office and demanded that the interview be terminated, but he was denied entry because Miller had not expressly asked for the right to consult him. The Minnesota Supreme Court made clear that Rule 4.2 provides more protection than *Miranda* rights. Even assuming that the interview was not unconstitutional, the court held that the prosecutor's involvement in keeping the lawyer out of the interview room violated Rule 4.2, and the appropriate sanction for that violation was suppression of the statement.

10. How should this principle apply when the lawyers involved are U.S. attorneys supervising FBI and other federal agents in drug and antiterrorism investigations?

a. United States v. Ryans, 903 F.2d 731 (10th Cir.1990), involved the government's use of an informant to initiate and record conversations with suspect before the suspect's indictment but after he had retained counsel. The court reported that "it is now well settled that [Model Rule 4.2] applies to criminal as well as civil litigation," and that it applies to agents of public prosecutors "when they act as the alter ego of the government prosecutor." Id. at 735. The court acknowledged that courts have differed on whether what is now Rule 4.2 applies to pre-indictment interviews when the defendant is in custody, and whether an appropriate remedy is exclusion of the defendant's statements from evidence. This court then concluded that what is now Model Rule 4.2 does *not* apply "before the initiation of criminal proceedings."

b. Should the court enforce Rule 4.2 only when its violation taints the veracity of the fact-finding process? For example, should the court exclude evidence that a lawyer obtained in violation of rules protecting client confidences?

In United States v. Ofshe, 817 F.2d 1508 (11th Cir.1987), the defendant faced drug charges. He retained one lawyer (Black) to prepare for trial and another (Glass) to negotiate with the government about a plea. Glass later found himself accused in Chicago's "Operation Greylord" corruption cases and wanted to do what he could to win favorable treatment for

himself. Chicago Assistant U.S. Attorney (and well-known author) Scott Turow had attorney Glass wear a body bug to his meeting with Ofshe, his Florida client. Agents monitoring the tape "were given very strict guidelines to instruct Glass not to violate any attorney-client privilege;" instead, Ofshe and Glass discussed other criminal plans. Ofshe argued that the government's use of his defense counsel as an informer justified dismissing the indictment against him. The court held that, absent prejudice, the remedy is not warranted. The government obtained no useful information developed from the bug, and the Chicago U.S. attorney's office gave none of it to the Florida U.S. attorney's office. Finally, although Glass did not provide effective assistance of counsel to Ofshe, his co-counsel did, so Ofshe suffered no prejudice.

What do you think of this analysis? Should a prosecutor ever be able to use a suspect's lawyer as an informant? Does such a practice make Barbara Bentley look like a model of ethical virtue by comparison?

11. Does the federal government have a legitimate interest in having its lawyers not be subject to the strictures of Model Rule 4.2 at all?

a. Following the lead of former Attorney General Richard Thornburgh, Attorney General Janet Reno promulgated what was called the Reno Memorandum. See Communications with Represented Persons, 28 C.F.R. Part 77 (1994). In the comments accompanying this rule, the attorney general emphasized that the Department of Justice "has long maintained, and continues to maintain, that it has authority to exempt its attorneys from the application of DR 7-104 and Model Rule 4.2 and their state counterparts." 59 Fed. Reg. 39910-11 (Aug. 4, 1994).

b. The Reno Memorandum listed various exceptions to the no-contact rule. For example, there was an exception for discovery by legal process (such as during a grand jury testimony); or when the "represented party initiates the communication directly with the attorney for the government or through an intermediary" and the party knowingly waives his or her right and a federal judge or magistrate concludes that the waiver is knowing and voluntary; or when there is a waiver of *Miranda* rights at the time of arrest; or when there is an investigation of "additional, different or ongoing crimes or civil violations," including "undercover or covert" operations; or when the government attorney believes in "good faith" that the communication is necessary to prevent the "risk of injury or death" to any person.

c. United States v. Lopez, 4 F.3d 1455 (9th Cir.1993), was a particularly interesting example of these issues. Lopez was charged with a drug offense and feared his children were being abused while he was in prison. He wanted to discuss cooperation with the government. However, his lawyer had a reputation for refusing to negotiate cooperation. Thus, Lopez tried to deal with the government through the lawyer for a co-defendant and, after obtaining permission of a magistrate judge, the U.S. attorney's office negotiated a deal with him-later rejected by both defendants through that lawyer. When he heard about the negotiations behind his back, Lopez' lawyer withdrew, and substitute counsel moved to dismiss the indictment based on government misconduct. The district court agreed that-even where the defendant initiated the contact-it was so improper for the U.S. attorney's office to meet with him in the absence of his lawyer that the indictment must be dismissed. The Ninth Circuit opinion overruled this decision. The Ninth Circuit was contemptuous of the Justice Department position that it was exempt from California Rule 2-100 [Model Rule 4.2] and equally critical of the U.S. attorney's claim that the contact with Lopez had been "authorized by law," but it concluded that dismissing the indictment went too far. In a concurring opinion, Judge Betty Fletcher opined

that both defense counsel's unwillingness to negotiate on Lopez' behalf and the magistrate judge's failure to apprehend the complete picture of what was going on had been big parts of the problem; there was plenty of blame to go around.

12. As a matter of policy, should the attorney general be able to exempt federal prosecutors from the operation of Model Rule 4.2 as it applies in the states that have licensed the prosecutors?

a. United States v. Colorado Supreme Court, 87 F.3d 1161 (10th Cir.1996), was one of the first direct Justice Department challenges to the applicability of state ethics rules to federal prosecutors. The rule at issue was what is now Model Rule 3.8(e) that forbade a prosecutor's requiring a lawyer to testify before a grand jury or in any other setting if the evidence could be obtained from another source. The district court held that because no federal prosecutor had been disciplined by the state there was no case or controversy, but the Tenth Circuit said the mere threat of discipline was enough to give the court jurisdiction. The Rule 3.8 prohibition also raised a threat to the grand jury process sufficient to require a hearing in the district court. The court then remanded for further proceedings.

b. Earlier, in a 5-4 decision written by Justice Scalia, United States v. Williams, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992), had held that grand juries were independent of the judicial branch and traditional judicial regulation did not apply to their operation. Thus, usual court rules did not apply and federal prosecutors need not present exculpatory evidence to a grand jury. In light of *Williams,* on remand, the district court held that Rule 3.8(e) was invalid as applied to federal prosecutors practicing before a grand jury, but valid in other settings. United States v. Colorado Supreme Court, 988 F.Supp. 1368 (D.Colo.1998). The 10th Circuit affirmed, 189 F.3d 1281 (10th Cir.1999).

c. Matter of Howes, 940 P.2d 159 (N.M.1997) (per curiam), was the first state case to impose discipline on a federal prosecutor who complied with the Justice Department regulations on ex parte contact. When Howes was an assistant U.S. attorney (AUSA) in the District of Columbia, he was a member of only the New Mexico bar. Following office policy, Howe, permitted a D.C. police detective to talk to a represented criminal defendant in the absence of his appointed counsel as long as the defendant initiated the contact. Howes later knew such conversations were being held and did not notify the defendant's lawyer, and that lawyer moved to dismiss the indictment for prosecutorial misconduct. The court denied the motion but sent the matter to the D.C. Board of Professional Responsibility, which said its rules did not apply to an AUSA. Therefore, New Mexico took up the case. The New Mexico Supreme Court upheld a sanction of public censure, holding that neither a superior's direction nor office policy can excuse a lawyer's violation of clear ethical standards. The court also said that the Reno Memorandum was not promulgated under valid statutory authority, and the supremacy clause did not independently protect *F* federal prosecutor from state professional discipline for his official acts.

d. Congress has now resolved this issue by federal legislation that expressly makes federal lawyers subject to state ethics rules. Called the McDade Act, the law took effect in April 1999 and is found at 28 U.S.C.A. § 530B. Do you agree with this resolution of the issue?