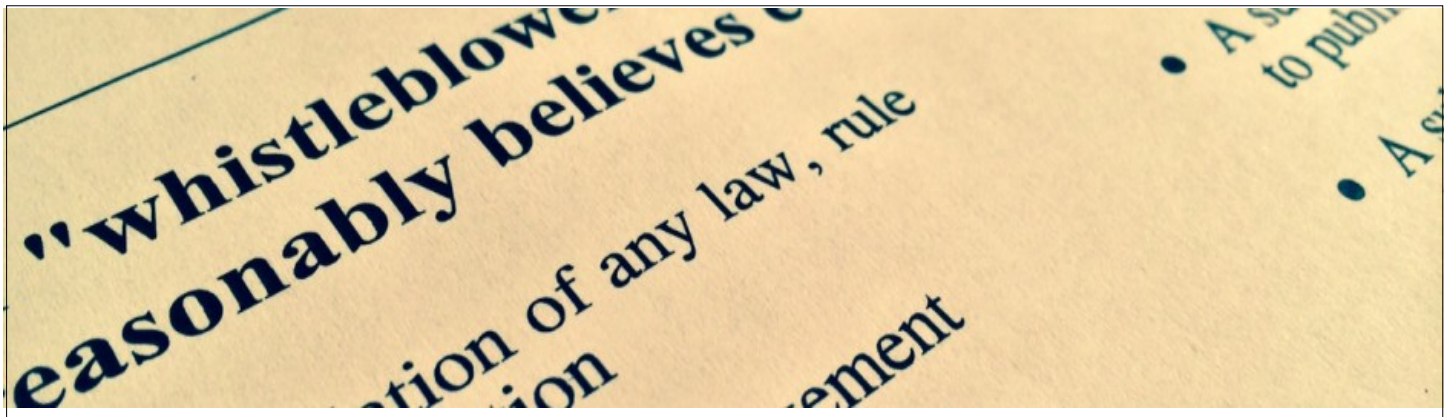


Whistleblower Laws in the 21st Century: Greater Rewards, Heightened Risks, Increased Complexity

March 20, 2014
Lewis Katz Hall
Carlisle, Pennsylvania

PENNSTATE
The Dickinson School of Law
1855

WHISTLEBLOWER LAWS IN THE 21ST CENTURY: GREATER REWARDS, HEIGHTENED RISKS, INCREASED COMPLEXITY

Thursday, March 20, 2014 — 1:00 to 6:00 p.m.
Apfelbaum Family Courtroom & Auditorium, Lewis Katz Hall, Carlisle, PA
Simulcast to Greg Sutliff Auditorium, University Park, PA

Table of Contents

WHISTLEBLOWER LAWS IN THE 21ST CENTURY: GREATER REWARDS, HEIGHTENED RISKS, INCREASED COMPLEXITY

Thursday, March 20, 2014 — 1:00 to 6:00 p.m.
Apfelbaum Family Courtroom & Auditorium, Lewis Katz Hall, Carlisle, PA
Simulcast to Greg Sutliff Auditorium, University Park, PA

1:00 p.m.	**Introduction** What is a Whistleblower? *Lance Cole, Professor of Law and Director, Center for Government Law and Public Policy Studies, Penn State Dickinson School of Law*
1:15 to 2:15 p.m.	**Panel One: Whistleblower Policy Issues** What Is It Like To Be a Whistleblower? *Stanley M. Brand, President and Founder, Brand Law Group, Washington, D.C. and Distinguished Fellow in Law and Government, Penn State Dickinson School of Law* Working with Government Whistleblowers *Scott H. Amey, General Counsel, Project on Government Oversight, Washington, D.C.* Commentators: *Professors Lance Cole and Kathleen Clark*
2:15 to 2:45 p.m.	**Audience Q&A (and Break)**
2:45 to 3:45 p.m.	**Panel Two: Business and Corporate Whistleblower Issues** Plaintiffs Perspective *Joseph E. B. "Jeb" White, Nolan Auerbach & White, Philadelphia, Pennsylvania* Corporate/Defense Perspective *Claudia M. Williams, Associate General Counsel, Labor & Employment, The Hershey Company, Hershey, Pennsylvania* Who Should "Benefit" from Settlement of Whistleblower Cases? *Katherine Pearson, Professor of Law, Penn State Dickinson School of Law* Commentator: *Professor Raymond Gibney, Jr. and David R. Hoffman, Esq.*
3:45 to 4:15 p.m.	**Audience Q&A (and Break)**
4:15 to 5:15 p.m.	**Keynote Address (and Audience Q&A)** The Law of Whistleblowing: An Overview & International Perspective *Kathleen Clark, Professor of Law, Washington University in St. Louis School of Law*
5:15 to 6:15 p.m.	**Reception**

Biographies

Scott H. Amey:

Scott Amey serves as general counsel for the Project on Government Oversight (POGO) and directs contract oversight investigations, including reviews of federal spending on goods and services, the responsibility of top federal contractors, and conflicts-of-interest and ethics concerns that have led to questionable contract awards. Scott testifies before Congress and federal agency panels, submits public comments on proposed regulations, educates the public by working with the media, and publishes reports, alerts, and blogs on contracting and openness issues.

Mr. Amey previously worked for POGO in the mid-nineties, but has been continuously with the organization since 2003. Scott left POGO in 1998 to attend law school, after which he clerked for the Honorable James A. Kenney, III, at the Court of Special Appeals of Maryland from 2001-2003. Mr. Amey received a J.D., magna cum laude, from the University of Baltimore School of Law in 2001, and a B.A. from the University of Pittsburgh in 1993. Scott is licensed to practice law in Maryland. He has appeared on CNN, NBC, CNBC, ABC, and NPR, and has been quoted in The New York Times, Washington Post, Wall Street Journal, Washington Times, and USA Today, among others, and often provides background information and leads to the media.

For more information, please visit:

- http://www.pogo.org/about/board-staff/staff-profiles/scott-amey.html

---

Professor Stanley M. Brand:

As the founding member of the Brand Law Group in Washington, D.C., Professor Brand has enjoyed success representing corporations, trade associations, labor unions, and individuals in major justice department, grand jury and independent counsel investigations and trial proceedings including Whitewater, HUD, the savings and loan crisis and the campaign finance task force investigations.

Earlier in his career, Professor Brand served as general counsel to the U.S. House of Representatives, and was the chief legal officer responsible for representing the House, its members, officers and employees in connection with legal procedures and challenges to the conduct of their official activities. With over thirty years of experience, Professor Brand offers students a particularly sharp insight into federal

regulatory and legislative practice in Washington, DC. In addition to his legal work, Professor Brand serves as the Vice-President of the National Association of Professional Baseball Leagues.

Drawing on his broad range of experience, Professor Brand's practice covers all levels of state and federal courts, with an emphasis on defending the rights of witnesses involved in government investigations. He has also represented numerous individuals and organizations investigated by and/or called to testify before the US Congress. Mr. Brand has developed a particular expertise in the application of the separation of powers doctrine. His diverse litigation and counseling practice also includes representing corporations, trade associations, labor unions, and individuals in major Justice Department, grand jury and independent counsel investigations and trial proceedings, including Whitewater, HUD, the savings and loan crisis, and the campaign finance task force investigations.

For more information, please visit:

- http://www.brandlawgroup.com/attorneys/stanley-brand/#sthash.BWP04Mqs.dpuf
- https://law.psu.edu/faculty/brand

Professor Lance Cole:

Professor Lance Cole's research and teaching interests reflect his practice experience in white-collar criminal defense, securities regulation law, and government investigations and prosecutions. Professor Cole researches the attorney-client privilege and the work product doctrine, government regulation of business entities, and legislative practice and procedure. His most recent publications have focused on constitutional and common law privileges and the government's ability to overcome those privileges and compel disclosure of information from private individuals and business entities.

For more information, please visit:

- https://law.psu.edu/faculty/cole

Professor Kathleen Clark:

Kathleen Clark practices law in Washington, DC, and is an expert on ethics standards for lawyers, current and former government officials and government contractors. She serves on the D.C. Bar's Rules of Professional Conduct Review Committee, and previously was Special Counsel to the Attorney General of the District of Columbia, writing an Ethics Manual for the District's 32,000 employees. As a consultant for the Administrative Conference of the United States (ACUS), she wrote a report on ethics standards for government contractor personnel that formed the basis for an ACUS recommendation and an ABA House of Delegates resolution. She previously served as Counsel to the U.S. Senate Judiciary Committee, drafting legislation on health care fraud and working on issues of white-collar crime.

Clark is also a law professor at Washington University in St. Louis, and has taught at the University of Michigan, Cornell University and Utrecht University. Her extensive academic work on ethics and corruption has been cited in hundreds of books and articles, and she has led ethics and whistleblowing workshops in North and South America, Europe, Asia, Africa, and Australia. A graduate of Yale College and Yale Law School, she studied Russian in the Soviet Union and Spanish in Guatemala and clerked for U.S. District Court Judge Harold H. Greene.

For more information, please visit

- http://law.wustl.edu/faculty/pages.aspx?id=222

Dr. Raymond Gibney, Jr.:

Raymond Gibney, Jr., PhD., is an Associate Professor of Management, in the Business Administration program at Penn State Harrisburg. His primary teaching focus is on human resource management. Prior to joining Penn State Harrisburg, Dr. Gibney was a consultant to several firms on HR related issues, including Coopers & Lybrand.

For more information, please visit:

- http://harrisburg.psu.edu/faculty-and-staff/raymond-gibney-jr-phd

---

David R. Hoffman:

David R. Hoffman, Esq. is the head of David Hoffman & Associates, P.C., a healthcare consulting firm based in Philadelphia. Mr. Hoffman was an Assistant United States attorney for more than 12 years, and prosecuted healthcare fraud cases, both civilly and criminally. Among his cases were successful prosecutions of long-term care facilities under the federal False Claims Act, to address serious problems with quality of care, including adequacy of nutrition, wound care, diabetes care and pain management protocols. Mr. Hoffman wrote about the experience of using the False Claims Act to prosecute Medicare and Medicaid abuse in "The Role of the Federal Government in Ensuring Quality of Care in Long-Term Care Facilities," 6 ANNALS OF HEALTH LAW 147 (1997). Mr. Hoffman uses his experiences to advise companies on best practices, to achieve effective regulatory compliance programs, and he speaks regularly at Health Law programs in Pennsylvania and nationally.

For more information, please visit:

- http://www.dhoffmanassoc.com/biographies.php

Professor Katherine Pearson:

Professor Katherine Pearson is a scholar of legal issues facing older adults. Her recent scholarship focuses on alternative models for provision of long-term care and senior health care; integration of health and social care; protection of vulnerable populations including the elderly and legal implications of dementia. Her interest in a wide range of emerging issues is captured in her most recent role, as a co-author and editor of the Elder Law Prof Blog. She often posts on high-profile whistleblower cases in elder care.

A 2009-2010 Fulbright scholar, Professor Pearson was a scholar in residence at Queen's University Belfast in Northern Ireland. In 2013-14, she joined interdisciplinary research teams reporting on comparative systems for social care and protection from abuse for older adults in Northern Ireland. Professor Pearson's interest in whistleblower laws actually began in Northern Ireland, when she was asked to analyze what legal protections should be available for an employee working in an adult residential-care facility, who was "sacked" after

reporting his concerns about unsafe staffing ratios. Looking at the protections under whistleblower laws in the U.K. and Ireland stimulated her interest in what is happening in the U.S.

For more information, please visit:

- https://law.psu.edu/faculty/pearson
- http://lawprofessors.typepad.com/elder_law/

Joseph E. B. "Jeb" White:

Joseph (Jeb) E. B. White is a Partner at Nolan, Auberach, and White and is also the former President and CEO of Taxpayers Against Fraud (TAF) and TAF Education Fund, a public interest organizations dedicated to combating fraud against the government through the promotion of the False Claims Act and its qui tam provisions.

A graduate of the University of Pennsylvania and the Georgetown University Law Center, Mr. White is widely recognized as one of the country's leading authorities on the False Claims Act. He regularly works with government and private attorneys, detailing the emerging case law through regular legal publications, educational seminars, and individual consultations. Mr. White launched the first legal website devoted to the False Claims Act case law; established a moot court program; reinvigorated an amicus curiae brief program; and coordinated various educational programs, including the nation's largest annual conference on False Claims Act litigation.

Mr. White has also filed amicus curiae briefs in state and federal courts across the country, including briefs in every U.S. Supreme Court case from the past five years involving the False Claims Act. In addition, he is regularly asked to lecture to a wide variety of audiences, including the American Bar Association, the American Health Lawyers Association, the American Law Institute, state assemblies, training sessions for state prosecutors, and the George Washington University Health Care Corporate Compliance Program. With over a dozen published articles, he has written extensively about fraud enforcement and whistleblower protections. A member of the BNA Health Care Fraud Report's Board of Advisors, Mr. White has been recognized as one of the nation's leading authorities on healthcare fraud and abuse. In addition, as the long-time Editor of the False Claims Act & Qui tam Quarterly Review, Mr. White managed the overall production of a 150+ page law journal devoted to False Claims Act litigation.

For more information, please visit:

- http://www.whistleblowerfirm.com/who-we-are/partners/
- http://www.healthlawyers.org/Events/Biographies/Pages/WhiteJeb.aspx

---

Claudia M. Williams:

Ms. Williams serves as Associate General Counsel, Global HR & Litigation. Reporting directly to the General Counsel, she leads the Law Department's Global Labor & Employment team to support the global legal needs of the Human Resources organization. She also leads the Law Department's Global Litigation team, with responsibility for managing the Company's global litigation portfolio. Ms. Williams serves as the key legal partner for the Chief HR Officer, the HR Leadership Team and Risk Management, providing support and advice on organizational HR initiatives, goals, processes and procedures and enterprise risk management. Ms. Williams also supports the General Counsel with her guidance/information to the Global Leadership Team, Board of Directors, Audit Committee, and the Ethical Business Practices Committee regarding global labor & employment and litigation matters. She assists with due diligence in the context of M&A and a target company's organizational integration.

Ms. Williams, a 2003 graduate of Penn State Dickinson Law, began her legal career as an Associate at Morgan Lewis. As an Equity Partner at Rhoads & Sinon, Ms. Williams assisted employers with the nuts and bolts of the employment relationship in both union and non-union work environments.

A former Adjunct Faculty Member at the Pennsylvania State University, she taught Labor-Management Relations from 2005-2008 at the Harrisburg Campus. She is active in the PBA Labor and Employment Law Section and currently is Immediate Past Chair. She was selected for inclusion in the 2008, 2010, 2011 and 2012 issues of Philadelphia Magazine Pennsylvania Super Lawyers - Rising Stars Edition, and she received the 2011 MS Society Leadership Award. She was selected by the Central Penn Business Journal as one of 2012's 25 Women of Influence.

INTRODUCTION

WHAT IS A WHISTLEBLOWER?

Lance Cole, Professor of Law and Director, Center for Government Law and Public Policy Studies, Penn State Dickinson School of Law

Khaled ASADI, Plaintiff–Appellant,

v.

G.E. ENERGY (USA), L.L.C., Defendant–Appellee.

No. 12–20522.

United States Court of Appeals, Fifth Circuit.

July 17, 2013.

Background: Employee filed complaint alleging that energy company violated the whistleblower-protection provision of the Dodd–Frank Wall Street Reform and Consumer Protection Act by terminating him after he made an internal report of a possible securities law violation. The United States District Court for the Southern District of Texas, Houston, Nancy F. Atlas, J., 2012 WL 2522599, dismissed complaint. Employee appealed.

Holding: The Court of Appeals, Jennifer Walker Elrod, Circuit Judge, held that employee was not a "whistleblower" under the Act.

Affirmed.

1. Statutes ⚷1111

When faced with questions of statutory construction, the court must first determine whether the statutory text is plain and unambiguous and, if it is, the court must apply the statute according to its terms.

2. Statutes ⚷1102, 1153

When construing statutes, the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

3. Statutes ⚷1108

If the statutory text is unambiguous, the inquiry into its meaning begins and ends with the text.

4. Statutes ⚷1151

In construing a statute, a court should give effect, if possible, to every word and every provision Congress used.

5. Statutes ⚷1155

If possible, the court interprets provisions of a statute in a manner that renders them compatible, not contradictory.

6. Action ⚷3
Securities Regulation ⚷11.22

The Dodd–Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the Securities and Exchange Commission (SEC). Dodd–Frank Wall Street Reform and Consumer Protection Act, § 922(a), 15 U.S.C.A. § 78u–6.

7. Securities Regulation ⚷11.22

Energy company's employee did not provide any information to Securities and Exchange Commission (SEC) when he made internal report of a possible securities law violation, and thus employee was not a "whistleblower" under whistleblower-protection provision of the Dodd–Frank Wall Street Reform and Consumer Protection Act. Dodd–Frank Wall Street Reform and Consumer Protection Act, § 922(a), 15 U.S.C.A. § 78u–6.

Ronald Edward Dupree, Jr. (argued), Esq., Houston, TX, for Plaintiff–Appellant.

Linda L. Addison, Esq., Fulbright & Jaworski L.L.P., New York, NY, Darryl Wade Anderson, Fulbright & Jaworski, L.L.P., Houston, TX, Jonathan Saul

Franklin (argued), Fulbright & Jaworski L.L.P., Washington, DC, for Defendant–Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before ELROD and HIGGINSON, Circuit Judges, and JACKSON, District Judge.*

JENNIFER WALKER ELROD, Circuit Judge:

Plaintiff–Appellant Khaled Asadi ("Asadi") filed a complaint alleging that Defendant–Appellee G.E. Energy (USA), L.L.C. ("GE Energy") violated the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd–Frank"), 15 U.S.C. § 78u–6(h) (the "whistleblower-protection provision"), by terminating him after he made an internal report of a possible securities law violation. The district court granted GE Energy's motion to dismiss for failure to state a claim. Because Asadi was not a "whistleblower" under Dodd–Frank, we AFFIRM.

I.

In 2006, Asadi accepted GE Energy's offer to serve as its Iraq Country Executive and relocated to Amman, Jordan. At a meeting in 2010, while serving in this capacity, Iraqi officials informed Asadi of their concern that GE Energy hired a woman closely associated with a senior Iraqi official to curry favor with that official in negotiating a lucrative joint venture agreement. Asadi, concerned this alleged conduct violated the Foreign Corrupt Practices Act ("FCPA"), reported the issue to his supervisor and to the GE Energy ombudsperson for the region. Shortly following these internal reports, Asadi received a "surprisingly negative" performance review. GE Energy pressured him to step down from his role as Iraq Country Executive and accept a reduced role in the region with minimal responsibility. Asadi did not comply and, approximately one year after he made the internal reports, GE Energy fired him.[1]

Asadi filed a complaint alleging that GE Energy violated Dodd–Frank's whistleblower-protection provision by terminating him following his internal reports of the possible FCPA violation.[2] GE Energy moved to dismiss Asadi's complaint under Rule 12(b)(6) on the basis that it failed to state a claim because, *inter alia*, (1) Asadi does not qualify as a "whistleblower" under the whistleblower-protection provision, and (2) the whistleblower-protection provision does not apply extraterritorially. The district court dismissed Asadi's whistleblower-retaliation claim with prejudice, concluding that the whistleblower-protection provision "does not extend to or protect Asadi's extraterritorial whistleblowing activity." Having reached this conclusion, it declined to decide whether Asadi qualified as a "whistleblower" under the whistleblower-protection provision. Asadi filed a timely notice of appeal.

* Chief Judge of the Middle District of Louisiana, sitting by designation.

1. Asadi learned of his termination by an email that specified, in part: "GE is exercising its right to terminate your employment as an at-will employee, as allowed under U.S. law and as described in your expatriate assignment letter. As a U.S. based employee you will be terminated in the U.S."

2. Asadi later amended his complaint to include a breach-of-contract claim. After the district court dismissed Asadi's Dodd–Frank whistleblower-protection claim, it declined to exercise supplemental jurisdiction over Asadi's breach-of-contract claim and dismissed it without prejudice. Asadi has not challenged the district court's dismissal of his breach-of-contract claim on appeal.

II.

We review *de novo* a district court order granting a Rule 12(b)(6) motion to dismiss for failure to state a claim and may affirm on any basis supported by the record. *Torch Liquidating Trust ex rel. Bridge Assocs. v. Stockstill,* 561 F.3d 377, 384 (5th Cir.2009) (citation omitted). We "accept[ ] all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.,* 495 F.3d 191, 205 (5th Cir.2007) (internal quotation marks omitted). The only issues on appeal are interpretations of Dodd–Frank, which we review *de novo. Rothe Dev., Inc. v. U.S. Dep't of Def.,* 666 F.3d 336, 338 (5th Cir.2011).

III.

[1–3] When faced with questions of statutory construction, "we must first determine whether the statutory text is plain and unambiguous" and, "[i]f it is, we must apply the statute according to its terms." *Carcieri v. Salazar,* 555 U.S. 379, 387, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009) (citations omitted); *see also BedRoc Ltd. v. United States,* 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' ") (quoting *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). If the statutory text is unambiguous, our inquiry begins and ends with the text. *BedRoc Ltd.,* 541 U.S. at 183, 124 S.Ct. 1587.

[4, 5] The parties' arguments in this case implicate several additional principles of interpretation. In construing a statute, a court should give effect, if possible, to every word and every provision Congress used. *See, e.g., Duncan v. Walker,* 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (citation and internal quotation marks omitted)). *But see, e.g., Corley v. United States,* 556 U.S. 303, 325, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (Alito, J., dissenting) ("Like other canons, the antisuperfluousness canon is merely an interpretive aid, not an absolute rule." (citing *Germain,* 503 U.S. at 254, 112 S.Ct. 1146)); *United States v. Monsanto,* 491 U.S. 600, 611, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989) ("We respect these [general canons of statutory construction], and they are quite often useful in close cases, or when statutory language is ambiguous. But we have observed before that such interpretative canon[s are] not a license for the judiciary to rewrite language enacted by the legislature." (citation and internal quotation marks omitted)). Also, if possible, we interpret provisions of a statute in a manner that renders them compatible, not contradictory. *See FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." (citations and internal quotation marks omitted)). With these principles in mind, we turn to the question presented in this appeal.

IV.

[6] Congress enacted Dodd–Frank in the wake of the 2008 financial crisis. Sec-

tion 922 of Dodd–Frank, as one component of the Act's comprehensive reform of the U.S. financial regulatory system, encourages individuals to provide information relating to a violation of U.S. securities laws to the Securities and Exchange Commission ("SEC" or "Commission"). Section 922, codified at 15 U.S.C. § 78u–6, encourages such disclosures through two related provisions that: (1) require the SEC to pay significant monetary awards to individuals who provide information to the SEC which leads to a successful enforcement action; and (2) create a private cause of action for certain individuals against employers who retaliate against them for taking specified protected actions.[3] We must answer a relatively straightforward question relating to the latter provision in this case: whether an individual who is not a "whistleblower" under the statutory definition of that term in § 78u–6(a)(6) may, in some circumstances, nevertheless seek relief under the whistleblower-protection provision. For the reasons that follow, we hold that the plain language of the Dodd–Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC. Because Asadi failed to do so, his whistleblower-protection claim fails.

A.

[7] We start and end our analysis with the text of the relevant statute—15 U.S.C. § 78u–6. That section is titled "Securities whistleblower incentives and protection" and contains ten subsections. The interplay between two of these subsections—(a) and (h)—is the focus of the statutory-interpretation question presented in this case.[4] Subsection (a) provides definitions for certain terms used throughout § 78u–6. Included in this list of terms defined for purposes of § 78u–6 is "whistleblower." Specifically, "[t]he term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." § 78u–6(a)(6) (emphasis added). This definition, standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a "whistleblower" for purposes of § 78u–6. *See, e.g.*, Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 226 (1st ed. 2012) ("When . . . a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning." (emphasis in original)).

Subsection (h), titled "Protection of whistleblowers," provides whistleblowers a private right of action against employers who take retaliatory actions against the whistleblower for taking certain protected actions. § 78u–6(h). Subsection (h) includes three paragraphs. Only paragraph (1), titled "Prohibition against retaliation," is relevant to this appeal. Paragraph (1) is divided into three subparagraphs. Subparagraph (A), the specific focus of this appeal, provides in its entirety:

3. For clarity, we refer to the award provision as the "whistleblower-incentive program," and the provision protecting whistleblowers from retaliation as the "whistleblower-protection provision."

4. The other subsections in § 78u–6 relate to the whistleblower-incentive program that provides for monetary awards to whistleblowers if the information provided to the SEC leads to a successful enforcement of a judicial or administrative action under the securities laws. Also, subsection (j) provides the SEC with the authority to issue necessary or appropriate rules and regulations that are consistent with the purposes of § 78u–6.

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

§ 78u–6(h)(1)(A).

B.

Asadi concedes that he is not a "whistleblower" as that term is defined in section 78u–6(a)(6) because he did not provide any information to the SEC. Asadi maintains, however, that the whistleblower-protection provision should be construed to protect individuals who take actions that fall within section 78u–6(h)(1)(A)(iii) (*i.e.*, the third category of protected activity), even if they do not provide information to the SEC. He bases this construction of the statute on a perceived conflict between the statutory definition of "whistleblower" in section 78u–6(a)(6) and the third category of protected activity, which does not necessarily require disclosure of information to the SEC.[5] Asadi has some case law,[6] as well as the SEC regulation on this issue, in his

5. Notably, however, Asadi does not maintain that the definition of "whistleblower" in § 78u–6(a)(6) is ambiguous. Similarly, he does not contend that the categories of lawful actions by a whistleblower in § 78u–6(h)(1)(A) are ambiguous. Nevertheless, he asserts that individuals who take actions that fall within the third category of lawful actions are protected, whether or not they qualify as a "whistleblower" as defined in § 78u–6(a)(6).

6. District courts that have considered this question have concluded that the whistleblower-protection provision, as enacted, is either conflicting or ambiguous. *See, e.g., Kramer v. Trans–Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820, at *4 (D.Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp.2d 986, 994 n. 9 (M.D.Tenn.2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *4–5 (S.D.N.Y. May 4, 2011). For instance, in *Egan*, the court explained that "a literal reading of the definition of the term 'whistleblower' in 15 U.S.C. § 78u–6(a)(6), requiring reporting to the SEC, would effectively invalidate § 78u–6(h)(1)(A)(iii)'s protection of whistleblower disclosures that do not require reporting to the SEC." *Egan*, 2011 WL 1672066, at *4; *see also Nollner*, 852 F.Supp.2d at 994 n. 9 (approvingly citing *Egan* and explaining that "the plain terms of anti-retaliation category (iii), which do *not* require reporting to the SEC, appear to conflict with the [Dodd–Frank Act's] definition of 'whistleblower' at § 78u–6(h)(1)(A)(iii), which defines a whistleblower as anyone who reports securities violations 'to the Commission' " (emphasis in original)). In *Kramer*, the district court focused on the same interplay between § 78u–6(a)(6) and § 78u–6(h)(1)(A)(iii) and concluded that it was not "unambiguously clear that the Dodd–Frank Act's retaliation provision only applies to those individuals who have provided information relating to a securities violation to the Commission." *Kramer*, 2012 WL 4444820, at *4.

Each district court, after concluding that the statute was conflicting or ambiguous, concluded that the Dodd–Frank whistleblower-protection provision extends to protect certain individuals who do not make disclosures to the SEC. *See Nollner*, 852 F.Supp.2d at 994 n. 9; *Kramer*, 2012 WL 4444820, at *4–5; *Egan*, 2011 WL 1672066, at *4–5.

corner. Our examination of the statutory language of Dodd–Frank, however, leads us to reject Asadi's construction of the whistleblower-protection provision. As explained below, the perceived conflict between § 78u–6(a)(6) and § 78u–6(h)(1)(A)(iii) rests on a misreading of the operative provisions of § 78u–6.

C.

Under Dodd–Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC. The three categories listed in subparagraph § 78u–6(h)(1)(A) represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers.

This construction of the whistleblower-protection provision follows directly from the plain language of § 78u–6(h)(1)(A): "No employer may discharge . . . or in any other manner discriminate against, a whistleblower . . . because of any lawful act done by the whistleblower" in taking any of the three categories of protected actions. § 78u–6(h)(1)(A). This statutory language clearly answers two questions: (1) who is protected; and (2) what actions by protected individuals constitute protected activity. First, and most critically to this appeal, the answer to the first question is "a whistleblower." *See* § 78u–6(h)(1)(A) ("No employer may discharge . . . *a whistleblower* . . . ." (emphasis added)). Second, the answer to the latter question is "any lawful act done by the whistleblower" that falls within one of the three categories of action described in the statute. *See id.*

The statutory text describing these three categories of protected activity is also unambiguous. The text of § 78u–6(h)(1)(A)(i) protects whistleblowers from employer retaliation for the action that made the individual a whistleblower in the first instance, *i.e.*, providing information relating to a securities law violation to the SEC. § 78u–6(h)(1)(A)(i) ("No employer may discharge . . . a whistleblower . . . because of any lawful act done by the whistleblower—(i) in providing information to the Commission in accordance with this section."). The text of § 78u–6(h)(1)(A)(ii) protects whistleblowers from retaliation for their participation in the investigation, and possible judicial or administrative action of the SEC, that follows on the heels of the information initially provided to the SEC.[7] § 78u–6(h)(1)(A)(ii) ("No employer may discharge . . . a whistleblower . . . because of any lawful act done by the whistleblower . . . (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.").

Congress's description of the final category of protected activity is similarly plain and unambiguous. The text of § 78u–6(h)(1)(A)(iii) protects whistleblowers from retaliation for making disclosures that are required or protected under any law, rule, or regulation subject to the jurisdiction of the SEC. § 78u–6(h)(1)(A)(iii) ("No em-

7. Section 78u–6 directly envisions information provided by "whistleblowers" to result in an investigation and, if appropriate, the SEC's initiation of a judicial or administrative action, leading to the potential of monetary awards for the "whistleblower." *See* § 78u–6(a), (b). The inclusion of this category of protection from retaliation indicates that Congress determined that protection from retaliation was appropriate not only for the initial disclosure by the "whistleblower," but also for the whistleblower's continued participation in the subsequent investigation and any resulting judicial or administrative actions.

ployer may discharge . . . a whistleblower . . . because of any lawful act done by the whistleblower . . . (iii) in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.").

Although Asadi does not contend that the language used in § 78u–6(h)(1)(A)(iii) is, by itself, ambiguous, he maintains that it conflicts with the definition of "whistleblower." The basis for his contention is that an individual can take actions falling within this category and, if he does not report information to the SEC, fail to qualify as a "whistleblower" under § 78u–6(a)(6). While it is correct that individuals may take protected activity yet still not qualify as a whistleblower, that practical result does not render § 78u–6(h)(1)(A)(iii) conflicting or superfluous. As discussed below, under the plain language and structure of Dodd–Frank, there are not conflicting definitions of "whistleblower," and § 78u–6(h)(1)(A)(iii) is not superfluous.

First, the definition of "whistleblower" and the third category of protected activity do not conflict. Conflict would exist between these statutory provisions only if we read the three categories of protected activity as additional definitions of three types of whistleblowers. Under that reading—which, as described above, the plain text of the statute does not support—individuals could take actions falling within the third category of protected activity yet fail to qualify under the more narrow definition of whistleblower.

The language and structure of the whistleblower-protection provision, however, does not support Asadi's construction. Importantly, the placement of the three categories of protected activity in subsection (h) follows the phrase "[n]o employer may discharge . . . or in any other manner discriminate against, a *whistleblower* . . . because of any lawful act done by the *whistleblower* . . . ." § 78u–6(h)(1)(A) (emphasis added). The use of the term "whistleblower," as compared with terms such as "individual" or "employee," is significant.[8] If Congress had selected the terms "individual" or "employee," Asadi's construction of the whistleblower-protection statute would follow more naturally because the use of such broader terms would indicate that Congress intended any individual or employee—not just those individuals or employees who qualify as a "whistleblower"—to be protected from retaliatory actions by their employers.[9]

8. We also note that the heading of subsection (h) is "[p]rotection of *whistleblowers*." § 78u–6(h) (emphasis added). While this heading cannot limit the plain meaning of the text, it lends support to the conclusion that the whistleblower-protection provision applies only to those individuals who qualify as "whistleblowers" as defined in § 78u–6(a)(6). *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008) ("To be sure, a . . . heading cannot substitute for the operative text of the statute. Nonetheless, statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." (citations and internal quotation marks omitted)).

9. GE Energy maintains that the legislative history indicates that Congress specifically rejected a broader description of individuals eligible to raise claims under the whistleblower-protection provision. Specifically, GE Energy explains that the bill initially passed by the House did not use the term "whistleblower" in describing the individuals protected from employer retaliation; instead, it used the phrase "employee, contractor, or agent." Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7203(g)(1)(A) (as passed by House,

Congress, however, used the term "whistleblower" throughout subsection (h) and, therefore, we must give that language effect.

Accordingly, § 78u–6(h)(1)(A) does not provide alternative definitions of the term "whistleblower" for purposes of the whistleblower-protection provision. Instead, the text of § 78u–6 clearly and unambiguously provides a single definition of "whistleblower." Therefore, the whistleblower-protection provision does not contain conflicting definitions of "whistleblower."

Second, the interplay between § 78u–6(a)(6) and § 78u–6(h)(1)(A)(iii) does not render § 78u–6(h)(1)(A)(iii) superfluous. Importantly, the third category of protected activity has effect even when we construe the protection from retaliation under Dodd–Frank to apply only to individuals who qualify as "whistleblowers" under the statutory definition of that term. Specifically, this category protects whistleblowers from retaliation, based not on the individual's disclosure of information to the SEC but, instead, on that individual's other possible required or protected disclosure(s). § 78u–6(h)(1)(A)(iii). An example illustrates the effect of this third category of protected activity for whistleblowers:

Assume a mid-level manager discovers a securities law violation. On the day he makes this discovery, he immediately reports this securities law violation (1) to his company's chief executive officer ("CEO") and (2) to the SEC. Unfortunately for the mid-level manager, the CEO, who is not yet aware of the disclosure to the SEC,[10] immediately fires the mid-level manager. The mid-level manager, clearly a "whistleblower" as defined in Dodd–Frank because he provided information to the SEC relating to a securities law violation, would be unable to prove that he was retaliated against because of the report to the SEC. Accordingly, the first and second category of protected activity would not shield this whistleblower from retaliation. The third category of protected activity, however, protects the mid-level manager. In this scenario, the internal disclosure to the

Dec. 11, 2009) ("No employer may discharge ... or in any other manner discriminate against an employee, contractor, or agent ... because of any lawful act done by the employee, contractor, or agent in providing information to the Commission....'). The Senate's subsequent version of the bill replaced the use of the phrase "employee, contractor, or agent" with "whistleblower" and restructured the format of the provision to resemble the enacted version. Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 922(h)(1)(A) (as passed by Senate, May 20, 2010). According to GE Energy, the enactment of the Senate bill, which predicates eligibility for protection from employer retaliation on qualifying as a "whistleblower," demonstrates that Congress eventually rejected the broader description of individuals eligible for protection used in the initial House bill.

We do not rely on this legislative history in our analysis of this case. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *Khalid v. Holder,* 655 F.3d 363, 371 (5th Cir.2011) (declining to "recite legislative history given the clarity of the statutory text" (quoting *Freeman v. Quicken Loans, Inc.,* 626 F.3d 799, 804 n. 9 (5th Cir.2010))).

10. Under 17 C.F.R. § 240.21F–9(a), "[t]o be considered a whistleblower ..., you must submit your information about a possible securities law violation by either of these methods: (1) Online, through the Commission's Web site ...; or (2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) ... to the SEC Office of the Whistleblower...." Regardless of which of these two methods a whistleblower utilizes to submit information to the SEC, the whistleblower's employer will not necessarily immediately be aware of the disclosure, unless of course, the whistleblower informs her employer that she has made such a disclosure.

CEO, a person with supervisory authority over the mid-level manager, is protected under 18 U.S.C. § 1514A, the anti-retaliation provision enacted as part of the Sarbanes–Oxley Act of 2002 ("the SOX anti-retaliation provision"). Accordingly, even though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level manager can state a claim under the Dodd–Frank whistleblower-protection provision because he was a "whistleblower" and suffered retaliation based on his disclosure to the CEO, which was protected under SOX.[11]

As this example demonstrates, under the plain text of Dodd–Frank, the third category of protected activity is not superfluous. It protects those individuals who qualify as whistleblowers from retaliation on the basis of other required or protected disclosures. Accordingly, we decline to adopt Asadi's construction of the whistleblower-protection provision on the basis that § 78u–6(h)(1)(A)(iii) is superfluous.

Moreover, it is Asadi's suggested construction of the whistleblower-protection provision that arguably renders statutory text superfluous. Specifically, Asadi's suggested statutory construction would read the words "to the Commission" out of the definition of "whistleblower" for purposes of the whistleblower-protection provision. Construing the statute in this manner would violate the surplusage canon, that every word is to be given effect. *See, e.g., TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (citations and internal quotation marks omitted)); *Duncan,* 533 U.S. at 174, 121 S.Ct. 2120. Accordingly, even if the whistleblower-protection provision were ambiguous, we would be reluctant to read the provision as suggested by Asadi because such a construction would treat "to the Commission" as mere surplusage.

D.

Asadi's construction of the whistleblower-protection provision is problematic for another reason. Specifically, construing the Dodd–Frank whistleblower-protection provision to extend beyond the statutory definition of "whistleblowers" renders the SOX anti-retaliation provision, for practical purposes, moot.[12] Such a construction has this impact because an individual who makes a disclosure that is protected by the SOX anti-retaliation provision could also bring a Dodd–Frank whistleblower-protection claim on the basis that the disclosure was protected by SOX. It is unlikely, however, that an individual would choose to raise a SOX anti-retaliation claim instead

11. In this scenario, the mid-level manager could also raise a claim under the SOX anti-retaliation provision. The Dodd–Frank whistleblower-protection provision, however, as discussed *infra,* provides greater levels of protection. Accordingly, there is an incentive not only to report such violations internally, but also to inform the SEC of the securities violation.

12. Given the language in § 922 of Dodd–Frank, construing the whistleblower-protection provision to have this impact is particularly odd. Specifically, § 922—which contains the securities-whistleblower program—also amended the applicable statute of limitations for the SOX anti-retaliation provision. Dodd–Frank § 922(b)(1) (amending 18 U.S.C. § 1514A(c)(2)). Section 922 extends the statute of limitations for SOX anti-retaliation claims from 90 days after an employer's violation of the anti-retaliation provision to 180 days after such a violation or 180 days after the date on which the employee becomes aware of the violation. *Id.*

of a Dodd–Frank whistleblower-protection claim.

Three separate, but important, distinctions between the SOX anti-retaliation and Dodd–Frank whistleblower-protection claims lead to this practical result. First, the Dodd–Frank whistleblower-protection provision provides for greater monetary damages because it allows for recovery of two times back pay, whereas the SOX anti-retaliation provision provides for only back pay. *Compare* 15 U.S.C. § 78u–6(h)(1)(C), *with* 18 U.S.C. § 1514A(c)(2). Second, individuals who bring a SOX anti-retaliation claim must first file a complaint with the Secretary of Labor and, only if the Secretary of Labor has not issued a final decision within 180 days, may then proceed to file a claim in a United States district court. 18 U.S.C. § 1514A(b)(1). Alternatively, individuals may bring a Dodd–Frank whistleblower-protection claim without first filing their claim with a federal agency. *See* 15 U.S.C. § 78u–6(h). Third, the applicable statute of limitations is substantially longer for Dodd–Frank whistleblower-protection claims. *Compare* 15 U.S.C. § 78u–6(h)(1)(B)(iii) (between six and ten years after the violation occurs), *with* 18 U.S.C. § 1514A(b)(2)(D) (between 180 days after the violation occurs and 180 days after the employee becomes aware of the violation).

Accordingly, if we were to accept Asadi's construction of the whistleblower-protection provision, the SOX anti-retaliation provision, and most importantly, its administrative scheme, for practical purposes, would be rendered moot.

E.

Based on our examination of the plain language and structure of the whistleblower-protection provision, we conclude that the whistleblower-protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws *to the SEC* to qualify for protection from retaliation under § 78u–6(h).

V.

Finally, Asadi maintains that we should defer to the SEC's recent regulation construing the Dodd–Frank whistleblower-protection provision. Asadi correctly notes that the SEC's final rule adopts his suggested construction of the whistleblower-protection provision and expands the meaning of a "whistleblower" beyond the statutory definition. The language of the regulation provides:

> (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u–6(h)(1)), you are a whistleblower if:
>
> (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;
>
> (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u–6(h)(1)(A)).

17 C.F.R. § 240.21F–2(b)(1). Simply put, this regulation, instead of using the statute's definition of "whistleblower," redefines "whistleblower" more broadly by providing that an individual qualifies as a whistleblower even though he never reports any information to the SEC, so long as he has undertaken the protected activity listed in 15 U.S.C. § 78u–6(h)(1)(A). *See id.* Moreover, the regulation unquestionably defines whistleblower more broadly for the prohibition against retaliation than it does for eligibility for an award.

The plain language of § 78u–6 does not support this distinction.

As discussed above, Congress defined "whistleblower" in § 78u–6(a)(6), and did so unambiguously. Congress specified that a "whistleblower," not merely any individual, is protected from employer retaliation on the basis of the whistleblower's protected activities. The statute, therefore, clearly expresses Congress's intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd–Frank. Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term "whistleblower" for purposes of the whistleblower-protection provision. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *id.* at 842–43, 104 S.Ct. 2778 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also Khalid,* 655 F.3d at 371 (" 'Congress has directly spoken to the precise question at issue,' and thus there is no room for the agency to impose its own answer to the question." (quoting *Chevron,* 467 U.S. at 842–44, 104 S.Ct. 2778)).

Moreover, the SEC's regulations concerning the Dodd–Frank whistleblower-protection provision are inconsistent. While 17 C.F.R. § 240.21F–2(b)(1) appears to adopt a broader definition of "whistleblower," as described above, 17 C.F.R. § 240.21F–9, which governs the procedures for submitting original information to the SEC, explicitly requires that an individual submit information about a possible securities law violation to the SEC. Specifically, 17 C.F.R. § 240.21F–9 provides:

> To be considered a whistleblower under Section 21F of the Exchange Act (15 U.S.C. 78u–6(h)), you must submit your information about a possible securities law violation by either of these methods:
>
> (1) Online, through the Commission's Web site . . .; or
>
> (2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) (referenced in § 249.1800 of this chapter) to the SEC Office of the Whistleblower . . . .

Id. The SEC's inconsistency in defining the term "whistleblower" for purposes of the Dodd–Frank whistleblower-protection provision does not strengthen Asadi's position that the SEC's interpretation "reasonably effectuate[s] Congress's intent." *Texas v. United States,* 497 F.3d 491, 506 (5th Cir.2007).

VI.

We conclude that the plain language of § 78u–6 limits protection under the Dodd–Frank whistleblower-protection provision to those individuals who provide "information relating to a violation of the securities laws" to the SEC. § 78u–6(a)(6). Asadi did not provide any information to the SEC; therefore, he does not qualify as a "whistleblower." [13] Accordingly, we AFFIRM the district court's dismissal of Asadi's Dodd–Frank whistleblower-protection claim.

13. Because Asadi's claim fails on the basis that he is not a whistleblower, we need not reach the remaining issues on appeal in this case. *See, e.g., U.S. ex rel. Doe v. Dow Chem. Co.,* 343 F.3d 325, 330 (5th Cir.2003) (declining to address issues that were not necessary to affirm the district court's ruling on a motion to dismiss).

Hatley's sole point of error in the court of appeals stated:

> The District Court erred by dismissing plaintiff's claims on the basis that the Constitution of the State of Texas does not provide an independent cause of action *r netar relie* and because state sovereign immunity shields liability for violations of the state constitution.

(Emphasis added.) Hatley's brief in the court of appeals argued for a constitutional cause of action for monetary damages and asserted that sovereign immunity does not bar his claim. A fair construction of Hatley's brief in the court of appeals reveals that Hatley did not argue his present assertion for equitable relief. Although he pleaded a cause of action for equitable relief in the trial court, Hatley did not raise his claim for equitable relief in the court of appeals until his motion for rehearing.

Hatley's sole point of error before this Court is that sovereign immunity does not bar his claim for equitable relief arising from A & M's alleged violations of his state constitutional rights. This Court cannot consider a point not assigned as error in the court of appeals and raised for the first time in a motion for rehearing. *ee at n len all n* , 505 S.W.2d 793, 797 (Tex. 1974). For these reasons, I concur with the Court's order withdrawing the order granting Hatley's application for writ of error as improvidently granted and denying Hatley's application.

Colette BOHATCH, Petitioner,

v.

BUTLER & BINION, et al., Respondents.

No. 95–0934.

Supreme Court of Texas.

Argued Nov. 20, 1996.

Decided Jan. 22, 1998.

Expelled partner brought suit against law firm, alleging breach of fiduciary duty and breach of partnership agreement. The 234th District Court, Harris County, Scott A. Brister, J., awarded partner actual damages and punitive damages. Appeals were taken. The Houston Court of Appeals, 14th District, 905 S.W.2d 597, reversed and rendered. Application for writ of error was filed. The Supreme Court, Spector, J., held that: (1) as matter of first impression, partner in law firm could be expelled from partnership for accusing, in good faith, another partner of overbilling without subjecting partnership to tort damages for breach of fiduciary duty, but (2) law firm's undisputed failure to give notice to partner that firm was reducing her tentative distribution rendered law firm liable for damages for breach of partnership agreement.

Affirmed.

Hecht, J., filed a concurring opinion.

Spector, J., filed a dissenting opinion, in which Phillips, C.J., joined.

1. Partnership ⚷70

Relationship between partners is fiduciary in character, and imposes upon all participants the obligation of loyalty to their joint concern and of utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to enterprise.

2. Partnership ⚷224

Partners have no obligation to remain partners; at heart of partnership concept is principle that partners may choose with whom they wish to be associated.

3. Partnership ⚷224

Fiduciary duty that partners owe one another does not encompass duty to remain partners or else answer in tort damages.

4. Attorney and Client ⚷30

Partner in law firm can be expelled from partnership for accusing, in good faith, another partner of overbilling without subject-

ing partnership to tort damages for breach of fiduciary duty.

5. Attorney and Client ⚷30

Law firm's undisputed failure to give notice to partner that firm was reducing her tentative distribution, as required by partnership agreement, rendered law firm liable for damages for breach of partnership agreement.

H. Victor Thomas, Eliot P. Tucker, Houston, for petitioner.

Richard N. Countiss, David W. Holman, Larry D. Knippa, Houston, for respondents.

ENOCH, Justice, delivered the opinion of the Court, in which GONZALEZ, OWEN, BAKER, and HANKINSON, Justices, join.

Partnerships exist by the agreement of the partners; partners have no duty to remain partners. The issue in this case is whether we should create an exception to this rule by holding that a partnership has a duty not to expel a partner for reporting suspected overbilling by another partner. The trial court rendered judgment for Colette Bohatch on her breach of fiduciary duty claim against Butler & Binion and several of its partners (collectively, "the firm"). The court of appeals held that there was no evidence that the firm breached a fiduciary duty and reversed the trial court's tort judgment; however, the court of appeals found evidence of a breach of the partnership agreement and rendered judgment for Bohatch on this ground. 905 S.W.2d 597. We affirm the court of appeals' judgment.

I. Facts

Bohatch became an associate in the Washington, D.C., office of Butler & Binion in 1986 after working for several years as Deputy Assistant General Counsel at the Federal Energy Regulatory Commission. John McDonald, the managing partner of the office, and Richard Powers, a partner, were the only other attorneys in the Washington office. The office did work for Pennzoil almost exclusively.

Bohatch was made partner in February 1990. She then began receiving internal firm reports showing the number of hours each attorney worked, billed, and collected. From her review of these reports, Bohatch became concerned that McDonald was overbilling Pennzoil and discussed the matter with Powers. Together they reviewed and copied portions of McDonald's time diary. Bohatch's review of McDonald's time entries increased her concern.

On July 15, 1990, Bohatch met with Louis Paine, the firm's managing partner, to report her concern that McDonald was overbilling Pennzoil. Paine said he would investigate. Later that day, Bohatch told Powers about her conversation with Paine.

The following day, McDonald met with Bohatch and informed her that Pennzoil was not satisfied with her work and wanted her work to be supervised. Bohatch testified that this was the first time she had ever heard criticism of her work for Pennzoil.

The next day, Bohatch repeated her concerns to Paine and to R. Hayden Burns and Marion E. McDaniel, two other members of the firm's management committee, in a telephone conversation. Over the next month, Paine and Burns investigated Bohatch's complaint. They reviewed the Pennzoil bills and supporting computer print-outs for those bills. They then discussed the allegations with Pennzoil in-house counsel John Chapman, the firm's primary contact with Pennzoil. Chapman, who had a long-standing relationship with McDonald, responded that Pennzoil was satisfied that the bills were reasonable.

In August, Paine met with Bohatch and told her that the firm's investigation revealed no basis for her contentions. He added that she should begin looking for other employment, but that the firm would continue to provide her a monthly draw, insurance coverage, office space, and a secretary. After this meeting, Bohatch received no further work assignments from the firm.

In January 1991, the firm denied Bohatch a year-end partnership distribution for 1990 and reduced her tentative distribution share for 1991 to zero. In June, the firm paid

Bohatch her monthly draw and told her that this draw would be her last. Finally, in August, the firm gave Bohatch until November to vacate her office.

By September, Bohatch had found new employment. She filed this suit on October 18, 1991, and the firm voted formally to expel her from the partnership three days later, October 21, 1991.

The trial court granted partial summary judgment for the firm on Bohatch's wrongful discharge claim, and also on her breach of fiduciary duty and breach of the duty of good faith and fair dealing claims for any conduct occurring after October 21, 1991 (the date Bohatch was formally expelled from the firm). The trial court denied the firm's summary judgment motion on Bohatch's breach of fiduciary duty and breach of the duty of good faith and fair dealing claims for conduct occurring before October 21, 1991. The breach of fiduciary duty claim and a breach of contract claim were tried to a jury. The jury found that the firm breached the partnership agreement and its fiduciary duty. It awarded Bohatch $57,000 for past lost wages, $250,000 for past mental anguish, $4,000,000 total in punitive damages (this amount was apportioned against several defendants), and attorney's fees. The trial court rendered judgment for Bohatch in the amounts found by the jury, except it disallowed attorney's fees because the judgment was based in tort. After suggesting remittitur, which Bohatch accepted, the trial court reduced the punitive damages to around $237,000.

All parties appealed. The court of appeals held that the firm's only duty to Bohatch was not to expel her in bad faith. 905 S.W.2d at 602. The court of appeals stated that " '[b]ad faith' in this context means only that partners cannot expel another partner for self-gain." Finding no evidence that the firm expelled Bohatch for self-gain, the court concluded that Bohatch could not recover for breach of fiduciary duty. at 604. However, the court concluded that the firm breached the partnership agreement when it reduced Bohatch's tentative partnership distribution for 1991 to zero without notice, and when it terminated her draw three months before she left. at 606. The court concluded that Bohatch was entitled to recover $35,000 in lost earnings for 1991 but none for 1990, and no mental anguish damages. at 606–07. Accordingly, the court rendered judgment for Bohatch for $35,000 plus $225,000 in attorney's fees. at 608.

II. Breach of Fiduciary Duty

[1, 2] We have long recognized as a matter of common law that "[t]he relationship between . . . partners . . . is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *it – eral H ll,* 150 Tex. 39, 237 S.W.2d 256, 264 (1951) (quotation omitted). Yet, partners have no obligation to remain partners; "at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated." *el er e r e er,* 41 N.Y.2d 680, 394 N.Y.S.2d 867, 870–71, 363 N.E.2d 573, 577 (1977). The issue presented, one of first impression, is whether the fiduciary relationship between and among partners creates an exception to the at-will nature of partnerships; that is, in this case, whether it gives rise to a duty not to expel a partner who reports suspected overbilling by another partner.

At the outset, we note that no party questions that the obligations of lawyers licensed to practice in the District of Columbia—including McDonald and Bohatch—were prescribed by the District of Columbia Code of Professional Responsibility in effect in 1990, and that in all other respects Texas law applies. Further, neither statutory nor contract law principles answer the question of whether the firm owed Bohatch a duty not to expel her. The Texas Uniform Partnership Act, Tex.Rev.Civ. Stat. Ann. art. 6701b, addresses expulsion of a partner only in the context of dissolution of the partnership. *ee i* §§ 31, 38. In this case, as provided by the partnership agreement, Bohatch's expulsion did not dissolve the partnership. Additionally, the new Texas Revised Partnership Act, Tex.Rev.Civ. Stat. Ann. art. 6701b–1.01 to –11.04, does not have retroactive ef-

fect and thus does not apply. *ee i* art. 6701b–11.03. Finally, the partnership agreement contemplates expulsion of a partner and prescribes procedures to be followed, but it does not specify or limit the grounds for expulsion. Thus, while Bohatch's claim that she was expelled in an *i r er a* is governed by the partnership agreement, her claim that she was expelled for an *i r er rea n* is not. Therefore, we look to the common law to find the principles governing Bohatch's claim that the firm breached a duty when it expelled her.

Courts in other states have held that a partnership may expel a partner for purely business reasons. *ee t J e e l Healt tr n* , 326 Ark. 605, 934 S.W.2d 192, 197 (1996) (holding that partner's termination of another partner's contract to manage services performed by medical partnership was not breach of fiduciary duty because termination was for business purpose); *aite l e ter,* 131 N.H. 663, 560 A.2d 619, 622–23 (1989) (holding that removal of partner as managing partner of limited partnership was not breach of fiduciary duty because it was based on legitimate business purpose); *ei re ent are, t* , 80 Ohio App.3d 231, 608 N.E.2d 1166, 1170 (1992) ("Taking into account the general partners' past problems and the previous litigation wherein Leigh was found to have acted in contravention of the partnership's best interests, the ouster was instituted in good faith and for legitimate business purposes."). Further, courts recognize that a law firm can expel a partner to protect relationships both within the firm and with clients. *ee a li i tlin er ra* , 562 N.E.2d 435, 442 (Ind.App.1990) (holding that law firm did not breach fiduciary duty by expelling partner after partner's successful struggle against alcoholism because "if a partner's propensity toward alcohol has the potential to damage his firm's good will or reputation for astuteness in the practice of law, simple prudence dictates the exercise of corrective action . . . since the survival of the partnership itself potentially is at stake"); *H l an ie,* 11 Wash.App. 195, 522 P.2d 515, 523 (1974) (finding no breach of fiduciary duty where law firm expelled two partners because of their contentious behavior during executive committee meetings and because one, as state senator, made speech offensive to major client). Finally, many courts have held that a partnership can expel a partner without breaching any duty in order to resolve a "fundamental schism." *ee aite,* 560 A.2d at 623 (concluding that in removing partner as managing partner "the partners acted in good faith to resolve the 'fundamental schism' between them"); *Heller Pill r a i n tr* , 50 Cal.App.4th 1367, 58 Cal.Rptr.2d 336, 348 (1996) (holding that law firm did not breach fiduciary duty when it expelled partner who was not as productive as firm expected and who was offensive to some of firm's major clients); *e a a Q een e r* , 102 A.D.2d 845, 476 N.Y.S.2d 613, 614 (1984) (concluding that expelling partner because of "[p]olicy disagreements" is not "bad faith").

[3] The fiduciary duty that partners owe one another does not encompass a duty to remain partners or else answer in tort damages. Nonetheless, Bohatch and several distinguished legal scholars urge this Court to recognize that public policy requires a limited duty to remain partners—*i e* , a partnership must retain a whistleblower partner. They argue that such an extension of a partner's fiduciary duty is necessary because permitting a law firm to retaliate against a partner who in good faith reports suspected overbilling would discourage compliance with rules of professional conduct and thereby hurt clients.

[4] While this argument is not without some force, we must reject it. A partnership exists solely because the partners choose to place personal confidence and trust in one another. *ee H l an,* 522 P.2d at 524 ("The foundation of a professional relationship is personal confidence and trust."). Just as a partner can be expelled, without a breach of any common law duty, over disagreements about firm policy or to resolve some other "fundamental schism," a partner can be expelled for accusing another partner of overbilling without subjecting the partnership to tort damages. Such charges, whether true or not, may have a profound effect on the personal confidence and trust essential to the

partner relationship. Once such charges are made, partners may find it impossible to continue to work together to their mutual benefit and the benefit of their clients.

We are sensitive to the concern expressed by the dissenting Justices that "retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future." 977 S.W.2d at 561 (Spector, J., dissenting). However, the dissenting Justices do not explain how the trust relationship necessary both for the firm's existence and for representing clients can survive such serious accusations by one partner against another. The threat of tort liability for expulsion would tend to force partners to remain in untenable circumstance—suspicious of and angry with each other—to their own detriment and that of their clients whose matters are neglected by lawyers distracted with intra-firm frictions.

Although concurring in the Court's judgment, Justice Hecht criticizes the Court for failing to "address amici's concerns that failing to impose liability will discourage attorneys from reporting unethical conduct." 977 S.W.2d at 556 (Hecht, J., concurring). To address the scholars' concerns, he proposes that a whistleblower be protected from expulsion, but only if the report, irrespective of being made in good faith, is proved to be correct. We fail to see how such an approach encourages compliance with ethical rules more than the approach we adopt today. Furthermore, the amici's position is that a reporting attorney must be in good faith, not that the attorney must be right. In short, Justice Hecht's approach ignores the question Bohatch presents, the amici write about, and the firm challenges—whether a partnership violates a fiduciary duty when it expels a partner who in good faith reports suspected ethical violations. The concerns of the amici are best addressed by a rule that clearly demarcates an attorney's ethical duties and the parameters of tort liability, rather than redefining "whistleblower."

We emphasize that our refusal to create an exception to the at-will nature of partnerships in no way obviates the ethical duties of lawyers. Such duties sometimes necessitate difficult decisions, as when a lawyer suspects overbilling by a colleague. The fact that the ethical duty to report may create an irreparable schism between partners neither excuses failure to report nor transforms expulsion as a means of resolving that schism into a tort.

We hold that the firm did not owe Bohatch a duty not to expel her for reporting suspected overbilling by another partner.

III. Breach of the Partnership Agreement

[5] The court of appeals concluded that the firm breached the partnership agreement by reducing Bohatch's tentative distribution for 1991 to zero without the requisite notice. 905 S.W.2d at 606. The firm contests this finding on the ground that the management committee had the right to set tentative and year-end bonuses. However, the partnership agreement guarantees a monthly draw of $7,500 per month regardless of the tentative distribution. Moreover, the firm's right to reduce the bonus was contingent upon providing proper notice to Bohatch. The firm does not dispute that it did not give Bohatch notice that the firm was reducing her tentative distribution. Accordingly, the court of appeals did not err in finding the firm liable for breach of the partnership agreement. Moreover, because Bohatch's damages sound in contract, and because she sought attorney's fees at trial under section 38.001(8) of the Texas Civil Practice and Remedies Code, we affirm the court of appeals' award of Bohatch's attorney's fees.

* * * * *

We affirm the court of appeals' judgment.

HECHT, Justice, filed a concurring opinion.

SPECTOR, Justice, filed a dissenting opinion, in which PHILLIPS, Chief Justice, joined.

HECHT, Justice, concurring in the judgment.

The Court holds that partners in a law firm have no common-law liability for expel-

ling one of their number for accusing another of unethical conduct. The dissent argues that partners in a law firm are liable for such conduct. Both views are unqualified; neither concedes or even considers whether "always" and "never" are separated by any distance. I think they must be. The Court's position is directly contrary to that of some of the leading scholars on the subject who have appeared here as amici curiae. The Court finds amici's arguments "not without some force", but rejects them completely. *nte* at 546. I do not believe amici's arguments can be rejected out of hand. The dissent, on the other hand, refuses even to acknowledge the serious impracticalities involved in maintaining the trust necessary between partners when one has accused another of unethical conduct. In the dissent's view, partners who would expel another for such accusations must simply either get over it or respond in damages. The dissent's view blinks reality.

The issue is not well developed; in fact, to our knowledge we are the first court to address it. It seems to me there must be some circumstances when expulsion for reporting an ethical violation is culpable and other circumstances when it is not. I have trouble justifying a 500–partner firm's expulsion of a partner for reporting overbilling of a client that saves the firm not only from ethical complaints but from liability to the client. But I cannot see how a five-partner firm can legitimately survive one partner's accusations that another is unethical. Between two such extreme examples I see a lot of ground.

This case does not force a choice between diametrically opposite views. Here, the report of unethical conduct, though made in good faith, was incorrect. That fact is significant to me because I think a law firm can always expel a partner for bad judgment, whether it relates to the representation of clients or the relationships with other partners, and whether it is in good faith. I would hold that Butler & Binion did not breach its fiduciary duty by expelling Colette Bohatch because she made a good-faith but nevertheless extremely serious charge against a senior partner that threatened the firm's relationship with an important client, her charge proved groundless, and her relationship with her partners was destroyed in the process. I cannot, however, extrapolate from this case, as the Court does, that no law firm can ever be liable for expelling a partner for reporting unethical conduct. Accordingly, I concur only in the Court's judgment.

I

I would ordinarily leave the recitation of relevant facts to the Court's opinion and not reiterate them in a separate opinion. But the fine points in this case are important to me, and rather than point out my differences with the Court, it is more convenient simply to say what I think the facts are. The evidence must, of course, be reviewed in light of the verdict and judgment favorable to Bohatch, although the reader should keep in mind that in many instances, the facts are disputed.

John McDonald, an attorney licensed to practice in the District of Columbia and managing partner of the Washington, D.C. office of Butler & Binion, a Houston-based law firm, hired Colette Bohatch, also a D.C. lawyer, as a senior associate in January 1986. The firm's Washington office had only one other lawyer—Richard Powers, also a partner in the firm—and represented essentially one client—Pennzoil—before the Federal Energy Regulatory Commission. Bohatch, who had been deputy assistant general counsel of the FERC when she left to join Butler & Binion, worked for McDonald and Powers on Pennzoil matters.

In January 1989, Bohatch was made a partner in the firm on McDonald's recommendation, and as a partner she began receiving internal firm reports showing the number of hours each attorney worked, billed, and collected for. Reviewing these reports, Bohatch questioned how McDonald could bill as many hours as he reported, given her personal observations of his work habits. She and Powers discussed the subject on several occasions and even went so far as to look through McDonald's daily time diary surreptitiously and make a copy of it.

Bohatch never saw the bills to Pennzoil, which McDonald prepared and sent, so she did not know what fees Pennzoil was actually

charged, or even what Butler & Binion's fee arrangement was with Pennzoil. Nevertheless, from monthly internal reports consistently showing that McDonald billed far more hours than she saw him working, Bohatch concluded that McDonald was overbilling Pennzoil. Convinced that she was obliged by the District of Columbia Code of Professional Responsibility governing lawyer conduct to report her concerns to the firm's management, she discussed them with Butler & Binion's managing partner, Louis Paine, on July 15, 1990. Paine assured her that he would look into the matter.

Bohatch told Powers of her meeting with Paine, and Powers told McDonald. The next day, McDonald informed Bohatch that Pennzoil was dissatisfied with her work. Bohatch feared that McDonald was retaliating against her, and in fact, from that point forward neither McDonald nor Powers assigned Bohatch any other work for Pennzoil. McDonald also insinuated to other partners that Bohatch had complained of him because Pennzoil found her work unacceptable, even though Bohatch had contacted Paine before she was aware of any criticism of her work.

Bohatch called Paine to tell him of McDonald's retaliation, and Paine assured her that he was still investigating. Paine reviewed the firm's bills to Pennzoil and found that in all but one instance fewer hours were billed than were shown on internal computer printouts as having been worked. However, since the printouts merely reflected the time reported by attorneys, and Bohatch was claiming that McDonald reported more time than he actually worked, Paine determined that Pennzoil must be told of Bohatch's assertions so that it could itself evaluate the amounts charged.

Robert Burns, a member of Butler & Binion's management committee, told John Chapman, the Pennzoil in-house attorney who dealt most directly with Butler & Binion's Washington office, of Bohatch's assertions and asked him to review the firm's bills. Chapman confirmed to Burns that he had complained to McDonald several months earlier about the quality of Bohatch's work, and Burns intimated that Bohatch's assertions might have been in response to such complaints. Chapman discussed the matter with his immediate superior and with Pennzoil's general counsel. The three of them reviewed Butler & Binion's bills for the preceding year and concluded that they were reasonable. After Chapman's superior discussed their conclusions with Pennzoil's president and chief executive officer, Chapman told Burns that Pennzoil was satisfied that the firm's bills were reasonable.

Bohatch expected that Paine would ask her for additional information, and when he did not do so, she wrote him that she believed McDonald had overcharged Pennzoil $20,000 to $25,000 per month for his work. In fact, in the preceding six months McDonald had billed Pennzoil on average less than $24,000 per month for his work, so that if Bohatch had been correct, McDonald should have billed Pennzoil almost nothing. On August 23, 1990, a few weeks after their initial meeting, Paine told Bohatch that he had found no evidence of overbilling. Since he did not see how Bohatch could continue to work for McDonald or Pennzoil under the circumstances, given the rifts her allegations had caused, Paine suggested that she begin to look for other employment.

For more than nine months Butler & Binion continued to pay Bohatch a partner's monthly draw of $7,500 and allowed her to keep her office and benefits while she sought other employment. So as not to impair her prospects, the firm did not immediately expel her as a partner, but it did not pay her any partnership distribution other than her draw. Bohatch contends that when the firm reduced her tentative distribution for 1991 to zero in January of that year, it effectively expelled her from the firm, although she continued to accept a partner's monthly draw. In April 1991, Paine told Bohatch that her draw would be discontinued in June, and in August he told her that she must vacate her office by November. Bohatch left to join another firm in September, and Butler & Binion formally expelled her as a partner in October.

Bohatch sued Butler & Binion, Paine, Burns, and McDonald for breach of the firm partnership agreement and breach of fiduciary duty. A jury found both a breach of

contract and a breach of fiduciary duty, found Bohatch's actual damages to be $57,000 in lost earnings and $250,000 in past mental anguish, assessed $4,000,000 punitive damages against the three individual defendants, and found Bohatch's reasonable attorney fees to be $225,000. Bohatch accepted the district court's suggestion that punitive damages be remitted to $237,141, and judgment was rendered awarding Bohatch actual and punitive damages.

All parties appealed. The court of appeals held that defendants' only duty to Bohatch was not to expel her in bad faith. 905 S.W.2d 597, 602. " 'Bad faith' in this context," the court of appeals wrote, "means only that partners cannot expel another partner for self-gain." Finding no evidence that defendants expelled Bohatch for self-gain, the court concluded that Bohatch could not recover for breach of fiduciary duty.
at 604. However, the court found that Bohatch's tentative partnership distribution for 1991 had been reduced to zero without notice to her, and that her draw had been terminated three months before she left. at 605–06. For these breaches of the partnership agreement the court concluded that Bohatch was entitled to recover $35,000 lost earnings for 1991 but none for 1990, and no mental anguish damages. at 606–07. Accordingly, the court rendered judgment for Bohatch for $35,000 plus $246,000 attorney fees.

Bohatch applied to this Court for writ of error, and defendants, to whom I shall refer collectively hereafter as "Butler & Binion", filed a conditional application. We denied Bohatch's application and dismissed Butler & Binion's, 39 TEX. SUP.CT. J. 725 (June 14, 1996), but on Bohatch's motion for rehearing, we granted both, 40 TEX. SUP.CT. J. 14 (Oct. 18, 1996).

II

A

Butler & Binion argues that its expulsion of Bohatch did not breach its fiduciary duty. No one questions that the obligations of the lawyers licensed to practice in the District of Columbia—including McDonald and Bohatch—were prescribed by the District of Columbia Code of Professional Responsibility in effect in 1990, and that in all other respects Texas law applies.

Of the three possible sources of governing Texas law—statute, contract, and common law—only one applies here. Butler & Binion argues that it did not violate the Texas Uniform Partnership Act in effect throughout the events of this case (but since repealed), Law of May 9, 1961, 57th Leg., R.S., ch. 158, 1961 Tex. Gen. Laws 289, formerly TEX.REV. CIV. STAT. ANN. art. 6132b (Vernon 1970).[1] But Bohatch responds that TUPA does not determine her claims because it spoke to expulsion of a partner only in the context of a partnership's dissolution. *ee i* art. 6132b, §§ 31 & 38. In this case, as provided by the partnership agreement, Bohatch's expulsion did not dissolve the partnership, and thus the statute does not directly answer Bohatch's claims. The partnership agreement contemplates expulsion of a partner and prescribes procedures to be followed, but it does not specify or limit the grounds for expulsion. Bohatch's claim that she was expelled in an improper way is governed by the partnership agreement, but her claim that she was expelled for an improper reason is not. Thus, the principles governing Bohatch's claim that her expulsion was a breach of fiduciary duty must be found in the common law.

We have long recognized that " '[t]he relationship between joint adventurers, like that existing between partners, is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise.' " *it – eral H ll,* 150 Tex. 39, 237 S.W.2d 256, 264 (Tex.1951)(quoting 30 AM.JUR. *J int ent re* § 34 (____)). But we have never had occasion to apply this duty in the situation of a partner's expulsion. A few other appellate courts have done so. *el er e i al r e er,*

1. The current law, the Texas Revised Partnership Act, TEX.REV.CIV. STAT. ANN. art. 6132b–1.01 to—10.04 (Vernon Supp.1998), did not become effective until 1994, long after the events of this case, and thus does not apply.

41 N.Y.2d 680, 394 N.Y.S.2d 867, 363 N.E.2d 573 (1977); *Heller Pill r a i n tr*, 50 Cal.App.4th 1367, 58 Cal.Rptr.2d 336 (1996); *in t n tra n al*, 279 Ill.App.3d 231, 215 Ill.Dec. 842, 664 N.E.2d 239 (1996); *a li i tlin er ra*, 562 N.E.2d 435 (Ind.Ct.App.1990); *e a a Q een e i al r*, 102 A.D.2d 845, 476 N.Y.S.2d 613 (1984); *ei re ent are, t*, 80 Ohio App.3d 231, 608 N.E.2d 1166 (1992); *H l an ie*, 11 Wash.App. 195, 522 P.2d 515, *re ie enie*, 84 Wash.2d 1011 (1974), *ert enie*, 420 U.S. 984, 95 S.Ct. 1415, 43 L.Ed.2d 666 (1975). None has held that a partnership breached its fiduciary duty to a partner by expelling the partner. *el er*, 394 N.Y.S.2d at 869–871, 363 N.E.2d at 576–577; *Heller*, 58 Cal.Rptr.2d at 348; *a li*, 562 N.E.2d at 439–443; *e*, 476 N.Y.S.2d at 614; *ei*, 608 N.E.2d at 1169–1171; *H l an*, 522 P.2d at 523–524. Only one has held that an expelled partner stated a claim for breach of fiduciary duty. *al*, 215 Ill.Dec. at 847–849, 664 N.E.2d at 244–246.

The courts have not had much difficulty holding that a partnership may expel a partner for purely business reasons. In *ei*, for example, a limited partnership formed to rehabilitate an apartment complex expelled a general partner, one Leigh, for misconduct in connection with the partnership's affairs. The court held that the partnership's failure to give Leigh notice of his impending ouster was not a breach of fiduciary duty. The court explained:

> We find that a general partner's fiduciary duty applies only to activities where a partner will take advantage of his position in the partnership for his own profit or gain. Taking into account the general partners' past problems and the previous litigation wherein Leigh was found to have acted in contravention of the partnership's best interests, the ouster was instituted in good faith and for legitimate business purposes.

608 N.E.2d at 1170. *aite l e ter*, 131 N.H. 663, 560 A.2d 619, 622–623 (1989) (holding that removal of a partner as managing partner of a limited partnership formed to own and operate a resort was not a breach of fiduciary duty because there was a legitimate business purpose); *t J e e i n al Healt enter n*, 326 Ark. 605, 934 S.W.2d 192, 197 (1996) (holding that a partner's termination of another partner's contract to manage services performed by their medical partnership was not a breach of fiduciary duty because there was a business purpose).

At least in the context of professional partnerships, the courts have uniformly recognized that a partner can be expelled to protect relationships both inside the firm and with clients. In *H l an*, a law firm expelled two partners, both sons of a retired partner, because they had been contentious members of the executive committee, and because one of them, as a state senator, had made a speech offensive to a major client. The court held that while the partners remaining in the firm owed the expelled partners a fiduciary duty,

> the personal relationships between partners to which the terms 'bona fide' and 'good faith' relate are those which have a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary, from taking any personal advantage touching those subjects. Plaintiffs' claims do not relate to the business aspects or property rights of this partnership. There is no evidence the purpose of the severance was to gain any business or property advantage to the remaining partners. Consequently, in that context, there has been no showing of breach of the duty of good faith toward plaintiffs.

522 P.2d at 523 (citations omitted).

aite, 560 A.2d at 623 (concluding that in removing a partner as managing partner "the partners acted in good faith to resolve the 'fundamental schism' between them").

Likewise, in *Heller*, the court held that a law firm was not liable for expelling Heller, a partner, who was not as productive as the firm expected and who was offensive to some of the firm's major clients. The court wrote: "Although partners owe each other and the partnership a fiduciary duty, this duty 'applies only to situations where one partner could take advantage of his position to reap

personal profit or act to the partnership's detriment.' " *Heller*, 58 Cal.Rptr.2d at 348 (quoting *ei* , 608 N.E.2d at 1170). The court added:

> More importantly, even with evaluating the evidence in the light most favorable to Heller, the evidence shows that the Executive Committee expelled Heller because of a loss of trust in him. "The foundation of a professional relationship is personal confidence and trust. Once a schism develops, its magnitude may be exaggerated rightfully or wrongfully to the point of destroying a harmonious accord. When such occurs, an expeditious severance is desirable. . . . "
>
> (quoting *H l an*, 522 P.2d at 524).

In *a li* , the court stressed the importance of a law firm's reputation in holding that the firm was not liable for expelling a partner, one Lawlis, following his successful struggle against alcoholism. The court observed that had the firm acted in bad faith or with a predatory purpose, it would have violated both the partnership agreement and its fiduciary duty, but the court limited actionable conduct to partners' attempting to obtain a personal financial advantage from the expulsion. The court explained:

> The lifeblood of any partnership contains two essential ingredients, cash flow and profit, and the prime generators of that lifeblood are "good will" and a favorable reputation. The term "good will" generally is defined as the probability that old customers of the firm will resort to the old place of business where it is well-established, well known, and enjoys the fixed and favorable consideration of its customers. An equally important business adjunct of a partnership engaged in the practice of law is a favorable reputation for ability and competence in the practice of that profession. A favorable reputation not only is involved in the retention of old clients, it is an essential ingredient in the acquisition of new ones. Any condition which has the potential to adversely affect the good will or favorable reputation of a law partnership is one which potentially involves the partnership's economic survival. Thus, if a partner's propensity toward alcohol has the potential to damage his firm's good will or reputation for astuteness in the practice of law, simple prudence dictates the exercise of corrective action, as in *H l an*, since the survival of the partnership itself potentially is at stake.

a li , 562 N.E.2d at 442 (citations omitted).

In *e* , a medical partnership claimed that it expelled a partner, Dr. Levy, because the partnership agreement allowed for expulsion of partners over seventy years of age. Dr. Levy countered that he had been expelled for being critical of partnership policies. The court held that even if Dr. Levy were right, the partnership did not breach any duty owed him.

> While bad faith may be actionable, there must be some showing that the partnership acted out of a desire to gain a business or property advantage for the remaining partners. Policy disagreements do not constitute bad faith since "at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated".

e , 476 N.Y.S.2d at 614 (citing *H l an* and *el er*, citations omitted).

Despite statements in these cases that partners cannot expel one of their number for personal profit, in each instance the expelling partners believed that retaining the partner would hurt the firm financially and that the firm—and thus the partners themselves—stood to benefit from the expulsion. It is therefore far too simplistic to say, as the court of appeals held, that partners cannot expel a partner for personal financial benefit; if expulsion of a partner to protect the firm's reputation or preserve its relationship with a client benefits the firm financially, it perforce benefits the members of the firm. If expulsion of a partner can be in breach of a fiduciary duty, the circumstances must be more precisely defined.

The New York Court of Appeals—the only high court to have addressed the topic—has expressed hesitation in specifying whether and when expulsion of a partner breaches fiduciary duties. In *el er*, a surgeon, a certain Dr. Webber, was expelled from a

medical partnership because his personal and professional conduct had become abrasive and objectionable to his partners. Dr. Webber's psychiatrist described him as "a perfectionist who was a 'rather idealistic sincere, direct, frank individual who quite possibly could be perceived at times as being somewhat blunt.' " 394 N.Y.S.2d at 868–870, 363 N.E.2d at 575–576. The court held that expulsion in accordance with the partnership agreement was proper. The court added:

> *in , n t it t e ti n, t at a ait i t li it t e t er i e a l te lan a e t e a ree ent,* the record does not reveal bad faith. Embarrassing situations developed, affecting the physicians and their patients, as a result of Dr. Webber's conduct, however highly motivated his conduct might have been. It was as important, therefore, in the group's eyes, as anything affecting survival of the group that it be disassociated from the new member's conflict-producing conduct. Indeed, at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated.
>
> *en i* bad faith on the part of the remaining partners would nullify the right to expel one of their number, it does not follow that under an agreement permitting expulsion without cause the remaining partners have the burden of establishing good faith. To so require would nullify the right to expel without cause and frustrate the obvious intention of the agreement to avoid bitter and protracted litigation over the reason for the expulsion. Obviously, no expulsion would ever occur without some cause, fancied or real, but the agreement provision is addressed to avoiding the necessity of showing cause and litigating the issue. On the other hand, if an expelled partners [sic] were to allege and prove bad faith going to the essence, a different case would be presented.... In his affidavits Dr. Webber has not shown even a suggestion of evil, malevolent, or predatory purpose in the expulsion. Hence, he raises no triable issue on this score.

el er, 394 N.Y.S.2d at 869–871, 363 N.E.2d at 576–577 (emphasis added; citations omitted). The court did not suggest what it might consider "bad faith going to the essence" or an "evil, malevolent, or predatory purpose". *ee al a i le tin,* 394 F.Supp. 986, 992–94 (D.D.C.1975) (holding that merger of two law firms resulting in demotion of the managing partner of one office and his consequent resignation was not a breach of fiduciary duty); *t ee al ea le a ala er, i er a a t,* No. 94–8646AJ, 1996 WL 438777 (Fla.Cir.Ct. July 23, 1996) (reporting a trial court's $2.5 million award to a partner expelled from a law firm as part of an office closing and reduction in size, because the purpose of the expulsion was to generate greater profits for the remaining partners, in violation of their fiduciary duty).

In only one case has an appellate court confronted circumstances which it believed might give rise to liability for a breach of fiduciary duty in expelling a partner. In *al,* an attorney claimed that he had been expelled from his firm because of his insistence on his right under the partnership agreement to inspect firm records which he believed would show misconduct by the firm's management. The court reversed summary judgment for the firm, holding that Nosal's evidence raised a fact issue that his expulsion was in breach of the fiduciary duty owed him. *al,* 215 Ill.Dec. at 849, 664 N.E.2d at 246.

Scholars are divided over not only how but whether partners' common-law fiduciary duty to each other limit expulsion of a partner. There is also disagreement over the impact of the Revised Uniform Partnership Act (which, as I have noted, has been adopted in Texas) on this issue. *ee* J. William Callison, *lin en an le ant : i iar tie n er t e e i e ni r Partner i t, ni r i ite ia ilit a n t, an e n ,* 1 J. SMALL & EMERGING BUS. L. 109 (1997); Allan W. Vestal, " *e a at er ar e at . . . : e e e Ha e a e Partner i a ,* 54 WASH. & LEE L.REV. 487 (1997); Larry E. Ribstein, *i iar t ntra t in nin r rat e ir ,* 54 WASH. & LEE L.REV. 537 (1997); Donald J. Weidner, *re r t ree ntra t an i iar t : r ani in t e nternal elati n t e nin r rate*

ir , 54 WASH. & LEE L.REV. 389 (1997). Nine distinguished law professors—Professor Richard L. Abel of the University of California at Los Angeles School of Law, Professor Leonard Gross of the Southern Illinois University School of Law, Professor Robert W. Hamilton of the University of Texas School of Law, Professor David J. Luban of the University of Maryland School of Law, Professor Gary Minda of the Brooklyn Law School, Professor Ronald D. Rotunda of the University of Illinois College of Law, Professor Theodore J. Schneyer of the University of Arizona College of Law, Professor Clyde W. Summers of the University of Pennsylvania School of Law, and Professor Charles W. Wolfram of the Cornell Law School OF LAW, the Reporter for the *e tate ent (ir) a , e a ernin a er* —have argued in amicus curiae briefs that expulsion of a partner in bad faith is a breach of fiduciary duty, and that expulsion for self-gain is in bad faith, but so is expulsion for reporting unethical conduct. From a canvass of the various commentators' arguments it is fair to say that the law governing liability for expulsion of a partner is relatively uncertain.

B

No court has considered whether expulsion of a partner from a law firm for reporting unethical conduct is a breach of fiduciary duty. Several courts have concluded that expulsion to remedy a fundamental schism in a professional firm is not a breach of fiduciary duty. There is hardly a schism more fundamental than that caused by one partner's accusing another of unethical conduct. If a partner can be expelled because of disagreements over nothing more significant than firm policy and abrasive personal conduct, as cases have held, surely a partner can be expelled for accusing another partner of something as serious as unethical conduct. Once such charges are raised, I find it hard to imagine how partners could continue to work together to their mutual benefit and the benefit of their clients. The trust essential to the relationship would have been destroyed. Indeed, I should think that a lawyer who was unable to convince his or her partners to rectify the unethical conduct of another would choose to withdraw from the firm rather than continue in association with lawyers who did not adhere to high ethical standards.

But I am troubled by the arguments of the distinguished amici curiae that permitting a law firm to retaliate against a partner for reporting unethical behavior would discourage compliance with rules of conduct, hurt clients, and contravene public policy. Their arguments have force, but they do not explain how a relationship of trust necessary for both the existence of the firm and the representation of its clients can survive such serious accusations by one partner against another. The threat of liability for expulsion would tend to force partners to remain in untenable circumstances—suspicious of and angry with each other—to their own detriment and that of their clients whose matters are neglected by lawyers distracted with intra-firm frictions. If "at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated", *el er*, 394 N.Y.S.2d at 870–871, 363 N.E.2d at 577, surely partners are not obliged to continue to associate with someone who has accused one of them of unethical conduct.

This very difficult issue need not be finally resolved in this case. Bohatch did not report unethical conduct; she reported what she *elie e* , presumably in good faith but nevertheless mistakenly, to be unethical conduct. At the time, the District of Columbia Code of Professional Responsibility provided that "[a] lawyer shall not . . . collect a[ ] . . . clearly excessive fee." D.C.CODE OF PROF'L. RESP. DR 2–106(A) (1990). Pennzoil's conclusion that Butler & Binion's fees were reasonable, reached after being made aware of Bohatch's concerns that McDonald's time was overstated, establishes that Butler & Binion did not collect excessive fees from Pennzoil. A fee that a client as sophisticated as Pennzoil considers reasonable is not clearly excessive simply because a lawyer believes it could have been less. Bohatch's argument that Pennzoil had other reasons not to complain of Butler & Binion's bills is simply beside the point. Whatever its motivations, Pennzoil found the bills reasonable, thereby establish-

ing that McDonald had not overbilled in violation of ethical rules. Bohatch's argument that Pennzoil's assessment of the bills was prejudiced by Butler & Binion's misrepresentations about her is implausible. There is nothing to suggest that Pennzoil would have thought clearly excessive legal fees were reasonable simply because it did not like Bohatch.

Bohatch's real concern was not that fees to Pennzoil were excessive—she had never even seen the bills and had no idea what the fees, or fee arrangements, were—but that McDonald was misrepresenting the number of hours he worked. The District of Columbia Code of Professional Responsibility at the time also prohibited lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." DR 1–102(A)(4). But there is no evidence that McDonald actually engaged in such conduct. At most, Bohatch showed only that McDonald kept sloppy time records, not that he deceived his partners or clients. Neither his partners nor his major client accused McDonald of dishonesty, even after reviewing his bills and time records. Bohatch complains that Butler & Binion did not fully investigate McDonald's billing practices. Assuming Butler & Binion had some duty to investigate Bohatch's charges, it discharged that duty by determining that Pennzoil considered its bills reasonable. (The district court, as the court of appeals noted, excluded evidence that Paine and McDonald himself went so far as to report the charges against McDonald to the lawyer disciplinary authority, which exonerated him. 905 S.W.2d at 607.)

Even if expulsion of a partner for reporting unethical conduct might be a breach of fiduciary duty, expulsion for *i ta enl* reporting unethical conduct cannot be a breach of fiduciary duty. At the very least, a mistake so serious indicates a lack of judgment warranting expulsion. No one would argue that an attorney could not be expelled from a firm for a serious error in judgment about a client's affairs or even the firm's affairs. If Bohatch and McDonald had disagreed over what position to take in a particular case for Pennzoil, or over whether Butler & Binion should continue to operate its Washington office, the firm could have determined that she should be expelled for the health of the firm, even if Bohatch had acted in complete good faith. Reporting unethical conduct where none existed is no different. If, as in *el er,* a partner can be expelled for being blunt, surely a partner can be expelled for a serious error in judgment.

Butler & Binion's expulsion of Bohatch did not discourage ethical conduct; it discouraged errors of judgment, which ought to be discouraged. Butler & Binion did not violate its fiduciary duty to Bohatch.

III

I respond briefly to the Court's opinion and to the dissent.

A

The Court seems to regard the proposition that "partners have no duty to remain partners", *ante* at 544, as determinative of Bohatch's damages claim for wrongful expulsion. It is true, of course, that any partner can withdraw from a partnership at any time. TEX.REV.CIV. STAT. ANN. art. 6132b–6.01 (Vernon Supp.1998) (formerly TEX.REV.CIV. STAT. ANN. art. 6132b, § 31 (Vernon 1970)). But it is not true that withdrawal and expulsion are always with impunity. *ee* ALAN R. BROMBERG & LARRY E. RIBSTEIN, PARTNERSHIP §§ 7.02(c), 7.03(a) (1988). Bohatch does not argue in this case that she was entitled to remain a partner at Butler & Binion contrary to the will of a majority of her colleagues. She concedes they had the power to expel her but contends that they are liable for doing so in breach of their fiduciary duty to her.

The Court also misstates the issue when it says that "[t]he fiduciary duty that partners owe one another does not encompass a duty to remain partners." *nte* at 546. The statement is correct, of course, but it has nothing to do with Bohatch's claim. The issue is not whether partners have a fiduciary duty to remain partners, but whether in choosing not to they can breach their fiduciary duty to one another. The cases I have cited indicate that partners cannot withdraw from a partnership or expel another partner solely to prevent a

partner from obtaining the benefit of a financial opportunity that should have been the partnership's. *ei* , 608 N.E.2d at 1170; *H l an*, 522 P.2d at 523. That is not Bohatch's claim, but her claim is similar. She argues that Butler & Binion breached its fiduciary duty to her, not merely by expelling her, but by expelling her for reporting McDonald's unethical conduct.

The Court's claim that it is "sensitive" to the concerns of the amici curiae is belied by its failure even to understand those concerns. The amici plainly argue that "breach of fiduciary duty should be established if it can be shown that the expelling partner violated his ethical duties or that the expelled partner was terminated for complying with her ethical responsibilities." The Court never addresses this issue directly, holding only that people cannot be forced to remain partners. The Court makes no mention of the amici's breach of fiduciary duty argument. Nor does the Court address amici's concerns that failing to impose liability will discourage attorneys from reporting unethical conduct. The Court states only that its decision "in no way obviates the ethical duties of lawyers." Again, the statement is correct but irrelevant. The argument is that failing to punish retaliation for reporting ethics violations discourages such reporting because it leaves the reporting attorney without any defense to such retaliation. The concern is a legitimate one, but the Court simply ignores it.

It is no answer to say, as the Court does, that those who share this concern cannot convincingly explain how partners can share the trust requisite for a law firm (or at least some law firms) if they resent another partner for having "snitched" or "ratted on" another, as they might refer to the reporting of an ethical violation. Bohatch and the amici do not even attempt to explain away this practical reality. Still, the fact that their concerns raise others does not mean that their concerns are not real.

Finally, the Court mischaracterizes my position, just as it does the amici's arguments. It simply is not true that I "propose[ ] that a whistle blower be protected from expulsion, but only if the report, irrespective of being made in good faith, is proved to be correct." *nte* at 547. As I have explained, I would not attempt to define when a law firm partner expelled for reporting unethical conduct can recover damages because I do not regard it as essential to the disposition of this case to do so. I would not hold that being correct is enough, only that being incorrect precludes recovery, at least in these circumstances. My criticism of the Court is not that another bright-line rule—one based on whether a report was correct—would be better, but that no bright-line rule should be adopted when the full ramifications of so broad a rule have not been adequately considered. It should come as no surprise to anyone that a lawyer can be fired for being incorrect, albeit in good faith. A lawyer can always be terminated for being incorrect about legal matters. It is, after all, a lawyer's judgment that is important, not her sincerity. Bohatch's charges were not merely an innocent mistake. They caused the expenditure of a significant amount of time in investigation, the report of possible overbilling to one of the firm's major clients, potentially jeopardizing that relationship, and an impossible strain on three lawyers working together on the same business for the same client in a small but important office of the firm.

Without offering a solution to the problems the amici raise, the Court adopts an absolute rule: a law firm that expels a partner for reporting ethics violations has no liability to the partner under any circumstances. The rule is ill-advised, particularly when it is far broader than necessary to address Bohatch's claims.

B

The dissent would hold that "law partners violate[ ] their fiduciary duty by retaliating against a fellow partner who ma[kes] a good-faith effort to alert her partners to the possible overbilling of a client." *P t* at 561. In fact, the dissent would adopt the broader proposition that a partner could not be expelled from a law firm for reporting any suspected ethical violation, regardless of how little evidence there might be for the suspicion:

> Even if a report turns out to be mistaken or a client ultimately consents to the behavior in question, as in this case, retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future. Although I agree with the majority that partners have a right not to continue a partnership with someone against their will, they may still be liable for damages directly resulting from terminating that relationship.

P t at 561.

The dissent relies heavily on *ie er ala,* 80 N.Y.2d 628, 593 N.Y.S.2d 752, 609 N.E.2d 105 (1992). In that case, Wieder, an associate at a law firm, sued the firm for terminating him for insisting that the conduct of another associate, L.L., in representing Wieder himself as well as firm clients be reported to disciplinary authorities. L.L. "admitted in writing that he had committed 'several acts of legal malpractice and fraud and deceit upon [Wieder] and several other clients of the firm.' " 593 N.Y.S.2d at 753, 609 N.E.2d at 106. The trial court dismissed the suit. The Court of Appeals held that Wieder was obliged by rules of conduct to report L.L. and that "by insisting that [Wieder] disregard [that obligation, the firm was] not only making it impossible for [Wieder] to fulfill his professional obligations but placing him in the position of having to choose between continued employment and his own potential suspension and disbarment." 593 N.Y.S.2d at 756, 609 N.E.2d at 109. Thus, the court concluded that Wieder had stated a cause of action against the firm.

Obviously, *ie er* did not involve a partnership relationship. More importantly the unethical conduct, and Wieder's duty to report it, were certain. The law firm insisted that to remain employed, Wieder had to violate rules of conduct by not reporting other admitted violations. Unlike L.L., McDonald not only denied unethical behavior, he was exonerated by his client and his partners. Unlike Wieder, Bohatch was expelled not because she insisted on reporting admitted unethical actions, but because she insisted on complaining of actions that were not unethical.

The dissent finds no support in any authority in any jurisdiction. Furthermore, the argument that allowing expulsion of a partner who incorrectly reports unethical conduct impairs Rule 8.03(a) of the Texas Disciplinary Rules of Professional Conduct is equally unfounded. That rule states in part that "a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority." TEX. DISCIPLINARY R. PROF'L CONDUCT 8.03(a), *re rinte in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp.1997) (TEX. STATE BAR R. art. X, § 9). A lawyer's duty under this rule is only triggered by (1) knowledge of (2) a rules violation that (3) raises a substantial question about a lawyer's honesty, trustworthiness, or fitness. Bohatch's suspicions do not meet these requirements.

Even if they did, the dissent fails to make a convincing argument for liability in every situation in which a lawyer reports a suspected ethical violation. The dissent does not even acknowledge the tensions that would plainly arise between partners making and denying charges of unethical behavior. These tensions might easily prevent proper representation of clients. "[P]artners have a right not to continue a partnership with someone against their will," the dissent concedes, but if their will is based on a partner's assertions of unethical conduct, then they must pay to exert it. *P t* at 561. Not even lawyers should be forced to choose *in e er in tan e* between maintaining an untenable partnership and paying for its termination over ethical disagreements however serious and sincere.

The dissent's reference to Twain to say that the "wages" of "right" and "wrong" in disagreements over ethics "is just the same" is clever, but it ignores the practicalities of maintaining a relationship of trust and confidence, and it glibly expresses a much too cynical view of the entire problem presented here. Acknowledging that some law partner-

ships cannot legitimately be expected to survive internecine quarrels over ethics simply does not spell the end of an attorney's responsibility to professional obligations and standards. Thus it is just not true, as the dissent asserts, that "this case sends an inappropriate signal to lawyers and to the public that the rules of professional responsibility are subordinate to a law firm's other interests." *P t* at 561. The matter is not so simple. A lawyer cannot simply enshroud any complaint against his colleagues in the mantle of obedience to rules of professional responsibility. The toll such a complaint makes is also important. The dissent's added charge that the result in this case "leave[s] an attorney who acts ethically and in good faith without recourse", *t* at 561, assumes incorrectly that the only "recourse" is an action for damages. Twain suggests that righteousness has its own rewards. The dissent argues that those rewards must be monetary to be real.

* * * * *

I do not disagree with the Court's treatment of Bohatch's claim for breach of contract. Accordingly, I concur in the Court's judgment but not in its opinion.

SPECTOR, joined by PHILLIPS, Chief Justice, dissenting..

> [W]hat's the use you learning to do right when it's troublesome to do right and ain't no trouble to do wrong, and the wages is just the same?
>
> — *e ent re H le err inn*

The issue in this appeal is whether law partners violate a fiduciary duty by retaliating against one partner for questioning the billing practices of another partner. I would hold that partners violate their fiduciary duty to one another by punishing compliance with the Disciplinary Rules of Professional Conduct. Accordingly, I dissent.

I.

This dispute arose after Colette Bohatch, a partner in Butler & Binion's Washington, D.C. office, expressed concerns to the firm's managing partner, Louis Paine, about possible overbilling by another partner, John McDonald. The firm had hired Bohatch to join McDonald as one of three attorneys in the firm's Washington office, which was devoted almost exclusively to Pennzoil matters. Bohatch had several years' experience working at the Federal Energy Regulatory Commission, ending her tenure there as Deputy Assistant General Counsel for Gas and Oil Litigation.

Once Bohatch became a partner in Butler & Binion, just over two years after being hired, she began receiving billing reports that indicated McDonald was charging Pennzoil for eight to twelve hours of work each day. Bohatch developed doubts about McDonald's billing practices after observing that he only worked an average of three to four hours per day.

She first expressed her suspicions about McDonald's billing practices to Richard Powers, the other partner in the Washington office, when he approached her with similar concerns. Together, Powers and Bohatch examined McDonald's time diary. They saw many vague entries that did not comply with firm requirements for keeping time records; Bohatch thought the records might have been falsified in an attempt to conceal overbilling. Powers told Bohatch that she should do something about her concerns.

Before reporting her suspicions, Bohatch reviewed the District of Columbia's ethical rules and consulted counsel. She ultimately met with Louis Paine, the firm's managing partner, to report that she suspected McDonald was overbilling Pennzoil on the level of $20,000 to $25,000 each month. Paine told Bohatch that she was right to report her concerns to him. Within a few hours, Bohatch informed Powers, upon his inquiry, that she had made a report to Paine.

The *a a ter* Bohatch made her report and immediately after an hour-long conversation with Powers, McDonald, the partner whose billing was in question, told Bohatch that Pennzoil had been dissatisfied with her work and that he would be supervising her future work. Bohatch testified that McDonald delivered this criticism with "red-faced anger." She also maintained that she

had never before heard any criticism of her work for Pennzoil. Bohatch phoned Paine that night and expressed fear that McDonald's criticism was a response to her report. Within a few weeks, McDonald removed her from a pending Pennzoil case, reassigning it to an associate of one month's tenure, and barred her from taking on any new work for Pennzoil.

Within six weeks of Bohatch's initial report, Paine met with her and told her she should look for a new position. But the firm continued to provide her with a monthly draw, office space, and a secretary. Later, Bohatch's share in the distribution of the firm's profits was reduced to zero, and ultimately, her monthly draw was cut off. Bohatch eventually found new employment and filed this suit. Butler & Binion's partners then formally voted to terminate her from the partnership.

Bohatch contends that instead of properly investigating and responding to the allegations, McDonald, Paine, and the firm's management committee immediately began a retaliatory course of action that culminated in her expulsion from the partnership. The partners deny these claims.

Paine and another partner on the management committee, Hayden Burns, conducted an investigation of the overbilling allegations and testified at trial that they concluded the allegations were groundless. They maintain that Bohatch made her report for selfish or spiteful reasons, not out of a desire to fulfill her ethical responsibilities as a lawyer.

The jury heard Bohatch's and the firm's versions of the events and weighed the credibility of Bohatch, McDonald, Paine, and other witnesses. It returned a verdict in favor of Bohatch, finding that the defendants had failed to comply with the partnership agreement and had breached their fiduciary duty to Bohatch. The jury found that $57,000 would compensate Bohatch for lost earnings sustained before October 21, 1991 and $250,000 would compensate her for mental anguish suffered in the past. The jury also awarded $4 million in punitive damages against Paine, Burns, and McDonald. The punitive damages were substantially reduced on remittitur.

The court of appeals held that under the Texas Uniform Partnership Act and the common law, partners violate a fiduciary duty in expelling another partner only if they act in bad faith for self-gain. 905 S.W.2d 597, 602. It concluded that the record in this suit contains no evidence of a breach of fiduciary duty because there was no evidence that the partners expelled Bohatch for self-gain. at 604. This Court, however, has never limited claims for a breach of fiduciary duty to circumstances in which a partner acts for self-gain. *ee, e , ri r ra t r a i tar nt l ran r* , 823 S.W.2d 591, 594 (Tex.1992). Today, the Court should have followed the advice of several leading legal scholars and disapproved of the court of appeals' opinion.[1] Instead, this Court, by affirming the court of appeals' judgment, discards the jury's conclusion that the partners violated their fiduciary duty.

II.

The majority views the partnership relationship among lawyers as strictly business. I disagree. The practice of law is a profession first, then a business. Moreover, it is a self-regulated profession subject to the Rules promulgated by this Court.

As attorneys, we take an oath to "honestly demean [ourselves] in the practice of law; and . . . discharge [our] duty to [our] *lient[ ]* to the best of [our] ability." TEX. GOV'T CODE § 82.037 (emphasis added). This oath of honesty and duty is not mere "self-adulatory bombast" but mandated by the Legislature. *ee are ar ar a r* , 353 U.S. 232, 247, 77 S.Ct. 752,

1. Professors Richard L. Abel (University of California at Los Angeles School of Law), Leonard Gross (Southern Illinois University School of Law), Robert W. Hamilton (University of Texas School of Law), David J. Luban (University of Maryland School of Law), Gary Minda (Brooklyn Law School), Ronald D. Rotunda (University of Illinois College of Law), Theodore J. Schneyer (University of Arizona College of Law), Clyde W. Summers (University of Pennsylvania School of Law), and Charles W. Wolfram (Cornell Law School) offered their analyses as *amici curiae,* concluding that self-gain is not the sole element of a breach of fiduciary duty among partners.

760–761, 1 L.Ed.2d 796 (Frankfurter, J. concurring) (noting that the rhetoric used to describe the esteemed role of the legal profession has real meaning). As attorneys, we bear responsibilities to our clients and the bar itself that transcend ordinary business relationships.

Certain requirements imposed by the Rules have particular relevance in this case. Lawyers may not charge unconscionable fees. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a), *re rinte in* TEX. GOV'T CODE, tit. 2, subtit. G app. A (TEX. STATE BAR R. art. X, § 9); *ee* D.C. R. PROF'L CONDUCT 1.5(a)(1) (West 1997).[2] Partners and supervisory attorneys have a duty to take reasonable remedial action to avoid or mitigate the consequences of known violations by other lawyers in their firm. TEX. DISCIPLINARY R. PROF'L CONDUCT 5.01; *ee* D.C. R. PROF'L CONDUCT 5.1. Lawyers who know that another lawyer has violated a rule of professional conduct in a way that raises a substantial question as to that lawyer's honesty or fitness as a lawyer must report that violation. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.03(a); D.C. R. PROF'L CONDUCT 8.3.[3] In Texas, Rules 5.01 and 8.03 are essential to the self-regulatory nature of the practice of law and the honor of our profession itself.

This Court has the exclusive authority to issue licenses to practice law. TEX. GOV'T CODE § 82.021. This Court also has the jurisdiction to discipline errant attorneys and establish procedures for doing so. §§ 81.071, 81.072(a)-(c). Attorneys, whether they are sole practitioners, employees, or partners, are still "officers of the court." *n re n er*, 472 U.S. 634, 644, 105 S.Ct. 2874, 2880–2881, 86 L.Ed.2d 504 (1985) (quoting *Pe le e rel arlin l in*, 248 N.Y. 465, 162 N.E. 487, 489 (1928)); *e ent n*, 163 Tex. 477, 357 S.W.2d 565, 567 (1962).

In sum, attorneys organizing together to practice law are subject to a higher duty toward their clients and the public interest than those in other occupations. As a natural consequence, this duty affects the special relationship among lawyers who practice law together.

It is true that no high court has considered the issue of whether expulsion of a partner for complying with ethical rules violates law partners' fiduciary duty.[4] The dearth of authority in this area does not, however, diminish the significance of this case. Instead, the scarcity of guiding case law only heightens the importance of this Court's decision.

III.

The few cases that provide guidance here do so with conflicting results, but each case highlights the grave implications of those decisions for a self-regulated profession. Ultimately, agreements to practice law may not by their terms or effect circumvent the ethical obligations of attorneys established by law. *ee t e tern ell el e anne* , 809 S.W.2d 493, 494 n. 1 (Tex.1991); *entral en e r e e t n e i t*, 783 S.W.2d 200, 202 (Tex.1989).

A.

In *ie er ala*, the New York Court of Appeals held in an at-will employment context that an associate terminated for reporting another associate's misconduct had a valid claim for breach of contract against his law firm based on an implied-in-law obligation to comply with the rules of the profession. 80 N.Y.2d 628, 593 N.Y.S.2d 752, 757, 609

2. Before January 1, 1991, the D.C. Bar's ethics rules were embodied by the Code of Professional Responsibility. Under the old code, DR 2–106 forbids excessive fees, as does the new Rule 1.5, and EC 1–4, DR 1–102(A)(2), and DR 1–103(A) require the reporting of ethical violations, as do the new Rules 5.1 and 8.3. Although the Code was in place during the majority of the D.C. events at issue in this case, the new Rules contain substantially the same provisions.

3. This rule is derived from the American Bar Association's Model Rules of Professional Conduct. As of 1993, the majority of jurisdictions, including the two at issue in this case, Texas and the District of Columbia, have adopted some version of the Model Rules. Anthony J. Blackwell, *Wieder's Paradox: Reporting Legal Misconduct in Law Firms*, 1992/1993 ANN. SURV. AM. L. 9, 25 n. 94 (1993).

4. None of the numerous partnership cases cited by the majority concern a law partner ousted for complying with the ethical rules of our profession. 977 S.W.2d at 546.

N.E.2d 105, 110 (1992). The court recognized that "[i]ntrinsic to [the hiring of an attorney to practice law] . . . was the unstated but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession." 593 N.Y.S.2d at 756–57, 609 N.E.2d at 109–10. To find otherwise would amount to "nothing less than a frustration of the only legitimate purpose of the employment relationship," *i* 593 N.Y.S.2d at 757, 609 N.E.2d at 110, that is, "the lawful and ethical practice of law." 593 N.Y.S.2d at 755, 609 N.E.2d at 108. *ee al* Seymour Moskowitz, *l ent–at– ill an e t i : e Pr e i nal ile a*, 23 VAL. U.L.REV. 33, 56–66 (1988) (arguing for a public policy exception to at-will employment for professional codes of ethics). The plaintiff was not just an employee, but also an "independent officer[ ] of the court responsible in a broader public sense for [his] professional obligations." *ie er*, 593 N.Y.S.2d at 755, 609 N.E.2d at 108.

Only one reported case involves an attorney who was punished solely for failing to report another lawyer's misconduct. The case is more notable for its rarity and effect than for the holding itself. The Illinois Supreme Court suspended an attorney for one year for failing to report misconduct pursuant to a settlement agreement forbidding reporting of unprivileged information about the conversion of client funds by another attorney. *n re Hi el*, 125 Ill.2d 531, 127 Ill.Dec. 708, 713, 533 N.E.2d 790, 795 (1988). Aware of the possible practical effect of its holding in setting an ethical standard for attorneys, the court found that "public discipline is necessary in this case to carry out the purposes of attorney discipline." 127 Ill.Dec. at 713, 533 N.E.2d at 795. Together these cases illustrate that lawyers, by their agreements, may not sidestep their ethical obligations.

B.

I believe that the fiduciary relationship among law partners should incorporate the rules of the profession promulgated by this Court. *ee entral en* , 783 S.W.2d at 202 (noting that employment contracts incorporate existing law). Although the evidence put on by Bohatch is by no means conclusive, applying the proper presumptions of a no-evidence review, this trial testimony amounts to some evidence that Bohatch made a good-faith report of suspected overbilling in an effort to comply with her professional duty. Further, it provides some evidence that the partners of Butler & Binion began a retaliatory course of action *e re* any investigation of the allegation had begun.

In light of this Court's role in setting standards to govern attorneys' conduct, it is particularly inappropriate for the Court to deny recourse to attorneys wronged for adhering to the Disciplinary Rules. *ee* Blackwell, *ra*, at 44–48. I would hold that in this case the law partners violated their fiduciary duty by retaliating against a fellow partner who made a good-faith effort to alert her partners to the possible overbilling of a client.

C.

The duty to prevent overbilling and other misconduct exists for the protection of the client. Even if a report turns out to be mistaken or a client ultimately consents to the behavior in question, as in this case, retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future. Although I agree with the majority that partners have a right not to continue a partnership with someone against their will, they may still be liable for damages directly resulting from terminating that relationship. *ee r r ant*, 558 S.W.2d 535, 539 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.).

III.

The Court's writing in this case sends an inappropriate signal to lawyers and to the public that the rules of professional responsibility are subordinate to a law firm's other interests. Under the majority opinion's vision for the legal profession, the wages would not even be the same for "doing right"; they

diminish considerably and leave an attorney who acts ethically and in good faith without recourse. Accordingly, I respectfully dissent.

1

W.R. ASHCRAFT, Petitioner,

v.

Donald E. LOOKADOO, Respondent.

No. 97–0920.

Supreme Court of Texas.

April 2, 1998.

Appeal from Court of Appeals of Dallas; Fifth Judicial District; Deborah G. Hankinson, Justice.

Gary M. Pridavka, Dallas, for Petitioner.

Gregory A. Whittmore, Dallas, for Respondent.

OPINION

PER CURIAM.

In denying this petition for review, the Court neither approves nor disapproves of the court of appeals' discussion of whether the assignment of a promissory note also operated as an assignment of a guaranty of that note. *ee* 952 S.W.2d 907, 911–13. The petition for review is denied.

2

James Milton MALONE, James D. Malone, Milton C. Malone, Phillip G. Malone, and Mary Elizabeth Johnson, Petitioners,

v.

Christopher FOSTER, M.D., Bill Christensen, M.D., and Baylor University Medical Center, Respondents.

No. 97–0661.

Supreme Court of Texas.

Argued on Dec. 3, 1997.

Decided June 5, 1998.

Patient brought action for medical malpractice and spoliation of evidence against hospital and physicians. The 95th Judicial District Court, Dallas County, Joe B. Brown, J., entered take-nothing judgment in favor of hospital and physicians on malpractice claim, and entered summary judgment in favor of hospital and physicians on spoliation of evidence claim. Patient appealed. The Court of Appeals, 956 S.W.2d 573, affirmed on malpractice claim. On application for writ of error, the Supreme Court, Enoch, J., held that: (1) failure to allow testimony from hospital employee as to hospital's policy did not cause rendition of improper judgment, and (2) juror's responses during voir dire did not demonstrate that he should have been excused for cause.

Affirmed.

Baker, J., concurred, in part, in separate opinion.

1. Physicians and Surgeons ⚷18.70

Failure to allow testimony from hospital employee, as to hospital's policy of destroying incident reports after six months, did not cause rendition of improper judgment in medical malpractice case, where employee testified that it was her practice to incorporate the contents of any incident reports into her regular nursing report, and her nursing report for the time period in question was available to the patient. Rules App.Proc., Rule 44.1.

18 U.S.C.A. § 1513(e)

[added to statute by the Sarbanes-Oxley Act of 2002]

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

The SEC's Corporate Cooperation Policy: A Duty to Correct or Update?

*By Lance Cole**

I. Introduction

Last year a federal judge in New York refused to dismiss a securities litigation class action against Goldman Sachs and some of its senior officers that arose out of the highly publicized home mortgage collateralized debt obligation ("CDO") scandal of 2007.[1] As the court explained, the plaintiffs in the case were Goldman's own shareholders, not the investors who purchased the questionable CDO instruments, so the issues before the court involved whether Goldman made material misstatements or omissions in its public filings and statements to its shareholders.[2]

The court concluded that statements Goldman had made about the firm's own reputation, integrity, honesty, and policy of compliance with the letter and spirit of the law were potentially fraudulent in light of Goldman's conduct in the 2007 CDO transaction.[3] A significant factor in the court's analysis was Goldman's prior settlement of an SEC enforcement action in which Goldman conceded it had made a "mistake" in its marketing materials for the CDO transaction and paid a $550 million penalty to the SEC.[4] When the private litigation against Goldman survived the motion to dismiss stage the terms of the previous settlement with the SEC took on new importance.[5]

To date the SEC's 2010 "landmark settlement" with Goldman Sachs has been the Commission's most significant and highly publicized enforcement action arising out of the near-collapse of the nation's financial system in 2008.[6] The Commission's press release announcing the settlement noted that the $550 million penalty Goldman Sachs agreed to pay to resolve the CDO investigation was the "largest-ever penalty paid by a Wall Street firm."[7] Then-deputy director of the SEC's Enforcement Division Lorin L. Reisner added, "The unmistakable

---

*Professor of Law and Director, Center for Government Law and Public Policy Studies, Penn State University Dickinson School of Law. The author would like to thank Penn State Dickinson School of Law students Courtney Elliot, Chad Sweigart, and Christopher Walker for excellent research assistance. In addition, the author thanks the faculty of Widener University School of Law-Harrisburg for their very helpful comments and suggestions at a faculty presentation on this Article in November 2012.

message of this lawsuit and today's settlement is that half-truths and deception cannot be tolerated and that the integrity of the securities markets depends on all market participants acting with uncompromising adherence to the requirements of truthfulness and honesty."[8]

For close observers of the SEC's enforcement program, however, the Goldman Sachs settlement documents and the terms of subsequent high-profile settlements[9] convey another important message: The SEC apparently now recognizes that it is inappropriate to require waivers of the attorney-client privilege and attorney work product protections as a condition of settlement. Buried in the Goldman Sachs settlement documents is language requiring Goldman to produce "non-privileged documents and other materials" to the Commission staff when requested to do so.[10] Nowhere in either the settlement documents or the SEC's public statements regarding the settlement is there any suggestion that Goldman Sachs was required to waive any privileges as a condition of settlement with the Commission. That concession by the SEC merits examination now that private civil litigation against Goldman has been allowed to proceed to the discovery stage, in which the plaintiffs will seek documents and deposition testimony from Goldman and its senior officials.[11]

Although it is not surprising that Goldman Sachs would have sought to avoid a waiver of privilege in the SEC settlement because of the threat of liability in related private civil litigation,[12] it is noteworthy that in its biggest case after the financial meltdown of 2007–08 the Commission did not require a privilege waiver, despite what it characterized as the extraordinarily serious nature of the Goldman Sachs case and the fact that the Commission's policy on cooperation then (and now) in effect permitted the staff to seek privilege waivers in appropriate cases.[13] The Commission's decision not to require a waiver of privilege in its settlement with Goldman Sachs, the highest profile SEC enforcement action in recent years, coupled with the fact that the Department of Justice's cooperation policy no longer provides for such privilege waiver requests,[14] suggests that the Commission needs to correct or update[15] its policy on seeking waivers of privilege as a measure of corporate cooperation in its enforcement proceedings.

The discussion below summarizes the recent history of the DOJ and SEC corporate cooperation policies and argues that the SEC's current policy is in some key respects inconsistent with the most recent revisions to the DOJ policy, and therefore should be updated. The revisions to the SEC's cooperation policy that are suggested below would promote consistency between the cooperation policies of the two primary federal regulators of corporate conduct and would help clarify the still-confused (despite numerous policy revisions by both the DOJ and the SEC) state of the law on corporate cooperation.

II. DOJ's Gradual, Grudging Corporate Privilege Waiver Retreat

Few government policies have galvanized both the corporate and criminal defense bars (not always natural allies, it should be noted) into a united front of unyielding opposition,[16] as did the DOJ's initial statements on corporate cooperation policies, and seldom has a government agency so diametrically reversed a major policy position in response to unrelenting private sector opposition, as did the DOJ's ultimate revamp of its policy on corporate cooperation.[17] The story of the evolution of the DOJ corporate cooperation policy has been told elsewhere numerous times[18] and need not be repeated in full here. For purposes of this discussion, it is sufficient to focus on the privilege waiver aspects of the policy changes and note how dramatically the most recent policy statement differs from the original DOJ position with respect to privilege waivers.

A. The Holder Memorandum.

The Department of Justice issued its first formal policy statement on corporate prosecutions in 1999 when then-Deputy Attorney General Eric H. Holder, Jr. issued an internal memorandum entitled "Federal Prosecution of Corporations," which quickly became known as the "Holder Memorandum."[19] The Holder Memorandum articulated eight factors that a prosecutor should consider when making corporate charging decisions.[20] The factors cited in the Holder Memorandum, however, were "not outcome-determinative and [were] only guidelines. Federal prosecutors [were] not required to reference these factors in a particular case . . .."[21]

Of the eight factors the Holder Memorandum articulated, the most controversial factor was the fourth factor, which stated "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges."[22] The Holder Memorandum emphasized in Part VI that a relevant consideration in determining that the corporation cooperated with the Department's investigation should be the corporation's willingness "to waive the attorney-client and work product privileges."[23] In addition, the commentary to Part VI recognized that the adequacy of the corporation's cooperation depended on "the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel."[24] Thus, while the Holder Memorandum authorized prosecutors to "request a waiver in appropriate circumstances,"[25] it also provided that "waiver of a

corporation's privileges [was not] an absolute requirement"[26] and the corporation's willingness to waive the privileges was "only one factor in evaluating the corporation's cooperation."[27]

Supplementing the guidance in Part VI, which authorized prosecutors to request waivers, was footnote two, which stated, "The waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation."[28] Thus, the footnote appears to have attempted to distinguish waivers of the findings of a "factual internal investigation" from waivers "with respect to communications and work product related to advice concerning the government's criminal investigation."[29]

The reaction to the Holder Memorandum was largely negative, as critics expressed concern that the Holder Memorandum permitted prosecutors to seek privilege waivers as a condition of a corporation receiving credit for cooperation in a Department of Justice criminal investigation. As one commentator has noted with respect to the controversy surrounding the Holder Memorandum, "it was not the idea of prosecuting corporations or even the idea of providing guidance on the decision to prosecute that was controversial; it was the content of the guidance itself."[30]

One criticism of the Holder Memorandum was that it failed to recognize that a corporation could cooperate in good faith with a governmental investigation without revealing privileged information.[31] Specifically, in the course of typical investigations, the information the prosecutor needs is the underlying factual information about past events, as opposed to the substance of subsequent privileged communications with counsel about those factual events.[32] Thus, some commentators concluded that the objective of the Holder Memorandum was not to obtain the factual information, but rather to coerce corporations to waive their attorney-client privilege and work product doctrine protections.[33]

The Holder Memorandum's policy on waivers was criticized on other grounds as well.[34] Additional criticisms included the fact that a policy of seeking waivers would diminish trust in corporate counsel,[35] that the policy discouraged full communication between client and counsel,[36] and that privilege waivers could have a detrimental impact on corporations in future civil cases.[37] In 2003, before the Holder Memorandum was amended for the first of the several times, this writer noted two "fundamental flaws" in the memorandum:

> First, it inappropriately focuses on obtaining privilege waivers in all cases, rather than on obtaining relevant underlying factual information,

> which is what government investigators should be seeking in the typical case and which usually can be obtained without requiring a waiver of privilege. Second, it threatens to intrude inappropriately into ongoing attorney-client relationships by suggesting that in some cases prosecutors should seek a waiver with respect to attorney-client communications and opinion work product relating to current representation in the pending criminal investigation.[38]

Much of the subsequent evolution of the DOJ cooperation policy, summarized below, was the result of grudging bureaucratic recognition of these flaws and the incremental implementation of revisions to the policy that would address them, at least in part.

B. The Thompson Memorandum

In 2003, four years after the Department issued the Holder Memorandum and two years after the SEC issued its "Seaboard Report" establishing that agency's corporate cooperation policy,[39] then-Deputy Attorney General Larry D. Thompson modified the Holder Memorandum by issuing a new memorandum entitled "Principles of Federal Prosecution of Business Organizations," which became known as the "Thompson Memorandum."[40] Despite the widespread criticism that had been directed at the Holder Memorandum's privilege waiver policies, the Thompson Memorandum was widely perceived as an effort to further advance those policies.[41] As one commentator observed, while the Holder Memorandum "appeared on its face to be advisory, the Thompson memorandum made it official Justice Department policy for prosecutors to apply the principles in all corporate prosecutions."[42]

In Part II, "Charging a Corporation: Factors to be Considered," the Thompson Memorandum provided a list of nine factors to guide prosecutors in determining whether to prosecute a corporation, with the fourth factor being "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product protection."[43] Although this language is almost identical to that of the Holder Memorandum, it differs in that the Holder Memorandum referred to the attorney-client and work product "privileges," while the Thompson Memorandum refers to corporate attorney-client and work product "protections."[44]

In Part VI of the Thompson Memorandum, entitled "Charging a Corporation: Cooperation and Voluntary Disclosure," the Department of Justice emphasized that one consideration in determining whether to charge a corporation included the corporation's willingness to "waive attorney-client and work product protection."[45] The commentary to Part VI of the Thompson Memorandum was largely modeled after the commentary to Part VI of the Holder Memorandum, as

prosecutors were again permitted to request waivers in appropriate circumstances, but the Thompson Memorandum did make more clear that a corporation's willingness to waive the protections was not an absolute requirement to obtain cooperation credit.[46]

Finally, in what became footnote three of the Thompson Memorandum, the footnote repeated verbatim the text of footnote two of the Holder Memorandum, stating that a request for a corporate "waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue."[47]

The reaction by scholarly commentators to the Thompson Memorandum was perhaps even more intensely critical than the response to the earlier Holder Memorandum.[48] The major criticism of the Thompson Memorandum was that it took the advisory — and thus discretionary and subject to the potentially ameliorating effect of the individual professional judgments of U.S. Attorneys and career prosecutors — guidelines of the Holder Memorandum and made them mandatory Justice Department policy.[49] Moreover, after it was implemented the Thompson Memorandum was criticized for having created a "culture of waiver,"[50] stopped the flow of information to counsel,[51] and discouraged corporate counsel from documenting internal investigations.[52] Other commentators went so far as to assert that the Thompson Memorandum required corporate counsel to do the government's work in hopes of avoiding corporate prosecution of their clients.[53]

Despite the largely negative reaction to the Thompson Memorandum, two influential commentators, both of whom were present or former Department of Justice prosecutors at the time they wrote, disputed the arguments asserted by the critics of the Thompson Memorandum. Professor Julie R. O'Sullivan, a former federal prosecutor, noted in 2008 that although the defense bar contended that prosecutors sought privilege waivers in almost every case, "there [was] a serious contest over the issue of the frequency of waiver requests."[54] In addition, Mary Beth Buchanan, then the United States Attorney for the Western District of Pennsylvania, stated in 2004 that claims of the attorney-client privilege being undermined were greatly exaggerated[55] because surveys that were conducted at the time demonstrated that requests for waivers were the exception, not the rule.[56] Buchanan asserted that "waiver[s] should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue"[57] and that prosecutors are primarily concerned with "learning the facts related to the underlying conduct."[58] As a result, she concluded that prosecutors generally did not seek privilege waivers; instead, "the government is

seeking the underlying facts regarding the wrongdoing, an inquiry normally limited to work product information and in some instances legal advice contemporaneous with the criminal conduct at issue."[59] This observation proved both prescient and extremely relevant to the subsequent evolution of the DOJ policy, discussed below, and has important implications for the proposed revisions to the SEC's cooperation policy that are discussed in Part V of this Article.

C. The McCallum Memorandum

In 2005 then-Acting Deputy Attorney General Robert D. McCallum, Jr. issued a one-page memorandum on "Waiver of Corporate Attorney-Client and Work Product Protection" to Heads of Department Components and United States Attorneys.[60] The McCallum Memorandum directed that DOJ component heads and United States Attorneys were "to establish a written manual review process for your district or component."[61] The review processes, however, could vary from district to district so that prosecutors in the field could retain discretion as to the most appropriate method to "seek timely, complete, and accurate information from business organizations."[62] Commentators concluded that the potential for a lack of consistency among U.S. Attorneys' Offices around the country made it unlikely that the McCallum Memorandum review process requirement would decrease the frequency with which the government would seek corporate privilege waivers.[63]

D. The McNulty Memorandum

The first significant revision of the DOJ cooperation policy occurred in 2006, when then-Deputy Attorney General Paul J. McNulty issued a memorandum that superseded the guidelines set forth in the prior Holder, Thompson, and McCallum memoranda.[64] The McNulty Memorandum provided that the Department's policy was being modified to ensure that employees communicated with corporate counsel fully and candidly.[65]

Much like the Thompson Memorandum, the McNulty Memorandum set forth a list of nine factors that prosecutors must consider in determining whether to charge a corporation.[66] The critical factor was the fourth, which stated that "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents" would be taken into account in assessing the company's cooperation.[67] What is most significant about the language of this factor is that the McNulty Memorandum abandoned the Thompson Memorandum's reference to "a corporation's . . . willingness to cooperate in the investigation . . . including, if necessary, the waiver of corporate attorney-client and work product protection."[68]

The evolving nature of the Justice Department's approach towards

cooperation in corporate investigations was also evident in the provisions of the McNulty Memorandum's Part VII, "Charging a Corporation: The Value of Cooperation."[69] That section of the memorandum contained a policy statement that relevant considerations in determining whether to charge a corporation included the corporation's timely and voluntary disclosure of wrongdoing and the corporation's cooperation during the course of the Department's investigation.[70] The commentary related to that policy went into greater detail on the specifics of what constituted cooperation by a corporation, listing five relevant considerations that were to be taken into account in ascertaining whether a corporation had in fact cooperated with a Department investigation.

The second listed consideration was entitled "Waiving Attorney-Client and Work Product Protections."[71] Here the McNulty Memorandum departed from the Holder/Thompson policy in two important respects. First, the McNulty Memorandum commentary both recognized the value of the attorney-client privilege and the attorney work product doctrine, and stated unequivocally that privilege waivers were not a prerequisite to a corporation's obtaining cooperation credit.[72] Second, and perhaps most important, the McNulty Memorandum commentary differed from the Holder/Thompson policies by prohibiting prosecutors from using a corporation's refusal to provide attorney-client communications or non-factual attorney work product ("Category II" information, in the terminology of the McNulty Memorandum) in making a charging decision with respect to a the corporation.[73]

Despite the McNulty Memorandum's retreat from treating privilege waivers as a necessary condition for a corporation to obtain cooperation credit, the commentary to the memorandum did provide that a prosecutor still could request waivers when "there is a legitimate need for the privileged information."[74] Whether or not a "legitimate need" existed depended upon:

(1) the likelihood and degree to which the privileged information will benefit the government's investigation;

(2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;

(3) the completeness of the voluntary disclosure already provided; and

(4) the collateral consequences to a corporation of waiver.[75]

If the application of these criteria demonstrated that there was a "legitimate need" to obtain a waiver of privilege, a prosecutor was permitted to seek a "Category I" waiver, so long as the prosecutor first obtained written authorization from the supervising United States

Attorney.[76] Category I information was defined as "purely factual information, which may or may not be privileged, relating to the underlying misconduct."[77] Perhaps most important as a practical matter, the commentary stated that a corporation's response to a "request for waiver of privilege for Category I information" — unlike a Category II waiver — could be considered in determining whether the corporation had cooperated in the government's investigation.[78]

The procedural barriers to obtaining a Category II waiver were higher than those for requesting a waiver for Category I "purely factual" information, but were by no means insurmountable. In instances where a prosecutor had obtained Category I factual information from a corporation, but concluded that the "purely factual information provide[d] an incomplete basis to conduct a thorough investigation," the prosecutor could request a "Category II" information waiver from the corporation if the prosecutor followed the more onerous procedural steps set out in the commentary.[79] Those steps included obtaining written authorization from the Deputy Attorney General and setting forth legitimate need for the information by identifying the scope of the waiver sought.[80] If the request was authorized, the United States Attorney was required to communicate the request in writing to the corporation.[81] Furthermore, a copy of each waiver request and authorization was to be maintained in the files of the Deputy Attorney General.[82] Finally, the commentary cautioned that a waiver of "Category II" privileged information "should only be sought in rare instances."

Category II information was defined as "privileged information [that] might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation."[83] The commentary was clear, however, that a Category II waiver should be requested "[o]nly if the purely factual information provides an incomplete basis to conduct a thorough investigation."[84] As noted above, in what was probably the most significant departure from previous DOJ policy,[85] the McNulty Memorandum commentary indicated that a corporation's decision to decline to provide Category II information should <u>not</u> be considered by the prosecutor in making a charging decision.[86] Thus the McNulty Memorandum made clear that a corporation should not be penalized for refusing to provide privileged legal advice of its counsel or its attorneys' "opinion" work product that reflected the mental impressions and legal theories of counsel.[87] It also made clear, however, that DOJ prosecutors could accept "voluntary" privilege waivers by corporations that were under investigation without first obtaining the departmental authorizations that were

required to request "Category II" waivers.[88]

The reaction to the McNulty Memorandum by commentators was "a mixture of both cheers and boos."[89] On the positive side, the McNulty Memorandum was believed to have eliminated a significant degree of the prosecutorial discretion in requesting waivers that had been in place under the prior DOJ policy statements.[90] Moreover, the McNulty Memorandum specifically authorized waiver requests only after other means of obtaining the information had been exhausted.[91] Thus, one commentator believed that the McNulty Memorandum "came close to stating that waiver [was] to be treated as a last resort."[92]

On the other hand, a number of commentators raised important criticisms of the approach taken in the McNulty Memorandum. One criticism of the McNulty Memorandum was that "the requirement that there be a 'legitimate need' sets the bar for seeking at the lowest possible level."[93] Another criticism was that the McNulty Memorandum only provided procedural protections for privilege waivers.[94] The McNulty Memorandum also was faulted because it did not prevent prosecutors from receiving the benefits of a privilege waiver, provided that the prosecutor had not explicitly requested that the corporation waive the privilege.[95] Commentators also were concerned with the McNulty Memorandum's failure to define key terms[96] and the lack of guidance as to what actually constituted a legitimate government need.[97] Overall, as the then-president of the American Bar Association noted, the McNulty Memorandum was perceived as continuing the "culture of waiver" that was believed to have developed under its Holder and Thompson memoranda predecessors.[98]

E. The Filip Guidelines

The most recent and most important revision to the "Principles of Federal Prosecution of Business Organizations" occurred in August 2008 when then-Deputy Attorney General Mark Filip issued the "Filip Guidelines,"[99] which were incorporated into the text of the United States Attorneys' Manual and remain in effect today.[100] The Filip Guidelines marked the Justice Department's fourth modification of its corporate cooperation policies and, as discussed below, largely reversed its predecessors' policy on corporate waivers of the attorney-client privilege and the work product doctrine. In the words of their author, the Filip Guidelines sought to "address any lingering perceptions that [the DOJ's] conduct in corporate criminal investigations is anything other than fair and respectful of the attorney-client privilege."[101]

Like the McNulty Memorandum, the Filip Guidelines set out a list of nine non-exhaustive factors that federal prosecutors should consider in making corporate charging decisions.[102] The factors are identical to

those set out in the McNulty Memorandum, and the fourth factor remains "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."[103] Despite this repetition of the key language from the McNulty Memorandum, however, the Filip Guidelines represent a significant departure in the analytical approach applied to corporate privilege waivers and cooperation.[104]

The Filip Guidelines adhere to the general principle that "[c]ooperation is a potential mitigating factor, by which a corporation . . . can gain credit in a case that otherwise is appropriate for indictment and prosecution."[105] But the guidelines also recognize the importance of the attorney-client privilege and the attorney work product doctrine in the American legal system,[106] and assert that "waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative."[107] The guidelines go on to say that "[e]veryone agrees that a corporation may freely waive its own privileges if it chooses to do so" and that "such waivers occur routinely" in our legal system.[108]

The Filip Guidelines then depart from the prior DOJ policy statements by recognizing that "[w]hat the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review."[109] Consistent with this fact-based approach, the Filip Guidelines provide that, while corporations are "free to convey" privileged information "if and only if the corporation voluntarily chooses to do so," federal prosecutors "should not ask for such waivers and *are directed not to do so*."[110]

This new focus on obtaining facts, rather than privilege waivers, is consistent with the fact-based analysis that both this writer[111] and, less explicitly, then-United States Attorney Mary Beth Buchanan[112] had advanced several years earlier. Although it took almost ten years of glacial bureaucratic movement, in response to widespread criticism from both academics and practitioners, as well as the threat of legislative intervention in the form of the proposed Attorney-Client Privilege Protection Act,[113] the Filip Guidelines finally explicitly recognized the merit of a "fact-based" rather than a "waiver-based" approach to assessing corporate cooperation.

The Filip Guidelines provide detailed guidance on how a corporation can gain cooperation credit by disclosing the relevant facts.[114] Initially, the guidelines indicate that for a corporation to obtain cooperation credit, it "must disclose the relevant facts of which it has knowledge."[115] Thus, the controlling question for cooperation credit is

whether the corporation disclosed all the relevant facts, not whether the corporation has agreed to waive its privileges.[116] Consistent with that new analytical approach, the Filip Guidelines explicitly recognize that "a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected."[117] In a corresponding footnote, the Filip Guidelines emphasize that the "corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers' interviews."[118] But it should also be noted that the same footnote provides that to obtain cooperation credit:

> [T]he corporation does need to produce, and prosecutors may request, relevant factual information — including relevant factual information acquired through those interviews unless the identical information has otherwise been provided — as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents."[119]

The Filip Guidelines also clarify the appropriate procedure for determining whether a corporation should be given credit for cooperation by recognizing the critical distinction between information obtained by defense counsel in the fact-gathering process and confidential communications between corporate counsel and corporate officials for the purpose of providing legal advice to the corporation.[120] Specifically, the Filip Guidelines note that "[c]ommunications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege."[121] As to these communications, except in instances when the corporation relies on advice of counsel as a defense or when the communications were made in furtherance of a crime or fraud,[122] the Filip Guidelines state that the "corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit."[123] The Filip Guidelines also provide that prosecutors should not request "non-factual or core" attorney work product.[124] Unfortunately, however, the Filip Guidelines conclude with the caveat that the "Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."[125]

In general, the Filip Guidelines, at least in terms of the manner in which corporate privileges are addressed, have been viewed as a significant improvement over their predecessors. The DOJ's movement

from a process-oriented, waiver-based approach to the more result-oriented, fact-based approach described above has been "less contentious than the previous memoranda and focuses on what is most important: the facts."[126] As a result, the Filip Guidelines have been recognized as "allow[ing] for more protections of privileged information" than had been provided by the previous Department of Justice policies.[127]

Even with the improvements in the protection of corporate privileges under the Filip Guidelines, concerns over the Department of Justice's cooperation policy have not been entirely ameliorated. First, as noted above,[128] the Filip Guidelines have "[o]ne huge loophole — they do not carry the force of law."[129] Moreover, the Filip Guidelines do not apply to federal agencies other than the DOJ[130] and, as one commentator has noted, they "seem to explicitly condone the use of coercive techniques outside of the DOJ."[131] Perhaps most important, the Filip Guidelines leave corporations under significant pressure to provide factual information to DOJ prosecutors, and if a corporation refuses to do so the DOJ still can use that refusal against it.[132] In short, despite the important steps taken by the Filip Guidelines in seeking to respect corporate privileges, the existing policy could be further refined to ensure that the Justice Department does not inappropriately impinge upon the protections provided by the work product doctrine and the attorney-client privilege — protections that the Supreme Court has consistently recognized as essential to our adversarial system of justice and has consistently upheld in its recent decisions.[133]

III. The Evolution of the SEC's Cooperation Policies

Although the Securities and Exchange Commission did not announce a formal "cooperation policy" until 2001, two years after the Department of Justice adopted the "Holder Memorandum,"[134] the agency already had a decades-long history of rewarding cooperation when resolving enforcement matters.[135] For example, in 1981 a registered broker-dealer violated the antifraud provisions of the Securities Act by failing to include certain unaudited financial statements in a municipal bond offering circular.[136] The broker-dealer was censured in an administrative proceeding and allowed to rehabilitate itself, by retaining an expert to conduct a review of its due diligence and compliance procedures with respect to its activities as a principal underwriter of municipal securities, in part because "the Commission recognize[d] *the existence of certain mitigating factors, including the Respondents' cooperation in the staff's investigation* and their prior inexperience as a principal underwriter of municipal securities."[137] Cooperation served as the basis for the Commission reducing enforcement sanctions in other enforcement proceedings that were resolved

prior to 2001,[138] but up until that time the Commission did not have a formal policy on cooperation. In 2001, perhaps influenced by attention surrounding the Department of Justice's action in promulgating the Holder Memorandum,[139] the Commission first announced an official policy regarding corporate cooperation with Commission investigations.

A. The Seaboard Report

The vehicle the SEC used to announce its cooperation policy was an enforcement proceeding in which the Commission determined to refrain from bringing an enforcement action against a parent company, Seaboard Corporation, that had misstated its public financial reports because of inaccurate accounting practices at one of its subsidiaries.[140] While the SEC did not bring an enforcement action against the parent company, even though it was the reporting entity, the Commission did bring an enforcement action against the subsidiary company's former corporate controller, whose actions had caused the parent company's financial records to be misstated.[141] In an accompanying Report of Investigation,[142] which became known as the "Seaboard Report" because of the name of the parent company,[143] the Commission explained its reasons for not bringing an enforcement action against the parent company.

The Commission's summary of the key factual circumstances underlying the decision to forgo bringing an enforcement action against the parent company is worth quoting in full:

> Within a week of learning about the apparent misconduct, the company's internal auditors had conducted a preliminary review and had advised company management who, in turn, advised the Board's audit committee, that Meredith [the subsidiary's controller] had caused the company's books and records to be inaccurate and its financial reports to be misstated. The full Board was advised and authorized the company to hire an outside law firm to conduct a thorough inquiry. Four days later, Meredith was dismissed, as were two other employees who, in the company's view, had inadequately supervised Meredith; a day later, the company disclosed publicly and to us that its financial statements would be restated. The price of the company's shares did not decline after the announcement or after the restatement was published. The company pledged and gave complete cooperation to our staff. It provided the staff with all information relevant to the underlying violations. Among other things, the company produced the details of its internal investigation, including notes and transcripts of interviews of Meredith and others; and it did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation.[144]

Although the focus of this Article is the Commission's current cooperation policy and whether or not further changes to that policy are merited, it is noteworthy that this was not a particularly difficult

case for the Commission to decide to exercise leniency as to the parent company. The facts provided indicate that the misconduct was centered in a single subsidiary, that there was no involvement of senior management of the parent company, and that the company acted promptly to bring in outside experts and to implement their recommendations — including restatement of prior period financial statements — to address the problems at the subsidiary.[145] In addition, the parent company's share price did not drop after the restatement of the financial results, so no private shareholders suffered losses as a result of the misconduct at the subsidiary. With the subsidiary's controller as a convenient scapegoat/subject of a separate SEC enforcement proceeding, the case presented the Commission with an ideal vehicle for both exercising leniency as to a particular reporting company and announcing general policies for rewarding corporate cooperation.[146]

The report states that the parent company "pledged and gave complete cooperation to [the SEC] staff" in connection with the investigation.[147] In addition to its general endorsement of the parent company's cooperative conduct, the report notes specifically that the company "did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation,"[148] the Commission went on to specify the actions that had influenced the Commission's decision not to bring an enforcement action against the parent company.[149] Those actions included strengthening its financial reporting processes, hiring additional accounting personnel, and increasing parent company oversight of subsidiaries' accounting personnel. The Commission also emphasized that investor protection is "the paramount issue" in every enforcement decision, and that "[s]elf-policing, self-reporting, remediation and cooperation" will not necessarily result in leniency in all cases: "Indeed, there may be circumstances where conduct is so egregious, and harm so great, that no amount of cooperation or other mitigating conduct can justify a decision not to bring any enforcement action at all. In the end, no set of criteria can, or should, be strictly applied in every situation to which they may be applicable."[150]

After announcing those caveats, the Commission set forth a non-exclusive[151] list of thirteen factors that it would "consider in determining whether, and how much, to credit self-policing, self-reporting, remediation, and cooperation — from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions . . .."[152] The eleventh factor set out the Commission's position on the attorney-client privilege and the work product doctrine:

> Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the

> situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?[153]

Unlike the DOJ's Holder Memorandum,[154] which was in effect at the time the Commission released the Seaboard Report, the SEC did not use the term "waiver" in the text of its report (although it did address waiver in a footnote, discussed below).[155] The main text of the Seaboard Report, in contrast to the Holder Memorandum, speaks of "mak[ing] available to [the SEC] staff the results of [a company's] review" and "provid[ing]" sufficient documentation" of its response.[156] This "waiver-neutral" language arguably demonstrated greater sensitivity to privilege issues, and was more consistent with the subsequent "fact based" DOJ policy that is discussed above, than the language DOJ initially employed in the Holder Memorandum.[157]

Footnote 3 of the Seaboard Report focused explicitly on the issue of privilege waivers:

> In some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections and exemptions with respect to the Commission. The Commission recognizes that these privileges, protections and exemptions serve important social interests. In this regard, the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff.[158]

This language has more in common with the DOJ McNulty Memorandum's "fact-based" approach,[159] which the DOJ did not adopt until just over five years after the issuance of the Seaboard Report,[160] than it does with the Holder and Thompson memoranda's "waiver-based" approach.[161] Nonetheless, the Seaboard Report, like its contemporary the DOJ Holder Memorandum, was generally viewed as requiring a waiver of corporate privileges in order to obtain credit for cooperation in SEC enforcement proceedings.[162]

B. THE 2008 ENFORCEMENT MANUAL

In October 2008 the SEC for the first time made available to the public a copy of its internal Enforcement Manual.[163] The 2008 Enforcement Manual was the Commission's first public action to update the corporate cooperation policy positions set out in its 2001 Seaboard Report. During the same seven-year period the DOJ had released four additional policy statements on corporate cooperation that were

intended, at least in part, to respond to criticisms of the privilege waiver policy set out in the Holder Memorandum.[164] Section 4 of the 2008 Enforcement Manual was entitled "Privileges and Protections,"[165] and included Section 4.1.1, which set forth the Commission's policy position on the general scope of the attorney-client privilege and provided guidance on a number of specific privilege issues, such as circumstances in which the privilege would not be available and the application of the privilege in the corporate context.[166]

Section 4.3, entitled "Waiver of Privilege," set forth the Commission's policy on the issue of waivers of privilege by companies under investigation.[167] That section of the Manual made clear that the Commission's staff was required to respect company assertions of the privilege, unless the privilege was voluntarily waived.[168] The Manual recognized that the objective of the Commission's investigation was to obtain the relevant information and that "both entities and individuals may provide significant cooperation in investigations by voluntarily disclosing relevant information. *That voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation, as long as all relevant facts are disclosed*."[169] The Manual also acknowledged that in the course of an investigation by the Commission, a company's attorneys might conduct interviews and generate notes or memoranda that would be, at least in part, protected by the attorney-client privilege or the work product doctrine.[170] Importantly, however, the Manual also explicitly recognized that while the attorney notes or memoranda would be protected by the privilege or the work product doctrine, the underlying factual information that was disclosed to the attorney would not necessarily be privileged.[171]

As to requests for waivers, the Manual provided that as a general matter the staff should not request privilege waivers.[172] The Manual did provide that Commission staff members could obtain the authority to request waivers if certain procedures were met, stating that all "potential waiver[s] of privilege are to be reviewed with the Assistant [Director of Enforcement] supervising the matter and that review *may* involve more senior members of management as deemed necessary."[173] Section 4.3 of the 2008 Enforcement Manual reiterated that "[w]aiver of privilege is not a pre-requisite to obtaining credit for cooperation," and that "[b]y timely disclosing the relevant underlying facts, a party may demonstrate cooperation for which the staff may give credit, while simultaneously asserting the privilege."[174] Overall, a fair reading of the provisions quoted above makes clear that the 2008 Manual, even more explicitly than the Seaboard Report, set out a policy of seeking underlying factual information, rather than seeking privilege waiver as an end in itself, while still permitting staff to request privi-

lege waivers in some instances. In that regard, the SEC's 2008 policy was, in important respects, more similar to the privilege waiver policies set out in the DOJ's previous McNulty Memorandum than the policies in the then just-released August 2008 Filip Guidelines.[175]

C. THE 2010 ENFORCEMENT MANUAL

Just over a year later, in January 2010, the Securities and Exchange Commission updated its recently released Enforcement Manual.[176] The 2010 update was the Commission's second modification of the Seaboard Report cooperation policies in a 15-month period, and the second Commission policy update since the Department of Justice issued the Filip Guidelines.[177] The 2010 Manual altered some aspects of the 2008 Enforcement Manual, especially those involving the attorney-client privilege and work product protections.[178]

The Commission's first major change to its approach to "Waiver[s] of Privilege," was set out in the revised Section 4.3, which provided that "[t]he staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director or Deputy Director."[179] Thus, requests for privilege waivers under the 2010 Manual were subject to heightened procedural protections, as "waiver[s] should be reviewed initially with the Assistant supervising the matter and that review *should* involve more senior members of management as appropriate before being presented to the Director or Deputy Director."[180] The Manual stated that for a company to obtain cooperation credit, it must voluntarily disclose all relevant factual information, but made clear that such disclosure did not necessarily require a waiver of the corporation's attorney-client privilege.[181] Therefore, the 2010 Manual acknowledged that, consistent with the policy position set out in the Seaboard Report, a company's waiver of privilege is not an end by itself, but is only a means by which a company could provide the Commission with all the relevant factual information.[182] The remainder of Section 4.3 is largely identical to Section 4.3 of the 2008 Manual.[183]

The 2010 Enforcement Manual's second major change was in Section 6, "Fostering Cooperation," which did not appear in the 2008 Enforcement Manual.[184] Section 6.1.1 of the 2010 Manual provided what might be viewed as a Seaboard Report for individuals.[185] After addressing cooperation by individuals, Section 6 of the 2010 Manual continues by providing a "Framework for Evaluating Cooperation by Companies."[186] Section 6.1.2 specifically directs the analysis for corporate cooperation to the Seaboard Report, as "[t]he report detailed the many factors the Commission considers in determining whether, and to what extent, it grants leniency to investigated companies for cooperating in its investigations . . . ."[187] Furthermore, Section 6.1.2

recognizes that although the Seaboard Report provided general principles for the Commission to follow, the Commission has the discretion to evaluate each case on its own merits.[188]

In evaluating cooperation of both individuals and corporations, the Commission sets forth a list of non-exclusive cooperation tools that its staff can use in rewarding cooperation.[189] First, the Commission authorizes the use of proffer agreements.[190] The other cooperation tools include cooperation agreements,[191] deferred prosecution agreements,[192] and non-prosecution agreements,[193] all of which are partially contingent on the company's willingness to "produc[e] all potentially relevant non-privileged documents and materials to the Commission."[194] The final potential cooperation tool the Commission cites is the use of immunity in appropriate circumstances.[195]

The Commission concludes Section 6 by stating, in a section titled "Publicizing the Benefits of Cooperation," that "[t]he staff should provide sufficient information to the public about the nature of the Commission's cooperation program and its significant benefits."[196] Thus, the Commission staff was directed to "include standard language relating to cooperation in Offers, Consents, or other dispositions and reference the individual or company's cooperation in the supporting paragraphs of the related litigation and/or press releases . . . ."[197] The Enforcement Manual made clear, however, that "the staff retains discretion regarding whether and how to disclose the fact, manner, and extent of an individual or company's cooperation . . . ."[198]

Within the first few months after the 2010 Enforcement Manual was made publicly available, the Commission publicized instances in which it had agreed to more lenient sanctions based upon the subject company's cooperation with the SEC staff's investigation.[199] For example, in *SEC v. Gen Re Corp.*, the Commission charged the corporation with manipulating and falsifying its reported financial results.[200] In deciding to accept the corporation's settlement offer the Commission's press release noted that "the SEC took Gen Re's remediation efforts and cooperation into account."[201] Thus in that respect the Commission's Gen Re Release was consistent with the policy of Section 6.3 of the 2010 Enforcement Manual on "Publicizing the Benefits of Cooperation" that is discussed above.[202] Noticeably absent from the efforts considered by the SEC in granting cooperation credit to Gen Re, however, was any reference to whether or not Gen Re waived the attorney-client privilege or work product protections.[203]

D. THE 2012 ENFORCEMENT MANUAL

In November 2012 the SEC once again published a revised Enforcement Manual.[204] Surprisingly, however, in light of both the Justice

Department's adoption of a policy forbidding its prosecutors from requesting privilege waivers[205] and the SEC's apparent practice in recent enforcement proceedings of not seeking privilege waivers,[206] the 2012 revision of the SEC Enforcement Manual leaves unchanged the provisions (at section 4.3 of both the 2010 and 2012 versions) on "Waiver of Privilege."[207] Most significant, the 2012 Enforcement Manual continues to provide that staff can "ask a party to waive the attorney-client privilege or work product protection" so long as the staff obtains the "prior approval of the Director or Deputy Director [of the Division of Enforcement]."[208] The same section of the 2012 Enforcement Manual goes on to state (as did the 2010 Enforcement Manual) that where a company has conducted an internal investigation, "the staff may not request, without approval, protected notes or memoranda generated by the attorney's interviews."[209] Thus the language of the 2012 Enforcement Manual clearly contemplates that, at least in some instances, the SEC staff may ask companies under investigation to waive their attorney-client privilege or work product protection, and may also in some instances ask a company to produce interview notes prepared by the attorneys during an internal investigation that "may be subject, at least in part, to the protections of the attorney-client privilege and/or attorney work product protection.[210] It therefore appears that while the SEC's cooperation policy was at one time more respectful of the attorney-client privilege and work product doctrine protection than the Justice Department's policy,[211] the SEC has not kept pace with the corporate cooperation policy changes at the Justice Department that are reflected in the Filip Memorandum,[212] and now may have "fallen behind" on this critically important policy issue. To determine whether or not that it the case, it is necessary to compare carefully the current SEC and DOJ corporate cooperation policies.

IV. Comparing the Current SEC and DOJ Cooperation Policies

Comparing the 2012 SEC Enforcement Manual with the post-Filip Guidelines DOJ Policy reveals that there are significant differences between the two policies as they have evolved to this point. Although the two corporate cooperation policies may initially give the appearance of affording similar protections to privileged communications and work product, close examination of the two policies reveals that the current DOJ policy provides stronger safeguards for protecting the attorney-client privilege and the work product doctrine.

As to the similarities between the DOJ and SEC policies, both policies explicitly allow a corporation to voluntarily disclose privileged communications or documents in connection with an investigation or prosecution.[213] Additionally, both the DOJ and SEC policies emphasize the importance of determining whether the corporation has

disclosed relevant factual information in a timely fashion.[214] Moreover, both the current DOJ corporate cooperation policy and the 2012 SEC Enforcement Manual recognize that a decision of whether or not to grant a company credit for cooperation depends on the corporation's willingness to disclose all the "relevant facts" combined with any other cooperative efforts and circumstances.[215] Despite the significant remaining differences between the two policies, which are discussed below, the fact that both policies have evolved to a common focus on providing the "relevant facts" rather than on a "waiver of privileges" represents a major step forward since the original Holder Memorandum[216] and should be viewed as an important victory by all those who have raised concerns about the federal government's cooperation policies.[217]

Despite these similarities of the DOJ and SEC policies, however, there are important differences in the details of how the two policies address the treatment and protection afforded to the attorney-client privilege and work product doctrine. The most important difference between the two policies is that the SEC policy continues to permit staff members to seek waivers of the attorney-client privilege and work product protection.[218] The SEC's 2012 Enforcement Manual states that Commission "staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director or Deputy Director [of the Division of Enforcement]."[219] The 2012 Manual also provides that a decision to allow staff to request a privilege waiver "should be reviewed initially with the Assistant [Director of the Division of Enforcement] supervising the matter and that review should involve more senior members of management as appropriate before being presented to the Director or Deputy Director."[220] Thus the SEC's corporate cooperation policy clearly contemplates asking companies for privilege waivers in at least some cases. Moreover, as noted above, the SEC policy also permits staff to ask for notes and memoranda prepared by attorneys conducting an internal investigation so long as the staff first obtains the appropriate approval.[221] The latter kind of waiver request is particularly problematic, as it may compromise the corporation's ability to assert privilege for communications with its current counsel in ongoing private civil litigation or other proceedings involving the same underlying conduct as the SEC's investigation.[222]

In short, the SEC's current corporate cooperation policy, as set forth in the 2012 Manual, continues to permit investigative staff to request privilege waivers, so long as they first obtain approvals from high-level staff in the Division of Enforcement. Consequently, the 2012 Enforcement Manual provides corporations with procedural protections against coerced waiver requests but, unlike current DOJ policy,[223]

does not expressly prohibit waiver requests. In this regard, the current SEC policy and the procedural requirements that Commission staff must follow prior to requesting waivers resemble more closely the short-lived policy that the DOJ adopted in the 2006 McNulty Memorandum[224] but largely abandoned in 2008[225] with the issuance of the Filip Guidelines.[226]

Unlike the 2012 Enforcement Manual, the Filip Guidelines do not expressly authorize waiver requests in any situations. Although some commentators may assert that the Filip Guidelines allow waiver requests in limited situations,[227] the Filip Guidelines do not provide any textual authorization for DOJ prosecutors to request privilege waivers, or to seek authorization from more senior DOJ officials to request waivers.[228] Instead, the Filip Guidelines consistently emphasizes the importance of DOJ prosecutors obtaining the relevant facts known by the corporation, "*not* whether the corporation discloses attorney-client or work product materials."[229] Although the policy does provide that "prosecutors may request relevant factual information" gathered during the course of an internal investigation conducted by corporate counsel,[230] the Filip Guidelines are very clear that such efforts to obtain factual information should not take the form of requests for privilege waivers.[231]

The Filip Guidelines also explicitly prohibit prosecutors from requesting waivers of communications between corporate officials or agents and the corporation's counsel that are "independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice."[232] Specifically, the Filip Guidelines state that "a corporation need not disclose and prosecutors *may not* request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit."[233]

Taken together, these important points demonstrate that there is a major policy difference between the 2012 Enforcement Manual and the Filip Guidelines: the DOJ now prohibits requests for waiver of attorney-client privilege and work product protections, but the SEC continues to allow its staff to request waivers if certain procedural requirements are followed.

V. Conclusion: Privilege Waivers are Unnecessary and the SEC Should Modify Its Corporate Cooperation Policy to Comport with the DOJ Policy

As this author observed ten years ago, "it is possible, and even probable in most cases, for a party under investigation to cooperate fully with the government and provide investigators with all relevant underlying factual information without waiving privileges."[234] With the adoption of the Filip Guidelines the Department of Justice has es-

sentially acknowledged, albeit belatedly and grudgingly, this basic point. DOJ's abandonment of its initial Holder/Thompson/McNulty "waiver-based" approach to corporate cooperation not only is good policy, it also reflects a better application of attorney-client privilege and work product doctrine law.

The Holder and Thompson memoranda's focus on waivers of privilege rather than a corporation's willingness to provide "the relevant facts of which it has knowledge"[235] created a great deal of unnecessary confusion regarding attorney-client privilege and work product doctrine protections. Much of the confusion stemmed from the provisions in those memoranda that authorized prosecutors to seek waivers, while also indicating that "[the] waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue."[236] This confusion was exacerbated when the McNulty Memorandum authorized prosecutors to request that corporations "waive the attorney-client or work product protections for Category I information," which was purely factual information.[237] This underlying assumption that providing purely factual information required a waiver of the attorney-client privilege or work product doctrine protection was mistaken and reflected a misconception of the applicable legal principles.

A brief review of the key principles underpinning the attorney-client privilege and the work product doctrine is sufficient to expose the fundamental misconception of privilege law that ultimately led to the demise of the Holder/Thompson/McNulty "waiver-based" approach to corporate cooperation. Although the attorney-client privilege and work product doctrine are often conflated or confused, "[t]he work product doctrine is an independent source of immunity from discovery, separate and distinct from the attorney-client privilege."[238] As a result, a "waiver of the attorney-client privilege does not necessarily mean that the protection afforded by the work product doctrine is also breached."[239] Moreover, "[t]he range of interests protected by the work product doctrine is broader than the interests served by the attorney-client privilege . . .."[240] Thus, the attorney-client privilege seeks to promote complete and accurate communications, while the work product doctrine seeks to ensure effective trial preparation by counsel.[241] Most important, disclosure of purely factual information does not necessarily constitute a waiver of the protections provided by either of the doctrines.

As to the attorney-client privilege, it has long been settled law that the privilege does not protect underlying factual information.[242] Instead, as the Supreme Court explained in 1981, "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney

. . . ."[243] Because under *Upjohn* the underlying factual information provided to an attorney during an internal investigation is not shielded from disclosure by the attorney-client privilege, a corporation never needed to waive the attorney-client privilege in order to provide investigators with factual information that had been obtained in that manner.[244] Consequently, the Holder/Thompson/McNulty "waiver-based" approach to corporate cooperation was both unnecessary and created confusion as to the scope and role of the attorney-client privilege in internal investigations. Had the Justice Department more carefully articulated its focus in evaluating cooperation as whether the corporation had produced "the relevant facts of which it had knowledge,"[245] as opposed to whether the corporation had waived its privileges,[246] a great deal of confusion and contentious debate could have been avoided.[247]

As to the work product doctrine, it is generally recognized that the doctrine does not protect purely factual information contained in an attorney's work product.[248] For example, the United States Court of Appeals for the Tenth Circuit has stated that the work product doctrine "does not protect facts concerning the creation of the work product or facts contained within work product."[249] In other words, as one federal judge succinctly explained, the work product doctrine "*does not protect factual information that a lawyer obtains when investigating a case*."[250] These authorities demonstrate that the attorney work product doctrine does not protect the underlying factual information contained in an attorney's work product.[251] Thus, the Justice Department did not need to focus on "waiver" of work product doctrine protection when evaluating corporate cooperation. The right approach would have been to focus on whether all relevant underlying factual information of which the corporation had knowledge was provided, without any "waiver" requirement — the approach that ultimately was adopted by the Department of Justice in the Filip Guidelines.

* * *

Over the past decade, both the Department of Justice and the Securities and Exchange Commission have modified their policies that provide corporations with credit for cooperating with government investigations. Responding to criticisms from the bar and Congress, these policy changes have focused on providing a greater level of protection for the attorney-client privilege and the attorney work product doctrine, culminating in the "no waiver requests" approach of the Filip Guidelines. Although the SEC has publicly released three versions of its Enforcement Manual (in 2008, 2010, and 2012) since the DOJ adopted the Filip Guidelines in 2008, the Commission's current policy affords less protection for privileged communications and attorney work-product than the current Department of Justice policy because it continues to permit waiver requests.

This inconsistency is both bad policy and has the potential to create serious private litigation waiver problems for any company that is or could become the subject of both an SEC enforcement investigation and a DOJ criminal investigation. Accordingly, to ensure that the attorney-client privilege and work product doctrine are provided consistent protections in governmental investigations by the two primary regulators of corporate misconduct, and to avoid subjecting companies under investigations to two inconsistent cooperation policies, the SEC should revise its corporate cooperation policy to comport with that of the Department of Justice. The most important change, which would require only minor modification of the current 2012 Enforcement Manual, is removal of the two provisions in section 4.3 that authorize Commission staff investigators to seek approval of their superiors to request privilege waivers.[252] Moreover, it appears that this minor policy change would not have a significant impact on the Commission's enforcement program, in light of the fact that the Commission did not obtain privilege waivers in the Goldman Sachs CDO case or other recent high-profile enforcement actions.[253]

With this relatively minor modification of the Commission's Enforcement Manual, both the Department of Justice and the Securities and Exchange Commission would have congruent policies that would appropriately focus the cooperation analysis on a corporation's willingness to provide "the relevant facts of which it has knowledge,"[254] as opposed to the current SEC policy that continues to present the potential for an unnecessary dispute over whether a corporation will acquiesce to a request "to waive the attorney-client privilege or work product protection."[255]

NOTES:

[1]*See Richman v. Goldman Sachs Group, Inc., 10 Civ. 3461 (PAC) (S.D.N.Y. June 21, 2012)*.

[2]*See id*. at 14–15.

[3]*See id*. at 14–21 and 27. The court did dismiss the plaintiffs' claims that were based on Goldman's failure to disclose to its shareholders that it had received a "Wells notice" from the SEC. *See id.* at 6–14 and 27.

[4]*See id*. at 17 (citing *S.E.C. v. Goldman Sachs & Co.*, 790 F.Supp.2d 147, 162–63 (S.D.N.Y. 2011)).

[5]*See generally* Peter J. Henning, "The Litigation That Haunts Goldman Sachs," The New York Times, June 25, 2012 (observing that "[o]ne reason companies agree to settle cases with the S.E.C. is to avoid any finding of wrongdoing that can be used by investors in private lawsuits" and that the court's "reference to Goldman's statements in the settlement shows that companies might not get a free pass if the S.E.C. is able to extract at least some small admission of misconduct when it concludes a case").

[6]*See* Goldman Sachs to Pay Record $550 Million to Settle Charges Related to Subprime Mortage CDO, SEC Press Release 2010–123 (July 15, 2010); *see also* Securities and Exchange Commission v. Goldman, Sachs & Co. and Fabrice Tourre, Litigation Release No. 21592 (July 15, 2010).

[7]SEC Press Release 2010–123 (July 15, 2010).

[8]*Id.*

[9]*See, e.g.,* Securities and Exchange Commission v. Carter's, Inc. Non-Prosecution Agreement, available at http://www.sec.gov/litigation/cooperation/2010/carters1210.pdf (". . . continuing cooperation of each person . . . shall include, but not limited to (a) producing all *non-privileged* documents and other materials as requested by the Division's staff . . .") (emphasis added). The Carter's case marked the first use of a "non-prosecution agreement" pursuant to the Division of Enforcement's new "cooperation initiative" that was announced in January 2010. *See* "SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations," Jan. 13, 2010, available at http://www.sec.gov/news/press/2010/2010-6.htm; *see generally* Morgan Lewis Client Memorandum, SEC Enters Into First Nonprosecution Agreement as Part of Its New Cooperation Initiative," Dec. 22, 2010, available at http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/5f83313e-bd4f-40a9-a1d2-095d37e164a6.

[10]*See* Securities and Exchange Commission v. Goldman, Sachs & Co. and Fabrice Tourre, No. 10-CV-3229 (BSJ), Consent of Goldman, Sachs & Co. at Para. 17 (July 14, 2010) ("In connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party, Defendant [Goldman, Sachs & Co.] . . . (iii) will produce *non-privileged* documents and other materials as requested by the Commission staff . . ..") (emphasis added). *See also* Securities and Exchange Commission v. Goldman, Sachs & Co. and Fabrice Tourre, No. 10-CV-3229 (BSJ), Final Judgment as to Goldman, Sachs & Co. [proposed] at IV ("Defendant's cooperation shall include those obligations set forth in Paragraph 17 of the Consent, including, but not limited to, producing *non-privileged* documents and other materials to the Commission as requested by the staff . . ..") (emphasis added).

[11]*See generally* notes 1–4 *supra*; *see also* Peter J. Henning, note 5 *supra* ("Rejecting Goldman's motion to dismiss the complaint means that the plaintiffs' lawyers will get to start digging through the firm for evidence of misconduct.").

[12]*See* Securities and Exchange Commission v. Goldman, Sachs & Co. and Fabrice Tourre, No. 10-CV-3229 (BSJ), Final Judgment as to Goldman, Sachs & Co. [proposed] at II (defining a "Related Investor Action" for purposes of the settlement terms with the SEC). *See generally* Lance Cole, *Corporate Criminal Liability in the 21st Century: A New Era?*, 45 S. TEX. L. REV. 147, 152 (2003) ("Because of the breadth of the waiver doctrine, a corporate client that waives privileges for advice and opinion work-product provided in an ongoing investigation is likely to lose the benefits of a confidential attorney-client relationship for all litigation and regulatory proceedings arising out of or related to that investigation."); *see also* Gideon Mark and Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 STAN. J.L BUS & FIN. 1, 17–18 (2007) (discussing the consequences of waiver in Department of Justice and SEC proceedings).

[13]*See infra* Part III. *See also* Sec. & Exch. Comm'n Div. of Enforcement, Enforcement Manual (Jan. 13, 2010) [hereinafter 2010 Enforcement Manual], at § 4.3; Sec. & Exch. Comm'n Div. of Enforcement, Enforcement Manual (Nov. 1, 2012) [hereinafter 2012 Enforcement Manual], at § 4.3.

[14]*See infra* Part II. *See also* Filip Guidelines, *infra* note 99, at 9-28.720 (". . .

prosecutors should not ask for such waivers and are directed not to do so").

[15]SEC reporting companies have a "duty to correct" any statements that were materially false or inaccurate when made. *See generally*, Marc I. Steinberg, Securities Regulation: Liabilities and Remedies 2.03[3] (Law Journal Press 2002) (collecting cases). A reporting company also may have a "duty to update" when a prior disclosure, although accurate when made, remains "alive" in the marketplace and becomes materially misleading. *See generally id.* at 2.02; *see also* Alan J. Berkeley, Fundamentals of Securities Law: Some FAQS And Answers About Corporate Disclosure, ALI-ABA Course of Study, May 13–14 2010 ("What is the difference between the 'duty to correct' and the 'duty to update'? Generally, if a company issues a statement that was incorrect when made, the company is obligated to make a public correction as soon as it becomes aware of the error, and particularly if the market is still relying on the earlier statement. Any duty to update is less clearly defined. Suffice it to say that, absent unusual factors, there is no duty to update unless the company or the business context somehow suggests that the company will do so. The Private Securities Litigation Reform Act specifically rejects the obligation to update forward-looking statements, although this provision is regarded as of limited value. Generally, it is best to specifically disclaim a duty to update."). Applying these general principles to the SEC's cooperation policy, the Commission arguably has either a duty to correct or a duty to update its corporate cooperation policy to reflect its current practices and to bring its policy into conformity with current Department of Justice policy. *See generally infra* Parts III, IV, and V.

[16]*See generally*, Statement of the Coalition to Preserve the Attorney-Client Privilege Re: H.R. 3013, "The Attorney-Client Privilege Protection Act of 2007," Nov. 13, 2007, *available at* http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=15925; Statement of the American Bar Association to the Committee on the Judiciary of the United States Senate concerning its hearing on "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum," Sept. 18, 2007, *available at* http://www.abanet.org/poladv/priorities/privilegewaiver/20070918__mcnulty.pdf; Statement of Karen J, Mathis, President of the American Bar Association, to the Committee on Judiciary of the United States Senate concerning its hearing on "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations, "Sept. 12, 2007, *available at* http://lawprofessors.typepad.com/whitecollarcrime__blog/files/attyclientprivissueabatestimonytosenjudcommkarenmathissept122006.pdf. *See also* Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 229, 243 (2009); Keith Paul Bishop, *The McNulty Memorandum — Continuing the Disappointment*, 10 CHAP. L. REV. 729, 730 (2007); Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469, 543, 564 (2003); Rebecca C.E. McFadyen, *The Thompson Memo: Its Predecessors, Its Successor, and Its Effect on Corporate Attorney-Client Privilege*, 8 J. BUS. & SEC. L. 23, 51 (2007); Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 47 (2008); David M. Zornow & Keith D. Krakaur, On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations, 37 AM. CRIM. L. REV. 147 (2000). *But see* Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No"*, 45 AM. CRIM. L. REV. 1237, 1240 (2008); Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 597 (2004).

[17]Professor Julie R. O'Sullivan has posited that the extraordinarily intense and

widespread opposition to the DOJ's privilege waiver policy was because the policy represented the "last straw" and a "tipping point" in a paradigm shift from an adversarial system of criminal justice in the corporate context to a system that would effectively "deputize" corporate defense counsel to create a "crime-fighting partnership" between prosecutors and corporate counsel. *See* Julie R. O'Sullivan, *The Last Straw: The Department of Justice's Privilege Waiver Policy And the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329 (2008). Professor O'Sullivan concludes that "regardless of how one conceptualizes an organizational defendant, the logic of our system would seem to demand that corporations be accorded the same process as individuals" and that she "has heard no convincing rationale for a distinction in this regard." *Id*. at 359.

[18]*See, e.g.,* Katrice Bridges Copeland, *Preserving the Corporate Attorney-Client Privilege*, 78 U. CIN. L. REV. 1199, 1211–34 (2010); O'Sullivan, *supra* note 16; McFadyen, *supra* note 16; Gideon Mark and Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 STAN. J.L BUS & FIN. 1, 2–14 (2007).

[19]*See* Memorandum from Deputy Attorney General Eric H. Holder, Jr. to All Component Heads and United States Attorneys on Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memorandum].

[20]*See id*. at Part II.

[21]*Id*. at Introduction.

[22]*Id*. at Part II.A.4. For a succinct analysis of what the defense bar perceived to be the major flaws in the Holder Memorandum, and the subsequent DOJ policy revisions that "moderated the more draconian aspects" of the policy, see Harvey Silverglate, Remember the Memo, The National Law Journal (Dec. 8, 2009), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426473951.

[23]Holder Memorandum, *supra* note 19, at Part VI.A.

[24]*Id*. at Part VI.B.

[25]*Id*.

[26]*Id*.

[27]*Id*.

[28]*Id*. at n.2.

[29]*See id*.

[30]Keith Paul Bishop, *The McNulty Memorandum — Continuing the Disappointment*, 10 CHAP. L. REV. 729, 730 (2007).

[31]*See* David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 154 (2000).

[32]*See* Cole, *supra* note 16, at 545; *see also* Don R. Berthiaume, *Just the Facts: Solving the Corporate Privilege Waiver Dilemma*, 46 NO. 1 CRIM. L. BULLETIN ART 1 (2010) (discussing how a corporation can provide "just the facts" without waiving the attorney-client privilege and work product protections); Sullivan & Cromwell, LLP, Second Circuit Affirms SDNY Ruling that Prosecutors Denied Defendants' Sixth Amendment Rights; DOJ Issues New Principles for Prosecution of Business Organizations (Sep. 3, 2008), *available at* http://www.sullcrom.com/files/Publication/1b2df867-3103-4f45-a295-369e41c0fb58/Presentation/PublicationAttachment/d51e9dc5-b007-44bc-ab3f-d35ca7ec9ff5/SC__Publication__Criminal__Defense__Investigations__9-3-08.pdf (discussing the distinction between "privileged attorney-client communications and

work product on the one hand," and " 'facts known to the corporation about the putative criminal misconduct,' on the other hand") [hereinafter "Sullivan & Cromwell memorandum"].

[33]*See id*. at 544–45; Zornow & Krakaur, *supra* note 16, at 155 ("The Memorandum leaves no doubt that the official policy of the Justice Department is to obtain waivers of the corporate attorney-client and work product privileges where, in the government's view, these privileges might shield evidence relevant to a criminal investigation.").

[34]*See generally* Cole, *supra* note 16, at 547–48 (summarizing early criticisms of the Holder memorandum).

[35]*See* Ball & Bolia, *supra* note 16, at 243.

[36]*See id*.

[37]*See id*. at 244.

[38]Cole, *supra* note 16, at 547.

[39]*See infra* Part III.

[40]*See* Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum], *available at* http://www.justice.gov/dag/cftf/corporate__guidelines.htm.

[41]*See* Silverglate, *supra* note 22; Copeland, *supra* note 18, at 1213.

[42]Berthiaume, *supra* note 32.

[43]Thompson Memorandum, *supra* note 40, at Part II.A.4.

[44]*Compare* Thompson Memorandum, *supra* note 40, at Part II.A.4, *with* Holder Memorandum, *supra* note 19, at Part II.A.4. *See also* Copeland, *supra* note 18, at 1213 (asserting that these changes in wording "were the first signals that the "DOJ intended to afford the attorney-client and work product privileges less respect in the course of their investigations than they had in the past").

[45]Thompson Memorandum, *supra* note 40, at Part VI.A.

[46]*Compare* Thompson Memorandum, *supra* note 40, at Part VI.B, *with* Holder Memorandum, *supra* note 19, at Part VI.B.

[47]*Compare* Thompson Memorandum, *supra* note 40, at n.3, *with* Holder Memorandum, *supra* note 19, at n.2.

[48]*See* The Thompson Memorandum's Effect on the Right to Counsel: Hearing before the S. Comm. on the Judiciary, 109th Cong. 6 (2006) (statement of Karen J. Mathis, President, Am. Bar Ass'n), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109__senate__hearings&docid=f:34117.pdf (noting that absent a waiver, the government's threat to label companies uncooperative would have a profound effect on charging and sentencing decisions, as well as on the companies' public image, stock price and credit worthiness); Copeland, *supra* note 18 ("The Corporate Fraud Task Force and the implementation of the Thompson Memorandum dramatically changed the atmosphere of internal investigations."). *But see* O'Sullivan, *supra* note 16, at 1240 ("Mr. Holder's memo was updated in 2003 by then-Deputy Attorney General Larry Thompson, in major part to emphasize that prosecutors ought to scrutinize carefully the authenticity of a corporation's cooperation, but with no change to the substance of the [Holder Memorandum] policy.").

[49]*See, e.g.,* Berthiaume, *supra* note 42; *Developments in White Collar Criminal*

Law and the "Culture of Waiver", 14 BERKELEY J. CRIM. L. 199, 207 (2009) ("Because the Thompson Memorandum required federal prosecutors to take each of these factors into consideration when deciding whether to indict a business organization, it placed pressure on companies to waive attorney-client and work product protection and to cooperate in the investigation of its agents.") [hereinafter "*Developments*"].

[50]*See* Lisa L. Richter, *The Power of Privilege and the Attorney-Client Privilege Protection Act: How Corporate America Has Everyone Excited About the Emperor's New Clothes*, 43 WAKE FOREST L. REV. 979, 993 (2008).

[51]*See id*.

[52]*See id*.

[53]*See* Ball & Bolia, *supra* note 16, at 248. *See also* Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1240 (2006) (asserting that "the Department of Justice has embarked on a path in which it essentially deputizes corporations to help 'catch the crooks' ").

[54]O'Sullivan, *supra* note 16, at 1240.

[55]*See* Buchanan, *supra* note 16, at 597.

[56]*See id*. at 598.

[57]*Id*. at 603.

[58]*Id*.

[59]*Id*. at 610.

[60]*See* Memorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. to Heads of Department Components and United States Attorneys on Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 1, 2005) [hereinafter McCallum Memorandum], *available at* http://www.abanet.org/poladv/priorities/privilegewaiver/2005oct21_privwaiv_dojmccallum.pdf.

[61]*Id*.

[62]*Id*.

[63]*See* Mark & Pearson, *supra* note 18, at 11.

[64]*See* Memorandum from Deputy Attorney General Paul J. McNulty to Heads of Department Components and United States Attorneys on Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memorandum], *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf. The final paragraph of the cover memorandum to the McNulty Memorandum explicitly stated that it "supercede[d] and replace[d] guidance contained in" the prior Holder, Thompson, and McCallum memoranda. *See id.*

[65]*See* McNulty Memorandum, *supra* note 64, at Introduction.

[66]*See id*. at Part III.A.

[67]*Id*. at Part III.A.4.

[68]*Compare* McNulty Memorandum, *supra* note 64, at Part III.A.4, *with* Thompson Memorandum, *supra* note 40, at Part II.A.4, *and* Holder Memorandum, *supra* note 19, at Part II.A.4.

[69]*See* McNulty Memorandum, *supra* note 43, at Part VII.

[70]*See id*. at Part VII.A.

[71]*See id*. at Part VII.B.2.

[72]*See id*.

[73]*See id. See also* Valerie Figueredo, *Misadventures into Corporate Prosecutions after the Holder, Thompson, and McNulty Memoranda*, 33 U. DAYTON L. REV. 1, 31 (2007) (noting that the McNulty Memorandum, "unlike its predecessors, a corporation's refusal to provide Category II information may not be used by a prosecutor against the corporation").

[74]*Id*.

[75]*Id*.

[76]*Id.* The United States Attorney was required to provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. *See id*.

[77]*Id*. "Examples of Category I information could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel." *Id.*

[78]*See id*.

[79]*Id*.

[80]*Id.*

[81]*Id.*

[82]*Id.*

[83]*Id*.

[84]*Id*.

[85]*See* Figueredo, *supra* note 73, at 31 (noting that the McNulty Memorandum is "unlike its predecessors" because it prohibits prosecutors from using a corporation's refusal to acquiesce to a request for a Category II waiver against the corporation in making a charging decision).

[86]*See* McNulty Memorandum, *supra* note 64, at Part VII.B.2.

[87]*See id*. *See also* Figueredo, *supra* note73, at 31.

[88]*See* McNulty Memorandum, *supra* note 64, at Part VII.B.2. The memorandum did require that all such "voluntary" waivers be reported to the supervising U.S. Attorney or the Assistant Attorney General in the Division handling the investigation, and required that records be kept of all such "voluntary" waivers. *See id*. *See also* Ball & Bolia, *supra* note 16, at 256 (noting that under the McNulty Memorandum corporations might still perceive the same pressures to cooperate and waive privileges as under the Holder and Thompson memoranda).

[89]Ball & Bolia, *supra* note 16, at 256. *See also* O'Sullivan, *supra* note 16, at 1269 (stating that "[t]he defense bar reacted to this policy with a distinct lack enthusiasm"); Figueredo, supra note 73, at 31 (noting the McNulty Memorandum "goes no further to protect the privilege than its predecessors"); Ann Graham, New Memo Won't Ease Attorney-Client Privilege Concerns, LAW.com (Feb. 11, 2008), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202469642951; Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 364 (2008) (observing that the reaction of the bar to the McNulty Memorandum was generally nega-

tive); Richard Ben-Veniste and Raj De, The "McNulty Memo": A Missed Opportunity to Reverse Erosion of the Attorney-Client Privilege, Washington Legal Foundation Legal Backgrounder (Jan. 19, 2007), *available at* http://www.wlf.org/upload/1-19-07%20ben-veniste.pdf.

[90]*See* O'Sullivan, *supra* note 16, at 1268 (noting that the McNulty Memorandum "cabined prosecutorial decision-making in significant respects as compared with earlier iterations").

[91]*See* Seigel, *supra* note 16, at 47.

[92]*Id*.

[93]*See* Bishop, *supra* note 14, at 739.

[94]*See, e.g.*, Mark & Pearson, supra note 12, at 69; McFadyen, supra note 16, at 51.

[95]*See* Bishop, *supra* note 14, at 742; Mark & Pearson, *supra* note 12, at 73; Ball & Bolia, *supra* note 16, at 256.

[96]*See* Mark & Pearson, *supra* note 12, at 71.

[97]*See* McFadyen, *supra* note 16, at 51.

[98]*See* The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations, Statement of Karen J. Mathis, President of the American Bar Association, before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary of the United States House of Representatives, at 6 (Mar. 8, 2007), available at http://www.abanow.org/wordpress/wp-content/files_flutter/1267222559_20_1_1_7_Upload_File.pdf.

[99]*See* U.S. Dep'T Of Justice, U.S. Attorneys' Manual § 9-28.700, *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf [hereinafter "the Filip Guidelines"]; *see also* Copeland, *supra* note 18 (noting that "the DOJ made the corporate charging policy a part of the United States Attorneys' Manual rather than a freestanding directive.").

[100]Although the Filip Guidelines were implemented during the final year of the George W. Bush administration, the Obama Justice Department to date has not amended the Filip Guidelines policy, and the corporate cooperation provisions (as well as the other provisions of the Filip Guidelines) remain set forth in §§ 9-28.700, 9-28.710, and 9-28.720 of the current U.S. ATTORNEYS' MANUAL, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.700 [hereinafter the "current DOJ cooperation policy"].

[101]July 9, 2008 Letter from Deputy Attorney General Mark Filip to Senators Patrick J. Leahy and Arlen Specter of the United States Senate Committee on the Judiciary, at 2, *available at* http://www.gibsondunn.com/publications/documents/filipletter070908.pdf. As the letter itself suggests, the DOJ was perhaps more concerned with heading off the continuing threat of federal legislation that would impose even greater limits on the Department's access to corporate communications and documents protected by the attorney-client privilege or the attorney work product doctrine. *See, e.g.*, Copeland, *supra* note 18, at 1224–33 (discussing the proposed Attorney-Client Privilege Protection Act of 2006 and its successors, introduced by Senator Arlen Specter in response to the DOJ's privilege waiver policies); *see also* Figueredo, *supra* note 73, at 34 (describing the proposed Attorney-Client Privilege Protection Act of 2006 as "an attempt to reverse the course set by the Department of Justice in the Holder and Thompson Memoranda").

[102]*See id*. at § 9-28.300.

[103]*Compare* Filip Guidelines, *supra* note 99, at § 9-28.300, *with* McNulty Memorandum, *supra* note 64, at Part III.A.4.

[104]*Compare* Filip Guidelines, *supra* note 99, *with* McNulty Memorandum, *supra* note 64. *Cf.* Copeland, *supra* note 18, at 1233 ("Although the Filip Guidelines are an improvement over prior versions of the corporate charging guidelines, they still leave the corporate attorney-client privilege vulnerable.").

[105]Filip Guidelines, *supra* note 99, at § 9-28.700.

[106]*See id*. at § 9-28.710.

[107]*See id.*

[108]*See id.*

[109]*Id*. at § 9-28.710.

[110]*Id*. (emphasis added).

[111]*See* Cole, *supra* note 16, at 591–592 (2003) (advocating cooperation policies "based upon factual disclosure, rather than waiver of privileges").

[112]*Cf.* Buchanan, *supra* note 16, at 596–97 (discussing providing "underlying facts" and observing that in most instances doing so "intrusion into counsel's mental processes would be minimal").

[113]*See* Copeland, *supra* note 18, at 1224–33; *see also* Figueredo, *supra* note 73, at 28.

[114]*See* Filip Guidelines, *supra* note 99, at § 9-28.720.

[115]*Id*.

[116]*See id.* at § 9-28.720(a). *Cf.* Cole, *Revoking Our Privileges*, at 547 ("[The Holder Memorandum] inappropriately focuses on obtaining privilege waivers in all cases, rather than obtaining relevant underlying factual information, which is what government investigators should be seeking in the typical case and which usually can be obtained without requiring a waiver of privilege.").

[117]*Id*.

[118]*Id*. at n.3.

[119]*Id*.

[120]*See id*. at § 9-28.720(b).

[121]*Id*.

[122]*Id.* at (b)(i) and (b)(ii). *Cf.* Cole, *supra* note 16, at 500–07 (discussing the crime-fraud exception), 508–09 (discussing the reliance on advice of counsel defense), and 515 (asserting that using a "cooperation" policy to coerce privilege waivers was unnecessary because under established legal doctrines, such as the crime-fraud exception, the reliance on advice of counsel defense, and the law of waiver, "the government has adequate means at its disposal under existing law to guard against unwarranted assertions of privilege and to overcome its protections in appropriate cases").

[123]*See* Filip Guidelines, *supra* note 99, at § 9-28.720(b).

[124]*See id*. *See generally* Cole, *Revoking Our Privileges*, at 513–15 (asserting that under established exceptions to the work product doctrine "[i]f law enforcement officials have a substantial need for factual information and cannot obtain that information from other sources [sources other than opposing counsel's work product] without undue hardship, the present system allows them to obtain such information

from opposing counsel after making that showing to a court").

[125]*Id*. at § 9-28.1300. The nonbinding nature of the Filip Guidelines is not affected by the fact that they have been incorporated into the *United States Attorneys Manual*. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 1-1.100 ("The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice."). *See also* Copeland, *supra* note 18, at 1236 (noting that "the U.S. Attorneys' Manual is not enforceable in any court" and therefore "if a U.S. Attorney disregards the guidelines and demands that a corporation waive the attorney-client privilege, the corporation has no recourse").

[126]Berthiaume, *supra* note 32; *see also* Cindy A. Schipani, *The Future of the Attorney-Client Privilege in Corporate Criminal Investigations*, 34 DEL. J. CORP. L. 921, 953 (2009). As noted above, this evolution to an emphasis on "the facts" is consistent with the "fact-based" approach advocated by this writer in 2003, before the Holder Memorandum was amended, see *supra* notes 33 and 111, and accompanying text, and the analysis of former United States Attorney Mary Beth Buchanan in 2004, see *supra* notes 55–59 and 112, and accompanying text.

[127]*Developments*, *supra* note 49, at 211.

[128]*See* note 125 *supra* and accompanying text.

[129]Ball &. Bolia, *supra* note 16, at 259.

[130]*Id.* at 260. *Cf.* Sullivan & Cromwell Memorandum, *supra* note 32 ("The new [Filip] Principles may cause the SEC and other enforcement agencies to consider adopting parallel guidelines.").

[131]*Developments*, *supra* note 49, at 211.

[132]*See* Copeland, *supra* note 18, at 1249 ("Under the current policy, prosecutors are no longer authorized to demand that corporations waive the attorney-client privilege. But, prosecutors can request information that is most likely privileged and use the corporation's refusal to provide the information against the corporation so long as they characterize their request as seeking factual information.").

[133]*See* Cole, *supra* note 16, at 487–98 (summarizing "The Supreme Court's Recent Decisions Affirming the Importance of the Attorney-Client Privilege and the Work Product Doctrine"). *See also* Copeland, *supra* note 18, at 1238–48 (proposing a procedure for judicial oversight of DOJ charging decisions made pursuant to the Filip Guidelines).

[134]*See supra* Part II.A.

[135]*See, e.g., In re Bullington-Schas & Co., Inc., Exchange Act Release No. 17,832 (June 1, 1981)* (administrative proceeding against a registered broker-dealer, its president, and one of its salespersons for violating section 17(a) of the Securities Act of 1933 by failing to include in a municipal bond offering circular certain material information contained in unaudited financial statements reflecting "lower revenues and higher bad debt losses" than the pro forma financial statements that were included in the offering circular).

[136]*See id.*

[137]*Id.* (emphasis added). It should be noted, however, that the broker-dealer and the two associated individuals, as well as the issuer of the bonds involved, also were the subject of a related civil injunctive action in federal court, in which they were

permanently enjoined from further violations of section 17(a) of the Securities Act. *See SEC v. Calhoun County Medical Facility, Inc., et al., Civil Action No. WC-81-61-WK-P (N.D. Miss. 1981)*, Litigation Release No. 9366 (June 1, 1981). In another related proceeding, the Commission "determined, in the exercise of its prosecutorial discretion, not to institute an enforcement proceeding" against an attorney who, as counsel for the underwriter issued a false and misleading opinion letter (which was drafted for his signature by bond counsel) that "facilitated violations of the securities laws." *See* Exchange Act Release No. 17831 (June 1, 1981), "Attorney's Conduct in Issuing an Opinion Letter Without Conducting an Inquiry of Underlying Facts Failed to Comport with Applicable Standards of Conduct" (a "Report of Investigation" issued pursuant to section 21(a) of the Securities Exchange Act of 1934, which reports information to the public but does not bring enforcement proceedings against the subject of the report). The Commission's report on the attorney's conduct does not state whether or not the Commission's "exercise of prosecutorial discretion" in the matter was based upon the attorney's cooperation with the Commission's investigation.

[138]*See, e.g.,* In re Lazard Freres & Co., Exchange Act Release No. 39,388 (Dec. 3, 1997) ("In determining to accept the Offer, the Commission considered the remedial efforts promptly taken by Lazard Freres and the cooperation Lazard Freres afforded the Commission staff."); In re City of Syracuse, Exchange Act Release No. 39,149 (Sept. 30, 1997) ("In determining to accept the Offers, the Commission considered remedial acts promptly undertaken by the City and cooperation afforded to the Commission's staff."); In the Matter of M.D.C. Holdings, Inc., Exchange Act Release No. 27,208, Fed. Sec. L. Rep. (CCH) ¶ 73,714 (Sept. 1, 1989) ("The Company's proactive response to the Commission's investigation and cooperation with the Commission's staff were taken into account in resolving this matter through the entry of this Order.")

[139]*See* William R. McLucas, Harry J. Weiss, Jolie F. Zimmerman & Mark M. Oh, Wilmer, Cutler & Pickering Securities Law Developments Newsletter (Nov. 20, 2001) ("The [Seaboard] Report may reflect the Commission's wish to align itself more closely with these [DOJ Holder Memorandum] guidelines."), *available at* http://www.wilmerhale.com/files/Publication/585192ee-6696-4ca4-b8f7-86b2bd376c8b/Presentation/PublicationAttachment/0371d0ed-fa90-4213-97fd-f55e62e94d8e/ACFC55.pdf; *cf.* Mark J. Stein and Joshua Levine, The Filip Memorandum: Does It Go Far Enough?, at 2 (Sept. 10, 2008) (noting that after the DOJ issued the Holder Memorandum the SEC "followed suit" with the Seaboard Report), *available at* http://w.stblaw.com/google__file.cfm?TrackedFile=4B46116003DFF48682B3&TrackedFolder=585C1D235281AED996A07D5F9F9478AB5A90188899.

[140]*See* In the Matter of Gisela de Leon-Meredith, Exchange Act Release No. 44969, Fed. Sec. L. Rep. (CCH) ¶ 74,986 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/admin/34-44970.htm.

[141]*See id*.

[142]Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions Exchange Act Release No. 44,969 Fed. Sec. L. Rep. (CCH) ¶ 74,985 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm#P16__499 [hereinafter "Seaboard Report"].

[143]It is interesting to note that although the Commission's Report of Investigation is widely known as "the Seaboard Report," the name of Seaboard Corporation does not appear anywhere in the Commission's report (although it does appear in the accompanying enforcement proceeding against de Leon-Meredith, *see* note 140 *supra*). If Seaboard Corporation and its counsel negotiated to have the parent company's name

not included in the Report of Investigation in hopes of avoiding bad publicity, their efforts proved unsuccessful, as the report is now universally known as "the Seaboard Report."

[144]Seaboard Report, note 142 *supra*.

[145]For a recent example of a case in which it appears that the Commission had little difficulty deciding not to charge a corporation that employed a "rogue employee" who violated the federal securities laws, see "SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud," SEC New Release 2012–78, April 25, 2012 (describing Foreign Corrupt Practices Act violations by a Morgan Stanley managing director in China and stating "Morgan Stanley, which is not charged in this matter, cooperated with the SEC's inquiry and conducted a thorough internal investigation to determine the scope of the improper payments and other misconduct involved"), available at http://www.sec.gov/news/press/2012/2012–78.htm.

[146]For a more in-depth analysis of this aspect of the Seaboard Report, see Cole, *supra* note 16, at notes 423 and 424.

[147]Seaboard Report, note 142 *supra*.

[148]*Id.*

[149]*See id*.

[150]*Id*.

[151]"Third, *we do not limit ourselves to the criteria we discuss below*. By definition, enforcement judgments are just that — judgments. Our failure to mention a specific criterion in one context does not preclude us from relying on that criterion in another. Further, the fact that a company has satisfied all the criteria we list below will not foreclose us from bringing enforcement proceedings that we believe are necessary or appropriate, for the benefit of investors." Seaboard Report, *supra* note 142 (emphasis added).

[152]*Id*.

[153]*Id*.

[154]*See* Holder Memorandum, *supra* note 19, at Part VI.A.

[155]*See* Seaboard Report, note 142 *supra*, at n. 3.

[156]*See* Seaboard Report, note 142 *supra*, at item 11.

[157]*Cf.* Cole, *supra* note 16, at 569 (arguing that the language of item 11 of the Seaboard Report "neither emphasizes waiving privileges nor implies that doing so is necessary to obtain credit for cooperation" and that the language of item 11 "appropriately focuses on voluntary disclosure of all relevant factual information"); Rept. of the Am. Coll. Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 319 (2003) ("It is not inconsistent with preserving the attorney-client privilege and work product protections for a company to provide information and documents to aid the government, since the privilege goes to the specific communications with the client and not necessarily to the information and documents obtained during the course of an internal investigation."). *See also* Part V *infra*.

[158]Seaboard Report, note 142 *supra*, at n. 3.

[159]*See* Part II.D. *supra*.

[160]*See* McNulty Memorandum, *supra* note 64, at Introduction.

[161]*See supra* notes 126–27 and accompanying text.

[162]*See* Cole, *supra* note 16, at n. 435 (collecting authorities).

[163]*See* Sec. & Exch. Comm'n Div. of Enforcement, Enforcement Manual (Oct. 6, 2008) [hereinafter 2008 Enforcement Manual]. *See also* Broc Romanek, "The 'SEC Enforcement Manual,' " The Corporatecounsel.Net Blog (Oct. 13, 2008) ("I'm not sure why the staff made it public, but I'm glad they did."). SEC Commissioner Paul Atkins suggested in a February 2008 speech that the Commission should make the Enforcement Manual public. *See* Paul Atkins, Remarks to the "SEC Speaks in 2008" Program of the Practising Law Institute (February 8, 2008) (available at http://www.sec.gov/news/speech/2008/spch020808psa.htm).

[164]*See supra* Part II.B-E.

[165]*See* 2008 Enforcement Manual, *supra* note 163, at § 4.1.

[166]*See id*. at § 4.1.1. Section 4.1.2 of the 2008 Manual provided a similar summary for the attorney work product doctrine. *See id*. at § 4.1.2.

[167]*See id*. at § 4.3.

[168]*See id*.

[169]*Id*. (emphasis added).

[170]*See id*.

[171]*See id*.

[172]*See id*.

[173]*Id*. (emphasis added).

[174]*Id*.

[175]*See supra* Part II.D-E.

[176]*See* Sec. & Exch. Comm'n Div. of Enforcement, Enforcement Manual (Jan. 13, 2010) [hereinafter 2010 Enforcement Manual].

[177]*See supra* Parts II.E, III.B.

[178]*Compare* 2010 Enforcement Manual, *supra* note 176, *with* 2008 Enforcement Manual, *supra* note 163.

[179]2010 Enforcement Manual, *supra* note 135, at § 4.3. The 2010 Enforcement Manual also deleted two paragraphs (the second and third paragraphs of section 4.3 of the 2008 Enforcement Manual) that discussed voluntary waivers (the second paragraph) and the fact that even when employees and witnesses are interviewed by attorneys during the course of an internal investigation, the "underlying factual information disclosed by the witness during the interviews is not privileged" (third paragraph). While the deletion of these paragraphs might suggest an effort to avoid any suggestion of "coerced" voluntary waivers, the 2010 Enforcement Manual retained language in section 4.3 (in the fourth paragraph) recognizing that "[a] party remains free to disclose privilege communications or documents if the party voluntarily chooses to do so."

[180]*Id*. (emphasis added). *But cf.* 2008 Enforcement Manual, *supra* note 163, at § 4.3 (indicating that review "may involve" more senior members).

[181]*See id*.

[182]*See id*.

[183]*Compare* 2010 Enforcement Manual, *supra* note 176, at § 4.3, *with* 2008

Enforcement Manual, *supra* note 163, at § 4.3.

[184]*Compare* 2010 Enforcement Manual, *supra* note 176, at § 6, *with* 2008 Enforcement Manual, *supra* note 163.

[185]*See* 2010 Enforcement Manual, *supra* note 176, at § 6.1.1. Section 6.1.1 states that "[t]here is a wide spectrum of tools available to the Commission and its staff for facilitating and rewarding cooperation by individuals, ranging from taking no enforcement action to pursuing reduced charges and sanctions . . .." *Id*. According to the 2010 Manual, the Commission will consider the following when determining whether the individual qualifies for cooperation credit: (1) the assistance provided by the individual, including whether the individual provided non-privileged information, (2) the importance of the underlying matter, (3) the interest in holding the individual accountable, and (4) the profile of the individual. *See id*.

[186]*See id.* at § 6.1.2.

[187]*Id*.

[188]*See id*.

[189]*See id*. at § 6.2.

[190]*See id*. at § 6.2.1.

[191]*See id*. at § 6.2.2.

[192]*See id*. at § 6.2.3.

[193]*See id*. at § 6.2.4.

[194]*Id*. at §§ 6.2.2-6.2.4.

[195]*See id*. at § 6.2.5.

[196]*Id*. at § 6.3.

[197]*Id*.

[198]*Id*.

[199]*See, e.g., SEC v. Gen. Re Corp.*, Litigation Release No. 21,384 (Jan. 20, 2010) [hereinafter Gen Re Release], *available at* http://www.sec.gov/litigation/litreleases/2010/lr21384.htm; *In the Matter of NATCO Group, Inc., Exchange Act Release No. 61,325 (Jan. 11, 2010)* [hereinafter NATCO Release], *available at* http://www.sec.gov/litigation/admin/2010/34-61325.pdf.

[200]*See* Gen Re Release, *supra* note 158.

[201]*Id*. The cooperation efforts that the SEC identified in its Gen Re Release included:

> Gen Re's comprehensive independent review of its operations conducted at the outset of the government's investigations the results of which were shared with investigators; Gen Re's substantial assistance in the government's successful civil and criminal actions against individuals involved in the scheme with AIG; and Gen Re's internal corporate reforms designed to strengthen oversight of its operations.

Id.

[202]*See* 2010 Enforcement Manual, *supra* note 135, at § 6.3.

[203]*See* note 201 *supra*; *see also* NATCO Release, *supra* note 199158 (indicating acceptance of the Offer of Settlement because of eleven measures taken by the company, none of which involved waiving privilege protections).

[204]*See* Sec. & Exch. Comm'n Div. of Enforcement, Enforcement Manual (Nov. 1,

2012) [hereinafter 2012 Enforcement Manual].

[205]*See supra* notes 110 and 118.

[206]*See supra* notes 9–11 and accompanying text and notes 200–203 and accompanying text.

[207]*Compare* 2010 Enforcement Manual at § 4.3, *with* 2012 Enforcement Manual, *supra* note 204, at section 4.3.

[208]*See* 2012 Enforcement Manual, *supra* note 204, at § 4.3.

[209]*Compare* 2010 Enforcement Manual at section 4.3, *with* 2012 Enforcement Manual, *supra* note 204, at § 4.3.

[210]*See* 2012 Enforcement Manual at § 4.3.

[211]*See supra* notes 157–161 and accompanying text.

[212]*See supra* notes 118–124 and accompanying text.

[213]*Compare* 2012 Enforcement Manual, *supra* note 204, at § 4.3 ("A party may choose to voluntarily disclose privileged communications or documents."), *with* Filip Guidelines, *supra* note 99, at § 9-28.710 ("Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so").

[214]*Compare* 2012 Enforcement Manual, *supra* note 204, at § 4.3 ("One important measure of cooperation is whether the party has timely disclosed facts relevant to the investigation."), *with* Filip Guidelines, *supra* note 99, at § 9-28.720 ("In short, so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation . . ..").

[215]*Compare* 2012 Enforcement Manual at § 4.3 ("timely disclosure of relevant facts"), *with* U.S. ATTORNEYS' MANUAL at § 9-28.720 ("Cooperation: Disclosing the Relevant Facts").

[216]*See supra* notes 111–113 and accompanying text.

[217]*See generally* Part II *supra*.

[218]*See supra* notes 208–212 and accompanying text.

[219]2012 Enforcement Manual, *supra* note 204, at § 4.3.

[220]*Id.*

[221]*See id*. ("[T]he staff may not request *without approval*, protected notes or memoranda generated by the attorney's interviews.") (emphasis added).

[222]*See generally* Cole, *supra* note 12, at 152 ("Because of the breadth of the waiver doctrine, a corporate client that waives privileges for advice and opinion work-product provided in an ongoing investigation is likely to lose the benefits of a confidential attorney-client relationship for all litigation and regulatory proceedings arising out of or related to that investigation."). S*ee also* Gideon Mark and Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 STAN. J.L BUS & FIN. 1, 17–18 (2007) (discussing the consequences of waiver in Department of Justice and SEC proceedings).

[223]*See supra* notes 121–124 and accompanying text.

[224]*See supra* Part II.D.

[225]*See* O'Sullivan, *supra* note 16, at 1242 (describing the "guidelines and approval requirements embedded in the McNulty policy" as "apparently obsolete" after the adoption of the Filip Guidelines).

[226]*See supra* Part II.E.

[227]*See* O'Sullivan, *supra* note 16, at 1242 and 1274–75 (asserting that the Filip Guidelines do not pohibit DOJ prosecutors from requesting waivers of factual work product and factual privileged communications).

[228]*See* Filip Guidelines, *supra* note 99, at § 9-28.720; *see also* Ball & Bolia, *supra* note 16, at 258 ("The Guidelines . . .. [B]ar prosecutors from: (1) requesting privilege waivers . . ..").

[229]Filip Guidelines, *supra* note 99, at § 9-28.720(a) (emphasis in original).

[230]*Id*. at n.3.

[231]*See id*.

[232]*See id*. at § 9-28.720(b).

[233]*Id*. (emphasis added). In this regard, it is also noteworthy that the McNulty Memorandum, even for purely factual information waivers, required that certain procedural steps be taken prior to the waiver request, *see* McNulty Memorandum, *supra* note 64, at Part VII.B.2, while Filip Guidelines do not contain similar protections, *see* Filip Guidelines, *supra* note 99, at § 9-28.700. *See also* Copeland, *supra* note 18. Professor Copeland states that "[s]o long as the prosecuting attorney asks only for the relevant facts and never specifically requests waiver of the attorney-client privilege, he is not in violation of the Guidelines." *Id*. She points out, however, that "if facts are understood . . . to include interview memoranda, factual chronologies created by counsel, and reports containing investigative facts, then providing those facts would probably lead to a full waiver of the attorney-client privilege." *Id*.

[234]Cole, *supra* note 12 at 158. *See also*, Cole, *supra* note 16, at 591 ("A requirement that all relevant factual information be disclosed (perhaps including factual attorney work product, but not opinion work product or attorney-client communications) is sufficient to meet the needs of law enforcement authorities in all cases except those in which there is credible evidence of attorney involvement in wrongdoing."); Am. Coll. Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 319 (2003) ("It is not inconsistent with preserving the attorney-client privilege and work product protections for a company to provide information and documents to aid the government, since the privilege goes to the specific communications with the client and not necessarily to the information and documents obtained during the course of an internal investigation.").

[235]*See* Filip Guidelines, *supra* note 99, at § 9-28.720.

[236]Thompson Memorandum, *supra* note 40, at n.3; Holder Memorandum, *supra* note 19, at n.2.

[237]McNulty Memorandum, *supra* note 64, at Part VII.B.2.

[238]*Handgards, Inc. v. Johnson & Johnson, Corp.*, 413 F. Supp. 926, 929 (N.D. Cal. 1976).

[239]*Id*.

[240]*In re: Commercial Fin. Serv., Inc.*, 247 B.R. 828, 846 (Bankr. N.D. Okla. 2000).

[241]*See Handgards*, 413 F. Supp. at 929–30.

[242]*See Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981); *see also Women's InterArt Ctr., Inc. v. N.Y. City Econ. Dev.*, 223 F.R.D. 156, 159 (S.D.N.Y. 2004) ("Under the attorney-client privilege, it is the communications between the client and the at-

torney itself that is protected, not the underlying facts."); *Freiermuth v. PPG Indus., Inc.*, 218 F.R.D. 694, 699 (N.D. Ala. 2003) ("[T]he attorney-client privilege does not protect the disclosure of the underlying facts by those who communicated with the attorney."); *United States v. Johnson*, 131 F. Supp. 2d 1088, 1097 (N.D. Iowa 2001) ("[T]he Supreme Court distinguished between disclosure of underlying facts and waiver of attorney-client privilege concerning communications.").

[243]*Upjohn*, 449 U.S. at 396.

[244]*See* Cole, *supra* note 16, at n.345.

[245]*See* Filip Guidelines, *supra* note 99, at § 9-28.720.

[246]*See supra* Parts II.A-D (discussing the "waiver-based" approach of the Holder/Thompson/McNulty memoranda).

[247]*Cf.* Cole, *supra* note 16, at 157–59 (comparing the SEC's approach in the Seaboard Report to the DOJ's Holder/Thompson approach).

[248]*See, e.g.*, *Equal Employment Opportunity Comm'n v. Jewel Food Stores, Inc.*, 231 F.R.D. 343, 346 (N.D. Ill. 2005); *Onwuka v. Fed. Express Corp.*, 178 F.R.D. 508, 513 (D. Minn. 1997); Dobbs v. Lamonts Apparel, Inc., 155 F.R.D. 650, 652 (D. Alaska 1994); *Duffy v. Wilson*, 289 S.W.3d 555, 559 (Ky. 2009); State v. Zwicker, 855 A.2d 415, 426 (N.H. 2004).

[249]*Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995).

[250]*Jewel Food Stores*, 231 F.R.D. at 346 (emphasis added).

[251]It must be noted that when the work product contains a combination of factual information and attorney legal impressions the issue of waiver becomes more complicated. In such a scenario, issues may arise as to whether production of the entire work product would result in a waiver or a selective waiver of certain material. One potential solution to this problem is to allow the attorney's impressions to be redacted from the work product and produce a redacted document that contains only the underlying factual information. *See, e.g., Soter v. Cowles Publ'g Co.*, 174 P.3d 60, 73–74 (Wash. 2007) (en banc) (listing cases that considered whether statements of the attorney's impressions should be redacted and then disclosed to the other party).

[252]*See supra* notes 207–209 and accompanying text.

[253]*See supra* notes 9–15 and accompanying text and notes 200–203 and accompanying text. One would hope that the Commission would not argue that it needs to retain the ability to request waivers from smaller companies when it has not done so in major cases such as Goldman Sachs, Carter's, and Gen Re. A "too big to waive" policy in Commission enforcement proceedings, which would have the effect of assisting larger companies in related private litigation while disadvantaging smaller companies, would seem to be especially difficult to defend, particularly in light of the many recent scandals involving large, publicly traded financial institutions.

[254]*See* Filip Guidelines, *supra* note 99, at § 9-28.720.

[255]*See* 2012 Enforcement Manual, *supra* note 204, at § 4.3.

PANEL ONE: WHISTLEBLOWER POLICY ISSUES

WHAT IS IT LIKE TO BE A WHISTLEBLOWER?

Stanley M. Brand, President and Founder, Brand Law Group, Washington, D.C. and Distinguished Fellow in Law and Government, Penn State Dickinson School of Law

WORKING WITH GOVERNMENT WHISTLEBLOWERS

Scott H. Amey, General Counsel, Project on Government Oversight, Washington, D.C.

Commentators: *Professors Lance Cole and Kathleen Clark*

“Whistleblowing in the 21st Century”

Penn State Dickinson School of Law

Carlisle, PA

March 20, 2014

Remarks of Stanley M. Brand

Distinguished Fellow in Law and Government

So, You Want to Be a Whistleblower?

"Whistleblowers" have occupied a mythical, and in some cases romantic, and for others, a scorned place in American legal history. I need only mention a few that have captivated our imaginations; some of them have been fodder for Hollywood feature films over the decades: Karen Silkwood, nuclear plant activist, Frank Serpico, New York City undercover corruption cop, Jeffrey Wigand, tobacco company scientist, to name a few. Others have populated the legal literature and been at the center of several infamous recent scandals: Sherron Watkins, an accounting executive at Enron; Ernie Fitzgerald, who exposed waste and abuse in the Air Force, C5A procurement and was targeted by the Nixon White House. While many of these whistleblowers were ultimately vindicated, they endured years of litigation, ostracism and even exile.

Whether you are representing a whistleblower or a company or government agency embroiled in disputes over whistleblower allegations, you will want to consider the impact of the decision by the whistleblower to embark on a path of disclosure.

In the case of government whistleblowers, because of myriad federal laws governing the disclosure of information and the ethical constraints on their conduct, they may wind up on the receiving end of disciplinary or legal actions targeting them in retaliation for their whistleblowing, despite legal prohibitions on retaliation. The same is true of corporate whistleblowers. Just last week, the *Washington Post* reported that the S.E.C. is investigating a large government contractor for forcing employees reporting fraud to sign confidentiality agreements preventing them disclosing the allegations even to the federal government. The agreement terms subject the employees to dismissal and suit for violating its terms. So the employees may not only be qui tam plaintiffs (who might recover part of any funds the government collects) but may also be defendants. How to fund their defense of such suits is an obvious consideration in their decision to come forward.

The media is also filled with stories about multi-million dollar awards to whistleblowers reinforcing the notion that there is always a silver lining at the end of the tortured legal journey. The *Wall Street Journal* reported last week that a former J.P. Morgan Chase employee who provided tips leading to the payment by the bank of $614 million over insurance home loans – received close to $64 million for his part in the case. Then there is Bradley Burkenfeld, a former UBS banker who was awarded $104 million by the IRS for his assistance in uncovering American citizens dodging their taxes (the bank paid $780 million for its part in the scheme). The only problem is he had to spend two and a half years in federal prison first for conspiring with a California developer to evade taxes. And last year a former assistant inspector general settled with the S.E.C. for $580,000, but only after being placed on administrative leave in May, 2012 while it investigated allegations of misconduct and suing in federal district court. And Robert Whitmore, a Department of Labor employee obtained an $820,000 settlement but first had to win a Court of Appeals for the Federal Circuit reversal of a Merit Systems Protection Board decision upholding his dismissal because it was

arbitrary, capricious and an abuse of discretion -- a process which took six years -- in retaliation for whistleblowing.

So, whether in the government or the private sector, in deciding to blow the whistle, be prepared for a long, expensive and grueling battle which may or may not end with remuneration, either because the statutory requirements haven't been met or the administrative process rules against your claims. Figuring out how to successfully navigate these shoals needs to be seriously considered before one embarks on the whistleblower course. And for every Bradley Burkenfeld or Robert Whitmore, there are dozens who never obtain either the financial or organizational vindication which they sought in deciding to blow the whistle.

Many of these people have also become entangled in congressional investigations that may run parallel to the agency or company internal investigations that spawn the disclosures of possible wrongdoing. Such congressional involvement may heighten public attention, and agency or company opprobrium, and complicate the whistleblowers ability to navigate difficult waters. This usually brings with it intense media attention which can exacerbate the whistleblowers vulnerability, when, for example, 60 Minutes pulled back on its commitment to air allegations brought to it by Jeffrey Wigand in response to threatened litigation by the tobacco companies.

This complicated matrix of considerations, strategies and legal exposure certainly counsels obtaining good legal advice -- a key ingredient in surviving the whistleblower juggernaut.

PROJECT ON GOVERNMENT OVERSIGHT

Exposing Corruption. Exploring Solutions.

PENNSTATE

The Dickinson School of Law

1855

Whistleblower Laws in the 21st Century:

Greater Rewards, Heightened Risks, Increased Complexity

March 20, 2014

Blowing the whistle without blowing their cover

Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government.

POGO was founded in 1981 by:

Pentagon Insiders

POGO oversees federal agencies, Congress, and government contractors. We made our mark in the 1980s by looking into Pentagon waste, fraud, and abuse, spotlighting overspending on toilet seats ($640), coffee makers ($7,600), and hammers ($436).

How POGO Works

POGO uses investigative journalism techniques to shed light on the government's activities, including working with whistleblowers and anonymous sources and accessing information obtained through the Freedom of Information Act (FOIA).

POGO's System

- **IDENTIFY** systemic corruption or other misconduct in the federal government
- Launch independent **INVESTIGATIONS**
- Work with whistleblowers, insiders, and other knowledgeable individuals to research and confirm **FINDINGS**
- Recommend common-sense solutions for **POSITIVE CHANGE**
- **INFORM PUBLIC** of findings
- Work with government officials to initiate systemic policy **IMPROVEMENTS**
- Continue to demand a more **ACCOUNTABLE** federal government

"Men must turn square corners when they deal with the Government."

United States Supreme Court Justice Oliver Wendell Holmes. *Rock Island, Arkansas & Louisiana R. Co. v. United States*, 254 U.S. 141, 143, 41 S. Ct. 55, 65 L. Ed. 188 (1920).

Anti-Corruption Entities

- Department of Justice (DOJ)
- Federal Bureau of Investigation (FBI)
- Securities and Exchange Commission (SEC)
- Federal Election Commission (FEC)
- Internal Revenue Service (IRS)
- Government Accountability Office (GAO)
- Inspectors General (IG)
- Federal Auditors (ex. COs, DCAA, DCMA)
- Office of Government Ethics
- Agency-level ethics offices
- Congress
- Courts
- Private entities (especially competitors)
- Non-governmental organizations (including watchdogs & unions)
- Media
- Taxpayers

Whistleblower Issues

Whistleblowers play a vital role in exposing corruption and other misconduct committed by the federal government and its contractors.

- Wasteful and Fraudulent Spending
- Poor Policy Decisions
- Corruption
- Security Vulnerabilities
- Public Safety and Health Concerns
- Constitutional Violations
- Environmental Concerns
- Securities Schemes
- Dangerous Products

Life of a Whistleblower

- Public
- Non-Public
- Anonymous

High Profile Cases

- Matthew Diaz – Former JAG officer who released the names of the prisoners at the detention camp
- Judith Miller – NYT reporter jailed for refusing to testify in the C.I.A. leak case
- Richard Barlow – Fired CIA officer who suggested that Congress should be informed about Pakistan's nuclear weapons program
- Thomas Tamm – Fired DOJ attorney who questioned and exposed warrantless national security wiretaps
- Gary Strader – Fired federal agent who reported that his colleagues had illegally used government airplanes to hunt mountain lions
- Edward Snowden – SAIC employee who exposed NSA phone and internet surveillance programs
- Bradley Manning – US Army soldier who was convicted and sentenced to 35 years for violating the Espionage Act for releasing classified documents to WikiLeaks.
- Thomas Drake – former NSA employee pleaded guilty to one misdemeanor count of "exceeding the authorized use of a computer" in an espionage case related to NSA intel gathering systems.

Working With Whistleblowers

- Don’t act as their attorney
- Don’t discount their information based on their motives
- Don’t think they are always protected
- Don’t forget FOIA
- Don’t ignore Congress (the Congressional Record)

Whistleblowing Pitfalls

- **Whistleblowers**
  - Intimidation
  - Demotion
  - Termination
  - Criminal Liability (Espionage Act)
  - Revocation of Security Clearance
  - Non-Disclosure Oaths
  - Weak Whistleblower Protection Laws (National Security Carve-Out for FBI, CIA, DIA, and NSA … Univ. of CA & Livermore)
  - State Secrets Privilege
  - Few Penalties for Officials who Retaliate against Whistleblowers

- **Media**
  - Releasing Protected Information (Classified, SBU, CUI, Proprietary)
  - Defamation
  - Privacy Suits

Weak Legal Protections

- 1st Amendment Protections
- State Reporter Shield Laws
- Labyrinth of Whistleblower Protection Laws
  - Anti-Gag Statutes
  - Civil Service Laws
  - Collective Bargaining Agreements
  - Whistleblower Protection Act (5 U.S.C. §§ 1201 note, 2302(b))
  - Military Whistleblower Protection Act (10 U.S.C. § 1034)
  - Defense Contractors (10 U.S.C. § 2409)
  - Environmental Statutes
  - False Claims Act/Qui Tam Provision (31 U.S.C. § 3729 et seq.)
  - Sarbanes-Oxley Act of 2002 ("SOX") (18 U.S.C. § 1514A(a))
  - IRS (26 CFR 301.7623-1)
  - Hotlines
  - Inspectors General
- MSPB and OSC
- Union Assistance

Whistleblower Improvements

- Whistleblower Protection Enhancement Act (5 U.S.C. § 2302(b))

- Moving Ahead for Progress in the 21st Century Act (MAP-21), required OSHA to establish protections for auto industry employees (49 U.S.C. § 30171)

- White House, Memorandum re: Scientific Integrity, March 9, 2009:

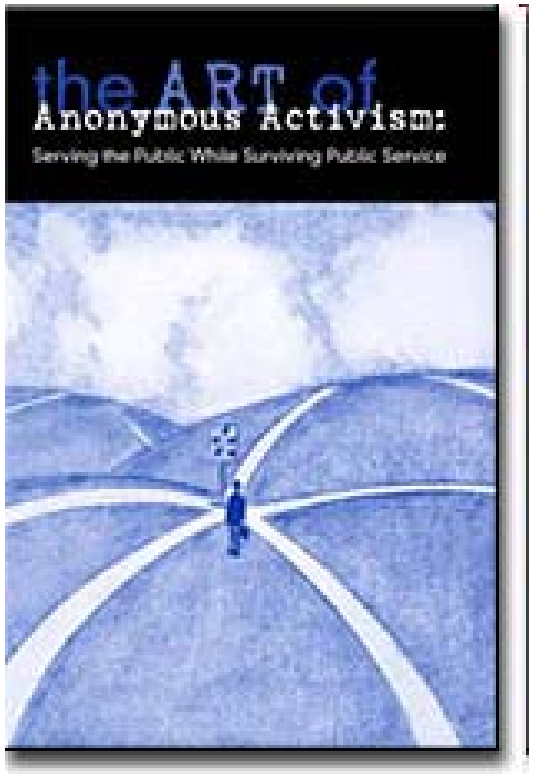
  Each agency should adopt such additional procedures, including any ***appropriate whistleblower protections***, as are necessary to ensure the integrity of scientific and technological information and processes on which the agency relies in its decision-making or otherwise uses or prepares.

- Changed Culture Inside the Government

"The Art of Anonymous Activism gives us the tools and guidance necessary to 'make noise' in defense of our fellow citizens while protecting ourselves from harm."

Frank Serpico

POGO
Government Accountability Project (GAP)
Public Employees for Environmental Responsibility (PEER)




Sidney Lumet's
SERPICO
AL PACINO


SILKWOOD


The Most Revealing
Detective Story Of This Century.
REDFORD/HOFFMAN
"ALL THE PRESIDENT'S MEN"


Julia Roberts
Erin Brockovich


THE PENTAGON WARS


BEST PICTURE
THE INSIDER


THE MOST
DANGEROUS
MAN IN
AMERICA
DANIEL ELLSBERG
AND THE
PENTAGON PAPERS

POGO PROJECT ON GOVERNMENT OVERSIGHT
Exposing Corruption. Exploring Solutions.

Scott H. Amey
General Counsel
202-347-1122
scott@pogo.org
Twitter: @SAmeyJD
www.pogo.org

1100 G Street, NW, Suite 500
Washington, DC 20005

PANEL TWO: BUSINESS AND CORPORATE WHISTLEBLOWER ISSUES

PLAINTIFFS PERSPECTIVE

Joseph E. B. "Jeb" White, Nolan Auerbach & White, Philadelphia, Pennsylvania

CORPORATE/DEFENSE PERSPECTIVE

Claudia M. Williams, Associate General Counsel, Labor & Employment, The Hershey Company, Hershey, Pennsylvania

WHO SHOULD "BENEFIT" FROM SETTLEMENT OF WHISTLEBLOWER CASES? — AN ANALYSIS OF RECENT HEALTH CARE INDUSTRY SETTLEMENTS

Katherine Pearson, Professor of Law, Penn State Dickinson School of Law

Commentators: *Professor Raymond Gibney, Jr. and David R. Hoffman, Esq.*

RECENT IMPROVEMENTS TO THE FALSE CLAIMS ACT:
BACK TO THE FUTURE FOR THE GOVERNMENT'S PRIMARY FRAUD-FIGHTING WEAPON

Joseph E. B. "Jeb" White, Esq.
Nolan Auerbach & White
Philadelphia, PA
www.WhistleblowerFirm.com

Introduction

After nearly a quarter of a century without a single legislative update, the U.S. Government's primary fraud-fighting weapon was finally modernized in 2009 and 2010. Specifically, by passing the Fraud Enforcement and Recovery Act of 2009 (FERA),[1] the Patient Protection and Affordable Care Act of 2010 (PPACA),[2] and the soon-to-pass Restoring American Financial Stability Act of 2010,[3] Congress removed some of the statutory confusion and liability loopholes that were undermining the federal False Claims Act (FCA).[4] Among other things, these landmark amendments restored key liability provisions, strengthened anti-retaliation protections, and changed the cost-benefit analysis for dishonest entities who seek to steal Government funds. This article highlights some of the concerns addressed by these recent amendments, offers a glimpse into the practical impact of these changes, and explains why additional work is still needed in the future to fully restore the Act.

I. FULLY PROTECTING GOVERNMENT FUNDS FROM FRAUD

The recent FCA amendments sensibly corrected legislative deficiencies that fraudfeasors had used and abused to drain billions of dollars from the U.S. Treasury. Congress clarified, once and for all, the reach of the *preexisting* FCA liability provisions and rejected extraneous limits that judges had legislated from the bench. Restoring the full reach of the FCA, the amendments empowered our law enforcement efforts to finally reach those who were stealing taxpayer dollars with impunity. The key improvements to the FCA Section 3729(a) liability provisions were those designed to do the following: a) fully protect U.S. Government dollars even when the Government relies on others to make payment decisions for the federal Government; b) impose liability on those who

[1] Pub. L. No. 111-21, 123 Stat. 1617.

[2] Pub. L. No. 111-148, 124 Stat. 119.

[3] H.R. 4173.

[4] 31 U.S.C. 3729 *et seq.*

steal funds administered by the U.S. Government; and c) recover funds from those who convert taxpayer funds to unauthorized uses or knowingly retain overpayments.

A. Liability for Those Who Seek to Steal Government Funds from Government Contractors or Grantees

The U.S. Government drastically changed in the quarter century since the FCA was last amended. During the course of this time period, the U.S. Government increasingly turned to federal contractors for many traditionally government functions, including procurement and contract management. However, with the FCA statutory language cemented to reflect the realities of the 1986 government contracting environment, a number of court decisions read the Act in a way that exposed the expenditure of Government funds to fraud and abuse. Oftentimes, courts lamented that the Act's antiquated language "tied their hands" to decisions that were directly contrary to the applicable legislative history.[5]

The Congressional intent behind the 1986 FCA amendments could not have been clearer. For example, in 1986, Congress intended FCA to apply to false claims "made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States."[6] To further drive home this point, Congress emphasized, "[A] false claim to a recipient of a grant from the United States or to a State under a program financed in part by the United States is a false claim to the United States."[7]

Courts increasingly turned a blind eye to this crystal clear legislative history. Finally, the need for clarifying legislation was heightened by *Allison Engine Co. v. United States ex rel. Sanders*, a 2008 U.S. Supreme Court decision that narrowed the Act to *only* apply to false claims that were potentially reviewable by the "Government itself" and that were "material to the Government's decision to pay."[8] This limiting Court decision was reached notwithstanding the underlying Congressional intent and a statutory definition of "claim" that included claims "made to a contractor, grantee, or other

[5] *See, e.g., United States ex rel. Totten v. Bombardier Corporation*, 380 F.3d 488, 495 (D.C. Cir. 2004) (Then-Judge John Roberts encouraging Congressional intervention: "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." (internal quotations and citations omitted)). *See also* oral argument transcripts from every U.S. Supreme Court case examining the FCA over the past 24 years, in which Justice Scalia regularly begs Congress to fix the Act's "drafting" problems.

[6] S. Rep. No. 99-345, 99th Cong., 2d Sess. 19-20 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89.

[7] *Id.*

[8] *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008).

recipient if the United States provides any portion of the money or property which is requested or demanded."[9]

The real-world impact of this Supreme Court decision was evident the very next day, when a district court dismissed, on the eve of trial, the Government's prosecution of a substantial crop subsidy fraud scheme.[10] In this case, the Government relied on a private bank to distribute government funds in the form of crop subsidies. However, because a government official did not personally ink the crop subsidy checks, the court ruled that the "Government itself" was not involved and thus could not utilize the FCA to recover its stolen funds. Moreover, the court held, when a private entity pays a claim and then seeks reimbursement from the Government, a false statement can *never* be "material to the Government's decision to pay."

Subsequently, similar arguments were parroted in courts throughout the country, seeking to squelch government investigations involving Medicare and Medicaid fraud,[11] defense subcontractor fraud,[12] and fraud on local and state programs, including those "funded in part by the United States where there [wa]s significant Federal regulation and involvement."[13]

[9] 31 U.S.C. § 3729(c).

[10] *United States v. Hawley*, 566 F.Supp.2d 918 (N.D. Iowa 2008).

[11] *See United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1305-06 (N.D. Ala. 2004), *aff'd*, 470 F.3d 1350 (11th Cir. 2006) (dismissing case involving nursing home claims on state Medicaid agency); *United States ex rel. Brunson v. Narrows Health & Wellness*, LLC, 469 F. Supp. 2d 1048, 1053 (N.D. Ala. 2006) (dismissing Medicare claims submitted to an insurance company hired by the federal government to administer the Medicare program).

[12] *See United States ex rel. Sanders v. Allison Engine Co.*, 364 F. Supp. 2d 710 (S.D. Ohio 2003*), rev'd by,* 471 F.3d 610 (6th Cir. 2006), *vacated and remanded by Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008).

[13] S. Rep. No. 99-345 at 19-20 (citing an area in which Congress intended the FCA to be applicable). *See, e.g., United States ex rel. Rutz v. Village of River Forest*, 2007 WL 3231439 (N.D. Ill. Oct. 25, 2007) (federal Bureau of Justice Assistance block grant to county)*; U.S. DOT ex rel. Arnold v. CMS Eng'g*, 2007 U.S. Dist. LEXIS 9118 (W.D. Pa. Feb. 6, 2007) (U.S. Department of Transportation grant to Pennsylvania Department of Transportation); *U.S. v. City of Houston*, 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. Aug. 16, 2006) *affirmed on other grounds by*, 523 F.3d 333 (5th Cir. 2008) (U.S. Department of Housing funding of City of Houston housing authority); *United States ex rel. Rafizadeh v. Cont'l Common, Inc*., 2006 U.S. Dist. LEXIS 18164 (E.D. La. April 10, 2006) *affirmed on other grounds by*, 553 F.3d 869 (5th Cir. 2008) (U.S. grants to state Department of Social Services and state Department of Health & Hospitals).

Congress was deeply concerned that these troubling court decisions were just the tips of the iceberg of future court dismissals, especially given the modern-day government contracting environment. These concerns were particularly well-founded in the years leading up the recent amendments, for the federal Government had outsourced an unprecedented number of governmental functions to private entities, including the contracting process itself.[14] Indeed, this trend was accelerating to a record level, with the Government spending nearly *40 cents* of every discretionary dollar on contracts with private companies.[15] In fact, in 2009, there was an estimated contract workforce of more than 7.6 million employees, or three contractors for every federal employee, and the number of contractors had skyrocketed 70 percent since 2002.[16]

The pervasiveness of this government outsourcing was highlighted by the U.S. Comptroller General in the year prior to the FCA Amendments:

> The government is relying on contractors to fill roles previously held by government employees and to perform many functions that closely support inherently governmental functions, such as contracting support, intelligence analysis, program management, and engineering and technical support for program offices.[17]

This trend was also identified in a 2008 Government Accounting Office report, noting that spending by the Department of Defense (DOD) on contractor services more than *doubled* between 1998 and 2008.[18] The GAO also reported that procurement

[14] Between 1993 and 2000, the size of the civilian workforce was reduced by 426,000 positions, reaching a level equal to that under President Eisenhower. Between 2000 and 2005, annual government procurement spending increased by 86%, or $175 billion dollars. *Dollars, Not Sense: Government Contracting Under the Bush Administration* at i, 3 (Comm. Print 2006), H.R. Comm. Gov't Reform – Minority Staff Special Investigations Division, 109th Cong., 2d Sess.

[15] *Id.* The Department of Energy spends approximately 98% of its budget on contractors, the Pentagon spends nearly half of its budget on contractors, and the National Air & Space Administration spends about 78% of its budget on contractors. Shane, Scott. "Uncle Sam keeps SAIC on Call for Top Tasks/Government Turns to California Company for Variety of Sensitive Jobs." THE BALTIMORE SUN, 26 Oct. 2003.

[16] Light, Paul C. "Open Letter to Presidential Candidates," *available at* http://www.nyu.edu/public.affairs/releases/detail/2182 (last visited March 29, 2010).

[17] *DOD's Increased Reliance on Service Contractors Exacerbates Long-standing Challenges, 2008: Hearings on Defense Acquisitions before the Subcom. On Defense of the House of Representatives Comm. on Appropriations*, 110th Cong., 2d Sess. 10-12 (2008) (statement of David M. Walker, Comptroller General of the United States).

[18] *DOD Needs to Reexamine Its Extensive Reliance on Contractors and Continue to Improve Management and Oversight, 2008: Hearings on Defense Management Before*

spending had reached an all-time high in 2008, and that between 2000 and 2005, procurement spending had risen by 86% to $377.5 billion annually.[19] During this time period, spending on federal contracts grew over twice as fast as other discretionary federal spending.[20]

Then, in early 2009, the outlay of government funds reached unprecedented proportions. Specifically, with the passage of the federal stimulus package,[21] nearly a trillion *additional* federal dollars were released into the economic stream. Of course, instead of having the "Government itself" pay out these funds, the federal Government largely relied on the usual third parties, including State agencies, government contractors, and government grantees, to distribute these stimulus funds.

Thus, against this backdrop of increased reliance on government contractors and unmatched government spending, the Supreme Court ruled that the FCA only protected government funds when the "Government itself" is involved in the payment decision. Of course, with a "shadow government" of contractors disbursing government funds, a government employee is rarely involved in the payment decision. For example, when seeking reimbursement from the Medicare or Medicaid program, hospitals submit their claims to private insurance companies on contract with the federal or a state government, and the "Government itself" is *never* consulted on whether or not to pay the claims. Similarly, defense contractors typically find themselves billing another defense contractor who, in turn, bills another defense contractor, who may or may not be the one with the prime contract with the Department of Defense. In each of these examples, however, the person submitting the bill knows full well that he is being paid by the taxpayers to perform work in furtherance of governmental purposes.

In short, the Supreme Court *Allison Engine* decision constructed a rapidly expanding "free fraud zone" for the *numerous* situations in which companies bill entities that have been paid in advance by the federal Government.

the Subcomm. On Readiness of the House of Representatives Comm. On Armed Services, 110th Cong., 2d Sess. 3 (2008) (statement of David M. Walker, Comptroller General of the United States).

[19] GAO Report, *2008: Hearings on Defense Management Before the Subcomm. On Readiness of the House of Representatives Comm. On Armed Services*, 110th Cong., 2d Sess. 3 (2008), *available at* http://oversight.house.gov/story.asp?ID=1071 (last visited March 29, 2010).

[20] *Id.*

[21] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

FERA shut down this gaping enforcement loophole by making the following changes to the FCA:

3729(a)(1)(~~1~~A) knowingly presents, or causes to be presented, ~~to an officer or employee of the United States Government or a member of the Armed Forces of the United States~~ a false or fraudulent claim for payment or approval;

3729(a)(1)(~~2~~B) knowingly makes, uses, or causes to be made or used, a false record or statement material to ~~get~~ a false or fraudulent claim ~~paid or approved by the Government~~;

3729(b)~~(c) CLAIM DEFINED.—For purposes of this section,~~(2) the term "claim~~" includes~~"—

(A) means any request or demand, whether under a contract or otherwise, for money or property ~~which~~ and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government —

(I) provides or has provided any portion of the money or property ~~which is~~ requested or demanded~~,~~; or ~~if the Government~~

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

Thus, consistent with the Congressional intent behind the 1986 FCA amendments, FERA corrected the FCA to make clear that liability attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the federal Government; with an agent acting on the Government's behalf; or with a third party contractor, grantee, or other recipient of such money or property. Notably, to ensure

that the Act was not interpreted to federalize fraud that threatens no harm to Government purposes or federal program objectives, the amendment explicitly excluded from liability requests or demands for money or property that the Government has paid to an individual as compensation for federal employment or as an income subsidy, such as Social Security retirement benefits, with no restrictions on that individual's use or the money or property at issue.

These amendments, in turn, clarified that the FCA could be used to redress Medicare Part D fraud and fraud on Medicare managed care, for Government contractors administer both of these programs. Moreover, FERA eliminated the argument, once and for all, that the FCA does not reach false claims submitted to State-administered Medicaid programs, as some argued under *Allison Engine*. Additionally, FERA correctly clarified that the Act could be used to reach federal funds stolen from recipients of federal block grants. The simple fact is that such claims undermine the purpose of those grants by diverting funding away from the objectives that the federal program sought to achieve.

Notably, these clarifications were consistent with what Congress intended to achieve in 1986. By removing from FCA Section 3729(a)(1) language that could be narrowly read to limit liability to persons who present false claims directly "to an officer or employee of the Government, or to a member of the Armed Forces," FERA finished the job Congress intended to complete in 1986, when it defined actionable "claims" in the current Act to include "any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."[22]

B. Liability for Those Who Steal Funds Administered by the United States

In 1986, Congress surely could not have predicted that the U.S. Government would enter into the role of administering the funds of another country, such as the Iraqi funds administered by U.S. officials at the Coalition Provisional Authority. However, as the U.S. Justice Department unsuccessfully argued to a court prior to the FERA, when the United States elects to invest its limited resources in administering the funds of another entity, the FCA should protect these funds from fraud.[23] Unfortunately, because the FCA did not expressly impose liability for false claims for money administered, but not owned

[22] 31 U.S.C. § 3729(c). *See also* S. Rep. No. 345, 99th Cong., 2d Sess. 1986 (section-by-section analysis explaining that a false claim includes claims submitted to grantees and contractors if the payment ultimately results in a loss to the Government).

[23] *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 636-641 (E.D. Va. 2006).

by the United States, fraudsters were able to drain these critical funds with impunity.

However, the Justice Department regularly argued that there were a myriad of reasons why the Act should be used to cover such situations. Perhaps most importantly, when the United States elects to invest its resources in administering the funds of another, it does so only because the achievement of important foreign or domestic policy goals turns on proper management of the funds. Indeed, while the Act did not explicitly cover these funds prior to FERA, the U.S. Government pursued cases of this nature, recovering millions of dollars from oil, gas and mining companies that had underreported the royalties owed under leases on Native American land.[24]

FERA codified, once and for all, the Government's ability to protect these funds under the FCA. FERA prudently amended the FCA so that it covered fraud on U.S.-administered funds by defining "claim" to include, among other things, requests or demands for money or property that are presented to an officer, employee, or agent of the United States "whether or not the United States has title to the money or property."[25] This amendment to the existing statutory language clarified that FCA liability attached to knowingly false requests or demands upon the United States for money or property administered by the United States on behalf of another person. This amendment took on added importance given the concern about fraud on Iraqi funds paid out by the U.S. Government.

C. Liability for Those Who Convert Taxpayer Funds to Unauthorized Uses or Knowingly Retain Overpayments

Since the FCA was last amended in 1986, a gaping liability loophole was recognized by fraudsters, allowing a "finders' keepers" regime to flourish when it came to the overpayment of federal funds. Specifically, the knowing retention of overpayments was, and is, a tremendous problem in government health programs and government procurements. Moreover, as then-CBO Director Peter Orszag stressed, "[f]uture health care spending is the single most important factor determining the nation's long-term fiscal condition."[26]

[24] *See, e.g., Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005)*; U.S. v. Chevron,* 186 F.3d 644 (5th Cir. 1999)*; United States ex rel. Wright v. Agip Petroleum Co.,* 2006 U.S. Dist. LEXIS 93415 (E.D. Tex. Dec. 27, 2006)*; United States ex rel. Koch v. Koch Indus.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999).

[25] *See* new 31 U.S.C. § 3729(b)(2)(A).

[26] "Opportunities to Increase Efficiency in Health Care," Statement of Peter R. Orszag, Director, Congressional Budget Office, at the Health Reform Summit of the Committee on Finance, United States Senate, June 16, 2008, at 8.

A common example would be a hospital that mistakenly overbilled the federal Government for services, identified its mistake, and then decided not to disclose the mistaken billing to the Government in order to fraudulently hold on to the overpayment. Understandably, the hospital's mistake might have stemmed from a misunderstanding of the billing rules or some other error, but, in each case, FCA liability would not attach, for the original claims would not be "knowingly" false.[27] However, after the hospital discovered the mistaken payment and retained it, it has committed a criminal offense.[28] The Compliance Guidelines of the Office of Inspector General of the U.S. Department of Health & Human Services (OIG) warn that failure to return overpayments within a "reasonable period of time" following discovery may be interpreted as an intentional attempt to conceal the overpayment from the Government.[29] Paradoxically, however, because of a drafting problem with the 1986 FCA Amendments, the Government was unable to use the FCA to protect these funds. In short, because *qui tam* whistleblowers were unable to expose the scheme under the FCA, the Government had a difficult time tracking down the individual dishonest providers who were engaged in this common fraud.

Equally disturbing, unless a contractor submitted something to the Government concealing its dishonesty, the FCA did not previously apply when someone wrongfully converted Government funds to an unauthorized use. An example of this scenario would be a government contractor's decision to spend an advance payment intended for hurricane relief efforts on his personal enrichment, instead. Of course, in the midst of a war effort or the wake of a major hurricane, government funds are oftentimes disbursed quickly in advance of the work being performed, and without the usual required certifications of performance under the contract. Moreover, when a contractor uses an advance payment for an improper purpose in these circumstances, there will rarely be a false claim or false statement submitted to the Government that would have triggered FCA liability. In short, these dishonest contractors were able to evade FCA liability.

FERA sought to address both of these common fraud schemes by expressly imposing liability on anyone who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the United

[27] In many situations of this nature, there also would no false statement to trigger liability. With the exception of long term health care providers that must submit quarterly statements to the Medicare program disclosing any known overpayment ("Credit Balance Reports" submitted by Medicare Part A providers), health care providers generally are not asked to submit statements disclosing known overpayments.

[28] 42 U.S.C. § 1320a-7b(a)(3).

[29] *See, e.g.*, Hospital Compliance Guidelines, 63 FED. REG. 8987 (February 23, 1998); Supplemental Compliance Program Guidance for Hospitals, 70 FED. REG. 4858 (January 31, 2005); Compliance Program for Individual and Small Group Physician Practices, 65 FED. REG. 59,434 (October 5, 2000).

States." This language made clear that a person who retains an overpayment, while avoiding a duty to disclose or return the overpayment that arises from a statute, regulation or contract, violates the False Claims Act. Indeed, to address any potential confusion among the courts as to what was intended to be encompassed within the term "obligation" as used in the revised Section 3729(a)(7),[30] now codified as Section 3729(a)(1)(G), the amendments broadly defined that term in new Section 3729(b)(3) as encompassing legal duties that arose from the retention of any overpayment.

As outlined above, this amendment was needed to plug a gaping loophole that was draining our public fisc and undermining the long-term viability of our government health care programs. This provision alone should recover millions of additional stolen tax dollars.[31]

II. REMOVING EXTRANEOUS HURDLES & ROADBLOCKS UNDERMINING THE FCA'S LAW ENFORCEMENT CAPABILITIES

A. Vesting the Government with Veto Power Over Defendants' Efforts to Use the Public Disclosure Bar to Silence Meritorious *Qui Tam* Actions

In an attempt to decipher the application of the FCA public disclosure bar, 31 U.S.C. 3730(e)(4), a court summarized the prevailing sentiment: "The Court sympathizes with anyone litigating under the False Claims Act. Perhaps Congress will elect at some point to give legislative attention to the FCA to resolve some of the still unresolved questions about the Act's application."[32] In passing the PPACA, Congress finally listened to the courts and removed much of the confusion surrounding the much-litigated public disclosure bar.

This pre-PPACA confusion was reflected in the 200+ published and unpublished rulings in well over 100 separate cases concerning the meaning of the "public disclosure"

[30] *See, e.g., United States ex rel. Prawer & Co. V. Verrill & Dana*, 946 F. Supp. 87 (D. Me. 1996); American Textile Manufacturers Institute, Inc. v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999).

[31] Nearly a decade ago, before the baby boomer generation even qualified for Medicare, HHS-OIG researched the instances of overpayment in the Medicare system and concluded that $23.2 billion, or 14% of total program costs, were lost each year due to fraud, waste and abuse. *HCFA's FY 1996 Medicare Audit, 997: Hearing before the Subcomm. On Health of the House Comm. On Ways and Means*, 105th Cong., 1st Sess. (1997) (statement by June Gibbs Brown, Inspector General, Dep't of Health & Human Services).

[32] *United States ex rel. Montgomery v. St. Edward Mercy Medical Center*, 2008 WL 110858 (E.D. Ark. 2008).

bar. The seemingly simple act of flow charting the steps in the public disclosure bar provision quickly produced a maze of diverging roads leading to confusion. The myriad of conflicting court decisions facilitated the ability of defendants to evade liability, greatly undermining the Government's fraud-fighting efforts.

Ironically, Congress added this so-called "public disclosure" bar in 1986 with the sole goal of protecting the Government's interests in allowing non-parasitic *qui tam* suits to survive dismissal. This provision replaced an earlier provision known as the "government knowledge bar" that deprived courts of jurisdiction over *qui tam* actions "based on evidence or information the Government had when the action was brought." Courts interpreted this provision so broadly that few *qui tam* actions survived, and the FCA fell into virtual disuse. By 1986, Congress had determined to eliminate this so-called "government knowledge bar" in light of its stated concern about cases in which "the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action."[33] Congress wished to "encourage more private enforcement suits" and consequently amended the statute to eliminate the government knowledge bar in 1986.[34] Congress remained concerned, however, about "parasitic" *qui tam* whistleblowers such as those who filed complaints simply by copying information from a government indictment.

The resulting public disclosure bar provision was an attempt to strike a balance between "encouraging people to come forward with information and . . . preventing parasitic lawsuits."[35] Unfortunately, however, by depriving courts of jurisdiction over cases barred under the provision, Congress unwittingly handed defendants a tool that was then used and abused to derail meritorious suits and to prevent judgments on liability.

Subsequently, virtually every *qui tam* suit was met with a motion to dismiss pursuant to the public disclosure bar. Even over the frequent objections of the *Government*, courts allowed defendants to use the public disclosure bar as a weapon to kill meritorious *qui tam* actions. The rampant use of this provision deterred countless insiders from risking their livelihoods in filing *qui tam* suits. For those who braved the *qui tam* waters, the courts' unreasonably broad interpretations of what constitutes a "public disclosure" forced many *qui tam* counsel from thoroughly investigating fraud allegations, fearful that their due diligence would trigger the public disclosure bar. For example, counsel were quite reluctant to use the Freedom of Information Act (FOIA) to corroborate their client's understanding of transactions, for some courts had barred *qui*

[33] H. R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986).

[34] S. Rep. No. 99-345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89.

[35] *FCA Implementation, Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (1990) (Statement of Sen. Grassley).

tams based even in part on responses to a private party's FOIA request.[36]

In 2007, the public disclosure bar confusion boiled up to the U.S. Supreme Court in a case where the Government wished to pay a whistleblower for being the original source in a successful fraud prosecution.[37] The Court, rejecting the Government's own assessment of the whistleblower's contributions, ruled that the statutory language of the public disclosure bar *prevented* the Government from awarding this particular whistleblower. In 2010, the U.S. Supreme Court, once again, rejected the Government's interpretation of the public disclosure bar, further expanding the "public disclosure" definition.[38]

In passing PPACA, Congress made the following changes to the public disclosure bar and its original source exception:

> 3729(e)(4)(A) ~~No court shall have jurisdiction over~~ The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same ~~based upon the public disclosure of~~ allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> > (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
> >
> > (ii) in a congressional, ~~administrative, or~~ Government ~~Accounting~~ Accountability Office, or other Federal report, hearing, audit, or investigation~~,~~; or
> >
> > (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> 3729(e)(4)(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(A), has voluntarily disclosed to the Government the information on allegations or transactions in a claim are based, or (2) who has knowledge that is ~~direct and~~

[36] *See, e.g., United States ex rel. Grynberg v. Praxair, Inc.,* 389 F.3d 1038, 1051 (10th Cir. 2004), *cert. denied*, 545 U.S. 1129 (2005*); United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.,* 384 F.3d 168, 175-176 (5th Cir. 2004); *United States ex rel. Mistick PBT v. Housing Auth.,* 186 F.3d 376, 383 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

[37] *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397 (2007).

[38] *Graham County Soil and Water Conservation District v. U.S. ex rel. Wilson*, 130 S.Ct. 1396 (U.S. Mar. 30, 2010).

independent of and materially adds to the publicly disclosed allegations or transactions, ~~knowledge of the information on which the allegations are based~~ and who has voluntarily provided the information to the Government before filing an action under this section ~~which is based on the information~~.

Thus, most importantly, Congress appropriately placed ultimate control over the public disclosure bar in the hands of the Government. Specifically, by inserting the veto language "unless opposed by the Government," Congress ensured that the Government would have the final say over whether a *qui tam* action was truly parasitic. Moreover, the amendment removes much of the uncertainty plaguing the Act by explicitly limiting "public disclosure" to the news media and specific *federal* Government fora. Finally, to eliminate the argument that industry-wide allegations somehow bar actions against specific wrongdoers, Congress stressed that the allegations must be *substantially* similar to trigger the public disclosure bar.

In addition to narrowing the relevant "public disclosures" that trigger the public disclosure bar, Congress expanded the original source exception, with the hopes of only precluding those who truly parrot publicly disclosed allegations of fraud. Perhaps most importantly, by removing the much-litigated "direct" knowledge prong, Congress rejected much of the extraneous and strained court decisions that have placed undue weight on this statutory term. Instead, under the amended Act, a relator qualifies for the original source exception if her disclosure to the government predates the public disclosure or if her knowledge adds something of substance beyond what is revealed by the public disclosure.

In the wake of these amendments, FCA defendants have lamented that the public disclosure bar is now too narrow and that the original source exception is too broad. However, the simple truth is that the Government is in the best position to determine whether a whistleblower was a "parasite" of public information. Moreover, because the Government takes on the primary role of prosecuting these suits and must pay a share to a successful whistleblower, they have a sizeable incentive to ensure that *only* non-meritorious suits are dismissed. The FCA defendants, on the other hand, have *every* incentive to get rid of meritorious whistleblower suits.

FCA defendants also have complained that, in effect, they will no longer be able to use the public disclosure bar to dismiss frivolous *qui tam* suits. However, this is a red herring, for the FCA public disclosure bar has *nothing* to do with the merits of a case. If cases are truly frivolous, defendants may and should rely upon the following:

- F.R.C.P. 11 (providing sanctions for unwarranted factual contentions and legal theories)
- F.R.C.P. 12(b)(6) (dismisses a complaint that "fails to state a claim upon which relief may be granted")
- F.R.C.P. 56(b) (permits defendant to move "at any time" for judgment on the facts set forth in the pleadings)
- F.R.C.P. 54(d) (awards costs to prevailing defendants)
- 31 U.S.C. 3730(d)(4) (awards attorneys' fees and expenses to

defendants that prevail in *qui tam* actions that are "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment")

In short, the amendments correctly vested the Government with ultimate power over the public disclosure bar, while still preserving the defendant's existing options for dismissing truly frivolous *qui tam* suits.

B. Empowering the Government With A Practical Subpoena Tool That Clearly Defines Appropriate Use of Subpoenaed Material

Perhaps most importantly for the day-to-day capabilities of the Justice Department, FERA amended the FCA to permit the Attorney General to delegate the issuance of Civil Investigative Demands (CIDs), a form of administrative subpoena that may be used to obtain documents, testimony and interrogatory responses. In 1986, when Congress added the CID to the Act, the Senate Judiciary Committee viewed this as an authority "supplementing the investigative powers of the IGs [Inspectors General]."[39] Unfortunately, the statutory language did not make the CID power delegable. Thus, when an Attorney General was occupied with matters that he or she considered more important than FCA investigations, the line attorneys at the Department of Justice and in the Offices of U.S. Attorney were unable to utilize CIDs to investigate their cases.

To compound matters, the CID provision did not spell out permissible "official uses" of materials obtained under the CID. This uncertainly over appropriate use of materials caused most Department of Justice trial attorneys and Assistant U.S. Attorneys to shy away from utilizing the CID authority in the first place.

FERA addressed these debilitating concerns by permitting the Attorney General to delegate the authority to issue CIDs, and by clearly defining the term "official use" to include "any use that is consistent with the law, and the regulations and policies of the Department of Justice." This new definition of "official use" also included specific examples of the types of uses that fall within the term "official use." Notably, these examples were not meant to be an exhaustive list, but rather illustrative of the ordinary, lawful uses of subpoenaed material in a Department of Justice investigation or litigation that Congress intended the Justice Department to employ in FCA cases. FERA also removed confusing language that had been misinterpreted by the courts to prevent the custodian of CID material from sharing the material with other Justice Department or program agency personnel for official uses in the absence of authority from regulations or a court.

Earlier this year, the Justice Department decided to delegate CID issuance authority to the individual U.S. Attorneys' Offices for delegated and monitored FCA

[39] S. Rep. No. 99-345, 99th Cong., 2d Sess. 33, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5298 (1986).

cases. Typically, because these cases only allege a few million dollars in damages, they do not receive the same level of monetary and investigative support as the last larger cases. With powerful CID subpoenas in their arsenal, US Attorneys will be able to leverage additional information from wrongdoers. In short, finally arming the Main Justice Department and the US Attorneys with usable CID powers should permit them to effectively investigate FCA cases on their own means, thereby allowing them to investigate many more cases and recover millions of additional dollars each year.

C. Updating Service Requirements to Reflect Realities of Multi-Jurisdictional *Qui Tam* Suits

FERA also recognized that *qui tam* plaintiffs were increasingly filing FCA actions on behalf of not only the federal Government, but also one or more States joined as co-plaintiffs pursuant to state False Claims Act statutes. Such cases ordinarily allege false claims submitted to Medicaid, which is a program funded jointly by the United States and the states.[40] The FCA had already provided that state law claims could be asserted in a case filed under the federal FCA if the claims arose from the same transaction or occurrence. However, the FCA was unclear as to whether the federal FCA seal precluded the *qui tam* plaintiff from complying with state requirements to serve the complaint, or restricted the *qui tam* plaintiff and the federal Government in their ability to serve other pleadings on the States.

FERA explicitly clarified that the seal did *not* preclude service or disclosure of such materials to the State officials authorized to investigate and prosecute the allegations that the *qui tam* plaintiff raises on behalf of the State. It also clarified that State officials and employees must respect the seal imposed on the case to the same extent as other parties to the proceeding must respect the seal.

D. Clarifying That the Government's Complaint-In-Intervention Relates Back to *Qui Tam* Complaint's Original Filing Date

Prior to the enactment of FERA, the FCA did not expressly provide that the Government could amend the *qui tam* plaintiff's complaint or that it could file its own complaint upon intervention in a *qui tam* case. This lack of clarity raised a question of whether the Government could avail itself of the Federal Rules of Civil Procedure "relation back doctrine." The Second Circuit ruled that the United States could not avail itself of this rule when amending a *qui tam* plaintiff's complaint.[41] The implication of that ruling was that the United States would have been regularly forced to forego a

[40] These cases have been increasing in number as many States have enacted *qui tam* statutes, especially after Congress offered the States a substantial monetary incentive under the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.

[41] *United States v. Baylor Univ. Medical Center*, 469 F.3d 263 (2d Cir. 2006).

thorough investigation of the merits of *qui tam* allegations in order to ensure that it did not lose claims due to the running of the statute of limitations.

FERA solved this conundrum by clarifying that the Government's complaint-in-intervention or amended complaint relates back to the date of the original *qui tam* complaint so long as the conditions of Federal Rule of Civil Procedure are otherwise met. Specifically, FERA added a new paragraph (c) to Section 3731 that expressly provided that the United States' complaint-in-intervention or amended complaint relates back to the date of the complaint filed by the *qui tam* plaintiff "to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."

III. FULLY PROTECTING WHISTLEBLOWERS FROM RETALIATION

In addition to strengthening and clarifying the reach of the False Claims Act, Congress also decided to fully protect America's courageous whistleblowers. Specifically, in the soon-to-be-enacted Financial Reform legislation, Congress closed debilitating loopholes that have undermined the False Claims Act's anti-retaliation provision, 31 U.S.C.§ 3730(h). Most importantly, these amendments widen the scope of protected conduct, expand the list of protected individuals, and lengthen the statute of limitations period for anti-retaliation suits.

Prior to this legislative change, the FCA imposed liability on any employer who discriminated in the terms or conditions of employment against an employee because of the employee's lawful acts in furtherance of a *qui tam* action. However, the FCA arguably did not cover the following common types of retaliation: (i) retaliation against those who plan to file a *qui tam* action that never gets filed, who blow the whistle internally or externally without the filing of a *qui tam* action, or who refuse to participate in the wrongdoing; (ii) retaliation against the family members and colleagues of those who have blown the whistle; and (iii) retaliation against contractors and agents of the discriminating party who were not technically "employees."

Widening the scope of protected activity, the amendments ensure that Section 3730(h) not only protects "lawful actions done…in furtherance of an [FCA] action," but it also protects "other efforts to stop 1 or more [FCA] violations." Thus, in addition to protecting steps taken in furtherance of a potential or actual *qui tam* action, the FCA also protects steps taken to remedy the misconduct through methods such as internal reporting to a supervisor or company compliance department and refusals to participate in the misconduct that leads to false claims, whether or not such steps are clearly in furtherance of a potential or actual *qui tam* action.

Addressing the concern about indirect retaliation against colleagues and family members of the person who acts to stop the FCA violations, the amendments also clarify Section 3730(h) by adding language expressly protecting individuals from employment

retaliation when "associated others" made efforts to stop FCA violations. This language is intended to deter and penalize indirect retaliation by, for example, firing a spouse or child of the person who blew the whistle.

Protecting persons who seek to stop violations of the Act regardless of whether the person is a salaried employee, an employee hired as an independent contractor, or an employee hired in an agency relationship, the amendments change Section 3730(h) so that it expressly protects not just "employees" but also "contractors" and "agents." Among other things, the amendments ensure that Section 3730(h) protects physicians from discrimination by health care providers that employ them as independent contractors, and government subcontractors from discrimination or other retaliation by government prime contractors.

Finally, to ensure that wronged individuals have sufficient time to avail themselves of Section 3730(h) protections, the amendments add an explicit three-year statute of limitations period for all FCA anti-retaliation actions. This much-needed amendment is underscored by a recent U.S. Supreme Court decision which held that the Act lacked an applicable statute of limitations provision and that the courts, therefore, must apply the limitations period from the "most analogous" state statute.[42] The resulting statute of limitations patchwork injected uncertainty into the practice area and greatly shortened applicable time periods to less than twelve months for the vast majority of jurisdictions. The amendments replace this confusion with a set, straightforward time limitation.

IV. PROBLEMS STILL UNDERMINING THE FCA

Many of the FCA Amendments recently etched into the law first appeared in a more comprehensive bill, the False Claims Act Corrections Act of 2009. To understand the need for the remaining clarifications offered under this legislation, one must first understand the important and necessary role *qui tam* whistleblowers and their counsel play in uncovering fraud against the U.S. Government.

Over the years, as the complexity of fraud has become increasingly buried behind innocuous transactions, there is a heightened need for the inside fraud evidence *qui tam* whistleblowers bring to fraud investigations. Equally important, as the limited resources of the federal Government have been stretched thin, especially in the wake of the September 11th attacks, the Government has relied, more and more, on the supplementary resources and capabilities of *qui tam* counsel. Indeed, *qui tam* whistleblowers and their counsel have been the driving force behind nearly 70% of the FCA dollars recovered in recent years and were the ones to originally file nearly all of the top FCA settlements of all time. In fact, several FCA settlements were achieved after *qui tam* whistleblowers and their counsel devoted years either trying to persuade the Government of the merits of the case before achieving an intervention decision, or litigating the case following a

[42] *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005).

Government declination.

Perhaps the best example of the benefits *qui tam* assistance brings to FCA enforcement was seen in a 2006 settlement involving Northrop Grumman. Here, the United States negotiated a $134 million FCA settlement that simply never would have been achieved without the dedication, hard work and perseverance of two *qui tam* whistleblowers and their counsel.[43] This settlement resolved allegations that were originally brought to light in 1989, that the defense contractor was overcharging the Government for radar jamming devices installed on Air Force airplanes. When the Government declined to intervene, the *qui tam* whistleblowers and their counsel continued working the case on their own for the next *nine years*, undertaking extensive document and deposition discovery, and risking their personal resources on the case. Finally, in 2002, they were able to convince the Government to take a second look and to intervene in the suit.

The good news for the public fisc is that this settlement is not an outlier. Time and time again, *qui tam* whistleblowers and their counsel have recovered the country's stolen tax dollars.[44] FCA defendants, however, argue that *qui tam* suits recover few dollars for the public fisc, especially after the Government declines to intervene. To support their argument, they point to Justice Department statistics that show a relatively low number of settlement dollars under the "non-intervened *qui tam* suits" category. However, while settlements like the above *Northrop Grumman* case are tallied in the "intervened *qui tam* suits" category, it is dishonest to argue that *qui tam* whistleblowers and their counsel brought little to the table in the nine years that they solely carried the case during the post-declination period.

However, for every successful FCA settlement, there are perhaps a dozen meritorious *qui tam suits* that have been derailed by atextual procedural hurdles found nowhere in the FCA or in the underlying legislative history. FCA defendants counter that the current FCA is working "well enough" and that the $27 billion recovered under the

[43] *United States ex rel. Holzrichter v. Northrop Grumman*, Civil Action No. 89C 6111 (N.D. Ill. 2006).

[44] Another good example is the settlements of *United States ex rel. Alderson v. HCA-The Healthcare Company* and *United States ex rel. Schilling v. HCA-The Healthcare Company*. Although the Justice Department originally intervened in all aspects of both cases in 1998, when it came time to litigate the consolidated cases following a lengthy stay of the proceedings, the Government declined to pursue a number of the allegations, instead restricting its efforts to the strongest claims. The *qui tam* whistleblowers and their counsel pursued the rest of the claims on their own, recovering about $100 million for the Government through their independent efforts. In addition, at the request of the Justice Department, they assumed almost all of the affirmative discovery work on the intervened parts of the case, with the Government's lawyers focusing on defending depositions of government witnesses and producing government documents. In 2003, the two cases settled for more than $600 million in cash and credits.

Act since the 1986 FCA Amendments is somehow sufficient. They paint our country's courageous whistleblowers as "parasites" whose cases should be silenced, not because of the merits of their suits, but because existing judicial rewrites to the Act. Their similar tactics in courts have silenced countless *meritorious* whistleblower suits, undermining FCA enforcement to the determent of the U.S. Department of Justice and the public fisc. The truth is that over the last quarter century of FCA enforcement, FCA defendants have been successful in highlighting some of the statutory deficiencies and procedural inefficiencies in the law. As outlined above, Congress recently decided to correct some of these deficiencies. However, when it comes to fighting fraud, particularly in the current economic crisis, it is not a matter of settling for "well enough."

In turn, the remaining proposed amendments offered in the FCA Corrections Act have received broad bipartisan support. They reject judge-created, extraneous procedural hurdles that have wrongfully derailed meritorious suits, and they fully restore the law enforcement capabilities of the FCA. The remainder of the bill clarifies that *qui tam* whistleblowers with *detailed* knowledge of fraudulent schemes may bring cases even when they lack access to the FCA defendants' underlying billing documentation. Moreover, it replaces the current patchwork of statute of limitations period with a uniform, straightforward statute of limitations period of ten years.

A. Encouraging *Qui Tam* Suits That Specifically Detail Fraudulent Schemes, Regardless of Whether the Allegations Include Innocuous Billing Documentation

Congress needs to inject predictability into the FCA practice by explicitly clarifying *how* Federal Rule of Civil Procedure Rule 9(b) applies to FCA *qui tam* suits. Currently, courts are in disarray on the proper application of Rule 9(b). Different standards apply in different federal circuits--and *even in the same courthouse and same type of case*[45]--with some requiring claims evidence at the pleading stage[46] and others not

[45] *Contrast Hopper* v. *Solvay Pharms., Inc.*, 588 F.3d 1318, 1326 (11th Cir. 2009) (holding that a relator must plead a specific false claim to avoid dismissal of his complaint), petition for cert. pending, No. 09-1065 (filed Mar. 4, 2010), with *United States ex rel. Walker* v. *R&F Props. of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005)(permitting a relator to allege detailed information about a fraudulent scheme supporting an inference that the defendant submitted false claims), cert. denied, 549 U.S. 1027 (2006), and *United States ex rel. Clausen* v. *Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (stating that a *qui tam* complaint must contain "some indicia of reliability . . . to support the allegation of an actual false claim for payment") (emphasis omitted), cert. denied, 537 U.S. 1105 (2003). *Cf. United States ex rel. Bledsoe* v. *Community Health Sys., Inc.*, 501 F.3d 493, 504n.12 (6th Cir. 2007) (declining to address whether a complaint must be dismissed "where a relator demonstrates that he cannot allege the specifics of actual false claims that in all likelihood exist, and the reason that the relator cannot produce such allegations is not attributable to the conduct of the relator").

requiring such evidence.[47] This confusion is compounded by the fact that no other category of cases has demanded pleading of specific pieces of evidence at the *pleading* stage of litigation.

That uncertainty and confusion greatly hinders *qui tam* relators ability to assist the Government. The simple fact is that the Government needs whistleblowers to provide inside information about fraudulent schemes; the Government already has easy access to the underlying invoice documentation. This is precisely why the Justice Department has consistently argued that requiring *qui tam* whistleblowers to plead specific false claims is a "formalistic and rigid interpretation of Rule 9(b) which distorts the purpose of the Rule."[48] The Government contends that it "hamstring[s] the parties in counter-productive pleading and motion practice that [ ] unduly delay[s] examination of False Claims Act cases on the merits."[49]

Moreover, requiring relators to identify specific false claims would not meaningfully assist the Government's enforcement efforts. To the contrary, the likely effect of such a requirement would be to discourage the filing of *qui tam* suits by relators who would otherwise have both the means and the incentive to expose acts of fraud against the United States. Whistleblowers typically know the details of the fraudulent scheme, not the innocuous information on an invoice. However, by requiring a *qui tam* whistleblower to produce an invoice, or some other sheet of paper, at the pleading stage, courts have prevented fraudulent schemes from seeing the light of day. Moreover, some laws prevent or discourage compiling claims data. For example, national and state patient privacy laws may discourage a physician-insider from disclosing this information, even if he knows everything about the underlying fraud scheme.

[46] *See United States ex rel. Bledsoe* v. *Community Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007) ("We hold that pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b)."); *see also United States ex rel. Sikkenga* v. *Regence BlueCross BlueShield*, 472 F.3d 702, 727-728 (10th Cir. 2006) (affirming dismissal of cause of action that failed "to identify any specific [false] claim"); *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1358-1360 (11th Cir. 2006) (same); *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 560 (8th Cir.) (requiring the relator to plead "some representative examples" of false claims), cert. denied, 549 U.S. 881 (2006).

[47] *See, e.g., United States ex rel. Lusby* v. *Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) (Easterbrook, C.J.) ("[It is not] essential "essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit."); *United States ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

[48] *Statement of Interest of the United States, United States ex rel Hopper v. Solvay Pharmaceuticals*, Civil No. 8:04-CV-2356 (M.D. Fla. 2007).

[49] *Id.*

Time and time again, *qui tam* whistleblowers have alleged significant details of the fraudulent schemes, only to have courts dismiss the suits on the basis that the whistleblowers lacked access to the billing documentation, and consequently could not allege details of the invoices sent to the Government, such as which billing department employee submitted the false claims, on which date, and with regard to the care of which patient. In fact, the Eighth and Eleventh Circuits both recently dismissed cases under Rule 9(b) simply because the whistleblowers "did not work in the billing department."[50]

The Eighth Circuit *Joshi* decision is a perfect example of the real-world absurdity of this Rule 9(b) misapplication. Here, the court acknowledged that it "fully recognize[d] Dr. Joshi alleges a systemic practice of St. Luke's and Dr. Bashiti submitting and conspiring to submit false claims over a sixteen year period."[51] In particular, in the court's own words:

> Dr. Joshi, an anesthesiologist who practiced from 1989 to 1996 at St. Luke's, brought a *qui tam* action under the FCA against St. Luke's and Dr. Bashiti, alleging violations [of the FCA] . . . In Count I, Dr. Joshi alleges St. Luke's requested and received Medicare reimbursement from the government for anesthesia services performed by Dr. Bashiti at the reimbursement rate for medical direction of anesthesia services, when St. Luke's was entitled only to the lower reimbursement rate for medical supervision or no reimbursement at all. Dr. Joshi alleged Dr. Bashiti failed both to perform pre-anesthetic evaluations and prescribe anesthesia plans, and Dr. Bashiti falsely certified he supervised or directed the work of several certified registered nurse anesthetists (CRNAs).[52]

In short, Dr. Joshi provided more than enough details of the scheme for the defendants to know exactly the nature of the fraud at issue. As an anesthesiologist, Dr. Joshi witnessed Dr. Bashiti's failure to perform the work and the supervision required to bill Medicare for specified services, and he alleged the specifics of what he had observed. Then, Dr. Joshi detailed how the services were being billed, and the fact that Medicare was being billed. Nonetheless, the Eighth Circuit affirmed the lower court's ruling that Dr. Joshi's failure to identify specific billing documentation was fatal to his complaint, noting: "Dr. Joshi was an anesthesiologist at St. Luke's, not a member of the billing department."[53]

Regrettably, court decisions such as *Joshi* drastically undermine the

[50] *See, e.g., United States ex rel. Joshi v. St. Luke's Hospital*, 441 F.3d at 557; *Corsello*, 428 F.3d at 1013-14.

[51] *Joshi* at 557.

[52] *Joshi* at 554.

[53] *Joshi* at 557.

Government's ability to uncover false claims targeting the U.S. tax dollar. This is especially true when the fraud takes places behind corporate walls, where organizational knowledge is regularly compartmentalized: the billing department employees rarely know the details of what is happening on the operational side, and the reverse is true as well. For example, in a hospital overbilling case, it would be highly unusual for billing department employees to be in a position to discern that a given doctor was misrepresenting the nature of the services delivered to any particular patient. On the flip side, the doctors practicing alongside another doctor will see what medical work he is performing, and may overhear how the work is being billed, but will not have access to the actual billing documentation itself.

While these court decisions may not pose a problem for the rare whistleblower-billing department employee, they pose a serious threat to the vast majority of potential whistleblowers who witness the fraud but do not work in the billing department. The reality is that the employees with the necessary inside information and knowledge of the underlying fraudulent schemes do not have ready access to the actual claims or invoices submitted to the Government. However, the information that would be supplied by these employees is *precisely* the evidence needed to unravel complex fraud schemes.

Moreover, as some courts have correctly recognized, the chief objective of Rule 9(b) -- putting the defendant sufficiently on notice of the allegations so that it can mount a defense--is easily met by a complaint that details other aspects of the fraudulent scheme, such as the category of claims alleged to be false, the perpetrators, time and location of the scheme, and the factual predicate for the whistleblower's belief that the claims are false.

Congress should reject such excessively rigid evidentiary standard by explicitly making Rule 9(b) apply to *qui tam* whistleblowers the *same* as it applies to any other litigant in a case where the Rule applies. Explicitly adopting the reading of the Rule 9(b) championed by the Justice Department, Congress should add a new subsection to the FCA that would provide that "[i]n pleading an action brought under section 3730(b), a person shall not be required to identify specific false claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made."

This proposed amendment would correctly highlight the inside information the Government actually needs for a successful fraud prosecution. Notably, the amendment would expressly require *qui tam* whistleblowers to either "identify *specific* claims that result from an alleged course of misconduct" or "provide adequate notice of the *specific* nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made." In turn, the Government would be greatly assisted by detailed *qui tam* suits without concerns that meritorious fraud allegations will be silenced under an erroneous pleading standard, and the defendants

would have more than enough information to mount a defense.

C. Setting Uniform Statute of Limitations Period

Congress should also remove the confusion over the statute of limitations period by adopting a straightforward ten-year period. Under the current law, the statute of limitations period is *currently* up to ten years for cases where the defendants have concealed the fraud. The truth is that because of the subversive nature of fraudulent schemes, the vast majority of *current* FCA cases qualify for the 10-year period. However, because some courts have adopted differing standards, it behooves Congress to adopt one uniform 10-year standard for all cases.

FCA defendants complain that such a change would greatly expand the limitations period from six years to ten years. However, the statute of limitations on FCA claims currently runs *on the later* of six years from the date of violation, or three years from the date that the United States learned of the violation, *not to exceed ten years*. The proposed amendment is necessary only because this language has proven confusing for the courts and the parties. Courts across the country now read the confusingly-worded limitations period in a myriad of ways, only adding to the confusion of all parties.[54]

The proposed amendment is especially needed to permit the U.S. Government to pursue fraud by contractors providing goods and services in Iraq. Some courts have effectively required the FCA plaintiff--whether the Government or a *qui tam*

[54] The FCA currently requires an FCA complaint to be filed by *the later of*: (i) six years from the date of the violation, or (ii) three years from the date "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances," not to exceed ten years from the date of the violation. 31 U.S.C. § 3731(b). The chief source of confusion has been the three year tolling provision in 31 U.S.C. § 3731(b)(2). The courts have been unclear how to apply this provision when a relator files a case, or proceeds with a case declined by the United States. Some courts have held that the relator does not get the benefit of the tolling provision at all. *See, e.g., United States ex rel. Sikkenga v. Regence Blue Cross Blue Shield of Utah*, 472 F.3d 702, 724-25 (10th Cir. 2006); *Neal v. Honeywell*, 33 F.3d 860, 865-66 (7th Cir. 1994); *United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 171 (D.D.C. 1998). Other courts have held that the relator may file within three years of when he or she first knew or reasonably should have known the facts material to the rights of action. *See, e.g., United States ex rel. Hyatt v. Northrop Corp*., 91 F.3d 1211, 1218 (9th Cir. 1996); *United States ex rel. Lowman v. Hilton Head Health Sys*., L.P., 487 F. Supp. 2d 682, 697 (D.S.C. 2007). Yet other courts have ruled that the relator may file within three years of when the Government knew or reasonably should have known about the violation. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.*, 474 F. Supp. 2d 75, 88-89 (D.D.C. 2007).

whistleblower--to file suit within six years of the date when the defendant violated the FCA. Six years is far too short a time to uncover many of the fraudulent schemes aimed at Government programs. In fact, Congress has provided the Government with a ten-year statute of limitations for recovery of debts owed to the United States.[55] Surely when fraud is involved, the Government needs at least as long a period of time to uncover the matter as it would need to look into an ordinary debt.

Moreover, a ten-year statute of limitations is even more important when the Government must surmount the special challenges of locating and acquiring evidence in a war-torn country. These special challenges include working with foreign law enforcement personnel, arranging for special security in high threat zones, and finding witnesses willing to risk their lives to cooperate with the Government's investigation. The United States is entering its eighth year in Iraq. Under some of the incorrect readings of the FCA statute of limitations, the United States has already lost the ability to pursue many claims for Iraq war fraud that took place in the initial year of the Iraq war and reconstruction effort. This proposed amendment is critical to preserve the ability of the Justice Department to effectively pursue and obtain recoveries for such fraudulent activities. In short, the proposed amendment would not only remove the confusion plaguing the FCA practice, but it would ensure that the Government is able to fully prosecute fraud targeting our war efforts in Iraq and Afghanistan.

[55] *See* 31 U.S.C. § 3716(e).

Whistleblower Reporting

Policy	XXXXX encourages the reporting of all fraudulent or illegal activity.
Whistleblower Definition	A whistleblower is defined by this policy as a XXXXXXX who reports an activity that he/she considers to be illegal or dishonest to one or more of the parties specified in this Policy. The whistleblower is not responsible for investigating the activity or for determining fault or corrective measures; appropriate management representatives are charged with these responsibilities.
Reporting Concerns	If an employee has knowledge and/or concern of an illegal or dishonest fraudulent activity, the employee should contact his/her immediate supervisor, the Vice President of Human Resources or email the confidential mailbox of the Audit Committee Chair. The employee must exercise sound judgment to avoid baseless allegations. An employee who intentionally files a false report of wrongdoing will be subject to disciplinary action up to and including termination.
Investigation Process	All reports of illegal and dishonest activities will be promptly investigated by the Vice President of Human Resources.
Protection from Retaliation	The Company will not retaliate against a whistleblower. This includes, but is not limited to, protection from retaliation in the form of an adverse employment action such as termination, compensation decreases, or poor work assignments and threats of physical harm. Any whistleblower who believes he/she is being retaliated against must contact the Vice President of Human Resources immediately.
Questions	Employees with any questions regarding this policy should contact the Vice President of Human Resources.

ETHICAL CONDUCT AND GOVERNANCE

XXXXXXXX

XXXXXX (the "*Organization*") is committed to lawful and ethical behavior in all of its activities and requires its employees to conduct themselves in a manner that complies with all applicable laws and regulations and to observe high standards of business and personal ethics in the conduct of their duties and responsibilities. If at any time a concern exists regarding the propriety or legality of any action contemplated to be taken or that has been taken by any Organization director, officer, employee, grantee, contractor or vendor, as the action relates to the Organization's activities, or if an action needs to be taken in order for the Organization to be in compliance with law or appropriate ethical standards, an employee can address the issue directly by going to his or her manager or to the next level of management as needed until matters are satisfactorily resolved.

Alternatively, if an employee is not comfortable speaking to a manager or does not feel the issue has been properly addressed, such employee may contact the Director of Human Resources. If such employee does not believe that these channels of communication can/should be used to express his or her concerns, such employee may contact the Chairman of the Audit Committee, or any member of the Board of Directors of the Organization.

Under this policy (sometimes referred to as a "whistleblower policy"), those who report illegal or improper activity will be protected. Efforts will be made to treat a report of unethical or illegal conduct as confidential, consistent with the need to investigate and prevent or correct the action. The individual making the report will not be discharged, threatened, harassed or discriminated against for reporting in good faith what he or she perceives to be wrongdoing, violations of law or unethical conduct.

XXXXXXXX

Procedures for the Submission of Complaints or Concerns Regarding Financial Statement Disclosures, Accounting, Internal Accounting Controls, Auditing Matters or Violations of the Code of Ethics for Senior Executive and Financial Officers or Code of Business Conduct and Ethics

Section 301 of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") requires the Audit Committee of the Board of Directors (the "Audit Committee") of XXXXXXXXX (the "Company") to establish procedures for: (i) the receipt, retention and treatment of complaints received by the Trust regarding accounting, internal accounting controls or auditing matters; and (ii) the confidential, anonymous submission by employees of the Company and others of concerns regarding questionable accounting or auditing matters.

In accordance with Section 301 of the Sarbanes-Oxley Act, the Audit Committee has adopted the following procedures:

1. The Company shall promptly forward to the Audit Committee any complaints that it has received regarding financial statement disclosures, accounting, internal accounting controls or auditing matters.

2. Any officer or employee of the Company may submit, on a confidential, anonymous basis if such officer or employee so desires, any concerns regarding financial statement disclosures, accounting, internal accounting controls, auditing matters or violations of the Company's Code of Ethics for Senior Executive and Financial Officers or Code of Business Conduct and Ethics. All such concerns shall be set forth in writing and forwarded in a sealed envelope to the chairman of the Audit Committee, in care of the Company's Chief Compliance Officer and labeled with a legend such as: "To be opened by the Audit Committee only. Being submitted pursuant to the "whistleblower policy" adopted by the Audit Committee." If an officer or employee of the Company or an officer or employee of the Manager would like to discuss any matter with the Audit Committee, such officer or employee should indicate this in the submission and include a telephone number at which he or she might be contacted if the Audit Committee deems it appropriate. Any such envelopes received by the Company's Chief Compliance Officer shall be forwarded promptly and unopened to the chairman of the Audit Committee.

3. Following the receipt of any complaints submitted hereunder, the Audit Committee will investigate each matter so reported and take corrective and disciplinary actions, if appropriate, which may include, alone or in combination, a warning or letter of reprimand, demotion, loss of merit increase, bonus or share options, suspension without pay or termination of employment, and if the complaint involves an officer or employee of the Manager, the Audit Committee may notify the Manager of the matter, as appropriate.

4. The Audit Committee may enlist officers and/or employees of the Company, including officers and/or employees of the Manager who provide services to the Company and/or outside legal, accounting or other advisors, as appropriate, to conduct any investigation of

complaints regarding financial statement disclosures, accounting, internal accounting controls, auditing matters or violations of the Company's Code of Ethics for Senior Executive and Financial Officers or Code of Business Conduct and Ethics. In conducting any investigation, the Audit Committee shall use reasonable efforts to protect the confidentiality and anonymity of the complainant.

5. The Company does not permit retaliation of any kind against officers or employees for complaints submitted hereunder that are made in good faith.

6. The Audit Committee shall retain as a part of the records of the Audit Committee any such complaints or concerns for a period of no less than seven (7) years.

WHISTLEBLOWER POLICY

XXXXX

XXXXXXX (the "Company") is committed to lawful and ethical behavior in all of its activities and requires its employees to conduct themselves in a manner that complies with all applicable laws and regulations and to observe high standards of business and personal ethics in the conduct of their duties and responsibilities. If at any time a concern exists regarding the propriety or legality of any action contemplated to be taken or that has been taken by any Company officer, trustee, employee, grantee, contractor or vendor, as the action relates to Company activities, or if an action needs to be taken in order for the Company to be in compliance with law or appropriate ethical standards, an employee can address the issue directly by going to his or her manager or to the next level of management as needed until matters are satisfactorily resolved.

Alternatively, if an employee is not comfortable speaking to a manager or does not feel the issue has been properly addressed, such employee may contact the President. If such employee does not believe that these channels of communication can/should be used to express his or her concerns, such employee may contact the Chairman of the Company.

Under this policy, those who report illegal or improper activity will be protected. Efforts will be made to treat a report of unethical or illegal conduct as confidential, consistent with the need to investigate and prevent or correct the action. The individual making the report will not be discharged, threatened, harassed or discriminated against for reporting in good faith what he or she perceives to be wrongdoing, violations of law or unethical conduct.

Adopted by the Board of Directors: _____

XXXXXXXX XXXXXXXXXX

XXXXX Whistleblower Procedure

The Executive Board and the Supervisory Board of XXXXX. (the "Company") have approved this COMPANY Whistleblower Procedure. COMPANY considers the good reputation and integrity of its organization as key requirements to operate successfully in the financial world. The COMPANY Whistleblower Procedure provides the opportunity for every COMPANY employee to make his or her complaint, including anonymous complaints, to the Compliance Officer in order for the responsible management to take appropriate and adequate action in case of alleged breaches of internal or external law or regulation, of COMPANY Business Principles or other irregularities (including those related to accounting, internal accounting controls and auditing matters). The COMPANY Whistleblower Procedure applies to all COMPANY entities.
[The management of each COMPANY entity is responsible for the implementation of this COMPANY Whistleblower Procedure and should inform all its employees of this COMPANY Whistleblower Procedure.
The Corporate Legal, Compliance & Security Department is responsible for the maintenance and update of this COMPANY Whistleblower Procedure.][1]

1.1 General

The COMPANY Whistleblower Procedure is not designed to replace open, honest and respectful communication between staff and their line managers on any breach or potential breach of COMPANY Business Principles or relating to other irregularities (including, without limitation, those related to accounting, internal accounting controls and auditing matters). The procedure recognises, however, that employees do not always want to raise certain issues with their line managers, and this is where the COMPANY Whistleblower Procedure provides an alternative.

Employees of COMPANY can report complaints via this COMPANY Whistleblower Procedure.

"Employee" means an individual employed by COMPANY or any COMPANY entity on the basis of a contract of employment, whether permanent, part-time or fixed-term.[2]

[1] Consider appropriateness if this document is made widely available.

[2] Please note that Rule 10A-3 under the Securities Exchange Act of 1934 (adopted under Section 301 of SOX) requires issuers to adopt 'whistleblower' procedures which that would enable 'employees' to make anonymous complaints regarding accounting, internal accounting controls, or auditing matters. There is not a clear definition of 'employee' under this section. There is another provision, under Section 806 of SOX, which enables 'whistleblowers' who think their employment was terminated as a result of their complaints regarding possible mail fraud, wire fraud, bank fraud, securities fraud or violation of federal of SEC rules relating to fraud against the shareholders to file a complaint with the U.S. Department of Labor. For these purposes, the US Department of Labor has adopted a very broad definition of 'employee' which was included in the draft. However, it should be noted that (1) it is not clear that the definition of 'employee' adopted by the US Department of Labor would be used/appropriate under Rule 10A-3 and (2) it is uncertain if SOX 806 is applicable to non-U.S. employees in the first place. Accordingly, we think the definition of 'employee' could be narrower as indicated above.

- The scope of the COMPANY Whistleblower Procedure is limited to complaints that refer to possible breaches by an COMPANY employee of external or internal laws or regulations, of COMPANY Business Principles, as well as alleged irregularities of a general, operational and financial nature in the company (including any procedure regarding accounting, internal accounting controls or auditing matters).
- If the COMPANY Whistleblower Procedure conflicts with any applicable local law, such local law prevails.
- [The management of COMPANY entities shall ensure that the COMPANY Whistleblower Procedure is available and known to all its employees.]
- The management of COMPANY entities shall appoint a Compliance Officer as the officer to whom whistleblower complaints must be reported. [Please note the term "Reporting Officer was taken out throughout the document. The reason we suggest to delete the second sentence is because it seems to describe the same idea covered in the next bullet point].
- The Compliance Officer shall assist management in implementing the COMPANY Whistleblower Procedure and is, moreover, responsible for the receipt of complaints and for executing the preliminary investigation.

1.2 Submission of complaints

Complaints may be reported by phone, e-mail, regular mail or fax, or where available, via internal employee hotlines or external hotlines operated by 3rd party vendors following scripts developed by COMPANY. Complaints may be submitted on an anonymous basis.

- As a general rule complaints must be reported to the Compliance Officer of the COMPANY entity the employee is working for. If the involved COMPANY entity is not the entity the employee is working for, the complaint can be reported to the Compliance Officer of the involved COMPANY entity.
- The Compliance Officer must report an incoming complaint immediately to the Compliance Officer at the next higher level and must also report the complaint separately to the Group Compliance Officer.
- Complaints that are submitted via other reporting channels (e.g. via the contact button of www.Company.com) must be passed on to the Group Compliance Officer. The Group Compliance Officer must pass the complaint on to the Compliance Officer of the involved COMPANY Entity via the Head of Compliance of the business line involved.

1.3 Content of complaints

Complaints should be factual rather than speculative, be made in "good faith" and contain as much specific information as possible. Complaints that contain unspecified wrongdoings or broad allegations without verifiable evidentiary support are difficult to

deal with. Without limiting the generality of the foregoing, complaints should, to the extent possible, contain the following information:

- the alleged event, matter or issue that is subject of the complaint;
- the approximate date and a location of each event;
- the name of each person involved and
- any documentation or other evidence available to support the complaint.

Employees must be aware that the COMPANY Whistleblower Procedure is not a platform to discuss lack of management style or competences, or business judgment of management decisions.

1.4 Complaint handling

- The Compliance Officer of the involved COMPANY entity shall perform the preliminary investigation, as soon as a complaint has been received.
- The Compliance Officer shall discuss a reported complaint with the management of the entity involved.
- The Compliance Officer shall hand over the complaint to the Compliance Officer of the next (higher) level if management of the involved COMPANY entity itself is the object of the complaint. The Compliance Officer of the next (higher) level will discuss the complaint with the management of the next higher level.
- The employee shall report his complaint to the Compliance Officer of the next (higher) level if the Compliance Officer himself or herself is object of the complaint or if the employee is unsatisfied with the progress and/or the outcome of the investigation.
- The Compliance Officer shall advise the management to close the complaint if his investigation shows no justification for the complaint.

1.5 Indication of Violations or Irregularities

If the preliminary investigation has revealed serious indications of possible violations of internal or external law or regulation or other irregularities, management shall report the complaint to Corporate Audit Services/Corporate Special Investigations (CAS/CSI). CAS/CSI and Corporate Legal, Compliance & Security Department (CLC&S) will decide about the scope of the investigation and how the investigation is to be carried out after consultation with the management of the entity involved or the management of the next (higher) level if the management of the entity involved is part of the investigation. The investigation and the settlement of such an incident must be carried out according to the COMPANY Group Investigation Policy.

1.6 Giving feedback information to the employee

The employee will receive general information on the progress of the investigation (and its outcome) unless the employee prefers not to be informed or unless this would be detrimental to the investigation or unless there are other sound reasons not to inform the employee. The Compliance Officer is responsible for informing the employee if the complaint has been settled or closed.

1.7 “Up-the-ladder” reporting and reports to the Audit Committee

The Compliance Officer shall report the results of the investigations and settlement of all complaints to the Compliance Officer of the next (higher) level and to the Group Compliance Officer according to the following reporting format:

1.	Specification of the person to whom the complaint was submitted
2.	Specification of the date on which the complaint was submitted
3.	Brief description of the facts and the allegation(s)
4.	Specification of the actions taken (to be) taken
5.	Specification of the findings and/or the result of the (preliminary) investigation
6.	Specification of how the complaint was or is to be settled
7.	Specification of measures for preventing the situation that gave rise to the complaint from recurring (such as refining the [AO][?]).
8.	Any other peculiarities

The Group Compliance Officer will report the aggregate of such reports to the Audit Committee of COMPANY Group. These reports shall be made on a quarterly basis and shall not disclose the employees’ names or other details that may lead to disclosure of the identity of the employee.

1.8 Complaints regarding members of the Executive Board and members of the Supervisory Board

The Compliance Officer shall report any complaints regarding the members of the Executive Board of COMPANY Group and the members of the Supervisory Board of COMPANY Group to the Group Compliance Officer. The latter will report the complaint to the chairman of the Supervisory Board of COMPANY Group. If the chairman of the Supervisory Board of COMPANY Group is object of complaint the Group Compliance Officer will report to the deputy-chairman of the Supervisory Board of COMPANY Group or in case of his absence the most senior member (in terms of years for COMPANY Group) of the Supervisory Board of COMPANY Group.

1.9 Records of all activities

The Compliance Officer shall keep records of all his activities, reports and information received. All reports made by the Compliance Officer (including discussions with management or others) will be anonymous with respect to the identity of the employee, except for those reports that are retained in his own file.

2 Special requirements

2.1 Easy access

All employees must have easy access to the Compliance Officer.

The (e-mail) address and telephone number of the Compliance Officer must be published. Persons wishing to report verbally should be able to visit the Compliance Officer in confidence. External meeting places should be considered for this purpose, if required.

To encourage the employee to report without fear of retaliation, the management must realize a possibility for the employee to report anonymously (e.g. by setting up an anonymous telephone line to report anonymously to the Compliance Officer).

The employee who prefers to submit a complaint on an anonymous basis should realize that in some cases it may not be possible to proceed with or properly conduct an investigation unless he or she provides further information. Also COMPANY can not give feedback to such employee on the progress of the investigation and its outcome if he or she can not be contacted. COMPANY therefore expects anonymous complainers to leave behind a possibility for the Compliance Officer to get in touch e.g. via an anonymous e-mail address.

2.2 No retaliation

None of the COMPANY entities will discharge, demote, suspend, threaten, harass, or in any other matter discriminate against an employee in the terms and conditions of employment because of any (lawful) actions done by the employee in connection with good faith reporting of complaints or participation in a related investigation or proceeding.

The Executive Board of COMPANY Group ensures that employees who respect the COMPANY Whistleblower Procedure are able to report their complaint without jeopardizing their relationship under law of employment as a result of their reporting. Retaliation as a result of any such action is to be considered a serious breach of the COMPANY Whistleblower Procedure in which case appropriate action shall be taken to safeguard the relationship under law of employment of the employee. An employee's right to protection from retaliation does not extend immunity for any participation or complicity in the matters that are the subject of the complaint or an ensuing investigation.

2.3 Confidentiality and anonymity

COMPANY and COMPANY entities will maintain the confidentiality of the complaint and shall never reveal the name of the employee making the complaint unless required by law. COMPANY also expects the employee to treat the complaint confidentially.

If the Compliance Officer at some point of time is ordered and required by law to report the name of the employee, the Compliance Officer will inform the employee immediately and before reporting the name of the employee, unless the Compliance Officer has lawful reasons not to do so.

OUTLINE

Who Should Benefit from Settlement of Whistleblower Cases?

A Preliminary Analysis of Recent Health Care Industry Settlements

Katherine C. Pearson
Professor of Law
The Dickinson School of Law
Pennsylvania State University
Date: March 20, 2014

I. Background

In recent years a few "whistleblower" cases have attracted high profile coverage in the media, including the controversy surrounding Edward Snowden, the former National Security Administration contractor who disclosed surveillance practices by national intelligence agencies. Whether he should be prosecuted as a "traitor" or celebrated as a "hero" is part of the national -- and international -- debate. As another example of a high profile case, former Pennsylvania cyclist Floyd Landis sought the protection of the federal False Claims Act as a whistleblower for disclosing the misuse of performance enhancing drugs by members of the United States Postal cycling team, including Lance Armstrong.

Most cases of whistleblowing attract far less dramatic coverage than Snowden or Landis, while at the same time having potentially greater significance to the public, to state and federal authorities and to the companies or agencies targeted by the whistleblowers' reports. In recent months I have become increasingly aware of federal False Claims Act cases involving whistleblowers in health care-related industries. Because of the relationship between False Claims Act cases and Medicare or Medicaid, these cases frequently coincide with my interest in elder law, and specifically my research on quality of care and financing concerns for senior care, including health and long-term care. The dollar amounts recovered through settlement of *qui tam* cases in health care and senior care are significant, growing, and therefore, I suggest, trigger new policy questions about the value and purpose of whistleblower laws, as I outline below. This is a work in progress, a "preliminary" look at who benefits from settlement of whistleblower cases in health care. I also ask a related question about who should benefit.

II. Key Whistleblower Statute: Federal False Claims Act, 31 U.S.C. §§ 3729 -3733

To begin, it is useful to focus on a summary of the key language in the federal False Claims Act, which provides that any person who knowingly presents a false or fraudulent claim for payment or approval, or make or uses a false record or statement material to a false or fraudulent claim "is liable to the U.S. Government for a civil penalty … plus three times the amount of damages which the Government sustains because of the act of that person." In 2009, the False Claims Act was amended to include liability for knowingly retaining "overpayments." *See* 31 U.S.C. § 3729(a)(1)(G); § 3729(b)(3).

Individuals may file *qui tam* suits under seal in the name of the United States, which in turn permits the United States to decide whether to intervene and join in prosecution of the case.

To incentivize individuals to report suspected fraud or other improper action, the federal law permits the reporter (termed a "relator") to be paid a percentage of the recovery from the target defendant. The maximum percentage is 30%, although in practice the percentage paid is usually significantly less.

Qui tam claims arising from health care (usually Medicare or Medicaid) now dominate the allegations of fraud addressed through the federal False Claims Act, both in terms of number of claims and the dollar amounts recovered through litigation or settlement. The history of the False Claims Act, once known as "Lincoln's Law," goes back to 1863, when the law was a key to coping with fraud and self-dealing by contractors for the Union army. Consistent with that original need, the second highest category for modern *qui tam* claims and recoveries is still connected to military defense. For example, according to information from the Civil Division of the U.S. Department of Justice:

- Between October 1, 1987 and September 30, 2013 (27 years), there were 1,434 new *qui tam* suits filed in connection with Department of Defense-related contracts, with a **total of $2.7 billion in settlements or judgments reached during those years**.
- During that same 27 year period, there were 5,279 new *qui tam* suits filed in connection with Department of Health and Human Services-related contracts, with a **total of $20 billion in settlements or judgments reached during those years.**
- During a ten year period starting October 1, 1987, there were approximately 440 new health care *qui tam* suits filed. By comparison, in a single 12 month period ending September 20, 2013, there were more than 500 new health care *qui tam* suits filed, thus demonstrating the sharp upward trend in health-care *qui tam* suits.

For additional statistics related to qui tam recoveries, see Addendum A to this outline, a Justice Department summary of *qui tam* and non *qui tam* recoveries during the last thirty years.

III. Types of Whistleblower Claims in Health Care

Whistleblowers who have initiated *qui tam* suits connected to federal and state government health-care sponsored programs have alleged a wide spectrum of improper practices, including:

- Seeking payment for services not rendered
- Seeking or making payments for referrals that violate the federal Anti-Kickback Statute, 42 U.S.C. § 1328-7b(b)
- Billing for "up-coded" services
- Seeking payment for Improper "bundled" or "unbundled" services
- Seeking payment for services that are not "medically necessary"
- Conflict of Interest, such as seeking payments that violate "Anti-Self-Referral Rules" under "kickback" prohibitions of the Stark Law, 42, U.S.C. §§ 1395nn and 1396b
- Improper billing for pharmaceuticals under Medicare Part D
- Marketing of medications for "off-label" (untested and/or unapproved) uses
- Seeking and accepting payment for "poor quality" services for Medicare/Medicaid patients

IV. Examples of Recent Health Care Settlements in Whistleblower Cases in Health Care

A. Marketing of Pharmaceuticals for Off-Label, Unapproved Uses:

In November 2013, the Department of Justice announced a "global" settlement whereby pharmaceutical giant **Johnson & Johnson (J&J)** and its subsidiaries will pay more than $2.2 billion to resolve criminal and civil liability claims arising out of allegations related to "off-label" marketing of prescriptions of Risperdal, Invega and Natrecor for uses not approved by the Food and Drug Administration. The allegations include claims the company made payments (kickbacks) to physicians and pharmacists for prescribing the drugs for unapproved uses, and thus dramatically increasing the customer pool. Details of the settlement include several interesting provisions:

- J&J subsidiary Janssen would "admit" that it "promoted Risperdal [approved by the FDA as an antipsychotic] to health care providers for treatment of psychotic symptoms and associated behavioral disturbances exhibited by elderly, non-schizophrenic dementia patients." Janssen will pay $400 million, including a criminal fine of $334 million and "forfeiture" of $66 million.
- Because the drugs in question were also marketed to patients on Medicaid, which is a joint state-and-federal payment program, the settlement will include payments of at least $524 million to the states.
- Part of the settlement is directed to alleged kickback payments made to a specific company, Omnicare, Inc., the "nation's largest pharmacy specializing in dispensing drugs to nursing home patients." J&J and Janssen "agreed to pay $149 million to resolve the government's contention that these kickbacks caused Omnicare to submit false claims to federal health care programs." In 2009, Omnicare agreed to pay $98 million to resolve civil liability claims connected to the same kickback scheme as well as other allegations of fraud.
- Part of the settlement payments involved allegations that J& J and another subsidiary, Scios Inc., improperly marketed Natrecor, a drug that was approved for treatment of patients with "acutely decompensated congestive heart failure," to patients with less severe heart conditions, again dramatically increasing the customer pool. In October 2011, Scios "pleaded guilty to a misdemeanor FDCA violation and paid a criminal fine of $85 million" for interstate off-label marketing of Natrecor.
- J&J also "executed a five-year Corporate Integrity Agreement" with Department of Health and Human Services Office of Inspector General. The agreement requires J&J to (a) change its executive compensation program to permit recoupment of bonuses or financial incentives tied to misconduct, (b) implement and maintain transparency regarding research, promotion and publication policies, and compensation to physicians, (c) have key employees and executives make annual certifications of compliance with provisions of the Corporate Integrity Agreement, and (d) make detailed annual reports to HHS on compliance and business operations.
- From the J&J settlement, whistleblowers in Pennsylvania, Massachusetts, and California will receive shares of the recoveries, including $112 million to whistleblowers in the cases filed in the Eastern District of Pennsylvania.

In conjunction with the settlement, the Justice Department filed or unsealed specific complaints against Johnson & Johnson and its subsidiaries. However, because the claims were simultaneously "settled" rather than litigated, both the government and Johnson & Johnson emphasize that other than the allegations specifically admitted in the criminal plea agreements "the claims settled by the civil settlements are allegations only, and there has been no determination of liability." See additional details on the J&J settlement at http://www.justice.gov/opa/pr/2013/November/13-ag-1170.html. A copy of the 70+ page Corporate Integrity Agreement is available at http://www.justice.gov/opa/jj-pc-docs.html.

Settlement of another off-label prescription case, involving a generic anti-psychotic drug, clozapine, was announced by the Justice Department in March 2014, whereby **Teva Pharmaceuticals**, located in North Wales, PA, and its Florida subsidiary IVAC, agreed to pay $27.6 million, arising out of allegations the company paid kickbacks in the form of "consulting fees" and other perks to a Chicago-area physician for improper prescribing the drug to inappropriate patients, including the elderly. At the time of the Teva settlement, a separate civil lawsuit was still pending against the physician. The Teva details are available at: http://www.justice.gov/opa/pr/2014/March/14-civ-251.html

B. Kickback Payments for Referrals of Medicare/Medicaid Patients

In January 2014, the Justice Department announced a settlement with **RehabCare Group Inc**., RehabCare Group East, Inc., and Rehab Systems of Missouri, all operators of nursing homes or rehabilitation facilities, and Health Systems, Inc., a management company, whereby they would pay $30 million to resolve claims under the False Claims Act that they engaged in an alleged kickback payment scheme tied to referrals of Medicare-covered residents in their nursing homes for treatments.

In this case, the relator was a competitor, Health Dimensions Rehabilitation, Inc., who "receive[s] $5.7 million as its share of the recovery in the case." Additional details of the settlement, from the Justice Department release, are available at http://www.justice.gov/opa/pr/2014/January/14-civ-060.html.

Along the same lines, in November 2013, the Justice Department announced settlement with a skilled nursing provider, **The Ensign Group Inc**. that was operating nursing homes in the western part of the U.S. In that case, the settlement amount was $48 million. The allegations were the facilities submitted "false claims [to Medicare] for medically unnecessary rehabilitation therapy services." Two former Ensign therapists were the *qui tam* plaintiffs in those cases. Details on the Ensign Group settlement are available at http://www.justice.gov/opa/pr/2013/November/12-civ-1235.html.

C. Billing Medicare for Hospice for Patients Who Were Not Terminally Ill

In November 2013, the Justice Department announced settlement with **Hospice of the Comforter, Inc., (HOTCI)**, with HOTCI, a Florida firm, agreeing to pay $3 million to resolve allegations it submitted false claims for hospice services provided to patients who were not "eligible" for Medicare hospice benefits. The point of attack by the Justice Department is the "six months or less" to live diagnosis, with the Justice Department alleging HOTCI directed staff "to admit all referred patients without regard to whether they were eligible for the Medicare hospice benefit." Other allegations include alleged falsification of records to maximize Medicare coverage.

As part of the settlement, HOTCI agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services, to create processes and review procedures to "prevent future conduct similar to that which gave rise to the settlement." In addition, HOTCI agreed to a three year, "voluntary" exclusion from Medicare, Medicaid and other federal health care programs. Additional details on HOTCI's settlement are available at http://www.justice.gov/opa/pr/2013/November/13-civ-1179.html. In this case, the whistleblower, a former executive at HOTCI, reportedly objected to the settlement as "unreasonably low."

The HOTCI settlement is one of a number of "hospice" False Claim Act cases, and recent settlements include a $12 million payment agreement with **Hospice of Arizona** and a related company, American Hospice Management LLC and their parent corporation American Hospice Management Holdings LLC in May of 2013; a $25 million settlement with multi-state hospice provider **Odyssey HealthCare** in March of 2012; and $24.7 million in payments from a settlement with multi-state hospice provider **SouthernCare Inc**. in January 2009.

V. Policy Questions Arising from Health Care Settlements

It is clear that a number of parties and individuals "benefit" from prosecution and settlement of *qui tam* and non-*qui tam* claims arising in health care industries. Beneficiaries include the federal treasury, sometimes state treasuries, individual relators, and, of course, attorneys on all sides of the whistleblower cases.

At the same time, especially given the tendency of False Claim Act cases to focus on Medicare and Medicaid and thus involve seriously ill, frail, or elderly patients, there is a question about how the settlements "benefit" or at least affect a uniquely vulnerable population. On the one hand, settlements would appear to make it less likely that such patients will continue to receive unnecessary or unapproved treatments or medications, and certainly that is a major potential benefit. On the other hand, there is the potential for that same population to continue to be victims in other ways, unrelieved by the non-admissions of fault or harm that typically accompany such settlements. These potential problems include:

- Patients will often, because of age or illnesses, have limited access to private legal counsel. Yet they may have been harmed by unnecessary or improper treatments or medications and are left to make and prove such harm on a case-by-case basis.
- Patients may continue to receive "off-label" marketed drugs, as there appears to be no system created in the settlements for monitoring of long-range usage, cessation of drugs, or for development or provision of "better" alternative medications.
- Patients have likely paid co-pays and deductibles out of their own pockets, but do not appear to be reimbursed as a result of the settlements.
- Some patients will have paid privately for the same unnecessary treatments or unapproved medications, but do not appear to be included in the settlements.
- Insurance companies may have paid for the same "unnecessary" services but are not covered by the settlements.

Finally, it appears that most settlements of False Claim Act cases permit the companies to continue to do business, while placing no limitation on the companies (and their shareholders) in recouping their "losses" in the future. Presumably there will be a downstream price to the settlements, arguably operating as a tax or cost of doing business, a tax that will ultimately be paid by the public.

FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2013

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM			
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL		WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
1987	343	30	86,479,949	0	0	0	86,479,949	0	0	0
1988	210	43	173,287,663	2,309,354	33,750	2,343,104	175,630,767	88,750	8,438	97,188
1989	224	87	197,202,180	15,111,719	1,681	15,113,400	212,315,580	1,446,770	200	1,446,970
1990	243	72	189,564,367	40,483,367	75,000	40,558,367	230,122,734	6,590,936	20,670	6,611,606
1991	234	84	270,530,467	70,384,431	69,500	70,453,931	340,984,398	10,667,537	18,750	10,686,287
1992	285	114	137,958,206	133,949,447	994,456	134,943,903	272,902,109	24,121,648	259,784	24,381,432
1993	304	138	181,945,576	183,643,787	6,603,000	190,246,787	372,192,363	27,576,235	1,766,902	29,343,137
1994	280	218	706,022,897	379,018,205	2,822,323	381,840,528	1,087,863,425	69,453,350	838,897	70,292,246
1995	233	269	269,989,642	239,024,292	1,635,000	240,659,292	510,648,934	45,162,296	465,800	45,628,096
1996	185	341	247,357,271	124,361,203	13,522,433	137,883,636	385,240,908	22,119,619	3,731,978	25,851,597
1997	185	547	465,568,061	621,919,274	6,021,200	627,940,474	1,093,508,535	65,857,419	1,658,485	67,515,904
1998	120	468	151,435,794	438,834,846	30,248,075	469,082,921	620,518,715	70,264,372	8,486,645	78,751,017
1999	140	493	195,390,485	492,924,785	5,067,503	497,992,288	693,382,773	63,018,064	1,374,487	64,392,552
2000	95	363	367,887,197	1,208,370,688	1,688,957	1,210,059,645	1,577,946,841	183,679,377	375,143	184,054,520
2001	85	311	494,496,974	1,215,525,916	128,587,151	1,344,113,067	1,838,610,042	187,550,470	30,701,881	218,252,350
2002	61	318	119,598,292	1,078,174,023	25,786,140	1,103,960,162	1,223,558,454	161,377,822	4,582,319	165,960,141
2003	92	334	708,098,299	1,534,262,352	5,185,911	1,539,448,263	2,247,546,563	337,181,857	1,382,741	338,564,598
2004	105	432	115,656,023	561,717,502	9,261,879	570,979,382	686,635,404	110,224,220	2,376,128	112,600,348
2005	105	406	276,914,983	1,149,047,524	7,481,593	1,156,529,117	1,433,444,099	168,580,543	2,031,695	170,612,237
2006	71	385	1,712,459,257	1,489,706,466	22,661,363	1,512,367,829	3,224,827,086	219,704,876	5,647,836	225,352,712
2007	129	365	564,826,844	1,246,291,003	160,246,894	1,406,537,897	1,971,364,741	192,767,871	4,616,899	197,384,770

FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2013

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2008	161	379	319,283,480	1,038,828,558	12,678,936	1,051,507,495	1,370,790,975	200,701,571	2,997,615	203,699,186
2009	132	433	469,334,681	1,957,410,366	33,776,480	1,991,186,845	2,460,521,527	249,095,207	9,684,147	258,779,354
2010	140	574	639,462,785	2,275,004,265	106,491,841	2,381,496,107	3,020,958,892	362,880,436	30,107,288	392,987,724
2011	124	635	241,225,995	2,645,095,115	173,113,339	2,818,208,454	3,059,434,449	510,181,604	48,886,533	559,068,137
2012	143	652	1,608,112,862	3,198,968,892	127,795,019	3,326,763,911	4,934,876,773	404,810,208	27,206,608	432,016,817
2013	93	753	829,912,477	2,870,141,363	109,229,614	2,979,370,977	3,809,283,454	374,326,958	13,498,753	387,825,711
TOTAL	4,522	9,244	11,740,002,708	26,210,508,743	991,079,038	27,201,587,782	38,941,590,490	4,069,430,017	202,726,621	4,272,156,638

NOTES:

1. "New Matters" refers to newly received referrals, investigations, and qui tam actions.
2. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS- HEALTH AND HUMAN SERVICES [1]

October 1, 1987 - September 30, 2013

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	12	3	11,361,826	0	0	0	11,361,826	0	0	0
1988	7	5	2,182,675	355,000	0	355,000	2,537,675	88,750	0	88,750
1989	19	16	350,460	5,099,661	0	5,099,661	5,450,121	50,000	0	50,000
1990	27	11	10,327,500	903,158	0	903,158	11,230,658	119,474	0	119,474
1991	19	12	8,670,735	5,420,000	0	5,420,000	14,090,735	861,401	0	861,401
1992	26	15	9,821,640	2,192,478	0	2,192,478	12,014,118	446,648	0	446,648
1993	22	38	12,523,165	151,760,404	0	151,760,404	164,283,569	22,946,101	0	22,946,101
1994	43	76	381,470,015	6,280,815	240,000	6,520,815	387,990,830	1,113,597	72,000	1,185,597
1995	27	87	96,290,779	84,061,789	1,620,000	85,681,789	181,972,568	14,337,982	465,800	14,803,782
1996	20	177	63,059,873	49,236,698	2,340,000	51,576,698	114,636,572	8,707,168	667,400	9,374,568
1997	48	269	351,440,027	578,987,081	92,500	579,079,581	930,519,608	58,852,605	20,250	58,872,855
1998	35	276	40,107,920	251,824,167	2,526,075	254,350,242	294,458,162	46,863,357	187,015	47,050,372
1999	27	315	38,000,792	406,761,680	1,366,699	408,128,379	446,129,171	45,174,556	317,829	45,492,385
2000	35	211	208,899,015	723,152,746	333,457	723,486,203	932,385,218	115,397,403	87,343	115,484,746
2001	34	177	435,849,179	931,262,922	14,991,554	946,254,475	1,382,103,654	143,864,700	3,735,501	147,600,200
2002	22	193	74,454,427	937,841,186	23,407,571	961,248,757	1,035,703,184	150,280,717	4,008,686	154,289,403
2003	26	215	541,929,810	1,304,320,314	2,880,785	1,307,201,099	1,849,130,909	283,948,368	722,233	284,670,601
2004	28	273	34,816,447	470,335,081	5,775,062	476,110,142	510,926,589	95,920,149	1,625,129	97,545,278
2005	34	270	204,821,548	906,656,836	6,671,593	913,328,429	1,118,149,977	120,989,298	1,900,095	122,889,393
2006	18	216	1,050,520,714	1,226,258,243	16,229,540	1,242,487,783	2,293,008,497	162,996,788	3,921,996	166,918,785
2007	25	199	465,052,993	928,365,846	152,456,640	1,080,822,486	1,545,875,480	156,165,282	2,497,177	158,662,458

FRAUD STATISTICS- HEALTH AND HUMAN SERVICES [1]

October 1, 1987 - September 30, 2013

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM			
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL		WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
2008	60	231	162,972,022	962,461,088	6,852,571	969,313,659	1,132,285,682	185,933,162	1,522,164	187,455,327
2009	34	279	238,061,424	1,364,336,522	30,283,452	1,394,619,974	1,632,681,398	155,342,800	8,669,822	164,012,622
2010	42	383	539,043,024	1,950,431,478	13,079,460	1,963,510,938	2,502,553,963	334,615,217	3,831,101	338,446,318
2011	37	417	178,147,545	2,182,785,375	87,516,029	2,270,301,404	2,448,448,949	446,646,645	23,900,490	470,547,135
2012	25	415	557,273,967	2,500,892,587	25,453,144	2,526,345,731	3,083,619,698	280,105,048	7,096,899	287,201,947
2013	22	500	61,354,329	2,513,247,578	102,395,927	2,615,643,504	2,676,997,834	306,123,648	11,905,597	318,029,245
TOTAL	774	5,279	5,778,803,853	20,445,230,733	496,512,058	20,941,742,791	26,720,546,644	3,137,890,862	77,154,526	3,215,045,388

NOTES:

1. The information reported in this table covers matters in which the Department of Health and Human Services is the primary client agency.
2 "New Matters" refers to newly received referrals, investigations, and qui tam actions.
3. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - DEPARTMENT OF DEFENSE [1]

October 1, 1987 - September 30, 2013

Civil Division, U.S. Department of Justice

FY	NEW MATTERS [2]		SETTLEMENTS AND JUDGMENTS [3]					RELATOR SHARE AWARDS [4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	237	20	27,897,128	0	0	0	27,897,128	0	0	0
1988	122	28	149,136,213	0	33,750	33,750	149,169,963	0	8,438	8,438
1989	122	31	154,588,297	10,002,058	0	10,002,058	164,590,355	1,394,770	0	1,394,770
1990	74	41	117,115,978	21,630,713	69,000	21,699,713	138,815,691	3,776,850	18,870	3,795,720
1991	78	44	227,898,245	57,200,000	42,000	57,242,000	285,140,245	8,625,800	10,500	8,636,300
1992	73	61	62,603,695	127,700,000	994,456	128,694,456	191,298,151	23,540,000	259,784	23,799,784
1993	93	53	83,742,840	24,000,000	5,707,641	29,707,641	113,450,481	3,280,425	1,671,498	4,951,923
1994	62	81	222,799,421	369,136,206	1,530,000	370,666,206	593,465,627	67,712,679	451,200	68,163,879
1995	54	88	110,459,386	140,548,237	15,000	140,563,237	251,022,623	28,348,711	0	28,348,711
1996	44	75	78,085,099	55,908,927	5,924,726	61,833,653	139,918,752	10,825,550	1,696,923	12,522,473
1997	47	79	30,734,273	35,090,213	1,513,700	36,603,913	67,338,186	6,018,810	379,435	6,398,245
1998	30	61	71,063,139	122,463,185	27,717,000	150,180,185	221,243,324	12,213,171	8,298,630	20,511,801
1999	33	66	30,522,711	15,114,509	745,137	15,859,646	46,382,357	2,684,186	179,750	2,863,936
2000	9	40	53,007,693	95,607,325	505,500	96,112,825	149,120,518	15,668,259	122,800	15,791,059
2001	10	42	17,472,751	30,030,696	88,083,098	118,113,794	135,586,545	5,955,566	19,451,866	25,407,432
2002	16	41	15,017,365	18,057,658	1,350,000	19,407,658	34,425,022	2,576,196	381,000	2,957,196
2003	10	36	107,337,000	204,884,468	0	204,884,468	312,221,468	48,592,795	0	48,592,795
2004	16	49	10,098,491	21,581,366	0	21,581,366	31,679,857	3,031,610	0	3,031,610
2005	16	49	19,049,935	101,125,200	0	101,125,200	120,175,135	21,428,085	0	21,428,085
2006	12	68	586,550,385	51,937,163	1,520,203	53,457,366	640,007,751	11,028,675	299,986	11,328,661
2007	25	50	16,400,000	32,044,844	496,909	32,541,753	48,941,753	4,983,718	126,419	5,110,137

FRAUD STATISTICS - DEPARTMENT OF DEFENSE [1]

October 1, 1987 - September 30, 2013

Civil Division, U.S. Department of Justice

FY	NEW MATTERS [2]		SETTLEMENTS AND JUDGMENTS [3]					RELATOR SHARE AWARDS [4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM			
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL		WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
2008	27	43	77,846,834	60,468,116	5,701,365	66,169,481	144,016,315	11,891,101	1,439,451	13,330,552
2009	17	52	22,388,261	414,981,979	140,000	415,121,979	437,510,240	64,095,675	26,600	64,122,275
2010	23	56	26,251,482	231,354,446	9,473,700	240,828,146	267,079,628	12,335,365	2,833,839	15,169,204
2011	19	46	29,484,345	111,630,570	0	111,630,570	141,114,915	9,195,127	0	9,195,127
2012	15	57	2,000,000	166,386,739	250,000	166,636,739	168,636,739	20,777,673	70,000	20,847,673
2013	12	77	665,654,874	47,118,462	0	47,118,462	712,773,336	7,246,939	0	7,246,939
TOTAL	1,296	1,434	3,015,205,841	2,566,003,079	151,813,185	2,717,816,264	5,733,022,105	407,227,736	37,726,989	444,954,724

NOTES:

1. The information reported in this table covers matters in which the Department of Defense is the primary client agency.
2 "New Matters" refers to newly received referrals, investigations, and qui tam actions.
3. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD) [1]

October 1, 1987 - September 30, 2013

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	94	7	47,220,995	0	0	0	47,220,995	0	0	0
1988	81	10	21,968,775	1,954,354	0	1,954,354	23,923,129	0	0	0
1989	83	40	42,263,423	10,000	1,681	11,681	42,275,104	2,000	200	2,200
1990	142	20	62,120,889	17,949,496	6,000	17,955,496	80,076,385	2,694,612	1,800	2,696,412
1991	137	28	33,961,487	7,764,431	27,500	7,791,931	41,753,418	1,180,336	8,250	1,188,586
1992	186	38	65,532,871	4,056,969	0	4,056,969	69,589,840	135,000	0	135,000
1993	189	47	85,679,571	7,883,383	895,359	8,778,742	94,458,313	1,349,709	95,404	1,445,113
1994	175	61	101,753,461	3,601,184	1,052,323	4,653,507	106,406,968	627,074	315,697	942,771
1995	152	94	63,239,477	14,414,266	0	14,414,266	77,653,743	2,475,603	0	2,475,603
1996	121	89	106,212,299	19,215,578	5,257,707	24,473,285	130,685,584	2,586,902	1,367,655	3,954,557
1997	90	199	83,393,761	7,841,980	4,415,000	12,256,980	95,650,741	986,005	1,258,800	2,244,805
1998	55	131	40,264,735	64,547,494	5,000	64,552,494	104,817,229	11,187,844	1,000	11,188,844
1999	80	112	126,866,982	71,048,596	2,955,667	74,004,263	200,871,245	15,159,323	876,908	16,036,231
2000	51	112	105,980,489	389,610,617	850,000	390,460,617	496,441,106	52,613,715	165,000	52,778,715
2001	41	92	41,175,045	254,232,298	25,512,500	279,744,798	320,919,843	37,730,204	7,514,514	45,244,718
2002	23	84	30,126,500	122,275,179	1,028,569	123,303,748	153,430,248	8,520,908	192,633	8,713,542
2003	56	83	58,831,489	25,057,571	2,305,126	27,362,697	86,194,186	4,640,694	660,508	5,301,202
2004	61	110	70,741,084	69,801,056	3,486,818	73,287,873	144,028,957	11,272,462	750,999	12,023,461
2005	55	87	53,043,500	141,265,488	810,000	142,075,488	195,118,988	26,163,159	131,600	26,294,759
2006	41	101	75,388,158	211,511,060	4,911,620	216,422,680	291,810,838	45,679,413	1,425,854	47,105,266
2007	79	116	83,373,851	285,880,313	7,293,345	293,173,657	376,547,508	31,618,872	1,993,303	33,612,175

FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD) [1]

October 1, 1987 - September 30, 2013

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2008	74	105	78,464,624	15,899,355	125,000	16,024,355	94,488,979	2,877,307	36,000	2,913,307
2009	81	102	208,884,996	178,091,864	3,353,028	181,444,892	390,329,888	29,656,732	987,725	30,644,457
2010	75	135	74,168,279	93,218,341	83,938,681	177,157,022	251,325,301	15,929,854	23,442,348	39,372,202
2011	68	172	33,594,105	350,679,170	85,597,310	436,276,480	469,870,585	54,339,832	24,986,043	79,325,875
2012	103	180	1,048,838,895	531,689,567	102,091,875	633,781,442	1,682,620,336	103,927,488	20,039,709	123,967,197
2013	59	176	102,903,274	309,775,324	6,833,687	316,609,011	419,512,285	60,956,370	1,593,156	62,549,527
TOTAL	2,452	2,531	2,945,993,014	3,199,274,931	342,753,796	3,542,028,727	6,488,021,741	524,311,419	87,845,107	612,156,525

NOTES:

1. The information reported in this table covers matters in which the primary client agency is neither the Department of Health and Human Services nor the Department of Defense.
2 "New Matters" refers to newly received referrals, investigations, and qui tam actions.
3. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

C

Annals of Health Law
1997

*147 THE ROLE OF THE FEDERAL GOVERNMENT IN ENSURING QUALITY OF CARE IN LONG-TERM CARE FACILITIES [FNa1]

David R. Hoffman [FNaa1]

Introduction

Quality of care. What does it mean in the nursing home context, where frail and vulnerable older adults reside, and where costs are reimbursed on a per diem basis by various government programs in a managed-care environment? What is the role of the government in ensuring that appropriate care is provided?

The protection of our older adults residing in nursing homes is one of the most important functions of government, whether federal, state, or local. While recognizing that the nursing home industry is one of the most regulated, enforcement of those regulations, by whatever means, is paramount to ensuring appropriate care.

One federal statute that may be used as an enforcement mechanism to ensure proper care is the False Claims Act. [FN1] Under the False Claims Act, the federal government may bring a claim against any person for making a false or fraudulent claim for payment or approval to an officer or employee of the United States government. [FN2] Penalties under the False Claims Act are significant. Anyone found liable under the Act must pay the United States government a civil penalty of not less than $5000 and not more than $10,000, plus up to three times the amount of ***148** damages that the government sustains because of the act of that person. [FN3]

In the context of health care delivery, the False Claims Act may be used when health care providers or facilities bill the government, under Medicaid or Medicare, for services that were either inadequate or simply undelivered. Such was the case in United States v. GMS Management-Tucker, Inc. [FN4] This case involved claims by the government that nursing home residents' nutritional needs and wounds were not properly treated, and the billing of Medicare and Medicaid programs for these services amounted to filing false claims. Specifically, the United States Attorney for the Eastern District of Pennsylvania brought a civil action in February 1996 under the False Claims Act, against Tucker House II, Inc. and GMS Management-Tucker, Inc., alleging that these two defendants billed and collected, as part of a scheme to defraud the United States of America, for services rendered to residents of Tucker House Nursing Home when, in fact, the elderly residents did not receive the adequate care for which the United States

was billed. The case was settled by two consent orders pursuant to which the owner of the nursing home and the management company paid penalties of $25,000 and $575,000, respectively, to recompense for past billing. More importantly--certainly in terms of quality of care regulation--the nursing home owner and the management company each entered into separate consent orders requiring them to improve their provision of nutritional and wound care services.

This case exemplifies the role of statutes such as the False Claims Act in ensuring quality of care in long-term care facilities. In order to convey the full import of the case, part I of this article will first examine the particular federal and state requirements pertaining to the delivery of health care services in long-term care facilities that were applicable to the defendants in this case. Next, part II will look at the facts particular to this case, which appropriately led to the filing of the complaint, and part III will describe the settlement provisions, which should act to significantly improve the quality of health care delivered in the defendants' long-term care facilities. Part IV concludes that the False Claims Act was an effective tool against quality of care abuses in the long-term care facilities of the defendants and that it should continue to be used as such for all long-term care facilities***149** to protect nursing home residents throughout the United States.

I. Federal and State Requirements for the Delivery of Health Care Services to Tucker House Nursing Home Residents

Tucker House Nursing Home is a long-term care (nursing) facility licensed under federal and state law and is certified to participate in the Medicare and Medicaid programs. Consequently, there are a number of federal and state requirements regarding the delivery of health care services in a long-term care facility--all of them reflecting, in part, quality of care concerns--that applied to the defendants in United States v. GMS Management-Tucker, Inc. The first of these comes from the Nursing Home Reform Act [FN5] (hereinafter "the Act").

The Act mandates that nursing facilities comply with federal requirements relating to the provision of services. [FN6] Specifically, in terms of the quality of life for residents of nursing facilities, the Act states: "A nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident." [FN7] Additionally, the Act mandates that a nursing facility "provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident in accordance with a written plan of care which describes the medical, nursing, and psychosocial needs of the resident and how such needs will be met . . . ." [FN8]

A duty is placed on the nursing facility to fulfill the residents' care plans by providing, or arranging for the provision of, inter ***150** alia, nursing and related services and medically related social services that attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident; pharmaceutical services; and dietary services that assure that the meals meet the daily nutritional and special dietary needs of each resident. [FN9]

The Social Security Act mandates that skilled nursing facilities that participate in the Medicare program and nursing facilities that participate in the Medical Assistance Program, also known as Medicaid, meet certain specific requirements in order to qualify for such participation. [FN10] These regulations "serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid." [FN11] The Act mandates that the state shall certify, in accordance with surveys it must conduct, the

compliance of nursing facilities (other than facilities of the state). [FN12]

Federal regulations, when addressing quality of care concerns, mandate that "[e]ach resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." [FN13] The regulations specifically address the area of nutrition [FN14] and those individuals who are tube fed. [FN15]

Tucker House Nursing Home is also subject to certain state regulation in its delivery of health care services as a long-term ***151** health care facility. By state regulation, Pennsylvania facilities are required to meet the daily nutritional needs of patients. [FN16] Additionally, if consultant dietary services are used, the consultant's visits must be at appropriate times and of sufficient duration and frequency to assure the consultant provides continuing liaison with medical and nursing staff, provides advice to the administrator, and participates in the development and revision of dietary policies and procedures. [FN17]

Pennsylvania's long-term care facilities are also required to provide nursing services that meet the needs of residents. [FN18] It is incumbent upon the director of nursing services to assure that "preventive measures, treatments, medications, diet and other health services prescribed are properly carried out and recorded." [FN19] Moreover, a nursing facility is required to retain a medical director who is responsible for the "coordination of the medical care in the facility to ensure the adequacy and appropriateness of the medical services provided to patients." [FN20]

Finally, a nursing home administrator is charged with the general administration of the facility whether or not these functions are shared with one or more other individuals. [FN21] According to regulations promulgated by the State Board of Examiners of Nursing Home Administrators, [FN22] a nursing home administrator is responsible for, among other things: (a) evaluating the quality of resident care and efficiency of services, [FN23] (b) maintaining compliance with governmental regulations, [FN24] and (c) developing policies that govern the continuing care and related medical and other services provided by the facility and that reflect the facility's philosophy to provide a high level of resident care in a healthy, safe, and comfortable environment. [FN25]

Beyond these state requirements, which apply to all long-term care facilities, are requirements specific to Tucker House via a ***152** provider agreement with the state. In Pennsylvania, the Department of Public Welfare administers the Medical Assistance Program, and as a prerequisite to enrollment as a provider in the Medical Assistance Program, Tucker House had to enter into a provider agreement and agree to the following terms:

> (1) That the submission by, or on behalf of, the Facility defined as [[[Tucker House] of any claim, either by hard copy or electronic means, shall be certification that the services or items from which payment is claimed actually were provided to the person identified as a medical assistance resident by the person or entity identified as the Facility on the dates indicated.

* * * (5) That the Facility's participation in the Medical Assistance Program is subject to the laws and regulations effective as to the period of participation, including all of those that may be effective after the date of the agreement and that the Facility has the responsibility to know the law with respect to participation in the Medical Assistance Program. [FN26]

These statutes, regulations, and agreements form the foundation for the care provided to residents of Tucker House, as monitored by the state and federal governments.

II. Facts Leading to the Filing of the Complaint

On March 2, 1994, an older adult was transported from Tucker House to Hahnemann University Hospital in Philadelphia. At the time of admission, he had approximately twenty-six decubitus ulcers or pressure ulcers, most at the stage IV level. [FN27] One of the decubitus ulcers extended into the shoulder joint and was measured at twelve-by-twelve centimeters, while another was the size of a grapefruit on his hip. All of the twenty-six pressure ulcers were necrotic and malodorous. The elderly gentleman also had a gangrenous left leg, and all five toes on his right foot were in a necrotic state and in the process of falling off. Finally, he was dehydrated, malnourished, severely***153** anemic, and his eyes were infected. In treating him, the hospital staff was able to communicate with him through the blinking of his eyes, and he advised the staff that he was in a great deal of pain. He was not, as asserted by counsel for Tucker House, diabetic.

Hospital staff, upset with the condition of this man, properly contacted the local long-term care ombudsman program, which in turn contacted law enforcement officials. Tucker House was inspected by Pennsylvania Department of Health surveyors, who identified numerous quality of care deficiencies. Several state surveyors then commenced an extended survey, noting additional serious deficiencies. The surveyors ordered Tucker House personnel to immediately arrange for the transfer of several residents from Tucker House to local hospitals for treatment.

This gentleman and two other residents of Tucker House served as the basis for the government proceeding against the defendants, based upon the lack of adequate care provided to them while at Tucker House. These two additional victims also suffered from malnutrition and exhibited severe skin breakdown as evidenced by multiple decubitus ulcers.

Any defense made to inadequate care--particularly that the victims were old or that they would have died anyway--is incomprehensible. Similarly astounding is the assertion that it is unfair to prosecute a nonprofit, community board of trustees that is also, in fact, the licensee that benefited from the reimbursements made by the government for care that was provided. This amazement derives from the fact that we are dealing with frail and vulnerable older people--individuals who are, in some instances, totally reliant on the staff of the facility to accomplish even the most basic of activities, such as eating and drinking. Certainly these individuals are sick, but the case at bar involved those who had no underlying reason for not being able to eat, gain weight, and heal their bodies except for the ineptitude of the staff, coupled with the goal of maximizing profits. Therefore, the licensee and the management company were both appropriate defendants. Ultimately, the Tucker House board of directors installed new management in an effort to provide the proper care to the frail elderly residing in Tucker House Nursing Home.

***154** III. The Settlement

On March 6, 1996, the Honorable Jan DuBois, United States District Court Judge for the Eastern District of Pennsylvania, entered two agreed-upon consent orders between the United States and the two defendants, Tucker House II, Inc. and GMS Management-Tucker, Inc., the parent of Geriatric and Medical Companies, Inc.

("Geri-Med"). Under the terms of the consent order, the owner of the nursing home paid penalties of $25,000, and the management company paid penalties of $575,000.

Beyond these monetary penalties are the separate consent orders requiring each defendant to improve the manner in which nutritional and wound care services are provided. These consent orders transcend simply remedying the treatment of the three victims by including all nineteen facilities owned by Geri-Med (covering 4000 residents) and providing a state-of-the-art nutrition and wound-care monitoring program.

The consent order entered into by Geri-Med, which was acquired and is now owned by Genesis Health Ventures, contains the following requirements:

• Implementation of a corporate compliance program that ensures appropriate response to weight loss and addresses the nutritional needs of all residents in the nineteen facilities;

• Provision of wound care in accordance with the Agency for Health Care Policy and Research ("AHCPR") Guidelines;

• Training of staff responsible for providing care to the residents on nutrition policies and procedures, wound care, and corporate compliance programs; and

• Monthly reporting of nutritionally at-risk or compromised residents to the United States Attorney's Office upon request.

The Geri-Med consent order also provides for the review and analysis of nutrition and wound care provided at seven facilities by the University of Pennsylvania's Institute on Aging, which will report all findings to the United States Attorney's Office. The Institute on Aging will analyze the nutritional services and wound care management at the various Geri-Med nursing homes, and will evaluate and refine a nutritional risk assessment tool to identify those residents who are at risk of clinical complications from nutritional decline. The United States and Geri-Med agreed that innovative approaches and experimentation are needed to improve the nutritional health of nursing home residents, and they have attempted to facilitate such approaches, ***155** including the strengthening of an interdisciplinary response to nutrition issues.

The consent order entered into by Tucker House Nursing Home requires the following:

• Implementation of a nutritional monitoring and quality assessment program;

• Provision of wound care in accordance with the AHCPR guidelines;

• Training of all Tucker House nursing home staff on the nutrition and wound care requirements; and

• Monitoring by the United States Attorney's Office of compliance with the consent order and reporting to the government of all nutritionally compromised or at-risk residents for a period of at least one year.

These provisions are specifically targeted to improve the quality of health care services delivered by the defendants' long-term health care facilities and providers. Thus, they demonstrate the success in using the False Claims Act as an enforcement mechanism in regulating quality of care.

IV. The Use of the False Claims Act

Should the False Claims Act ("FCA") [FN28] be used in cases involving the rendering of inadequate care? The answer is a resounding yes.

The notion that quality of care cases cannot be pursued under the FCA is simply incorrect. In the recent case of United States ex rel. Aranda v. Community Psychiatric Centers of Oklahoma, Inc., [FN29] the district court, in denying the defendant's motion to dismiss, found that quality of care issues are proper for FCA actions:

> [False Claims Act] cases cited by the government involving contractors who furnished inferior goods are inapposite, but they provide a useful analogy. It may be easier for a maker of widgets to determine whether its product meets contract specifications than for a hospital to determine whether its services meet "professionally recognized standards for health care." In the Court's view, however, a problem of measurement should not pose a bar to pursuing an FCA claim against a provider of substandard health care services under appropriate circumstances.

***156** In this case, the second amended complaint alleges that [the defendant] charged the government for in-patient care of children and adolescents "who were subjected to unreasonable risks of physical and mental harm, including sexual perpetration" and "the risk of harm was sufficiently unreasonable, and the risks of harm known by [the defendant] were sufficiently blatant, that it was improper for [the defendant] to admit government insured patients into such an environment and to bill the Government Payors for the care of these patients." . . . The Court declines to hold that these allegations, if proved, cannot form the basis of an FCA claim. [FN30]

The court also rejected the argument that since a facility is licensed and regulated by the government under a comprehensive regulatory scheme, an FCA action could not be pursued. [FN31] Quality of care issues can and will be addressed through the use of the FCA.

Conclusion

The use of the False Claims Act has led to a comprehensive change in how care is to be provided to over 4000 residents at nineteen different facilities. The provision of adequate nutrition and wound care to these residents is not a facility-specific concern; rather, it has been elevated to a corporate compliance level. If long-term care facilities exhibit gross negligence in the provision of care to our elderly, and we, the taxpayers, are paying for this care through the Medicare and Medicaid programs, simply stated, there is the potential for False Claims Act liability. This type of action, coupled with appropriate criminal sanctions against those who mistreat nursing home residents, will go a long way in ensuring that adequate care is rendered. The use of the False Claims Act is another weapon available to the government to combat inappropriate behavior, and it will be pointed at those who choose profits over good care, neglect over concern, and greed over compassion when caring for nursing home residents.

[FNa1]. The opinions expressed herein do not represent the official policy of the United States Department of Justice and are solely those of the author. He represented the United States in United States v. GMS Management-Tucker, Inc. This articles shares some insight into how the case unfolded and where future prosecutions may be headed.

[FNaa1]. Mr. Hoffman is an Assistant United States Attorney with the Eastern District of Pennsylvania, prior to which he served as the Chief Counsel for the Pennsylvania Department of Aging and as an Assistant District Attorney in Philadelphia. He served the Honorable Anthony J. Scirica as a law clerk. Mr. Hoffman received his Juris Doctorate and his Bachelor of Arts from the University of Pittsburgh.

[FN1]. 31 U.S.C. § 3729-3733 (1995).

[FN2]. Id. at § 3729(a)(1).

[FN3]. Id. § 3729(a).

[FN4]. No. 96-1271 (E.D. Pa. Feb. 21, 1996).

[FN5]. Pub. L. No. 100-203, 101 Stat. 1330 (1989) (codified at 42 U.S.C. § 1396r (1995)). A nursing facility is defined in the Act as an institution that

(1) is primarily engaged in providing to residents--

(A) skilled nursing care and related services for residents who require medical or nursing care,

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or

(C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities, and is not primarily for the care and treatment of mental diseases ....

Id. at § 1396r(a).

[FN6]. Id. at § 1396r(b).

[FN7]. Id. at § 1396r(b)(1)(A).

[FN8]. Id. at § 1396r(b)(2)(A).

[FN9]. Id. at § 1396r(b)(4)(A)(i-iv).

[FN10]. 42 C.F.R. § 483.1-.75 (1996).

[FN11]. Id. at § 483.1(a)(3)(b).

[FN12]. 42 U.S.C. § 1396r(g)(1)(A).

[FN13]. 42 C.F.R. § 483.25.

[FN14]. “Based on a resident's comprehensive assessment, the facility must ensure that a resident (1) [m]aintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and (2) [r]eceives a therapeutic diet when there is a nutritional problem.” 42 C.F.R. § 483.25(i).

[FN15]. Based upon a resident's comprehensive assessment,

the facility must ensure that--

(1) A resident who has been able to eat enough alone or with assistance is not fed by naso-gastric tube unless the resident's clinical condition demonstrates that use of a naso-gastric tube was unavoidable; and

(2) A resident who is fed by a naso-gastric or gastrostomy tube receives the appropriate treatment and services to prevent aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers and to restore, if possible, normal eating skills.

Id. at § 483.25(g).

[FN16]. 28 Pa. Code § 211.6(a) (1996).

[FN17]. Id. at § 211.6(m) (1996).

[FN18]. Id. at § 211.12(a) (1996).

[FN19]. Id. at § 211.12(e)(9) (1996).

[FN20]. Id. at § 211.2(k) (1996).

[FN21]. 63 Pa. Cons. Stat. Ann. § 1102(2) (West 1996).

[FN22]. 49 Pa. Code § 39.91 (1996). These were enacted to “establish and maintain a high standard of integrity and dignity in the profession and to protect the public against unprofessional conduct on the part of nursing home administrators.” Id. at § 39.91.

[FN23]. Id. at § 39.91(1)(ii).

[FN24]. Id. at § 39.91(1)(vi).

[FN25]. Id. at § 39.91(1)(i).

[FN26]. Provider Agreement between the Pennsylvania Department of Public Welfare and Tucker House (on file with the author).

[FN27]. Pressure ulcers, or bedsores, are inflamed ulcers on the skin over a bony part of the body, resulting from prolonged pressure on the part. Stage IV ulcers are considered the most severe. At this stage, a deep crater-like ulcer

has formed, and the full thickness of the skin and the underlying tissues are destroyed. Such ulcers can be life threatening, given the danger of serious infection. The Signet Mosby Medical Encyclopedia 87 (Walter D. Glanze & Kenneth N. Anderson eds., rev. ed. 1996). Most pressure ulcers can be prevented through a variety of techniques.

[FN28]. 31 U.S.C. §§ 3729-3733 (1995).

[FN29]. 945 F. Supp. 1485 (W.D. Okla. 1996).

[FN30]. Id. at 1488-89.

[FN31]. Id.

6 Annals Health L. 147

END OF DOCUMENT

Medical necessity review: Compliance in a new era of accountability

By Robert R. Corrato, MD, MBA, David Hoffman, Esq., and Michael Taylor, MD

Editor's note: Robert R. Corrato is President and Chief Executive Officer with Executive Health Resources in Newtown Square, Pennsylvania. He may be contacted by e-mail at rcorrato@ehrdocs.com.

David Hoffman is President of David Hoffman & Associates, PC, in Philadelphia, Pennsylvania. He may be contacted by e-mail at dhoffman@DHoffmanAssoc.com.

Michael Taylor is Vice President of Clinical Operations with Executive Health Resources in Newtown Square, Pennsylvania. He may be contacted by e-mail at mtaylor@ehrdocs.com.

The federal government estimates that, in recent years, tens of billions of dollars have been improperly paid through Medicare programs.[1] As a result, hospitals now face a new era of health care audit accountability as the government seeks to reduce or eliminate inappropriate overpayments to providers and suppliers.

The Centers for Medicare and Medicaid Services (CMS) reports that the majority of Medicare overpayments made erroneously to hospitals are due to errant determinations of medical necessity.[2] Over the past two years, procedures such as kyphoplasty (a treatment for back pain) and cardiac defibrillator implantations have received particular scrutiny by the Department of Justice (DOJ), because of the potential for fraudulent claims submission arising from inappropriate utilization of the inpatient hospital setting or lack of medical necessity for the procedure itself.

Recent allegations relating to overutilization of Medicare inpatient services demonstrate that awareness of the importance of Medicare inpatient utilization patterns has reached the mainstream business community and financial sector. Add to this, Capitol Hill's ongoing battle to reduce Medicare costs, and hospitals are finding that, more than ever, medical necessity compliance is a top priority within their organizations.

In today's environment of increased health care scrutiny and accountability, it is more important than ever for hospitals to maintain a strong, concurrent compliance review program to ensure appropriate utilization of inpatient services.

Expanded power to fight overpayments, fraud, and abuse

In addition to subjecting providers and suppliers to increased scrutiny through programs, such as Recovery Audit Contractor (RAC) and Zone Program Integrity Contractor (ZPIC) review, the government has simultaneously strengthened its ability to deal with suspected fraud through rulemaking.

On January 24, 2011, the Department of Health and Human Services (DHHS) announced new rules, authorized by the Affordable Care Act, that apply to Medicare, Medicaid, and the Children's Health Insurance Program (CHIP). Under the new rules, payments to providers can be suspended in the event of a credible allegation of fraud or abuse. When considered in light of a recent expansion of the False Claims Act to make clear that hospitals have a duty to refund overpayments within 60 days of identification, government investigators now have more powerful tools in their fight against Medicare overpayments, fraud, and abuse.

A look at the government's expanded toolbox reveals that providers must consider, not just institutional risk, but personal risk as well. On October 20, 2010, the Office of Inspector General (OIG) of DHHS issued guidance for implementing its permissive exclusion authority under Section 1128(b)(15) of the Social Security Act. (Exclusion refers to the ability of the OIG to exclude individuals or entities from participating in the federal health care programs.) Section 1128(b)(15) specifically authorizes the OIG to exclude an owner, officer, or managing employee of a sanctioned entity (i.e., health care provider, supplier, or manufacturer) from participation in federal health care programs.

Furthermore, recent testimony before Congress makes clear that a key plank in the government's strategy is to target not just institutions that engage in fraud and abuse, but the executives who manage those institutions.

RACs are only the tip of the iceberg

While the contingency fee-based RACs have been the subject of much media attention in recent years, CMS has greatly expanded the role of other auditors, as well. Medicare Administrative Contractors (MACs) have essentially combined the roles previously performed by Part A Fiscal Intermediaries and Part B Carriers. MACs have the authority to institute and monitor Progressive Corrective Action (PCA) Plans, which may entail actions such as putting hospitals on pre-payment review.

Other important Medicare audit programs include Comprehensive Error Rate Testing (CERT), which works to measure payment error rates, and ZPICs, which are specialized contractors tasked with ferreting out fraud and abuse in the Medicare program.

The two aspects of medical necessity

Hospitals should be aware that CMS contractors and other investigators may examine two different aspects of medical necessity: (1) the medical necessity for the procedure or medical service itself, and (2) the medical necessity for the setting of care. Both of these aspects of medical necessity have been extensively examined in recent years by CMS contractors and have been the subject of government enforcement activities. Medical necessity for a procedure or service itself is often determined by National Coverage Determinations, Local Coverage Determinations, evidence-based clinical care guidelines, and local and national standards of medical practice.

Because Medicare providers are tasked with providing care in the most appropriate setting, medical necessity of the setting in which the patient is treated is also a target of auditor attention. Such auditors frequently review short-stay hospital admissions to determine if the patient could have been treated just as safely and effectively in the outpatient setting.

Medical necessity of the inpatient setting was a major target of RAC denials in the demonstration project, and remains a focus of RAC and MAC audit scrutiny today. To ensure optimal compliance, a hospital's utilization review program should evaluate both of these aspects of medical necessity.

Achieving medical necessity compliance

As a first step toward creating a medical necessity compliance process, a hospital may consider reviewing its past performance as an organization with the goal of understanding and recognizing whether there is potential exposure or liability due to pre-existing poor utilization review practices.

The following nine suggestions are offered in order to create a compliant process for Medicare medical necessity admission review.

1. Build a strong UR plan and UR Committee

The process of medical necessity compliance starts with the

Continued on page 7

 ...continued from page 5

utilization review (UR) standards of the Medicare Conditions of Participation (CoP). In accordance with Title 42 of the Code of Federal Regulations under 482.30 and its subparts, hospitals are required to maintain an active UR Committee as part of a comprehensive UR plan. At a minimum, the UR Committee is charged with reviewing hospital's admissions, continued stays, and outlier cases.

It is the responsibility of the UR Committee to review the UR plan annually, to continually identify areas of improvement, and to include physicians and other hospital medical staff stakeholders in the process of ensuring Medicare admission review compliance.

2. First-level concurrent medical necessity review

It is important for hospital case and utilization managers to use credible, up-to-date inpatient admission screening criteria when conducting first-level reviews and making evaluations for patient status. Such widely accepted utilization screening criteria as InterQual, Milliman, or MCAP™ frequently fulfill this role at hospitals.

It is important to note, however, that CMS does not endorse any particular set of commercial screening criteria, and the satisfaction of any particular set of commercial screening criteria is not a guarantee of Medicare coverage. Hospitals should monitor the accuracy of their first-level screening reviews by asking questions such as:

- Are we applying the criteria correctly?
- Are we measuring and achieving appropriate levels of inter-rater reliability in the application of criteria?

First-level criteria screening reviews are generally conducted by non-physicians, and the professionals who perform these reviews should take care to operate within their appropriate professional scope of practice. The role of the case and utilization manager is to strictly apply the screening criteria, not to substitute for or overrule physician judgments of medical necessity.

It is important to note that first-level screening criteria are not meant to be a substitute for case-by-case expert physician review of medical necessity. In fact, many of these criteria have anywhere from a 20% to 25% error rate. In some instances, some patients who don't satisfy commercial admission criteria at the first-level review may nevertheless require inpatient admission, based on physician assessment.

3. Second-level concurrent medical necessity physician review

When a case does not satisfy the hospital's first-level utilization review screening criteria, that case should be referred for second-level physician review. As detailed by the Hospital Payment Monitoring Program (HPMP) Compliance Workbook, hospitals should ensure a two-level admission medical certification process that includes strict application of inpatient screening criteria by case or utilization management professionals, followed by expert physician advisor review for those cases that do not meet the screening criteria.[3] As directed by the Medicare State Operations Manual, only a physician can make the final determination of the medical necessity of an admission.

4. Establish a strong Physician Advisor program.

As hospitals do not close their doors and turn off the lights during nights and weekends, a compliant utilization review program must operate 365 days a year, seven days a week. Physician advisors operating in such a program must be knowledgeable regarding Medicare rules and regulations, and up to date on the latest medical evidence.

Physician advisors need to be skilled and experienced in making proven, consistent, and valid medical necessity recommendations (i.e., recommendations that

Continued on page 8

 ...continued from page 7

are not subject to unexplained variation and that will stand up to scrutiny, as necessary, through the audit and appeals process).

5. Educate and monitor key staff members

Hospitals should ensure ongoing training, education, and inter-rater reliability testing of their utilization management and physician advisor teams. A sound, ongoing education program is a necessity to support and maintain hospital regulatory compliance, and to ensure continued optimal performance of both first- and second-level utilization review processes.

6. Educate treating physicians

The treating physician is a key part of the process and must be an active and central participant in the utilization review process. With this in mind, hospitals should consider providing ongoing treating physician education on:

- the importance of complete documentation,
- the need to work closely with UR/case management and physician advisors, and
- the role of the treating physician in ensuring both hospital and physician practice regulatory compliance.

7. Create an enduring and auditable document

An evidence-based utilization review process that adheres to regulatory requirements and CMS policy guidance may result in significant protection to the hospital pursuant to Section 1879 of the Social Security Act. In essence, Section 1879 of the Act provides that when a provider does not know, and cannot reasonably have known, that a service will not be covered by Medicare as medically unnecessary, the provider is entitled to payment by Medicare for that service. This is known as the Limitation on Liability.

If a hospital fails to thoroughly document evidence of its compliant, concurrent, medical necessity utilization review process, then that hospital may lose the benefit of the protection conferred to it under the Social Security Act's Limitation on Liability. For this reason, an enduring and auditable document should be created for each Medicare admission to provide permanent evidence of the hospital's compliant Medicare admission claim status certification process that will be available for review in the event of an audit by a RAC contractor or other investigator.

This document should include not only documentation of the first-level screening and secondary physician advisor reviews, but any subsequent conversation between the physician advisor and the treating physician that resulted in additional chart documentation.

8. Conduct regular PEPPER analysis

On a quarterly basis, hospitals should review their Program for Evaluating Payment Patterns Electronic Report, more commonly known as PEPPER. This report takes a critical look at targeted diagnoses that are often associated with short stays to identify areas that may require improvement or attention. The data can help serve as a guide to help hospitals identify potential areas of vulnerability.

9. Engage key stakeholders

The final step in the process ensures that UR/case management, physician advisors, HIM/Coding, finance, and compliance professionals are all involved in the process of ensuring a compliant, daily, Medicare medical necessity utilization review program. At the same time, the team that manages this process must be sufficiently streamlined to execute it on a daily basis.

Closing thoughts

In today's environment of increased health care accountability, it's no longer a matter of "if," but "when" a given hospital will be audited. Compliance requires a concurrent medical necessity review process that is legally defensible to avoid auditor denials and to retrospectively manage and appeal inappropriate auditor denials.

The costs of non-compliance far outweigh the costs of compliance.

The best practice approach to a comprehensive medical necessity compliance program is a proactive approach that infuses clinical and regulatory guidelines in the decision-making process, ongoing communications among team members, and proper training to ensure all cases are properly screened, documented, and validated. ■

1. Kathleen M. King and Kay L. Daly: "Medicare and Medicaid Fraud, Waste, and Abuse: Effective Implementation of Recent Laws and Agency Actions Could Help Reduce Improper Payments." Government Accountability Office, March 2011. Available at http://www.gao.gov/new.items/d11409t.pdf
2. "The Medicare Recovery Audit Contractor (RAC) Program: An Evaluation of the 3-Year Demonstration." June 2008. Available at http://www.cms.gov/RAC/Downloads/RACEvaluationReport.pdf
3. HPMP Compliance Workbook. (Prepared by TMF Health Quality Institute, the Quality Improvement Organization Support Center for the Hospital Payment Monitoring Program, under contract with the Centers for Medicare & Medicaid Services, an agency of the U.S. Department of Health and Human Services. 8SOW-TX-HPMPQ-08-06), page 38. January 2006, (rev. March 2008). The workbook is available for download at http://www.metastar.com/Web/Portals/0/Documents/HPMP/HPMP-Compliance-Workbook.pdf

CCB The Compliance Professional's Certification

The Compliance Certification Board (CCB) compliance certification examinations are available in all 50 states. Join your peers and demonstrate your compliance knowledge by becoming certified today.

Congratulations!! The following individuals have recently successfully completed the CHC® certification exam, earning their certification:

Thomas P. Ambury
Bruce R. Anderson
Brian D. Annulis
Gwen M. Avery
Joni K. Baker
John C. Barrett
Shawn D. Barton
Todd M. Bejian
Jacqueline N. Bloink
Janet C. Braun
Margaret R. Brockett
Charita V. Bryant
Jeffery A. Buehrle
Tammie L. Campton
Claire Cieri
Louis Di Giovanni
Penny Etter
Janet K. Feldkamp
Steve J. Fischer
Patricia Galarrita
Brenda J. Gates
Lisa M. Gerlach
Carole S. Good
Jeffrey B. Hayes
Rebekah R. Hays
Bradley M. Head
Jeff Holloway
Pamela K. Hulse
Teresa M. Huysman
Michele P. Kane
Jeramy D. Kuhn
Amy R. Langord
Scott Leckey
Sophie Lee
Audrey D. Lewis
Curt E. Meeks
Angela I. Muncy
Suzanne Neuber
Michael A. Peer
Lynette R. Peterson
Vicki Y. Potteiger
Rachel R. Powell
Sandra J. Priebe
Tina M. Qualls
Mary Ann Randolph
Patty Rhoden
Maria L. Rivera
Violeta K. Rose
Elizabeth H. Russell
Brian G. Santo
Susie F. Schumacher
Katie E. Shepard
Todd A. Tangeman
Karen P. Thomason
Daniel T. Valdez
Maribel Valentin
Aaron W. Van Artsen
Sara K. Wheeler
William H. Wojcik
Benjamin N. Wright

Congratulations!! The following individuals have recently successfully completed the CHRC® certification exam, earning their certification:

Susan Colvin
Jeremy J. Corsmo
Patricia A. Eshleman
Gustavo A. Fernandez
Barbara Gibson
Dawn Lowe-Gooden
Christopher Longspaugh
Tina G. Noonan
Edith S. Paal
Elizabeth D. Taccetta

Congratulations!! The following individuals have recently successfully completed the CHPC® certification exam, earning their certification:

Mary D. Craig
Joann Kubica
Sheila N. Thomas

The CCB offers certifications in Healthcare Compliance (CHC®), Healthcare Research Compliance (CHRC®), and the Certified in Healthcare Privacy Compliance (CHPC®).

Certification benefits:

- Enhances the credibility of the compliance practitioner
- Establishes professional standards and status for compliance professionals in Healthcare and Healthcare Research
- Heightens the credibility of compliance practitioners and the compliance programs staffed by these certified professionals
- Ensures that each certified practitioner has the knowledge base necessary to perform the compliance function
- Facilitates communication with other industry professionals, such as physicians, government officials and attorneys
- Demonstrates the hard work and dedication necessary to succeed in the compliance field

For more information about certification, please call 888/580-8373, email ccb@hcca-info.org, or visit our website at www.hcca-info.org.

KEYNOTE ADDRESS (AND AUDIENCE Q&A)

THE LAW OF WHISTLEBLOWING: AN OVERVIEW & INTERNATIONAL PERSPECTIVE

Kathleen Clark, Professor of Law, Washington University in St. Louis School of Law

White Paper on the Law of Whistleblowing

© Kathleen Clark[1]

Introduction

Whistleblowers can play an important role in fighting corruption, protecting the public and the environment from harm, and ensuring accountability for the violation of legal norms. A well-known example of whistleblowing involved a Morton Thiokol engineer who was concerned that cold weather at the space shuttle launch site would cause the shuttle's O-rings to fail and an explosion to occur. He pleaded with his colleagues to prevent NASA from launching the space shuttle, but his internal whistleblowing was unsuccessful. The launch did occur, resulting in a catastrophic explosion. A less well-known example of whistleblowing involved a medical device company lawyer who blew the whistle internally when he learned that the company planned to sell faulty dialysis equipment that could cause illness and death to kidney disease patients. When he learned that the company was going ahead with these sales, he engaged in external whistleblowing, disclosing the information to the Food and Drug Administration, which seized the shipment and prevented the sale.

When an individual blows the whistle on alleged wrongdoing, she may suffer severe financial consequences. Whistleblowers who disclose information about their employers' misconduct are sometimes fired or demoted. Some employers "blacklist" whistleblowers among other employers in the industry, making it difficult or impossible for a whistleblower to find another job in her chosen field. While whistleblowers can play a critical role in protecting the public, they often pay an enormous personal price. For example, a former Justice Department lawyer who disclosed to a journalist internal government e-mails that she believed were evidence of government misconduct was fired from her job at a private law firm, was investigated by the Justice Department and by bar disciplinary authorities, and was unable to find work as a lawyer for several years.

The law recognizes the social good that can come from whistleblowing. It provides protection to whistleblowers and encourages whistleblowing in a variety of ways. This paper provides a definition of whistleblowing, describes five distinct ways that the law encourages it, acknowledges that some confidentiality mandates conflict with whistleblowing norms, and identifies key legal concepts and distinctions found in the law of whistleblowing.

Definition of "Whistleblower"

A "whistleblower" is someone who discloses alleged wrongdoing or a danger to someone else in an effort to rectify or address the wrongdoing. In some cases, the wrongdoing is continuing or in the future, and the whistleblower is attempting to end or prevent the wrongdoing. In other cases, the wrongdoing has already occurred, and the whistleblower is attempting to rectify it or hold the wrongdoer accountable.

---

[1] Kathleen Clark practices law in Washington, D.C. and is the John S. Lehmann Research Professor of Law at Washington University in St. Louis. kathleen_clark@mac.com.

The wrongdoing may be an activity that is criminal in nature, or it may violate a less serious legal norm. The information being disclosed is generally closely held, and a key issue is whether a legal obligation of confidentiality prohibits such disclosures. The recipient of the information may be someone who directly or indirectly can take action to end the misconduct or to hold accountable the wrongdoer. The recipient of information may be "internal" (such as a supervisor or other official within the organization) or "external" (i.e., someone outside the organization, such as the government or the press).

Five Ways that the Law Encourages Whistleblowing

When most people think about whistleblower laws, they tend to focus on laws that provide compensation to whistleblowers who have experienced retaliation. But this is just one of five different ways that the law encourages whistleblowing. These are:

(1) requiring individuals to report certain types of wrongdoing or other dangers;
(2) prohibiting retaliation against whistleblowers and punishing those who engage in retaliation;
(3) providing compensation to whistleblowers who have suffered retaliation;
(4) requiring or encouraging institutions to create mechanisms (such as anonymous tip lines) to facilitate whistleblowing; and
(5) providing financial incentives for those who blow the whistle on certain types of misconduct.

The first technique – imposing a legal mandate to disclose wrongdoing – can be found in statutes, rules and even common law decisions involving particularly vulnerable populations or situations where there is concern that legal authorities may never learn of the wrongdoing with such a reporting requirement. A prominent example involves the mandate that teachers, social workers and health professionals report suspected child abuse or neglect. Another example is the requirement that lawyers report to bar disciplinary authorities serious misconduct by other lawyers.

The second technique – prohibiting retaliation against whistleblowers – can be found in a variety of statutes. A federal statute prohibits killing or injuring someone in retaliation for testifying at an official proceeding. Congress significantly expanded the reach of this statute when it enacted the Sarbanes Oxley Act of 2002, adding criminal penalties for interfering with the lawful employment or livelihood of someone in retaliation for providing truthful information about the violation of federal criminal law to law enforcement. While this kind of enactment may have significant symbolic significance, its weakness is that a whistleblower must rely on government prosecutors to enforce the criminal prohibition.

The third technique – providing compensation to whistleblowers who have suffered retaliation – can be found in both the common law and in many statutes. In the United States, the common law in most states allows an employer to fire an employee for no reason at all or for almost any reason (except a few prohibited reasons). This legal regime (called "employment-at-will") gives employers wide freedom to fire their employees. But courts in many states have created an exception to employment-at-will for whistleblowers. If an employee can show that she was fired in retaliation for disclosing her employer's wrongdoing, she may be able to recover damages for lost

wages.[2] (Courts generally do not have the power to order employers to re-hire fired employees.)

In addition to this protection under common law, state legislatures and the Congress have enacted statutes that promise compensation for employees who have been fired or demoted for whistleblowing. While these statutes are many in number, they tend to be narrow in scope. In the United States, whistleblower protection statutes tend to protect relatively narrow slices of the workforce for a narrowly defined set of disclosures.

Under both the common law and most of these statutes, the compensation provided – back wages – is quite modest. Even so, administrative agencies and courts have often construed these statutes narrowly, undermining the limited protection they provide. The promise of compensation for whistleblowers found in the common law and statutes creates the appearance -- but not always the reality -- of protection for whistleblowers.

A fourth way that the law encourages whistleblowing is by requiring organizations to facilitate whistleblowing through the creation of new mechanisms or institutions. Sarbanes Oxley, for example, requires publicly traded companies to create procedures for the submission of confidential, anonymous reports of questionable accounting or auditing practices.[3] Military contractors are required to display posters listing the Defense Department's fraud hotline, thus increasing the chances that contractor employees will know to whom they can report fraud that they observe. Scores of federal agencies and many state and local governments have offices of Inspector General to receive and investigate allegations of wrongdoing. Some institutions have created procedures not just for channeling or investigating whistleblowers' concerns, but also for resolving them. After years of contentious whistleblower litigation at the Hanford nuclear site, for example, the parties established a non-adversarial system for addressing and resolving the safety and concerns that whistleblowers raise.[4]

The fifth way that the law encourages whistleblowing is by providing financial incentives to whistleblowers themselves. The False Claims Act enables whistleblowers with information about fraud against the government to file a lawsuit in the name of the government and receive up to 30% of the proceeds if the lawsuit is successful. This statute was originally enacted in 1863 in response to fraud committed by contractors selling the government supplies for the Civil War, but it was only after Congress broadened the statute in 1986 that whistleblowers began to use it in significant numbers. This statute has proven to be a very powerful tool. Since 1986, the government has recovered over $21 billion with the assistance of these whistleblower lawsuits.

---

[2] Courts have used this same doctrine, "retaliatory discharge," to provide compensation to employees who were fired for refusing to engage in wrongdoing. An person who refuses to engage in wrongdoing is sometimes referred to as a "passive" whistleblower, while a person discloses wrongdoing is an "active" whistleblower.

[3] These mandates have created an entire cottage industry in the outsourcing of tip hotlines. But they have also created particular challenges for companies operating internationally because European Union and foreign restrictions on the use of personal informational limit the types of allegations that companies can collect.

[4] See Jonathan Brock, *Filling the Holes in Whistleblower Protection Systems: Lessons from the Hanford Council Experience*, 11 SEATTLE J. FOR SOC. JUST. 573 (2013).

Whistleblowers -- and the lawyers who represent them -- have received over $3 billion for coming forward with these claims.

The United States has recently expanded the availability of financial incentives for those who blow the whistle on securities and tax fraud. The Dodd-Frank Wall Street Reform and Consumer Protection Act provides financial incentives to individuals who report securities law violations to the Securities and Exchange Commission (SEC) or the Commodities Futures Trading Commission (CFTC). If that information leads to agency sanctions greater than $1 million, the whistleblower receives between 10 and 30% of those sanctions. In its first year of operation, the SEC's Office of the Whistleblower received more than 3000 tips. The Internal Revenue Service has a similar program providing financial incentives to whistleblowers who provide information about large-scale tax fraud.

While many statutes prohibit retaliation against whistleblowers and seem to provide compensation to those who experience retaliation, these laws have proven to be largely ineffective. Whistleblowing can be a career-ending device, so the financial consequences of whistleblowing can be enormous. If the financial incentives for whistleblowing are large enough, they can effectively compensate a whistleblower for the loss of her career.

Whistleblowing in the Face of a Confidentiality Obligation

While many laws encourages or facilitate whistleblowing, there are also legal standards that mandate confidentiality or nondisclosure, conflicting with whistleblowing norms. Confidentiality mandates can be found in contracts (e.g., non-disclosure agreements), professional rules (e.g., lawyers' obligation of confidentiality), statutes (e.g., the Health Insurance Portability and Accountability Act of 1996 or HIPAA), regulations (e.g., restrictions on government employees' use of nonpublic information), executive orders (e.g., those establishing the security classification system) and the common law (e.g., court decisions recognizing the fiduciary nature of certain relationships).

When a potential whistleblower is subject to a confidentiality mandate, which legal norm prevails: whistleblowing or confidentiality? There is no single answer to this question. Courts generally won't enforce contracts mandating confidentiality about wrongdoing or dangerous conditions. Professional confidentiality rules often have exceptions allowing disclosures to prevent crimes or serious bodily harm. The federal Whistleblower Protection Act allows government employees to violate confidentiality norms stemming from regulations, but not those stemming from statutes or executive orders. To determine whether someone who is subject to a confidentiality mandate may nonetheless engage in whistleblowing, one must carefully examine the specific legal and factual context.

Key Legal Issues

There are dozens of different legal issues and distinctions that arise in the law of whistleblowing and that would be relevant to any jurisdiction considering whether to

adopt such laws. This section does not comprehensively review all of those issues, but it does identify the most important issues that must be considered. They include:

- scope of coverage:
    - types of wrongdoing covered:
        - violations of criminal law
        - violations of regulations
        - actions that can result in physical harm
        - actions that can result in financial harm
        - only violations of significant magnitude
    - recipients of the disclosure:
        - internally within the organization:
            - a supervisor
            - co-workers
            - a designated recipient, such as an ombudsperson
        - external to the organization:
            - law enforcement authorities
            - journalists
            - non-governmental organizations
    - sector of the economy to cover:
        - public sector
        - private sector
        - a particular industry
    - types of whistleblowers protected:
        - employees
        - contractors
        - subcontractors
    - types of retaliation that are prohibited:
        - firing
        - change in job responsibilities
        - change in contractual or business relationship
- whether:
    - the motivation of the whistleblower is relevant
    - the whistleblower is protected even if her information turns out to be inaccurate
    - to permit or facilitate anonymous or confidential reporting
    - to require that certain individuals blow the whistle on misconduct
    - to protect whistleblowers who are required to make disclosures as part of their jobs
    - to grant protection or financial incentives to whistleblowers who call attention to information even where other outsiders already know about it
- procedures:
    - private cause of action for individual whistleblower or
    - administrative action under the control of government agency.

Conclusion

While this paper has focused on the law of whistleblowing in the United States, one can find aspects of whistleblowing law in many other countries (both common law and civil law) and in international treaties.[5] The law – here and abroad -- encourages whistleblowing in a variety of ways. Even so, whistleblowers continue to occupy a fundamentally ambivalent position in society. Some whistleblowers are celebrated for their courage and self-sacrifice in protecting society from harm. But at the same time, many whistleblowers experience financial and social retaliation. This ambivalence is reflected in the law of whistleblowing: both its limited scope and how it actually operates. The law offers whistleblowers some legal protections, but government officials who are responsible for administering those laws often find ways to narrow that protection. And even the most robust legal protections cannot protect whistleblowers from the social consequences of their actions.

In deciding whether or how to encourage whistleblowing, it is important to consider the social and historical context. Whistleblowing -- the reporting of allegations against others -- resonates quite differently in a country that has recently experienced an authoritarian regime and widespread use of informants than in a country without such experience. Legal mandates that are seen as relatively uncontroversial in the United States, such as the creation of anonymous tip lines for reporting a wide range of misconduct, are viewed as inappropriate and actually illegal in continental Europe, which experienced a different recent history and has adopted robust limits on the collection of derogatory information about individuals.

The law of whistleblowing raises complex questions about the role of individuals in protecting the public at large. The many distinctions described in the "Key Legal Issues" section above thus reflect broader policy choices about how far the law will go in embracing the role of whistleblowing in protecting the public and vindicating legal norms.

[5] The U.N. Convention Against Corruption, for example, requires national governments to protect testifying witnesses from retaliation or intimidation (Article 32) and to consider establishing protections against "unjustified treatment" for some whistleblowers (those who "in good faith and on reasonable grounds" report alleged corruption "to competent authorities"). (Article 33).

Washington University in St. Louis
SCHOOL OF LAW

FACULTY WORKING PAPERS SERIES

PAPER NO. 08-08-02

August 21, 2008

Confidentiality Norms and Government Lawyers

by

Kathleen Clark
Professor of Law

GOVERNMENT LAWYERS AND CONFIDENTIALITY NORMS

KATHLEEN CLARK*

TABLE OF CONTENTS

---

* © Kathleen Clark. Professor of Law, Washington University in St. Louis. kathleen@wustl.edu. I want to thank the law faculties at Rutgers, Temple, and Washington universities and the participants in the Government Secrecy Panel at the Law & Society Conference in Berlin, where I presented earlier versions of this Article; Sam Strohbehn, who provided research assistance; and Steven Aftergood, Steven Berenson, James Cooper, Howard Erichson, Mark Fenster, Morgan Frankel, Bruce Green, Leslie Griffin, Peter Joy, Dan Keating, Robert Lawry, Leslie Levin, Ron Levin, Ronald Mann, Peter Margulies, Susan Martyn, David McGowan, Richard Painter, Laura Rosenbury, Margo Schlanger, Kent Syverud, and Robert Vaughn, who commented on earlier drafts. I also want to thank the editors of the *Washington University Law Review*, including Joshua Mourning, Andrew Nash, Laura Uberti, Matt Walczewski, and Jessica Wilson.

INTRODUCTION

Alberto Mora served as General Counsel of the Department of the Navy from 2001 to 2005. Mora was concerned about the government's treatment of prisoners at Guantanamo Bay. He had led an internal Defense Department effort to ensure that the government would begin to treat those prisoners humanely. But he had met powerful opposition—including Secretary of Defense Donald Rumsfeld and Defense Department General Counsel William Haynes—who wanted the government to have a free hand to treat the Guantanamo Bay prisoners more harshly during interrogations. Mora fought an internal, bureaucratic battle on this issue, marshalling allies from within the uniformed services, but he never revealed to anyone outside the government this internal struggle over prisoner treatment. Eventually, after the Abu Ghraib scandal, he wrote a lengthy memorandum to the Navy Inspector General describing how he and Judge Advocate General lawyers argued for humane treatment, and how Haynes and other Defense Department officials responded.[1]

Mora left the Defense Department in December of 2005 and was approached by a journalist, Jane Mayer of the New Yorker, *who had obtained a copy of his memorandum. Mayer wanted to speak with Mora to better understand the policy battle that had taken place within the Defense Department. Mora agreed to speak with her, and Mayer wrote about the internal Defense Department battle and profiled Mora in the* New Yorker.[2]

---

1. *See* Memorandum from Alberto J. Mora, Gen. Counsel, Dep't of the Navy, to Navy Inspector Gen. (July 7, 2004), http://aclu.org/pdfs/safefree/mora_memo_july_2004.pdf. *See also* Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32.

2. *See* Carnegie Council, Dan Rather Interviews Alberto J. Mora, Former U.S. Navy General Counsel (Nov. 2, 2006), http://www.cceia.org/resources/transcripts/5404.html; Mayer, *supra* note 1.

> *When asked why he agreed to speak with a journalist about this issue after remaining publicly silent for so long, Mora noted that his memorandum to the Inspector General was unclassified, and thus the government had deemed that release of the information could not cause damage to national security. Someone had provided Mayer with a copy of the memorandum, and so Mora thought that he could legitimately amplify and give her additional background on the memorandum. When asked whether his duty of confidentiality as a lawyer prevented him from revealing further information, Mora responded that because Mayer already had some information, it seemed that the duty of confidentiality had been waived.*[3]

A lawyer's duty of confidentiality is not subject to the kind of waiver that Alberto Mora posited. A client's revelation of some information about a topic does not give her lawyer the option of revealing additional information about that same topic.[4] In most states, a lawyer's duty of confidentiality is defined very broadly and applies to all information relating to the representation of the client. The lawyer is required to be discreet with such information whether or not it could harm or embarrass a client, and whether or not the client has revealed the information to others. In most states, the professional confidentiality rule does not distinguish between government and private sector lawyers.[5] Thus, government lawyers appear to be bound by the same broad confidentiality obligation as lawyers for private sector clients.[6]

---

3. Alberto Mora, Remarks at Ethics of Lawyering in Government course, Washington University Congressional & Administrative Law Clinic, Washington, D.C. (Apr. 3, 2006).

4. *See* discussion of confidentiality exceptions *infra* notes 27–32 and accompanying text. Attorney-client privilege, by contrast, is subject to client waiver. If a client reveals information about a conversation with a lawyer, then the client has waived the privilege for that conversation and can be forced to reveal more information about that otherwise privileged conversation. RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 79 (2000) ("The attorney-client privilege is waived if the client . . . voluntarily discloses the communication in a non-privileged communication.").

5. The exception is Hawaii, which has adopted different confidentiality standards for government lawyers. *See* HAWAII RULES OF PROF'L CONDUCT R. 1.6(c)(4)–(5) (2007) (discussed *infra* Part III.A).

6. This Article uses the term "government lawyers" to refer to lawyers who are either employed or retained by the government. Most government-retained lawyers generally have traditional lawyer-client relationships with their government clients, while some lawyers employed by governments have the authority to make decisions that are usually in the hands of the client. This difference in the structure of authority can have implications for the lawyer's confidentiality duty. *See infra* Part II.C. For a discussion of how several legal ethics rules (but not the duty of confidentiality) apply to lawyers retained by governments, see Ronald D. Rotunda, *Ethical Problems in Federal Agency Hiring of Private Attorneys*, 1 GEO. J. LEGAL ETHICS 85 (1987).

This broad confidentiality obligation would seem to prohibit a former government lawyer like Mora from giving any information about his work. Although there are exceptions to this duty of confidentiality (the professional confidentiality rule identifies eight in particular[7]), it is not clear that any of these exceptions would permit Mora's disclosure.[8]

Was Mora permitted to discuss these internal Defense Department debates about prisoner treatment? This Article is an attempt to answer that question for Mora and for the more than 100,000 federal, state, and local government lawyers who need to determine which information they can ethically reveal.[9]

Surprisingly little has been written on the question of government-lawyer confidentiality.[10] A spate of law review articles and student notes

---

7. ABA Model Rule of Professional Conduct (hereinafter "Model Rule") 1.6(a) identifies two exceptions. The lawyer may disclose information if:

- "the client gives informed consent" to the disclosure; or
- the lawyer is impliedly authorized to make the disclosure "in order to carry out the representation."

MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007). The remaining exceptions are found in Model Rule 1.6(b)(1)–(6). *See infra* notes 27–32 and accompanying text.

8. It appears that Mora's conduct would be governed by the D.C. Rules of Professional Conduct because he is licensed to practice by the District of Columbia. D.C. Bar, Find a Member, http://www.dcbar.org/find_a_member/index.cfm (last visited Mar. 21, 2008) (indicating that Alberto Mora was admitted to practice in D.C. in 1994).

The information that Mora disclosed would constitute "secret" information "the disclosure of which would be embarrassing . . . to the client." D.C. RULES OF PROF'L CONDUCT R. 1.6(b) (2006). Mora might be able to justify his disclosure by arguing that his client consented to disclosures related to government wrongdoing. *See id.* 1.6(d)(1) ("A lawyer may . . . reveal client . . . secrets . . . with the consent of the client affected, but only after full disclosure to the client."). *See also infra* Part III.A.1 (arguing that the whistleblower protection laws constitute government consent to lawyer disclosure of wrongdoing).

9. The Bureau of Labor Statistics indicates that the federal government employs 28,440 lawyers, state governments employ 34,760 lawyers, and local governments employ 49,110 lawyers, for a total of 112,310 lawyers employed by the government. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES MAY 2006, http://www.bls.gov/oes/current/oes231011.htm#nat.

10. Robert P. Lawry wrote one of the most comprehensive examinations of this issue before the American Bar Association adopted the Model Rules of Professional Conduct, which is now the model for lawyer regulation in forty-seven states and the District of Columbia. Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625 (1979) [hereinafter Lawry, *Confidences*]; *see also* Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J. 61 (Fall 1978) [hereinafter Lawry, *Wrong Question*]; http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Apr. 3, 2008) (indicating that California, New York and Maine are the only states that have not adopted professional conduct rules that follow the format of the ABA Model Rules). Several articles have briefly examined confidentiality in the course of a broader look at the ethical issues facing government lawyers. *See* Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 31–45 (2003); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U.

about the government's attorney-client privilege were published after the high-profile legal battle on this issue between Independent Counsel Kenneth Starr and President Bill Clinton.[11] But outside the context of Freedom of Information requests, the issue of attorney-client privilege arises relatively rarely for government lawyers. On the other hand, government lawyers face the confidentiality issue every day when they decide which information they can share with friends and colleagues both inside and outside of government.

This Article makes several significant contributions to the literature on government lawyers. First, it provides a theoretical basis for identifying the client of a government lawyer. There is no single answer to the question of client identity for government lawyers. Instead, one must

---

CHI. L. REV. 1293 (1987); Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 SW. U. L. REV. 265 (1996).

Several articles have examined the ability of government lawyers to blow the whistle on government misconduct. *See* Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); Charles S. Doskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey To Nowhere)*, 25 WHITTIER L. REV. 21 (2003); James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633 (2005); Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125 (2003). Others have looked specifically at the confidentiality obligations of prosecutors. *See* Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 FORDHAM L. REV. 1809 (1995); Rachel Luna, Note, *The Ethics of Kiss-and-Tell Prosecution: Prosecutors and Post-Trial Publications*, 26 AM. J. CRIM. L. 165 (1998).

11. That legal battle occurred in separate court cases in the D.C. and Eighth Circuits. *See In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997). Articles about these cases include Lance Cole, *The Government-Client Privilege After* Office of the President v. Office of the Independent Counsel, 22 J. LEGAL PROF. 15 (1998); Todd A. Ellinwood, *"In the Light of Reason and Experience": The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291 (2001); Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469 (2002); Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998); Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799 (2001); Patricia E. Salkin & Allyson Phillips, *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 IND. L. REV. 561 (2006); Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682 (1999); Amanda J. Dickmann, Note, In re Lindsey*: A Needless Void in the Government Attorney-Client Privilege*, 33 IND. L. REV. 291 (1999); Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695 (1999); Katherine L. Kendall, Note, In re Grand Jury Subpoena Duces Tecum*: Destruction of the Attorney-Client Privilege in the Governmental Realm?*, 1998 UTAH L. REV. 421 (1998); Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 HARV. L. REV. 1995 (1999). For earlier treatments of the issue, see Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725 (1988); Ronald I. Keller, Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 B.U. L. REV. 1003 (1982).

examine the structure of authority within government to identify which of several possible entities is actually the client.

Second, the Article explains how government and private sector lawyers' confidentiality duties differ even though the ethics rules do not differentiate between them. Government lawyers' confidentiality duties are not based solely on the broad mandate of confidentiality found in the legal ethics rules, but also on the complex regime for control of government information. While lawyers are normally bound by a broad duty of confidentiality (applying to all "information relating to representation") under the legal ethics rules, a client can consent to disclosure of otherwise confidential information.[12] One of the insights of this Article is that government clients have *consented* to large amounts of disclosure by their lawyers through enactment of open government laws.

In other words, to determine whether the client of a government lawyer has consented to a specific disclosure, the lawyer need not rely solely on a particular government official's ad hoc decision about whether to consent. Instead, that official is bound to respect the legal regime controlling government information. If that legal regime requires that information be disclosed, then the institutional client has consented to its disclosure. If that legal regime prohibits the information from being disclosed, then the institutional client has withheld consent to disclosure.

The third significant contribution of this Article is that it identifies for the first time the need to revise the confidentiality rule to clarify that government lawyers have the discretion to disclose government wrongdoing. Examination of case law and statutes suggests a norm that governments—unlike private sector clients—do not have a legitimate interest in keeping secret information about their own wrongdoing. Other scholars have not previously recognized that the implication of this norm is that government lawyers may be able to disclose government wrongdoing.

Part I of this Article outlines the lawyer's confidentiality obligation, which is both strict and broad. One of the exceptions to that obligation, however, is that clients can consent to disclosure. Thus, Part II examines in some depth the identity of the government lawyer's client, and concludes that no single definition of a client applies to all government lawyers. Instead, one must examine the structure of authority within the particular government context where the lawyer works. Only with such a contextualized and structural analysis can one properly identify the

12. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007).

government lawyer's client and the extent of the lawyer's authority to make decisions on behalf of that client. In addition, Part II notes that certain government lawyers are authorized to make decisions that are normally in the hands of clients.

Part III explains the specific ways in which government lawyers' confidentiality obligations differ from those of private sector lawyers. First, policy concerns and specific whistleblowing protection laws suggest that government lawyers may disclose government wrongdoing. Second, as a substantive matter, government lawyers must be permitted to disclose information that is subject to mandatory disclosure under open government laws. Since this could result in a chaotic situation with each government lawyer applying her own conception of open government laws, this Article recommends that governments adopt a set of procedures that lawyers can use to get approval of such disclosures. To that end, Part III sets out the substantive standard for the government lawyer's confidentiality obligation. Part IV recommends the adoption of specific procedures so that government lawyers can make these disclosures in an orderly fashion, providing their clients with advance notice and protecting legitimate government interests.

I. SECRECY AND TRANSPARENCY IN LAWYER-CLIENT RELATIONS AND IN GOVERNMENT

In the early 1970s, Mark Felt, a law school graduate and licensed lawyer, was the Associate Director of the Federal Bureau of Investigation (FBI). On several occasions, Felt had provided information to Bob Woodward, an acquaintance of his who was a reporter for the Washington Post. *When Woodward was assigned to cover the Watergate break-in in June 1972 he asked for Felt's assistance, and Felt provided it. As the number two official at the FBI, Felt had "full responsibility for the day-to-day Watergate investigation."*[13] *Felt surreptitiously provided Woodward with leads and confirmed information that Woodward learned from other sources.*[14] *In the book chronicling the Watergate investigation, Woodward referred to Felt as "Deep Throat" and credited this*

13. MARK FELT & JOHN O'CONNOR, A G-MAN'S LIFE: THE FBI, BEING "DEEP THROAT," AND THE STRUGGLE FOR HONOR IN WASHINGTON 193 (2006).

14. *Id.* at 215 ("Only two days after the [Watergate] burglary, [Felt] helped Woodward on the Washington Post's first big story, confirming that [Howard] Hunt was connected to the White House and a prime suspect in the break-in.").

source with a critical role in the Post*'s investigation.*[15] *While there was much speculation about the identity of this anonymous source, Woodward indicated he would not reveal Deep Throat's identity until after the source died. But in 2005, Felt came out as Deep Throat in a* Vanity Fair *profile written by a Felt family friend, and Felt later published a revised memoir acknowledging his role in the Watergate investigation.*[16] *Felt's memoir asserts that he was motivated by a desire to protect the FBI from interference by the White House.*[17] *Frustrated that the White House had prevented the FBI from fully investigating the ties between the Watergate burglars and the Nixon White House, Felt used Woodward to instigate public and congressional pressure for a more thorough investigation.*[18]

When Felt leaked information about the FBI's investigation to Bob Woodward, he was apparently trying to protect the FBI's institutional interest in its independence from the White House.[19] *Yet by providing information to Woodward, he violated the FBI's own rules for protection of confidential information. If Felt had been acting as a lawyer rather than as an administrator, would this leak have violated his professional duty of confidentiality?*[20] *If Felt's role as Deep Throat had been revealed while his law license was current, could he have been disciplined for revealing this information to Woodward, or was he legally justified in making these disclosures?*[21]

---

15. CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 71 (1974).

16. John D. O'Connor, *"I'm the Guy They Called Deep Throat,"* VANITY FAIR, July 2005, at 86; *see also* FELT & O'CONNOR, *supra* note 13. In 1979, Felt published his original memoir, which was, of course, silent about his role as "Deep Throat." W. MARK FELT, THE FBI PYRAMID FROM THE INSIDE (1979).

17. FELT & O'CONNOR, *supra* note 13, at xiii.

18. *Id.* at 216–21.

19. *Id.* at xiii (asserting that Felt "stood alone to guard the FBI's integrity" and that "when the Nixon administration tried to subvert the Bureau as it had other government agencies, Mark met with Woodward to shed light on the abundant misuses of power").

20. Felt was in a government job that routinely required legal judgments about compliance with constitutional and statutory standards as well as court rules, but it appears that he was not acting as a lawyer. Lawyers advise and advocate on behalf of clients. Felt was an administrator who was advised by lawyers.

21. Felt actually did face bar discipline for other actions he took at the FBI. He had authorized warrantless searches of the homes and apartments of people associated with the Weather Underground. W. MARK FELT, THE FBI PYRAMID FROM THE INSIDE 327 (1979). After his retirement, Felt acknowledged his role in these warrantless searches, *id.* at 330, and was eventually convicted for criminal violation of the constitutional rights of those subjected to these illegal searches. Robert Pear, *2 Ex-F.B.I. Officials Are Found Guilty in Break-ins Case*, N.Y. TIMES, Nov. 7, 1980, at A1. After his felony conviction, the District of Columbia Bar suspended Felt's bar license. *In re* W. Mark Felt, No.

To understand the legal status of any government lawyer's disclosure, one must consider two distinct legal regimes: that which applies to all lawyers and that which applies to all government employees. This Article explains how these two legal regimes intersect. In the lawyer-client setting, there is an overriding expectation of confidentiality, with only limited exceptions to confidentiality. In the government setting, by contrast, there is an expectation of transparency, with important but limited exceptions to that transparency. This part of the Article examines the theoretical underpinnings for confidentiality and transparency in the lawyer-client and government settings, respectively.

A. Secrecy in Lawyer-Client Relationships

The secrecy of lawyer-client information is protected by two distinct legal doctrines that are sometimes conflated: the lawyer's confidentiality duty and the attorney-client privilege. The lawyer's confidentiality duty prevents a lawyer from *voluntarily* disclosing a client's information.[22] Under the professional rules, lawyers owe clients a confidentiality obligation that is both strict and broad. Most states require lawyers to keep confidential *all* "information relating to representation" unless a client consents to disclosure or unless another specific exception applies.[23] The confidentiality obligation applies not just to information that the client has told the lawyer in confidence, but to all other factual information that the lawyer learns in connection with the representation.[24] The confidentiality

---

M-68-81 (D.C. Cir. Mar. 27, 1981) (on file with author). Later, President Ronald Reagan pardoned Felt and his law license was restored. *In re* W. Mark Felt, No. M-68-81 (D.C. Cir. June 21, 1982) (on file with author). Years later, the D.C. Court of Appeals decided that it could still discipline a lawyer for conduct that was subject to a presidential pardon. *In re* Abrams, 689 A.2d 6, 2325 (D.C. 1997) (censuring former Assistant Secretary of State Elliott Abrams for giving false testimony to Congress in connection with the Iran-Contra scandal).

22. The confidentiality duty also prohibits a lawyer from using client information for the lawyer's or someone else's benefit to the disadvantage of the client. This prohibition is in a distinct professional rule. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(b) & cmt. 5 (2007).

23. Model Rule 1.6(a) states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." *Id.* R. 1.6(a). Model Rule 1.6(b) sets out exceptions.

A few states use an older, narrower formulation of the confidentiality obligation, requiring lawyers to keep confidential only information that the client has told the lawyer in confidence and information that could be detrimental to the client if disclosed. *See, e.g.*, D.C. RULES OF PROF'L CONDUCT R. 1.6; ILL. RULES OF PROF'L CONDUCT R. 1.6. This formulation comes from the ABA Model Code Disciplinary Rule 4-101, which states that "a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client." MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980).

24. The confidentiality obligation applies to the factual information that the lawyer learns about a client's situation (and any other factual information), but does not apply to the legal expertise that a

duty continues even after the representation has ended.[25] Lawyers who violate the duty of confidentiality can be disciplined by bar authorities or held liable to their clients for breach of fiduciary duty.[26]

The principle underlying the confidentiality duty is the lawyer's status as a fiduciary and the client's status as a beneficiary. The client entrusts the lawyer with information so that the lawyer can provide a service to the client. The information belongs to the client, and it would be misappropriation for a lawyer to disclose or use the information, just as it would be misappropriation for a lawyer to use a client's financial asset for the lawyer's benefit.

A lawyer's confidentiality duty is subject to several exceptions, and these exceptions reflect a policy judgment that a client's interest in confidentiality may give way to a societal interest (such as the prevention of crime, fraud, bodily harm, and death[27]) or even the lawyer's interest (such as the lawyer's need to obtain legal advice or defend herself).[28] Two

---

lawyer develops in a particular area of the law. RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 59 cmt. e.

25. There is some support for the notion that the client's interest in confidentiality diminishes over time. *See* Bonnie Hobbs, Note, *Lawyers' Papers: Confidentiality Versus the Claims of History*, 49 WASH. & LEE L. REV. 179, 204–08 (1992) (discussing an implied "historical interest" exception allowing lawyers to donate their papers to archives and historians and others to examine these documents decades after the matters have closed, even without client consent). *But see* Swidler & Berlin v. United States, 524 U.S. 399, 403–11 (1998) (attorney-client privilege survives the death of the client).

26. *See, e.g.*, *In re* Gemmer, 566 N.E.2d 528, 529, 533 (Ind. 1991) (lawyer suspended from practice of law for three years for, inter alia, writing letter to tax authorities asserting that former client did not have any documentary support for his position); *In re* Nelson, 327 N.W.2d 576, 579 (Minn. 1982) (lawyer suspended for six months for "attempt[ing] to use clients' confidences to their detriment and to his own advantage"); *In re* Metrik, 240 N.Y.S.2d 443, 444 (N.Y. App. Div. 1963) (lawyers censured for revealing confidences unnecessarily in a fee dispute with former client); Grutman Katz Greene & Humphrey v. Goldman, N.Y. L.J., June 11, 1996, at 27 (lawyer breached fiduciary duty when he revealed confidential information about his former clients in his book, *Lawyers and Thieves*); Bar Ass'n v. Watkins, 427 N.E.2d 516, 517 (Ohio 1981) (lawyer suspended indefinitely from practice of law for revealing client confidence); *In re* Pressly, 628 A.2d 927, 928–29, 931 (Vt. 1993) (lawyer reprimanded for revealing against client's will her suspicion that her husband had sexually abused their daughter); Thiery v. Bye, Bye, Goff & Rohde, Ltd., 597 N.W.2d 449, 451, 453 (Wis. 1999) (lawyer sued for breach of fiduciary duty for disclosing confidential client information while teaching college course); *In re* Rader, 359 N.W.2d 156, 159–60 (Wis. 1984) (lawyer suspended for ninety days for revealing client confidences).

27. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (to prevent death or substantial bodily harm); *id*. R. 1.6(b)(2) (to prevent client from committing crime or fraud using the lawyer's services); *id*. R. 1.6(b)(3) (to prevent, mitigate, or rectify financial injury caused by a client's crime or fraud, where client is using the lawyer's services).

28. *Id*. R. 1.6(b)(4) (to obtain legal advice); *id*. R. 1.6(b)(5) (to establish claim or defense in lawyer's dispute with client, or to establish defense to criminal charge or civil claim against lawyer). While most states have adopted the Model Rules, the confidentiality exceptions vary considerably from state to state. *See* SUSAN R. MARTYN, LAWRENCE J. FOX & W. BRADLEY WENDEL, THE LAW GOVERNING LAWYERS 2006–2007 EDITION: NATIONAL RULES, STANDARDS, STATUTES, AND STATE

other exceptions actually further client interests. First, a lawyer may reveal otherwise confidential information if the client gives informed consent.[29] This consent exception recognizes that clients have autonomy and can consent to conduct that would otherwise constitute a violation of fiduciary duty if done without consent. Second, a lawyer representing an entity client may under certain circumstances disclose otherwise confidential information in order to protect the entity from a disloyal employee.[30] If an entity's lawyer learns that an entity employee has engaged in serious wrongdoing that could harm the entity or that could be attributed to it, the lawyer is required to refer the matter to a higher authority within the entity and ensure that the entity adequately addresses the issue.[31] If the higher authority fails to adequately address the issue, then the lawyer may reveal the information outside the entity in order to prevent substantial injury to the entity.[32] This exception recognizes that entity clients sometimes need to be protected from their agents and that outside disclosure may be necessary to effect that protection.

The attorney-client privilege, by contrast, is an evidentiary privilege. In court and other official proceedings, the state can compel individuals and entities to provide information unless a privilege prevents such mandatory disclosure. The attorney-client privilege prevents the state from requiring the disclosure of certain communications between a lawyer and client regarding legal representation. The privilege is narrow in scope and covers only those communications between a lawyer and client that were made in confidence and for the purposes of providing or obtaining legal advice.[33] If the client reveals the contents of the lawyer-client communication to anyone, then the client waives the privilege.[34]

LAWYER CODES 112–19 Ch. (2006) ("State Lawyer Code Exceptions to Client Confidentiality That Permit (May) or Require (Must) Disclosure").

29. MODEL RULES OF PROF'L CONDUCT R. 1.6(a). This Article argues that open government laws should be construed as client consent to disclosure. *See infra* Part III.B.

30. MODEL RULES OF PROF'L CONDUCT R. 1.13(b). The ABA added this exception when it adopted revised Model Rule 1.13 in the wake of the Enron and Worldcom scandals and the passage of Sarbanes-Oxley. Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 732–33 (2004). Twenty-two states have adopted this additional entity-based exception to confidentiality. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2008 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 165–67 Ch. (2008) ("Chart of Ethics Rule on Disclosure Outside the Organization").

31. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

32. *Id*. R. 1.13(c). This rule and its confidentiality exception is relevant to a government lawyer if that lawyer's client is an entity (such as a government agency) rather than a particular government official. *See infra* Part II (discussing government client identity).

33. RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 68 (2000).

34. *Id*. § 79.

The principle underlying the attorney-client privilege is the recognition that the public interest in the availability of evidence sometimes must give way to the countervailing interest of individuals and entities in obtaining legal advice to guide their actions. The privilege is based on two assumptions: first, that a lawyer can adequately advise a client only if the client provides complete information about the circumstances relevant to the legal issue, and second, that a client will communicate that information only if assured that the communication is protected by the attorney-client privilege.[35]

The confidentiality duty is robust. Even if a client recounts to a third party the client's conversation with his lawyer, the lawyer must still keep that information confidential. The attorney-client privilege, by contrast, is easily lost through waiver. If the client has shared the information with a third party, then the client can no longer claim the protection of the privilege to prevent mandatory disclosure in a state proceeding.

The professional rules seem to require lawyers to keep client information confidential in perpetuity.[36] Some commentators have argued for a "historical interest" exception to confidentiality that would allow disclosure long after the representation has ended.[37] At present there is no formal recognition of a "historical interest" exception to lawyer confidentiality.

In the government setting, by contrast, one can find support for the idea that the government's interest in confidentiality diminishes after time. In

---

35. *Id*. § 68 cmt. c (identifying also a third assumption that clients need to consult lawyers in order to vindicate rights and comply with legal obligations). For an excellent critique of the second empirical assumption, see Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

For clients who might be subject to criminal prosecution, the Fifth and Sixth Amendments to the Constitution also provide additional bases for protecting lawyer-client communications from compelled disclosure.

36. *See* Legal Ethics Advisory Panel, Okla. Bar Ass'n, Op. 301 (1983), *reprinted in* [Ethics Opinions 1980–1985] Laws. Man. of Prof. Conduct (ABA/BNA), at 801:7001 (June 25, 1986) (lawyer may not donate papers with client confidences and secrets to libraries without express client consent); Legal Ethics Comm., D.C. Bar, Op. 128 (1983), *reprinted in* [Ethics Opinions 1980–1985] Laws. Man. of Prof. Conduct (ABA/BNA), at 801:2308 (July 19, 1983) (lawyers may not donate their papers to university archive unless they get clients' consent or delete from the papers all client confidences and secrets); *see also* Hobbs, *supra* note 25, at 200–02; Patrick Shilling, Note, *Attorney Papers, History and Confidentiality: A Proposed Amendment to Model Rule 1.6*, 69 FORDHAM L. REV. 2741, 2751 (2001). Despite this apparent perpetual obligation, some lawyers have donated papers containing confidential client information to archives, apparently breaching confidentiality. *See* Shilling, *supra*, at 2757 (D.C. lawyer Joseph Rauh donated his papers to the Library of Congress with the stipulation that if historians or journalists wanted to publish information about living clients or those with active estates, they had to seek clients' consent).

37. Hobbs, *supra* note 25, at 202 (proposing amendment to confidentiality rule so that a lawyer may donate her papers to a library twenty-five years after the client's death).

Attorney-General v. Jonathan Cape Ltd., a British court was asked to enjoin publication of a former cabinet minister's memoir because it revealed confidential cabinet deliberations.[38] The court acknowledged that cabinet discussions are confidential in character, but noted that there was no single rule regarding how long such discussions must be kept confidential and observed that different types of information require different lengths of confidentiality.[39] The court explained that at some point the government's interest in the confidentiality of these discussions would lapse, but noted the difficulty in determining exactly when that would occur.[40] The court ruled that it should enjoin publication only if the continuing confidentiality of the material could be clearly demonstrated and concluded that this was not that case.[41]

In the national security field there is a presumption that confidential national security–related information can be released ten years after its creation, unless the sensitivity of the information requires that automatic declassification occur in twenty-five years.[42] One also finds some support for the concept of diminishing confidentiality over time with respect to the secrecy of criminal investigations. Courts have noted that the need for secrecy may end when the investigation ends.[43] On occasion, courts have

---

38. (1975) 3 All E.R. 484 (Q.B.).

39. *Id*. at 495. The court wrote that

> [s]ome secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over. . . . Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations . . . . It is evident that there cannot be a single rule governing the publication of such a variety of matters.

Id. at 492, 495.

40. *Id*. at 496.

41. *Id*. ("In less clear cases—and this, in my view, is certainly one—reliance must be placed on the good sense and good taste of the minister or ex-minister concerned.").

42. Exec. Order No. 13,292 §§ 1.5(b), 3.3(a), 3 C.F.R. 196, 198–99, 203 (2003); *see id*. § 3.3(b), 3 C.F.R. at 203 (identifying factors that can rebut the presumption of declassification); *id*. § 4.4(a), 3 C.F.R. at 209–10 (permitting access to classified information by historians as well as former high-level government officials, presumably to assist them in the writing of their memoirs); *see also* President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (2000). Some previous executive orders have included automatic declassification after varying lengths of time. *See, e.g.*, Exec. Order No. 11,652 § 5.A (1972).

43. *See, e.g.*, Butterworth v. Smith, 494 U.S. 624, 632–33 (1990). In *Butterworth*, the Supreme Court struck down a Florida statute that imposed a permanent ban on grand jury witnesses' disclosing their own testimony because

> [w]hen an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape—that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on

noted that some government interests in secrecy diminish over time,[44] and have ruled that the historical significance of particular events combined with "the long passage of time"—measured in decades—may justify disclosure of secret grand jury proceedings.[45]

B. Secrecy and Transparency in Government

While the overriding norm regarding lawyer-client information is secrecy unless there is a good reason for disclosure, the overriding norm regarding government information in the modern era is disclosure unless there is a good reason for secrecy. One finds this principle not in the U.S. Constitution, but in constitutive statutes that determine how governments will operate. The federal open government laws include the Freedom of Information Act (FOIA),[46] Privacy Act of 1974,[47] Government in the Sunshine Act,[48] Federal Advisory Committee Act,[49] and the Presidential Records Act of 1978.[50] These statutes establish a baseline of providing the public with access to government information, both in terms of government documents and government meetings. Under the FOIA, executive-branch agencies are required to publish their rules, regulations,

---

> the other. There is also no longer a need to prevent the importuning of grand jurors since their deliberations will be over.

Id. (footnote call number omitted); *see also* Brown v. Thompson, 430 F.2d 1214, 1215 (5th Cir. 1970) (privilege preventing discovery of police investigative files "will expire upon the lapse of an unreasonable length of time").

44. *In re* Am. Historical Ass'n, 49 F. Supp. 2d 274, 292, 295, 297 (S.D.N.Y. 1999) (stating that some of the justifications for grand jury secrecy—such as protecting grand jury witnesses from retaliation or tampering—"dissolve[]" when the appeals of any convictions are complete, that "fifty years after the proceedings [had] ended . . . [t]he inhibiting effect of . . . disclosure is insignificant," that the public's interest in establishing an accurate historical record may strengthen over time, and that "[t]he public must acquire, at an appropriate time, a significant, if not compelling, interest in ensuring the pages of history are based upon the fullest possible record").

45. *In re* Am. Historical Ass'n, 49 F. Supp. 2d at 293–94 (granting partial disclosure of grand jury proceedings related to Alger Hiss investigation). *See also In re* May, 13 Media L. Rep. (BNA) 2198, 2199 (S.D.N.Y. 1987) (granting disclosure thirty-five years after grand jury investigation of William Walter Remington); *In re* O'Brien, No. 3-90-X-95 (M.D. Tenn. May 16, 1990) (granting disclosure forty-five years after grand jury investigation), *cited in In re* Am. Historical Ass'n, 49 F. Supp. 2d at 293. *But see In re* Craig, 131 F.3d 99, 107 (2d Cir. 1997) (denying historian access to 1948 grand jury investigation). Note that similar requests for disclosure of grand jury materials were denied in 1977 in *Hiss v. Dep't of Justice*, 441 F. Supp. 69, 71 (S.D.N.Y. 1977) (ruling under the Freedom of Information Act that the historical significance of the Alger Hiss grand jury investigation did not provide an exception to Federal Rule of Criminal Procedure 6(e)'s requirement of grand jury secrecy).

46. 5 U.S.C. § 552 (2000).

47. 5 U.S.C. § 552a (2000).

48. 5 U.S.C. § 552b (2000).

49. 5 U.S.C. app. §§ 1–16 (2000).

50. 44 U.S.C. §§ 2201–2207 (2000).

and policies; final opinions made in the adjudication of cases; and information about how the agencies are organized.[51] The statute makes all other government documents public upon request, unless there is a good reason for the government to keep the document secret.[52] The FOIA sets out nine specific exceptions to this mandated disclosure upon request.[53] When someone seeks disclosure of government information, there is a presumption that the information will be made available. Where the government refuses to disclose it, the burden is on the government to justify the refusal.[54] This presumption in favor of disclosure is consistent with principles of robust democratic government.

Our government is based on the premise that the government is of, for, and by the people.[55] But if the people do not have access to information about what the government is doing, then this premise is little more than an empty promise.[56] One can find a constitutional basis for the right to know only indirectly in the U.S. Constitution.[57] The First Amendment prohibits the government from restricting the freedom of press, but does not directly give the press access to government information. On the other hand, the First Amendment does ensure that government employees may speak about their work unless there is a compelling reason to restrict their speech.[58]

---

51. 5 U.S.C. § 552(a)(1)–(a)(2) (2000).

52. *Id*. § 552(a)(3), (b).

53. *Id*. § 552(b).

54. *Id*. § 552(a)(4)(B) (where a requester appeals an agency's denial of information "the burden is on the agency to sustain its action").

55. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *available at* http://www.ourdocuments.gov/doc.php?doc=36&page=transcript.

56. Letter from James Madison to William T. Barry (Aug. 4, 1822), *available at* http://1stam.umn.edu/main/historic/Madison_letter_1822.htm ("A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.").

57. *See* Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 23–24 (1976); Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CON. L. (forthcoming 2008) ("[T]he body of the Constitution provides no right to public information. What the Constitutional text omits, the last generation has embedded as a part of modern constitutional practice in the Freedom of Information Act.").

58. United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir. 1972) ("[T]he First Amendment limits the extent to which the United States . . . may impose secrecy requirements upon its employees . . . . It precludes such restraints with respect to information which is unclassified . . . .").

C. Harmonizing the Lawyer-Client Secrecy Norm with the Governmental Openness Norm

Returning to the story that began this section, how would one evaluate Mark Felt's disclosure of the details of the FBI's Watergate investigation if Felt had been acting as a lawyer? This analysis requires several counterfactual assumptions. First, one must identify Felt's client. Felt believed that his primary loyalty was to the FBI.[59] When the White House attempted to thwart the FBI's Watergate investigation, Felt was severely limited in what he could do through official government channels. The FBI could investigate the connections between the Watergate burglars and other activities of the Nixon reelection campaign only with the permission of the Justice Department, which was under the control of the White House. So Felt went outside of official government channels and used his leaks of information to Woodward to spur congressional and public pressure for a more complete investigation of the Watergate–White House ties.

Applying today's legal ethics standards to this situation, could Felt legally justify his disclosures to Woodward? The exception that comes closest is the entity exception to confidentiality.[60] While Felt had primary loyalty to the FBI, it would be more accurate to identify his putative client as the executive branch of the federal government.[61] Under the current ethics rule for entity clients, if Felt knew that executive-branch officials had engaged in "a violation of law that reasonably might be imputed to" the executive branch and that was "likely to result in substantial injury to" the branch, then he had an obligation to "refer the matter to higher authority."[62] In this situation, higher authority would be the Director of the FBI, the Attorney General, and the President. There is no indication that Felt ever confronted any of these officials over the alleged transgressions. So even under the current more lax confidentiality rules now in place, Felt would not be able to legally justify his leaking this information to Woodward.

---

59. O'Connor, *supra* note 16, at 130.
60. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2007).
61. *See infra* Part II.
62. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

II. IDENTIFYING THE CLIENT OF A GOVERNMENT LAWYER

In 2000, Cindy Ossias was a lawyer in the California Insurance Department, where she investigated California insurance companies. Ossias had investigated the companies' practices in settling cases arising out of the 1994 Northridge earthquake, concluded that the companies had violated state law, and recommended that the companies be fined. Instead, California Insurance Commissioner Chuck Quackenbush, the head of the Insurance Department and an elected official, authorized secret settlements under which the companies would donate to private foundations formed by Quackenbush. When Ossias learned of these secret settlements, she believed they were improper and disclosed them to state legislators who were investigating the Insurance Department. When Quackenbush discovered that Ossias had disclosed this information to the legislators, he placed her on administrative leave, and state bar authorities investigated whether Ossias had violated her professional duty of confidentiality.[63] *Ossias argued that her disclosure was authorized by state whistleblower protection laws, and bar authorities ultimately decided not to discipline her.*[64] *The state bar proposed a rule allowing government lawyers to disclose government misconduct, but the state supreme court rejected the proposed rule.*[65] *The California legislature passed legislation that would have clarified that a government lawyer does not violate confidentiality by*

63. As a California lawyer, Ossias was bound by the California Business and Professions Code § 6068(e)(1), which states that a lawyer must "maintain inviolate the confidence . . . and . . . preserve the secrets . . . of his or her client." CAL. BUS. & PROF. CODE § 6068(e)(1) (West Supp. 2007). The statutory duty of confidentiality has an exception for disclosure that "is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." *Id*. § 6068(c)(2); *see also* CAL. RULES OF PROF'L CONDUCT R. 3-100(A), (B) (2008) (providing a similar exception and an additional exception when the client gives informed consent). For an extensive discussion of Ossias's case, see Doskow, *supra* note 10, at 24–26; *see also* Radack, *supra* note 10, at 126, 138–40.

64. Letter from Donald R. Steedman, Deputy Trial Counsel, State Bar of Cal., to Richard Alan Zitrin, Attorney for Cindy Ossais (Oct. 11, 2000), *available at* Response by Respondent to Bar Ass'ns Counter Statement at 21–22 app., *In re* Schafer, No. 00031 (Wash. State Bar Ass'n Dec. 7, 2000), http://www.dougschafer.com/Response2Bar.pdf. One might argue that the decision of the California bar authorities not to discipline Ossias indicates that government lawyers in California may disclose otherwise confidential information about government wrongdoing. But a decision not to discipline has no precedential value and would provide little comfort for a lawyer seeking definitive guidance on her ethical obligations.

65. Doskow, *supra* note 10, at 23. The proposal can be found at http://www.calbar.ca.gov/calbar/pdfs/rule3-600request.pdf.

disclosing government wrongdoing, but the Governor vetoed the legislation.[66]

To whom did Ossias owe a duty of confidentiality? Was it to the California Insurance Department, or its head, Chuck Quackenbush? The government of California? The people of California?

A. A Wide Range of Possible Clients

Government officials, courts, and commentators have identified a wide variety of possible clients that the government lawyer might represent.[67] One can find some support for the following as clients: the "public interest,"[68] the public at large,[69] the entire government,[70] the branch of

---

66. State Bar of California, Office of Governmental Affairs, *Governor Vetoes Public Attorney Whistleblower Bill*, SACRAMENTO SCENE, Oct. 4, 2002, at 1, *available at* http://www.calbar.ca.gov/calbar/pdfs/legis/Newsletter1-37.pdf. The text of the bill is available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0351-0400/ab_363_bill_20020828_enrolled.html. The veto message is available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0351-0400/ab_363_vt_20020930.html.

67. For other discussions of the range of possible clients of government lawyers, see Cramton, *supra* note 10, at 296 (identifying five possible clients of government attorney: public interest, government as a whole, branch of government, agency, and particular officer who makes decisions for agency); Bruce A. Green, *Must Government Lawyers "Seek Justice" In Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 266–69 (2000); Joshua Panas, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541 (2004).

Two types of lawyers employed by the government have no client at all because they are not acting as lawyers in a representative capacity: judges, *see infra* text accompanying note 121, and administrators, such as former Secretary of State Warren Christopher and former Director of Central Intelligence William Webster.

68. Feeney v. Commonwealth, 366 N.E.2d 1262, 1266 (Mass. 1977) ("'[The Attorney General] also has a common law duty to represent the public interest'" in his representation of the Commonwealth and specific Commonwealth officers being sued (citing MASS. GEN. LAWS ch. 12 § 3 (2002)); Sec'y of Admin. & Fin. v. Att'y Gen., 326 N.E.2d 334, 338–39 (Mass. 1975) (same); Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 J. MARSHALL L. REV. 181, 185, 190 (1990) (asserting that the government lawyer must serve the public interest as well as a specific agency and the government as a whole); Keith W. Donahoe, Note, *The* Model Rules *and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and* The Model Rules of Professional Conduct, 2 GEO. J. LEGAL ETHICS 987, 1000 (1989) ("The client of the government lawyer should be the public interest."); *see also In re* Lindsey, 158 F.3d 1263, 1273 (D.C. Cir. 1998) ("Unlike a private practitioner, the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency."); Superintendent of Ins. v. Att'y Gen., 558 A.2d 1197, 1199–1200, 1202 (Me. 1989) (referring to government lawyers' representation of "both the public interest and public agencies" in ruling that the state attorney general is not obligated to represent the superintendent of insurance in an action seeking review of a rate order issued by the superintendent).

69. *In re* Witness Before Special Grand Jury 2000–2, 288 F.3d 289, 294 (7th Cir. 2002) (refusing to recognize former state secretary of state's assertion of attorney-client privilege regarding his conversation with lawyers because, inter alia, a government attorney owes "ultimate allegiance" to "public citizens . . . as represented by the grand jury"); Conn. Comm'n on Special Revenue v. Conn.

government employing the lawyer,[71] the particular agency employing the lawyer,[72] and a particular government official (such as the head of a

---

Freedom of Info. Comm'n, 387 A.2d. 533, 538 (Conn. 1978) ("[T]he real client of the attorney general is the people of the state."); Levitt v. Att'y Gen., 151 A. 171, 174 (Conn. 1930) (state attorney general's "duty as a lawyer [is] to protect the interest of his client, the people of the state"); Times Publ'g Co. v. Williams, 222 So. 2d 470, 475 (Fla. Dist. Ct. App. 1969) (referring to "the public" as the government lawyer's "real client" in a case examining the effect of state open meeting laws on confidential government lawyer-client consultations); Humphrey v. McLaren, 402 N.W.2d 535, 540–41, 543 (Minn. 1987) (stating that a government attorney "has for a client the public, a client that includes the general populace even though this client assumes its immediate identity through its various governmental agencies" and ruling that the state attorney general is not disqualified from suing the former head of a state agency because he never represented the head of the agency); W.J. Michael Cody, *Special Ethical Duties for Attorneys Who Hold Public Positions*, 23 MEMPHIS ST. U. L. REV. 453, 457 (1993) ("the people of the states are [the] clients" of state Attorneys General); Charles Fahy, *Special Ethical Problems of Counsel for the Government*, 33 FED. BAR J. 331, 332 (1974) (the government lawyer's client is "the people as a whole"); Patricia M. Wald, *"For the United States": Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS., Winter 1998, at 107, 110 ("[T]he government lawyer's client is seen as being . . . the U.S. citizenry at large, a client whose ultimate objective is that justice be done."). *But see In re* Grand Jury Investigation, 399 F.3d 527, 533–34 (2d Cir. 2005) (rejecting federal government's assertion that the court should not recognize Connecticut governor's assertion of attorney-client privilege because a lawyer's "loyalty to the Governor . . . must yield to her loyalty to the public, to whom she owes ultimate allegiance when violations of the criminal law are at stake").

Some have asserted that while the government lawyer may have a more immediate client (such as a government agency), she also represents the public. Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) (asserting in dicta that "government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large"); Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1069 (1978) ("Although our client is the government, in the end we serve a more important constituency: the American people."); Jack B. Weinstein & Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 TOURO L. REV. 1, 4–5 (1985) ("[Government lawyers] represent not only the government entity, but also the public."); Justin G. Davids, Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 412 (2005) ("State attorneys general . . . owe allegiances to two clients—the 'people' and the executive officers and agencies.").

70. Lawry, *Wrong Question*, *supra* note 10, at 66 ("[T]he client of the federal government lawyer is the federal government."); *see also* James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1575–76, 1594 (1996) (noting that "the Solicitor General['s] . . . client is most often the government as a whole, or the executive branch in particular, rather than an individual agency").

71. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1298 (1987) ("[T]he duties of an [executive branch] agency attorney run to the executive branch generally rather than to the agency only. . . . [T]he attorney's obligation is most reasonably seen as running to the executive branch as a whole and to the President as its head."); *cf.* Babcock, *supra* note 68, at 185 (asserting that the Justice Department's client is sometimes "the Congress whose legislation is under attack").

72. D.C. RULES OF PROF'L CONDUCT R. 1.6(k) (2007) (stating that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order"); *see In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915–21 (8th Cir. 1997) (asserting that "the White House is the real party in interest in this case" and refusing to recognize attorney-client privilege for a lawyer's notes of a conversation with then First Lady when they were sought by a federal grand jury); Prof'l Ethics Comm., Fed. Bar Ass'n Op. 73-1

government organization) in his official or individual capacity.[73]

In some situations a government lawyer is assigned to defend an individual government employee rather than represent a government entity. Such is routinely the case for Judge Advocate General military defense lawyers, who take on a traditional lawyer-client relationship with their individual clients.[74] Justice Department lawyers representing government officials who have been sued in their individual capacity face a more complex situation. Federal government lawyers represent individual government officials only if the Attorney General has determined that it is "in the interest of the United States" to provide such representation.[75] Under Justice Department regulations, the government lawyer's confidentiality duty toward her individual client is more limited than in a traditional lawyer-client relationship. The lawyer must keep confidential only that information that is covered by the attorney-client

---

(1973) ("The Government Client and Confidentiality"), *in* 32 FED. B.J. 71, 72 (1973) ("[T]he client of the federally employed lawyer . . . is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business."); FED. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (1990) ("[A] Government lawyer represents the Federal Agency that employs the Government lawyer."); D.C. BAR, REPORT BY THE DISTRICT OF COLUMBIA BAR SPECIAL COMMITTEE ON GOVERNMENT LAWYERS AND THE MODEL RULES OF PROFESSIONAL CONDUCT, *reprinted in* WASH. LAW., Sept.–Oct. 1988, at 53, 54 [hereinafter D.C. BAR REPORT] ("[T]he employing agency should in normal circumstances be considered the client of the government lawyer."); Cramton, *supra* note 10, at 298 ("For day-to-day operating purposes, the government lawyer may properly view as his or her client the particular agency by which the lawyer is employed.").

73. The Attorney General's Role as Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47, 54 (1982) (stating that the President is the client of the Attorney General); Bruce E. Fein, *Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney*, 30 FED. B. NEWS & J. 406, 406 (1983) (referring to "the incumbent President" as the client of "a government attorney in the Executive Branch"); Harvey, *supra* note 70, at 1607–12 (suggesting that the President might appropriately be viewed as the client whenever a federal agency is involved in litigation).

As a practical matter, there may not be much difference between identifying the client as an agency and identifying the client as the head of the agency in her official capacity. The latter formulation simply makes explicit who is empowered to make decisions on behalf of the agency. But in certain circumstances, the difference in conception is significant. Lawyers licensed in states that have adopted the new Model Rule 1.13 on entity representation have an additional exception to confidentiality if their client is the agency rather than the individual heading the agency. *See* MODEL RULE OF PROF'L CONDUCT 1.13(c) (2007).

74. *See* D.C. RULES OF PROF'L CONDUCT R. 1.6 cmt. 39 (2007) (noting that government lawyers may "be assigned to provide an individual with counsel or representation," such as "a public defender, a government lawyer representing a defendant sued for damages arising out of the performance of the defendant's government employment, and a military lawyer representing a court-martial defendant"); Legal Ethics Comm., D.C. Bar, Op. 313, *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion313.cfm (explaining that a JAG lawyer's client is an individual defendant rather than the government).

75. 28 C.F.R. § 50.15(a) (2007).

privilege.[76] Any nonprivileged information need not be held confidential, and Justice Department attorneys have been required to disclose information adverse to their individual client where the lawyer learned it from a source other than a client communication.[77]

In most situations, the government lawyer represents a government entity rather than an individual government employee.[78] While the professional rules provide guidance for entity representation,[79] they generally leave open the key question for government lawyers: which government entity does the lawyer represent?[80]

The identity of the client has important implications for lawyer confidentiality. If a government lawyer represents "the people," then presumably she could disclose information to anyone who is one of "the people."[81] If a government lawyer represents an agency, then the entity exception to confidentiality will apply,[82] but if she is representing the agency head, then it will not.[83] If a Justice Department lawyer represents

---

76. *Id*. § 50.15(a)(3) ("Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege.").

77. Memorandum from Ralph W. Tarr, Acting Assistant Att'y Gen., Office of Legal Counsel, to Ralph K. Willard, Acting Assistant Att'y Gen., Civil Div. 6 (Mar. 29, 1985) (on file with author).

This approach—providing only limited confidentiality to a government employee client—may no longer be sustainable. The Tarr memorandum asserts that the United States Constitution's Supremacy Clause will prevent state bar authorities from disciplining a government lawyer who reveals (non-privileged) information in violation of state legal-ethics rules. *Id*. at 9 n.7. But in 1998, Congress passed the McDade Amendment, which prohibits the Justice Department from using the Supremacy Clause to opt out of state ethics rules. Act of Oct. 21, 1998, Pub. L. No. 105-277, sec. 101(b), §§ 801(a), 112 Stat. 2681, 2681–118 (codified at 28 U.S.C. § 530B(a) (2000)) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.").

78. *E.g.*, Ward v. Superior Court, 138 Cal. Rptr. 532, 538 (Cal. Ct. App. 1977) (holding that county counsel represented county rather than former assessor, so there was no conflict of interest in counsel's defending county in assessor's defamation action against county); Humphrey v. McLaren, 402 N.W.2d 535, 540–41 (Minn. 1987) (holding that state attorney general represented state agency rather than agency's executive director, so there was no conflict of interest when attorney general sued executive director for misuse of public funds).

79. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2007) (organization as client).

80. *But see* D.C. RULES OF PROF'L CONDUCT R. 1.6(k) (2007) (asserting that the government lawyer's client is the agency that employs the lawyer).

81. *Cf*. Roberts v. City of Palmdale, 5 Cal. 4th 363, 380 n.5 (1993) (rejecting resident's assertion that "because the city attorney has a duty to serve the public, she is the client of the city attorney as a member of the public and has the authority to waive the privilege").

82. MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2007); *see* discussion *supra* notes 30–32 and accompanying text.

83. As a practical matter, the key difference between conceiving of the client as a government agency rather than as the head of the government agency in his official capacity is the Model Rule 1.13 duty to protect entity clients from disloyal agents. *See* Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005). In *Ross*, a city was being sued for alleged civil rights violations by its police force. The

the entire government, then she can reveal information to a member of Congress, but if she represents the executive branch, she cannot. If a state natural resources department lawyer represents her agency, then she cannot reveal information about wrongdoing at the department to anyone outside of the department, including the state attorney general.[84] If a lawyer in the California Insurance Department (such as Cindy Ossias) represents the entire government of California, then she can reveal information to state legislators. But if she represents only the Insurance Department, then she cannot—unless an exception to confidentiality applies.

Writing years before the American Bar Association adopted its Model Rules of Professional Conduct—including its rule specifically dealing with entity clients—Robert Lawry argued that client identity was the wrong question for government lawyers to ask.[85] Lawry correctly noted that identifying the client does not end the inquiry regarding a government lawyer's confidentiality duty.[86] But client identity is an appropriate starting point for an inquiry about confidentiality. Correctly identifying the government lawyer's client will help the lawyer determine the set of individuals to whom she can reveal information.

Some have attempted to provide a universal answer to the question of the identity of the government lawyer's client. Politicians often claim that the government lawyer's client is "the public,"[87] and a few commentators

---

court ruled that the city could assert attorney-client privilege even though the former police director (a co-defendant) purported to waive the privilege by defending on the basis of the legal advice he received. *Id*. at 603. As long as the city rather than the police director was the client, the city could maintain the privilege. *Id*. at 605–06.

84. *But see* HAW. RULES OF PROF'L CONDUCT R. 1.6(c)(4)–(5) (2007) (permitting government lawyers licensed in Hawaii to make such disclosures).

85. Lawry, *Wrong Question*, *supra* note 10; Lawry, *Confidences*, *supra* note 10. The American Bar Association adopted its Model Rules of Professional Conduct, including Model Rule 1.13 on entity clients, in 1983. *See* MODEL RULES OF PROF'L CONDUCT preface (2007).

Steven Berenson has also argued that identifying the government lawyer's client is unnecessary. Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics*, 56 CASE W. RES. L. REV. 345, 364 (2005) ("[C]hoosing a single client from among the many possibilities mentioned above would be arbitrary . . . ."). He suggests that government lawyers should instead "seek guidance from a wide range of the sources . . . [and] serve a mediating function in considering how to incorporate those views in the representation." *Id*. But this approach would often result in indeterminacy.

86. Lawry, *Confidences*, *supra* note 10, at 631 ("The primary reason this is the wrong question is that the answer to it does not automatically answer other, separate questions of immense practical importance, not least of which is the question of confidentiality.").

87. Senator Patrick Leahy asserted that the memoranda John Roberts wrote when he was at the Solicitor General's office were not subject to attorney-client privilege because "[t]hose working in the solicitor general's office are not working for the president. They're working for you and me, and all the American people." Interview by George Stephanopolous with Sen. Patrick Leahy (July 24, 2005)

assert that government lawyers should pursue "the public interest."[88] But these formulations fail to identify who can give direction to the lawyer on behalf of the client.[89] Some assert that the government lawyer represents the government as a whole,[90] but Geoffrey Miller persuasively rebuts that notion as it pertains to a government with separated powers.[91] Miller notes that lawyers in the executive branch do not generally represent Congress or the judiciary.[92] Many assert that the client is the particular agency that employs the lawyer,[93] but this approach is singularly inappropriate for the hundreds of Justice Department lawyers who represent other government agencies and departments in court.

(transcript available at http://blog.washingtonpost.com/campaignforthecourt/2005/07/talk_shows_leah.html).

88. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000) [hereinafter Berenson, *Public Lawyers*]; *see also* Berenson, *supra* note 10.

89. *See* Prof'l Ethics Comm., Fed Bar Ass'n, Op 73-1 (1973) ("The Government Client and Confidentiality") *in* 32 FED. B.J. 71, 72 (1973) ("[W]e do not suggest . . . that the public is the client as the client concept is usually understood."); *see also* D.C. BAR REPORT, *supra* note 72, at 54 (concluding "that 'the public interest' was an unworkable ethical guideline" and that "the 'public interest' [is] too amorphous a standard to have practical utility in regulating lawyer conduct"); Cramton, *supra* note 10, at 298 (noting that "conceptions of the 'public interest' vary significantly from one person to the next" and that "defining the government lawyer's client as the public interest would fail to provide any real guidance in regulating lawyers' conduct"); Harvey, *supra* note 70, at 1601 ("The public interest model . . . allows unelected officials to substitute their judgment for that of an agency."); Miller, *supra* note 10, at 1294–95 ("[T]he notion that government attorneys represent some transcendental 'public interest' is, I believe, incoherent. . . . [T]here are as many ideas of the 'public interest' as there are people who think about the subject.").

On the other hand, certain government lawyers have client-like decision-making authority, such as whether to bring or settle a lawsuit and whether to appeal an adverse court decision. If a lawyer does have this client-like authority, she can appropriately consider the public interest in making such decisions. *See* discussion *infra* Part II.C.

90. *See* Lawry, *Wrong Question*, *supra* note 10, at 66 ("[T]he client of the federal government lawyer is the federal government."); *see also* Harvey, *supra* note 70, at 1575–76 (regarding the Solicitor General in particular). But in a longer article published just a year later, Lawry asserts that "'[t]he client for the federal government lawyer is the head of the agency or department or the head of the public or quasi-public body to which the lawyer is currently attached . . . .'" Lawry, *Confidences*, *supra* note 10, at 644.

91. Miller, *supra* note 10, at 1296 ("The notion . . . that an agency attorney serves the government as a whole is misplaced.").

92. *Id*. ("In a system of checks and balances it is not the responsibility of an [executive branch] attorney to represent the interests of Congress or the Court. Those [branches] have their own 'constitutional means and personal motives' to protect their prerogatives." (footnote call number omitted)); *see also* D.C. BAR REPORT, *supra* note 72, at 55 ("The identification of one's client as the entire government would raise serious questions regarding client control and confidentiality. For example, without some focus of responsibility, each government lawyer would be free to perform as he or she saw fit, subject only to the practical constraint of internal agency discipline.").

93. D.C. BAR REPORT, *supra* note 72, at 55; *see also* Prof'l Ethics Comm., Fed. Bar Ass'n, Op. 73-1 (1973), *in* 32 FED. B.J. 71 (1973).

There are problems with each of these formulations. Given the wide variety of roles that government lawyers play, it is no wonder that a universal definition of the government lawyer's client evades us. The next section develops an alternative approach. It identifies the government lawyer's client by examining the specific context in which the government lawyer works, paying particular attention to the structure of government authority.

B. Client Identity Depends on Context and Structure of Governmental Power

While there is no universal answer to the question of identifying a government lawyer's client, one can determine a particular government lawyer's client by examining the particular context and the precise structure of governmental authority.[94] This section describes the process for identifying a government lawyer's client and gives examples of that analysis. It does not purport to provide a comprehensive list of clients for all government lawyers. Instead, it explains how one can identify a particular lawyer's client and provides some examples of this method.

To determine the identity of the client, one must examine the range of possible clients of the government lawyer and consider the relationships among those putative clients. Is one of those entities subordinate to another or do they act independently? One must then consider the relationship between the lawyer and those entities. A few concrete examples will show how complex and contextual the issue of client identity can be in the government context.[95]

The issue of client identity often comes up in cases involving claims of attorney-client privilege or conflicts of interest. For example, an attorney-client privilege case arose when a federal grand jury subpoenaed the

---

94. *See* RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 97 cmt. c ("No universal definition of the client of a governmental lawyer is possible."); Harvey, *supra* note 70, at 1615–16 ("[N]o one model completely describes Department loyalty. . . . The varied facts and forces that operate in each case of representation make a single model inappropriate for describing the loyalty relationship."); *see also* Lawry, *Wrong Question*, *supra* note 10, at 62–63; Lawry, *Confidences*, *supra* note 10, at 631–32 (noting that the question of client identity also depends on the particular question being asked: confidentiality, conflict of interest, or whether the government lawyer must do what the particular government official has instructed).

95. *See* Gray v. R.I. Dep't of Children, Youth and Families, 937 F. Supp. 153, 157 (D.R.I. 1996) ("[A]scertaining who the client really is can be a complex affair when a governmental entity is involved."); United States v. Am. Tel. & Tel. Co., 86 F.R.D. 603, 617 (D.D.C. 1979) (adopting a contextualized approach to identifying the government lawyer's client, indicating that the client can be more than one government agency "if the two agencies have a substantial identity of legal interest in a particular matter").

minutes from the Detroit City Council's closed sessions. The Detroit corporation counsel had attended those sessions and the federal prosecutor argued that the corporation counsel represented only the executive arm of city government, not the Detroit City Council.[96] Under this theory, the presence of corporation counsel would waive the City Council's attorney-client privilege. The Sixth Circuit closely examined the particular legal context of these closed sessions, which dealt with condemnation proceedings. The Detroit city government is normally bifurcated, with the corporation counsel representing the city administration rather than the City Council. But in condemnation proceedings, the City Council actually instructs the corporation counsel whether to proceed. So, the City Council was able to assert attorney-client privilege for its meetings with corporation counsel.[97]

The Sixth Circuit used a similar structural, contextual approach to come to a different conclusion in a case involving Murfreesboro, Tennessee city council members, the city manager, and a lawyer for the city.[98] The issue was again application of the attorney-client privilege. The court found that the city-council members were investigating an executive decision and had interests adverse to those of the city manager. Thus, the city council members were not clients of the city attorney and the city could not assert attorney client privilege because the meeting with the lawyer occurred with non-clients (i.e., city council members) present.[99]

In a California case, the issue was a possible conflict of interest by a county counsel who had given legal advice to the county's civil service commission.[100] The court ruled that ordinarily a county counsel's client is the entire county rather than a constituent agency of the county, even when the lawyer is giving specific legal advice to such an agency. But the court identified an exception to this general rule where the agency has the authority to act independently of the county.[101] In this particular case the

96. *In re* Grand Jury Subpoena, 886 F.2d 135, 137–38 (6th Cir. 1989).

97. *Id*. at 138–39.

98. Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998).

99. *Id*. at 357–58.

100. Civil Serv. Comm'n v. Superior Court, 209 Cal. Rptr. 159, 164 (Cal. Ct. App. 1985) ("We . . . accept the general proposition that a public attorney's advising of a constituent public agency does not give rise to an attorney-client relationship separate and distinct from the attorney's relationship to the overall governmental entity of which the agency is a part.").

101. *Id*. The court further states that

> an exception must be recognized when the agency lawfully functions independently of the overall entity. Where an attorney advises or represents a public agency with respect to a matter as to which the agency possesses independent authority, such that a dispute over the

court found that the civil service commission had independent authority because when the county opposed a commission decision, the county had to take the commission to court rather than simply overrule it.[102] Since the county counsel had given legal advice to a commission with independent authority, the commission itself was a distinct client of the county counsel.[103]

In another conflicts of interest case, employees of the Rhode Island Department of Children, Youth and Families sued the department for alleged civil rights violations.[104] The employees' lawyer also did legal work for two Rhode Island state boards, and the state's attorney general argued that representation of the employees constituted an improper conflict of interest. The issue was whether the lawyer represented just the two specific state boards, or instead represented the entire state government. The court noted that governmental agencies sometimes oppose each other in litigation, and thus the agency, rather than the government as a whole, is the client.[105] It examined Rhode Island's restrictions on its employees and found that state employees are prohibited from serving as lawyers for a party suing the particular agency where they are employed.[106] By contrast, federal law prohibits executive branch employees from serving as lawyers for a party suing the executive branch.[107] Thus, the court found that the clients of this lawyer were the particular boards he represented, rather than the entire state government.

While this kind of structural analysis is the most satisfying way to identify a government lawyer's client, not all courts that have decided the issue of client identity use the structural approach. In a case involving the possible disqualification of a private law firm that arguably represented the

---

> matter may result in litigation between the agency and the overall entity, a distinct attorney-client relationship with the agency is created.

Id.

102. *Id.* The court states:

> Here, . . . the conflict between the Department of Social Services and the Commission cannot be resolved in the usual manner because the County Charter gives the Commission authority independent of the County's normal hierarchical structure. The Board of Supervisors has been forced to sue the Commission in an attempt to overturn its rulings.

Id.

103. *Id.* at 164, 167 (disqualifying county counsel from representing county in litigation against commission). For further discussion of this case, see Solomon, *supra* note 10, at 274–75.

104. Gray v. R.I. Dep't of Children, Youth and Families, 937 F. Supp. 153 (D.R.I. 1996).

105. *Id*. at 160 (noting that government agencies' "interests are quite often conflicting or divergent").

106. *See id*. at 156–58 (applying the Rhode Island Code of Ethics (1990) and citing R.I. GEN. LAWS § 36-14-5(e)(2)).

107. *Id*. (citing 18 U.S.C. § 205(a)(2) (2000)).

State of New York but was now representing a tobacco company being sued by the state, the court concluded that the firm represented only specific agencies rather than the state as a whole, analogizing in a rather strained fashion to the situation of a firm that represents an association's members but not the entire association.[108] In a case involving a county's claim of attorney-client privilege for communications between the county attorney and a county employee, where those communications had also been shared with "the county personnel office, the county auditor's office, and the county judge's office," a Texas state court found that those other offices constituted third parties outside the lawyer-client relationship, thus waiving the attorney-client privilege.[109] But the court failed to consider whether those offices were all part of the county attorney's client.[110]

The identity of the client is determined by examining the structure of authority within the government. Applying this structural analysis to the federal government's executive branch, client identity depends on one's theory about the structure of executive-branch authority. Proponents of the unitary-executive view have asserted that all executive-branch lawyers have as their client the entire executive branch, with the President ultimately responsible for defining client interests.[111] But this unitary-executive view is not universally held. Some commentators note that individual departments have some independent authority based on congressional enactments, even though the President can put political pressure on a department secretary, or even fire the secretary.[112] These commentators would likely conclude that the client of a department lawyer is the department itself rather than the entire executive branch.[113] For

108. Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp. 2d 276, 282–89 (S.D.N.Y. 2001) (refusing to disqualify the law firm from representing a tobacco company being sued by the state). See discussion of this case in Patricia E. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality*, 35 URB. LAW. 283, 292 (2003).

109. Cameron County v. Hinojosa, 760 S.W.2d 742, 745–46 (Tex. App. 1988).

110. *See id*. Compare the Texas court's approach in *Hinojosa*, 760 S.W.2d at 746, with the California court's approach in *Civil Serv. Comm'n v. Superior Court*, 209 Cal. Rptr. 159, 163–67 (Cal. Ct. App. 1985).

111. *See, e.g.*, Miller, *supra* note 10, at 1298 (asserting that "the [executive branch] attorney's obligation is most reasonably seen as running to the executive branch as a whole and to the President as its head"); Paulsen, *supra* note 11, at 487 ("[A]s a matter of the constitutive law of the legal entity in question . . . an attorney working for an agency within the executive branch represents . . . the executive branch.").

112. *See, e.g.*, Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. (2007).

113. *But cf.* Lawry, *Wrong Question*, *supra* note 10, at 67. Lawry states:

> [C]alling the agency the "client" only confuses . . . sound policy, for it is never the case that the matter cannot be pursued by the individual lawyer at least to the Attorney General or

many of the lawyers employed by independent agencies, such as the Securities and Exchange Commission (SEC) or the Federal Communications Commission, their client is the agency itself.[114] Such an agency is even more insulated from presidential control and thus can take positions that will dissatisfy the President. An SEC lawyer who disagrees with an agency decision can appeal that decision up to the Commission itself, but not beyond the Commission. A Justice Department lawyer who is defending a lawsuit against the Agriculture Department may in common parlance refer to that department as her client. But by statute the Justice Department controls the litigation and is concerned with the effect of any rulings on the rest of the executive branch.[115] Even if the Secretary of Agriculture would prefer a particular position, the Attorney General can overrule that position if he deems it in the interest of the executive branch. So it would be more accurate to say that the client of the Justice Department lawyer is the entire executive branch.[116] Federal prosecutors have as their clients the executive branch, and they have significant independence in how they go about their duties.[117]

Most congressional lawyers have as their clients individual legislators, while a few represent entities within the legislative branch.[118] The former work either on the personal office staff or the committee staff of a particular member of the House of Representatives or Senate. They owe duties of loyalty and confidentiality to the individual legislator. Similarly,

---

> Justice Department level. If the lawyer is working in the Executive Branch, the process may not stop until it reaches the President himself.

Id.

114. In a few cases, lawyers work for individual commissioners rather than the commission as a whole. In those cases, the client is the individual commissioner in his official capacity.

115. 28 U.S.C. § 516 (2000) ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice . . . .").

116. By contrast, the D.C. Rules of Professional Conduct assert that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order." D.C. RULES OF PROF'L CONDUCT R. 1.6(k) (2007). This would make the Justice Department lawyer's client the Justice Department.

117. *See infra* Part I.C (discussing lawyers with client-like authority to make decisions). Under the former Independent Counsel statute, Independent Counsels had the same authority as the U.S. Attorney General. 28 U.S.C. § 594(a) (2000). The statute provides that

> an independent counsel appointed . . . shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction . . . full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice . . . .

Id.

118. Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 LAW & CONTEMP. PROBS., Spring 1998, at 31, 36–37.

lawyers in the Office of the Legislative Counsel have transitory lawyer-client relationships with the individual legislators to whom they give legal advice on the drafting of legislation.[119] By contrast, there are a few lawyers on Capitol Hill whose clients are legislative entities rather than individual legislators. For example, the Senate Legal Counsel represents the Senate as an institution, regularly defending the Senate in lawsuits and pursuing subpoena enforcement actions in connection with Senate Committee investigations.[120]

In the judicial branch, although judges are lawyers, they do not act in a representative capacity and therefore do not have any clients. Judicial clerks give legal advice to the judges for whom they work, so one might classify the judge as the clerk's client. But many judicial clerks are not yet licensed as lawyers when they begin their clerkships. So it is unclear that judicial clerks are lawyers at all, let alone whether their judges are their clients.[121] For example, Edward Lazarus clerked for Justice Blackmun during the 1988–89 Term and ten years later published a book that critiqued the Supreme Court's handling of certain highly charged cases.[122] Lazarus's book was met with a chorus of criticism.[123] Lazarus was accused of violating the confidentiality inherent in the clerk-Justice relationship and of violating the confidentiality provision in the Supreme Court's rules for clerks.[124] But there was little discussion of whether he violated the confidentiality rule for lawyers.[125]

With regard to local governments, normally the client is the local government itself rather than the local officials who run the government.[126]

---

119. *See* MATTHEW ERIC GLASSMAN, CONG. RESEARCH SERV., OFFICE OF LEGISLATIVE COUNSEL: SENATE (2007), *available at* http://www.senate.gov/reference/resources/pdf/RS20856.pdf. These lawyers are required "to maintain the attorney-client relationship with respect to any communications with Senators or staff." *Id.* at 2.

120. Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS., Spring 1998, at 47, 56–62.

121. *Cf.* Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1247 (1981) (asserting that a clerk's putative client would be the court rather than the individual judge, based on Prof'l Ethics Comm., Fed. Bar Ass'n, Op. 73-1 (1973) (identifying a government lawyer's client as the employing agency)).

122. *See* EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998).

123. *See, e.g.*, Richard W. Painter, *A Law Clerk Betrays the Supreme Court*, WALL ST. J., Apr. 13, 1998, at A23; Gretchen Craft Rubin, *Betraying a Trust*, WASH. POST, June 17, 1998, at A27.

124. *See, e.g.*, Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 843–46 (1999); Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. 1430, 1435 (1999).

125. *See* Erwin Chemerinsky, *Opening Closed Chambers*, 108 YALE L.J. 1087, 1100 (1999) ("[T]he attorney-client relationship is not analogous to the clerk-Justice relationship.").

126. Ross v. City of Memphis, 423 F.3d 596, 605 (6th Cir. 2005) ("[G]enerally in conversations between municipal officials and the municipality's counsel, the municipality, not any individual

One would need to look closely at the structure of the particular local government to determine whether the client is the entire local government, the local legislature, the local government's executive branch, or some other subset of the government.

C. Some Government Lawyers Have Authority to Make Decisions That Are Normally in the Hands of the Client

The previous section showed how complicated it can be to determine the identity of a particular government lawyer's client. This section addresses two related issues: the fact that the lawyer-client relationship in government is sometimes—but not always—fundamentally different from the lawyer-client relationship in the private sector and the fact that some government lawyers may, and indeed should, consider the public interest in making decisions about the representation.[127]

1. "Runaway" Lawyers[128]

Some government lawyers have a traditional lawyer-client relationship with their government client. The client decides on the objectives of the representation and the lawyer pursues those objectives.[129] Other government lawyers serve both as the lawyer and essentially as a trustee, entrusted to make decisions that clients normally make.[130] The professional rules require a lawyer to abide by a client's decision on whether to settle a case or whether to appeal an adverse decision.[131] Yet some government lawyers routinely decide whether to litigate or settle

---

officers, is the client.").

127. *See* Humphrey v. McLaren, 402 N.W.2d 535, 543 (Minn. 1987) ("[I]n the public attorney-public client relationship, there is a quality of disinterested interest not usually found in the private sector.").

128. Compare a discussion of "runaway" grand juries in Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821 (2000).

129. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.").

130. For an example of a state rejecting this type of trustee-like power for an attorney general, see State *ex rel*. Amerland v. Hagan, 175 N.W. 372, 374 (N.D. 1919) ("[T]he Attorney General . . . [does not] step[] into the shoes of such client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned."), *overruled on other grounds by* Benson v. N.D. Workmen's Comp. Bureau, 283 N.W.2d 96, 107 (N.D. 1979).

131. Model Rule 1.2(a) states: "A lawyer shall abide by a client's decision whether to settle a matter." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007).

cases on behalf of their clients.[132] Prosecutors decide themselves whether to seek indictments and whether to allow plea agreements and cannot allow other officials in the government to make these decisions.[133] In addition, many state attorneys general have this client-like authority in civil cases. For example, in a case where the South Carolina Attorney General was representing the state tax commission, the Attorney General was permitted to settle a tax dispute even though two of the three members of the commission objected to the settlement.[134] In Massachusetts, after the Attorney General unsuccessfully defended the civil service commission in a sex discrimination lawsuit, the commission voted not to appeal the decision. But the Attorney General took the appeal anyway against the wishes of his client.[135] The Massachusetts Supreme Court found that the Attorney General's "relationship with the State officers he represents . . . is not constrained by the parameters of the traditional attorney-client relationship."[136] In another case, the Massachusetts Attorney General refused to appeal an adverse judgment even though the state officer being sued wanted to appeal.[137]

At the federal level, Congress has set out by statute that the Department of Justice controls most litigation decisions.[138] Justice Department lawyers represent executive-branch agencies in court, but it is the Justice Department—not the agencies—that decides whether to bring litigation

132. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 709 (2005) (noting that the U.S. Solicitor General files petitions for certiorari in "less than ten to twenty percent" of cases in which federal agencies and department want Supreme Court review of lower court decisions and "turns down . . . the overwhelming majority of [agency] requests for authorization to seek rehearing en banc" and "two to three times per year" confesses error, "abandoning the government's victory in a lower court . . . [i]f [his] own analysis disagrees with the judgment of the lower court that sustained the government's position"). In some cases where the government has confessed error, the court has appointed amicus curiae to argue in favor of the judgment below. *See id.* at 719 n.130.

133. Nancy V. Baker, *The Attorney General as a Legal Policy-Maker: Conflicting Loyalties*, *in* GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 44 (Cornell W. Clayton ed., 1995). After a Dallas policeman received a light sentence from a state court jury for killing a 12-year-old Hispanic boy, President Carter wanted his Justice Department to bring a federal civil rights prosecution against the policeman. Attorney General Griffin Bell refused and told the President, "You can't tell me who to prosecute. You delegated the prosecutorial discretion to me. I have to exercise it. But you can get rid of me." *Id*. *See also* Green, *supra* note 67, at 238 ("Unlike most other lawyers, prosecutors cannot look to a client, or the client's representative, to decide how to carry out this objective [to seek justice].").

134. Cooley v. S.C. Tax Comm'n, 28 S.E.2d 445, 449–511 (S.C. 1943).

135. Feeney v. Commonwealth, 366 N.E.2d 1262, 1264, 1266–67 (Mass. 1977).

136. *Id*. at 1266.

137. Sec'y of Admin. & Finance v. Att'y Gen., 326 N.E.2d 334, 336 (Mass. 1975) (rejecting the secretary's argument that he had a traditional attorney-client relationship with the attorney general, which would allow the secretary to decide whether to appeal).

138. 28 U.S.C. § 516 (2000).

and whether to settle it.[139] The Solicitor General "is not bound by the views of his 'clients.' He may confess error when he believes they are in error. . . . He may refuse to approve their requests to petition the Court for writs of *certiorari*."[140]

As part of the Congressional Accountability Act of 1995, Congress made itself subject to employment discrimination laws and set up a mechanism allowing congressional employees to seek redress despite the Constitution's Speech or Debate Clause immunity.[141] When a Senate employee alleges discrimination, he can file suit against the office where he was employed (rather than against the particular senator or the Senate itself). The Senate Chief Counsel for Employment represents the defendant office, and any monetary judgment is paid out of general Senate coffers rather than a particular senator's allotment.[142] Under this arrangement, Senate employees can obtain compensation for wrongful discrimination, but individual senators are not subject to liability. The Senate as an institution has determined that it has an interest in assuring that its employees are able to seek compensation for discrimination, while individual Senate offices presumably have an interest in avoiding any finding of wrongful discrimination. The Senate Chief Counsel for Employment apparently takes direction from the particular offices that she represents and has vigorously defended offices accused of discrimination, repeatedly arguing for broad immunity under the Constitution's Speech or Debate Clause.[143] This situation finally came to a head in a discrimination case when the senator whose office the plaintiff was suing retired before

139. Harvey, *supra* note 70, at 1573. The division of responsibility between the Justice Department lawyer and the "client" agency deserves a closer empirical look. *See* Wald, *supra* note 69, at 118 (describing a court-initiated mediation program under which the mediator can "request that agency representatives attend the mediation sessions if it appeared that it was the lawyer—and not the agency—who was resistant to settlement and to communicate offers directly to those representatives (with prior notice to government counsel)").

140. Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 230 (1977). It is significant that this opinion puts "clients" within quotation marks. *See id*. The opinion appears to be referring to individual agencies' officeholders who have preferences regarding particular legal disputes. It is more accurate to assert that the Solicitor General's client is the entire executive branch, and that these individual agencies or officeholders may have parochial interests that must be subjugated to the more wide-ranging interests of the executive branch, both laterally across the branch and across time. *See* Pillard, *supra* note 132, at 729 (noting that "the SG considers the impact of any given litigation position both across the government as a whole and over time").

141. Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified as amended at 2 U.S.C. § 1301 et. seq. (2000)).

142. 2 U.S.C. § 1415(a) (2000).

143. John Bresnahan, *Supreme Court Case Pits Senate Lawyer Against Senate Lawyer*, POLITICO, Apr. 2, 2007, http://www.politico.com/news/stories/0407/3392.html.

the case had been adjudicated.[144] The Senate Chief Counsel for Employment argued for broad speech or debate immunity,[145] while the Senate itself filed an amicus brief disclaiming immunity applied in the case.[146] Perhaps even more remarkable, the Senate Chief Counsel for Employment argued that her client, the Office of Senator Dayton, no longer existed and that the case was moot because the senator's term had expired and he had not sought a new term.[147] But if her client no longer existed, one wonders from whom she was taking direction in the case. Congress needs to clarify whether the Senate itself—rather than a particular senator whose office is being sued—controls the defense of these lawsuits, just as the Senate itself is ultimately responsible for any monetary judgment.[148] Under the current arrangement, the Senate Chief Counsel for Employment appears to be untethered to any client and has made arguments that undermine the institutional interests of the Senate.[149]

At the state level, the situations vary considerably. Many states allocate to a state attorney general decisions on whether to bring and settle lawsuits.[150] The Illinois Attorney General, for example, has the authority to "direct the legal affairs of the State and its agencies."[151] In such a situation, the relationship between the state attorney general and the agency is not "precisely akin" to that between a private sector lawyer and client.[152] Because the lawyer-client relationship is different, the state

144. Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007).

145. Brief for Appellant at 23–47, Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007) (No. 06-618), 2007 WL 621862, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-618_Petitioner.pdf.

146. Brief for the United States Senate as Amicus Curiae Supporting Appellee at 19–30, Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007) (No. 06-618), 2007 WL 1022679.

147. Brief for Appellant, *supra* note 145, at 16–22.

148. Brief for the United States Senate as Amicus Curiae Supporting the Appellee, *supra* note 146, at 17 (noting that "[t]he employing office is nothing more than an administrative unit of the Senate; it is the Senate that provides the resources for the vigorous defense of suits and for the payment of judgments" (footnote omitted)).

149. Transcript of Oral Argument at 4, Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007) (No. 06-618), 2007 WL 1198567 (Senate Chief Counsel for Employment arguing that the Supreme Court does not defer to Congress's own interpretation of the speech and debate clause because "Congress of course is a political body . . . that . . . will make decisions that are politically expedient . . . , which means that over time their decisions can change").

150. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2455–61 (2006); Davids, *supra* note 69, at 371–73, 399–400.

151. EPA v. Pollution Control Bd., 372 N.E.2d 50, 53 (Ill. 1977).

152. *Id*. at 52–53 ("[A]lthough an attorney-client relationship exists between a State agency and the Attorney General, it cannot be said that the role of the Attorney General apropos of a State agency is precisely akin to the traditional role of private counsel apropos of a client."); *see also* Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n, 387 A.2d. 533, 537–38 (Conn. 1978).

attorney general is permitted to do things that conflict-of-interest standards would normally prohibit. Thus, a state attorney general's office has been permitted to represent opposing parties in a lawsuit—two separate state commissions that disagreed about application of state law.[153] State attorneys general routinely file lawsuits *against* state agencies and officials that they normally represent.[154]

In other states, attorneys general have a more traditional lawyer-client relationship with client agencies.[155] The agencies make legal policy

---

153. *See, e.g.*, *Conn. Comm'n*, 387 A.2d. at 537 (finding that the state attorney general was not "guilty of any professional impropriety" when his office represented both plaintiff and defendant in a lawsuit); *Pollution Control Bd.*, 372 N.E.2d at 53 ("[T]he Attorney General may represent opposing State agencies in a dispute" when the Attorney General is not an actual party to the dispute); *see also* Scott v. Cadagin, 358 N.E.2d 1125, 1128–29 (Ill. 1976) (permitting attorney general to withdraw from representation of state commission and represent government department that was intervening and opposing commission); State *ex rel*. Allain v Miss. Pub. Serv. Comm'n, 418 So. 2d 779, 782, 784 (Miss. 1982) (permitting attorney general to intervene in lawsuit and challenge rate increase approved by public service commission, even though a member of his office represented commission and acknowledging that attorney general "will be confronted with many instances where he must, through his office, furnish legal counsel to two or more agencies with conflicting interest or views").

154. *See, e.g.*, People *ex rel*. Salazar v. Davidson, 79 P.3d 1221, 1129–31 (Colo. 2003) (attorney general can sue secretary of state regarding constitutionality of congressional redistricting); People *ex rel*. Scott v. Ill. Racing Bd., 301 N.E.2d 285, 288–89 (Ill. 1973) (attorney general could sue Racing Board seeking review of its decision to grant licenses); Commonwealth *ex rel*. Hancock v. Paxton, 516 S.W.2d 865, 868 (Ky. Ct. App. 1974) (attorney general's "constitutional, statutory and common law powers include the power to initiate a suit" against a state agency challenging the constitutionality of a statute); Superintendent Of Ins. v. Att'y Gen., 558 A.2d 1197, 1204 (Me. 1989) ("[W]hen the Attorney General disagrees with a state agency, he is not disqualified from participating in a suit affecting the public interest merely because members of his staff had previously provided representation to the agency at the administrative stage of the proceedings."); State *ex rel*. Olsen v. Pub. Serv. Comm'n, 283 P.2d 594, 600 (Mont. 1955) (attorney general can sue public service commission challenging its approval of a telephone rate hike, even though he "is the attorney for the commission"). *But see* People *ex rel*. Deukmejian v. Brown, 624 P.2d 1206, 1207–11 (Cal. 1981) (attorney general cannot sue State Personnel Board where lawyers in his office had previously advised Board on same issue); Reiter v. Wallgreen, 184 P.2d 571, 575 (Wash. 1947). The *Reiter* court stated:

> [The Attorney General's] paramount duty is . . . the protection of the interest of the people of the state, and, where he is cognizant of violations of the Constitution or the statutes by a state officer, his duty is to obstruct and not to assist, and, where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.

Id. (quoting State *ex rel*. Dunbar v. State Bd. of Equalization, 249 P. 996, 999 (Wash. 1926)).

155. *See* Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 862 (W. Va. 1995) (citing Manchin v. Browning, 296 S.E.2d 909, 920 (W. Va. 1982)) ("[T]here [is] a traditional attorney-client relationship between the Attorney General and the state officer he represents."); State *ex rel*. Caryl v. MacQueen, 385 S.E.2d 646, 649 (W. Va. 1989) ("[T]he relationship between the Attorney General and the Tax Commissioner is clearly one of an attorney to his client and shall be treated as such by the Attorney General with regard to the confidentiality of the information." (footnote call number omitted)); Manchin v. Browning, 296 S.E.2d 909, 920 (W. Va. 1982) ("The Legislature has thus created a traditional attorney-client relationship between the Attorney General and the state officers he is required to represent."); *see also Deukmejian*, 624 P.2d at 1207–11.

decisions and the attorney general defends those decisions in court.[156] These government lawyers must defer to their clients' decisions, even when the lawyers believe that the clients are acting against the public interest.[157] For example, in a Texas case, the Attorney General asked a court to overturn a state agency's water regulation because of alleged violations of equal protection.[158] The court ruled that the Attorney General could not sue a state agency.[159]

Occasionally, government lawyers who do not have this trustee-like power will nonetheless make decisions as though they did have the power. The results can be rather strange. For example, in a 1997 case involving a voter initiative, the "Legal Division" of the California Fair Political Practices Commission filed an amicus brief in a case on behalf of the Legal Division itself, even though the Commission had not taken a position on the case.[160] When a lawyer is not tethered to a client, the lawyer may make arguments with which the client would disagree.[161] The West Virginia Attorney General was called upon to defend the Secretary of State in a federal case challenging the state's apportionment plan for

156. *See, e.g.*, *McGraw*, 461 S.E.2d at 862 ("[T]he role of the Attorney General 'is not to make public policy in his own right on behalf of the state[,]' but rather 'to exercise his skill as the state's chief lawyer to zealously advocate and defend the policy position of the officer or agency in the litigation' . . . ." (quoting *Manchin*, 296 S.E.2d at 920)); *see also* York v. Penn. Pub. Util. Comm'n, 295 A.2d 825, 832 (Pa. 1972) (prohibiting attorney general from arguing against decision made by state agency and stating that "boards and commissions are given authority to make decisions which involve . . . conclusions of law. . . . The legislature provided for the review of these decisions by courts . . . . Appeals from these decisions are not to the attorney general." (internal quotation marks omitted)).

157. *Deukmejian*, 624 P.2d at 1209 (rejecting the attorney general's contention that he "may determine, contrary to the views of the Governor, wherein lies the public interest"); Motor Club of Iowa v. Dep't of Transp., 251 N.W.2d 510, 514 (Iowa 1977) (attorney general's role is "to defend the department, not to assert his vision of state interest"); *see* Solomon, *supra* note 10, at 323 (extensively discussing *Deukmejian*, 624 P.2d 1206); *see also* Miller, *supra* note 10, at 54 (arguing against consideration of public interest). *But cf.* Davids, *supra* note 69, at 373–74 (asserting that some lawyers have as a client the public interest).

158. Hill v. Tex. Water Quality Bd., 568 S.W.2d 738, 739 (Tex. Civ. App. 1978). The court ruled that a state statute required the attorney general to represent the agency and to supervise any lawyer working for the agency. Thus, allowing the attorney general to sue the agency "would put him on both sides of the lawsuit." *Id.* at 741. This and other cases concerning the Texas Attorney General's authority are discussed extensively in Bill Aleshire, Note, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187 (2000).

159. *Tex. Water Quality Bd.*, 568 S.W.2d at 741. *But see* Davids, *supra* note 69, at 401 (criticizing courts that prioritize application of the ethics rules to state attorneys general rather than focusing on the attorney generals' roles within state governments).

160. Yes on Measure A v. City of Lake Forest, 70 Cal. Rptr. 2d 517, 518 n.2 (Cal. Ct. App. 1997) (noting that the brief of the Fair Political Practices Commission states that the "'position taken in this brief is that of the General Counsel and the Legal Division of the agency'" and that the issue "'ha[d] not been presented to the Commission for a formal discussion and vote'").

161. United States v. Providence Journal Co., 485 U.S. 693 (1988) (special prosecutor did not have authority to seek certiorari against wishes of Solicitor General).

congressional districts.[162] But rather than pursuing the wishes of the Secretary of State and conceding the unconstitutionality of the plan, the Attorney General sought to defend the apportionment plan. So, the Secretary of State obtained a mandamus from the state's supreme court, directing the Attorney General to pursue the Secretary of State's objectives in the apportionment litigation.[163]

2. Basing Decisions on the Public Interest

Although one finds some support for consideration of the public interest, most commentators have criticized this approach. Geoffrey Miller, in particular, wrote a convincing critique of government lawyers' considering the public interest, pointing out that this approach would lead to chaos since different lawyers have different conceptions of the public interest.[164] This is a valuable insight, but it is limited in its application. For there is a set of government lawyers who should consider the public interest: those who can make client-like decisions.

Government lawyers who have this client-like decision-making authority essentially serve as trustees for the client.[165] When making those client-like decisions in their role as trustees, it is appropriate for government lawyers to consider the public interest.[166] For example, the California Attorney General has the authority to bring lawsuits on behalf of the State and has a "paramount duty to represent and protect the public interest."[167]

---

162. Manchin v. Browning, 296 S.E.2d 909, 912–13 (W. Va. 1982). The West Virginia Supreme Court acknowledged that when the attorney general pursues litigation in his own name (rather than on behalf of a particular state official), he is free to pursue the public interest as he sees it. *Id*. at 918.

163. *Id*. at 912–13, 923.

164. Miller, *supra* note 10, at 1294–95. Bruce Green has characterized the "public interest" approach this way: "In this conception, . . . as a practical matter, the lawyer has no client and is not in an attorney-client relationship. . . . [T]he lawyer essentially has a roving commission to do what, in the exercise of professional judgment, seems best to serve the public." Green, *supra* note 67, at 267–68.

165. Former Attorney General Francis Biddle asserted that the Solicitor General "stands in his client's shoes," and that "the client has no say in the matter." FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962), *quoted in* Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 230 (1977).

166. *In re* Witness Before Special Grand Jury 2000–2, 288 F.3d 289, 294 (7th Cir. 2002) ("Public officials . . . exercise the power of the state . . . [and have] the responsibility to act in the public interest."); Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n, 387 A.2d. 533, 538 (Conn. 1978); EPA v. Pollution Control Bd., 372 N.E.2d 50, 53 (Ill. 1977) (noting that the state attorney general represents not only "the particular interests of State agencies," but also "the broader interests of the State"); Humphrey v. McLaren, 402 N.W.2d 535, 543 (Minn. 1987) ("[A] government litigator must take positions with the common public good in mind, unlike the private practitioner who seeks vindication of a particular result for a particular client.").

167. D'Amico v. Bd. of Med. Exam'rs, 11 Cal. 3d 1, 16, (Cal. 1974) (rejecting idea that the public interest is unrepresented when state attorney general makes concession in litigation).

While some have asserted that, for these lawyers, the "public interest" is their client, it makes more sense to conceive of these lawyers as trustees of the client (such as the state government) who can consider the public interest in making their decisions. So, it is not that the public interest is the client, but rather the state is the client, and the state attorney general is entrusted to make decisions about what is in the best interest of the State, and then to implement those decisions through her legal work.[168] The attorney general is both the lawyer and the trustee of the client. The attorney general has the power as trustee to make the determination of what is in the interest of the State.

If a government lawyer has the authority to make client-like decisions (such as whether to bring or settle cases), then she also has the responsibility to act not just like any client, but in a way this particular client—a sovereign—should act. In our legal tradition, the sovereign is not free to act in the same way as any private litigant but is expected to act fairly and impartially.[169] This obligation of fairness is seen most prominently in criminal prosecutions. As the United States Supreme Court declared in *Berger v. United States*,

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[170]

This requirement that government lawyers be fair is reflected in prosecutors' obligations to provide criminal defendants with information that can help the defense, a deviation from the normal adversary process.[171] This obligation to act fairly is so central to the government

168. For a rather prescient prediction of how the role of a state attorney general would expand to include protection of the public interest, see William J. Baxley, *The State's Attorney*, 25 ALA. L. REV. 19, 21 (1972) (predicting that the state attorney general "in the year 2000 will find himself more the 'people's lawyer' than the state's lawyer . . . . He will be somewhat of an 'ombudsman'—a person who is a buffer between the citizen and his government and whose ultimate allegiance is to the people-at-large.").

169. Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 311–13 (1989).

170. Berger v. United States, 295 U.S. 78, 88 (1935).

171. Brady v. Maryland, 373 U.S. 83, 87–88 (1963). Model Rule 3.8(d) requires prosecutors to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

lawyer's mission that the Justice Department building has this quotation inscribed near the entrance to the Attorney General's office: "The United States wins its point whenever justice is done its citizens in the courts."[172]

As the Supreme Court explained in *Berger*, the obligation to do justice is based on the government's obligation as a sovereign "to govern impartially."[173] As such, the obligation to govern impartially and do justice would seem to apply with equal force to the government's civil litigation.[174] One finds strong support for this principle in civil condemnation cases, where courts have found that government lawyers have an obligation to develop a full and fair record to arrive at just compensation, not just to minimize the financial payout by the government.[175] Judge Jack Weinstein has explained that when he was a county attorney handling a condemnation action against an unsophisticated elderly couple, he rejected a proposed settlement because it did not adequately compensate the couple for their valuable land.[176]

MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007). Some scholars have argued that prosecutors can best seek justice by scrupulously following the specific procedures required of them rather than by attempting to implement a more inchoate notion of "justice" in particular cases. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).

172. This quotation from former Solicitor General Lehmann is inscribed in the Rotunda of the Justice Department building. *See* Janet Reno, *Indigent Defense: Legal Service for Poor Needs Vigilance*, CHAMPION, May 1998, at 32, *available at* http://www.nacdl.org/CHAMPION/ARTICLES/98may05.htm; *see also* Pillard, *supra* note 132, at 723 (identifying the quote's author as former Solicitor General Frederick W. Lehmann).

173. *Berger*, 295 U.S. at 88.

174. *See* Green, *supra* note 67, at 277 (persuasively arguing that government civil litigators—particularly those who "act as surrogate[s] of the client"—should seek justice); *see also* People *ex rel*. Clancy v. Superior Court, 705 P.2d 347, 350–53 (Cal. 1985) (disqualifying lawyer hired by a city to handle abatement action on contingent fee basis). In *Clancy*, the California Supreme Court declared that a prosecutor

> is a representative of the sovereign; he must act with the impartiality required of those who govern. . . . [This duty is] not limited to criminal prosecutors: A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record . . . .

Id. at 350 (internal quotation marks omitted).

175. City of Los Angeles v. Decker, 558 P.2d 545, 551 (Cal. 1977) (holding that the duty of a government attorney in an eminent domain action includes developing full and fair record to arrive at just compensation and reversing compensation award because city attorney withheld from jury information about land's commercial use and its value); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7–14 (1980) ("A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record . . . .").

176. Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155 (1966) (describing his rejection of a proposed settlement compensating unrepresented elderly couple with consideration worth only a third of assessor's valuation of land and paying couple more than they requested); Weinstein & Crosthwait, *supra* note 69, at 6–7 (same).

Aside from civil condemnation cases, one finds only a few cases supporting the obligation to be fair.[177] One academic commentator, Steven Berenson, has looked at these few civil cases and concluded that government civil litigators "should be much more concerned with pursuit of the public interest than their counterparts who represent private clients."[178] But in each of the identified cases, the assertion that government civil litigators must do justice was merely dictum and had no impact on the outcome of the case. For example, in *Freeport-McMoRan Oil & Gas Co. v. FERC*, Judge Abner Mikva noted that while "[t]he Supreme Court was speaking of government prosecutors in *Berger*, . . . no one, to our knowledge (at least prior to oral argument), has suggested that the principle does not apply with equal force to the government's civil lawyers."[179] But Mikva's assertion had no impact on the outcome of this case, in which the court dismissed an appeal as moot. Instead, Judge Mikva was simply excoriating the FERC lawyer for pursuing an appeal after the case had clearly become moot and for "so unblushingly deny[ing] [at oral argument] that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission."[180]

Most of the academic commentary on this issue rejects the notion that government lawyers should consider the public interest, concluding that it is too vague a standard for government lawyers to apply in specific situations.[181] While government lawyers who have client-like decision-making authority should consider the public interest, those who are acting

177. Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45, 47 (D.C. Cir. 1992); Douglas v. Donovan, 704 F.2d 1276, 1279–80 (D.C. Cir. 1983); Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983). Judge Abner Mikva wrote each of these decisions.

178. Berenson, *Public Lawyers*, *supra* note 88, at 794; *see also* Berenson, *supra* note 10.

179. *Freeport-McMoRan Oil*, 962 F.2d at 47.

180. *Id.* at 48. In *Douglas v. Donovan*, while the court wrote that "government attorneys . . . have special responsibilities to both this court and the public at large," it admonished both the government and the private lawyer for failing to inform the court that the underlying dispute had been settled and therefore the case was moot. 704 F.2d 1276, 1279–80 (D.C. Cir. 1983).

In *Gray Panthers v. Schweiker*, while the court wrote that "[t]here is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large," it directed the district court to consider a form of written notice for entitlement to a hearing that the government had only recently submitted, even though it had "been circulating within the Department for many years." 716 F.2d 23, 23 (D.C. Cir. 1983).

181. Miller, *supra* note 10, at 1294 ("[T]he notion that government attorneys represent some transcendental 'public interest' is, I believe, incoherent."); *see also* William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 564 (1986) ("The government lawyer who uses the public interest approach . . . is not a lawyer representing a client but a lawyer representing herself."); Lanctot, *supra* note 10, at 975 (criticizing the public interest approach as anti-democratic).

in more traditional lawyer roles vis-à-vis their government clients should defer to their clients' decisions about what is in the public interest.

One can find some support for the position that government lawyers should take into account the public interest when making decisions about whether to disclose information. For example, the Hawaii Rules of Professional Conduct specifically empower government lawyers to assess "the public good" in deciding whether to disclose information about government wrongdoing.[182]

A more modest, alternative formulation of the public interest approach is that the public interest is embodied in a government's duly enacted statutes, regulations, and rules. A government lawyer promotes the public interest by ensuring compliance with the law.[183] This Article argues that those statutes and regulations that constitute the government's information-control regime are the substantive standards that define a government lawyer's confidentiality obligation.[184]

Usually, the government structure makes it clear that there is an elected or appointed government official who has the authority to make decisions on behalf of the public. Unless the government lawyer has been delegated the authority to make such a determination, she should defer to the appropriate government officials and their determination of what is in the public interest and should take direction from them, rather than implement her own concept of what "the people" desire.[185]

Returning to the factual scenario that began this Part, Ossias's client would be the Department of Insurance, which has as its head an elected official, Charles Quackenbush. Even if Ossias believed that Quackenbush was violating the law, she was not permitted to disclose that information to anyone outside the client.[186] Under California law, Ossias had the option

---

182. HAW. RULES OF PROF'L CONDUCT R. 1.6(c)(4)–(5) (2007).

183. Miller, *supra* note 10, at 1295. Miller writes:

> Although the public interest as a reified concept may not be ascertainable, the Constitution establishes procedures for approximating that ideal through election, appointment, confirmation, and legislation. Nothing systemic empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through these governmental processes.

Id. Similarly, at least one Justice Department opinion has reduced the "do justice" command to requiring that a government lawyer act in accordance with the law. Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 232 (1977) (asserting that Solicitor General "must 'do justice'—that is, he must discharge his office in accordance with law and ensure that improper concerns do not influence the presentation of the Government's case in the Supreme Court").

184. *See infra* Part III.

185. Miller, *supra* note 10, at 1298.

186. California Rule of Professional Conduct 3-600(B) states that if a lawyer

of raising the issue with Qackenbush personally,[187] but there is no indication that she did so. The following Part develops an approach to government-lawyer confidentiality that would have specific application to a situation like the one Ossias faced: where a government lawyer comes across information about government wrongdoing.

III. A GOVERNMENT LAWYER'S CONFIDENTIALITY OBLIGATION

This Part examines two characteristics of governments that bear on the question of confidentiality. The first characteristic concerns the legitimacy of the government's keeping secret its own wrongdoing. While the private sector may legitimately keep secret past wrongdoing, several sources—including statutes, court decisions, and commentators—suggest that a government has no such right. This Part will explore the support for the proposition that, as a substantive matter, government lawyers may disclose government wrongdoing.

The second characteristic concerns the way that the government controls its information. Private sector clients may make disclosure decisions on an ad hoc basis, but most governments have a complex legal regime for controlling their information.[188] This regime includes statutes and regulations prohibiting the disclosure of certain information (such as

---

> acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the [lawyer] shall not violate his or her duty of protecting all confidential information . . . .

CAL. RULES OF PROF'L CONDUCT R. 3-600(B) (2008). In contrast, Model Rule 1.13(c) permits an entity lawyer to disclose otherwise confidential information if "the highest authority that can act on behalf of the [entity] insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law." MODEL RULES OF PROF'L CONDUCT R. 1.13(C) (2007).

187. California Rule of Professional Conduct 3-600(B) states that the entity lawyer who knows of wrongdoing

> may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:
>
> (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or
>
> (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

CAL. RULES OF PROF'L CONDUCT R. 3-600(B) (2007). In contrast, Model Rule 1.13(b) requires an entity lawyer in such circumstances to "refer the matter to higher authority in the organization." MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

188. Cramton, *supra* note 10, at 294 (referring to the "pervasive regulations [that] govern much of the information with which a government lawyer must necessarily deal").

private information about a particular taxpayer);[189] rules requiring disclosure of other types of information (such as an agency's organizational structure and its final decisions);[190] rules requiring disclosure of certain information upon request (such as unclassified, unprivileged information that must be disclosed under the Freedom of Information Act (FOIA));[191] and additional rules allowing the government to withhold some of the requested information (such as documents subject to FOIA exceptions).[192] This Part asserts that, as a substantive matter, government lawyers may disclose information that the government is required to disclose—either in general or in response to a FOIA request.

A. Norm of Openness Regarding Government Wrongdoing

One state has adopted a specific exception to confidentiality for government wrongdoing. Hawaii's confidentiality rule explicitly permits government lawyers to disclose information about both future and past wrongdoing by government officials. Government lawyers licensed by Hawaii may disclose information in order to prevent a government official or agency "from committing a criminal or illegal act" that the lawyer believes would "result in harm to the public good"[193] or to rectify the consequences of a government official's or agency's "criminal or illegal" act that the lawyer reasonably believes was "harmful to the public good."[194]

But are lawyers licensed outside of Hawaii free to disclose government wrongdoing even though there is no explicit exception?[195] This section argues that many governments have consented to the disclosure of past misconduct by government employees—including lawyers. One finds such consent in laws encouraging all government employees to come forward with information about misconduct and in whistleblower protection statutes. This section discusses whistleblower protection statutes and how they interact with the lawyer's ethical obligation of confidentiality.

---

189. 5 U.S.C. § 552a(a)(8)(B)(iv) (2000).
190. *Id.* § 552(a)(1)–(2).
191. *Id.* § 552(a)(3).
192. *Id.* § 552(b).
193. HAW. RULES OF PROF'L CONDUCT R. 1.6(c)(4) (2007).
194. *Id.* R. 1.6(c)(5).
195. One finds in the scholarly literature an undertheorized intuition that government lawyers should be able to disclose government wrongdoing. *See, e.g.*, Comment, *supra* note 121, at 1260–61 (proposing a confidentiality rule for judicial clerks, with an exception for "specific wrongdoing").

1. Statutes Encouraging Government Employees to Disclose Government Wrongdoing

Jesselyn Radack was working at the Justice Department's Professional Responsibility Advisory Office in December 2001 when she received a phone call from an FBI lawyer who wanted to find out whether the FBI could legally interrogate John Walker Lindh, an American in Afghanistan who was being held by American forces. CNN had broadcast an interview with Lindh, and the Attorney General had announced that the government would prosecute Lindh to the full extent of the law. In response, Lindh's father hired a lawyer to represent him. Lindh's lawyer faxed a letter to the Attorney General and the FBI Director informing them that Lindh was represented by counsel. The FBI lawyer wanted to know whether the government could legally interrogate Lindh, since a legal ethics rule prohibits a lawyer from speaking to another lawyer's client without that other lawyer's permission.[196] *Radack told the FBI lawyer that the ethics rule prohibited such an interrogation. A couple of days later, the FBI lawyer informed Radack that the interrogation had occurred and together they strategized about how the government should handle the situation. The FBI lawyer and Radack exchanged numerous emails, which Radack printed out and put into the case file.*

About a month later, Radack was given a poor performance evaluation and told that unless she left the Justice Department, the evaluation would become part of her personnel file. Radack began looking for a different job. A few weeks later, the FBI lawyer contacted Radack again because the district court in the Lindh prosecution had ordered the Justice Department to disclose all documents related to the legality of the Lindh interrogation. Radack looked through the case file for the emails on this issue and could find only two of them. After consulting a more experienced colleague, Radack concluded that someone had cleansed the file. Radack asked the information technology specialists to recover the e-mails electronically, and they were able to recover some of them. When Radack informed her supervisor of the action she had taken in recovering the missing e-mails, the supervisor was not pleased.

196. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2007).

> *Radack eventually left the Justice Department and started her new job. One morning, Radack heard* Newsweek*'s David Isikoff report that the Attorney General said the Justice Department had never taken the position that its interrogation of Lindh had been illegal. Radack thought that this meant that Justice Department did not disclose her e-mails to the district court judge. She had retained copies of those e-mails and faxed them to Isikoff, who put them on the* Newsweek *website. After an Inspector General investigation pointed to Radack as the likely source for the leak of these e-mails, the Justice Department opened a criminal investigation of Radack and filed ethics charges against her in the two jurisdictions where she was licensed as a lawyer, Maryland and the District of Columbia. The Maryland bar authorities decided not to pursue a case against Radack. The District of Columbia has not yet made a decision on the Justice Department complaint.*[197]

A variety of statutes indicate that the government does not claim to have a legitimate interest in keeping secret information about government wrongdoing. In 1958, Congress adopted a resolution calling upon all government employees to "[e]xpose corruption wherever discovered."[198] More concretely, federal, state, and local governments have passed dozens of whistleblower statutes prohibiting retaliation against government employees who disclose government wrongdoing.[199]

At the federal level, federal law prohibits retaliation against certain executive-branch employees who disclose information that they

---

197. *See generally* Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 50. For an excellent analysis of Radack's situation using insights from rational-choice theory and psychology, see David McGowan, *Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment*, 20 GEO. J. LEGAL ETHICS 1057, 1058–70 (2007) (asserting that a rational actor in Radack's position would not conclude that the Justice Department failed to disclose the emails to the federal district court).

198. H.R. Con. Res. 175, 85th Cong. July 11, 1958, 72 Stat. B12 (1958) ("[I]t is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees . . . . Expose corruption wherever discovered."). *But cf.* Kenneth W. Dam, *The Special Responsibilities of Lawyers in the Executive Branch*, 55 CHI. BAR REC. 4, 8 (1974) (asserting that this Concurrent Procedure should not "be regarded as having the force of law [because] the legislative history itself states that it 'creates no new law'").

199. Robert T. Begg, *Whistleblower Law and Ethics*, *in* ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS 156, 161, 168 (Patricia E. Salkin ed., 1999) [hereinafter ETHICAL STANDARDS] (asserting that forty-six states and "even some local governments" have adopted whistleblower protection statutes); Radack, *supra* note 10, at 136 (asserting that thirty-eight states have adopted whistleblower protection for government employees). *See generally* DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE (2d ed. 2004).

"reasonably believe[] evidences . . . a violation of any law, rule, or regulation, . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[200] The statute applies to many but not all executive-branch employees. In general, it applies to civil service employees, to career appointees in the Senior Executive Service, and to employees in the "excepted service" unless their positions have been "excepted from the competitive service because of [their] confidential, policy-determining, policy-making, or policy-advocating character."[201] It does not apply to military service members or to employees of the FBI, CIA, NSA, or any other agency or unit of an agency that the President determines has as its "principal function . . . foreign intelligence or counterintelligence."[202] Employees of the judicial and legislative branches are also excluded from its coverage.[203]

Employees can blow the whistle internally by disclosing the information to another government official, such as an inspector general, or externally by disclosing it to someone outside government, such as a member of the press.[204] Where disclosure of the information is *not* "specifically prohibited by law," the employee may choose either internal or external disclosure.[205] But if disclosure of the information is

200. 5 U.S.C. § 2302(b)(8)(A)(i)–(ii) (2000). The statute provides protection to current employees, former employees, and applicants. 5 U.S.C. § 1221(a) (2000). For an excellent discussion of the federal Whistleblower Protection Act and its history, see Begg, *supra* note 199, in ETHICAL STANDARDS, *supra* note 199, at 156.

201. 5 U.S.C. § 2302(a)(2)(B) (2000).

202. 5 U.S.C. § 2302(a)(2)(C)(ii) (2000). Congress has passed legislation providing limited whistleblower protection to intelligence agency employees and military service members who disclose information to members of Congress. Intelligence Community Whistleblower Protection Act of 1998 § 702(b), Pub. L. No. 105-272, 112 Stat. 2413 (codified at Inspector General Act of 1978, 5 U.S.C. app. § 8H); Military Whistleblower Protection Act, 10 U.S.C. § 1034 (2000); *see also* LOUIS FISHER, CONG. RESEARCH SERV., NATIONAL SECURITY WHISTLEBLOWERS (2005). Rep. Waxman has introduced legislation that would provide additional whistleblower protection to employees of these agencies who disclose information to an agency Inspector General or to certain members of Congress. Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. § 10(a) (2007).

203. 5 U.S.C. § 2302(a)(2)(C) (2000) (defining the statute's coverage as executive-branch agencies and the Government Printing Office). Senator Grassley has introduced legislation that would provide some whistleblower protection to legislative-branch employees. *See* Congressional Whistleblower Protection Act of 2007, S. 508, 110th Cong. (2007).

204. If the employee is disclosing information the disclosure of which is "specifically prohibited by law," including information that is "specifically required by Executive order to be kept secret," then the employee will be protected from retaliation only if he discloses the information to an agency Inspector General, to the Special Counsel, or to another official designated by the agency head. Otherwise, the employee is not protected against retaliation. 5 U.S.C. § 2302(b)(8)(A)–(B) (2000); *see* H.R. REP. NO. 103-769, at 18 (1994), *quoted in* L. PAIGE WHITAKER, CONG. RESEARCH SERV., THE WHISTLEBLOWER PROTECTION ACT: AN OVERVIEW 4 (2007), *available at* http://www.fas.org/sgp/crs/natsec/RL33918.pdf.

205. While the Whistleblower Protection Act purports to protect *any* disclosure, the Court of

"specifically prohibited by law," then in order to be protected from reprisal, the government employee must disclose the information internally to one of several identified government officials.[206]

Many government lawyers are within the class of employees protected by the statute.[207] For these lawyers, what effect does the Federal statute have on their professional obligation of confidentiality under state ethics rules? Several commentators have attempted to answer this question.

The first to examine this question was Roger Cramton, who in 1991 concluded that the whistleblower statute supersedes state ethics rules because of the Constitution's Supremacy Clause.[208] But Cramton was writing before Congress's 1998 enactment of the McDade Amendment, which requires that federal government lawyers comply with state legal ethics rules.[209] In the post–McDade Amendment era, one can no longer rely on the Supremacy Clause to privilege federal whistleblower protection over state confidentiality rules.

A second commentator, Jesselyn Radack (who blew the whistle on alleged government misconduct as described at the beginning of this

---

Appeals for the Federal Circuit—the only appellate court with jurisdiction over whistleblower lawsuits—has construed the statute narrowly, and has excluded from protection disclosures to supervisors within the chain of command, to co-workers, and to suspected wrongdoers. Radack, *supra* note 10, at 136 n.76 (citing Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1344, 1351 (Fed. Cir. 2001)).

206. 5 U.S.C. § 2302(b)(8)(B) (2000).

207. Government lawyers have filed whistleblower claims, primarily for internal whistleblowing. *See, e.g.*, Kalil v Dept. of Agric., 479 F.3d 821 (Fed. Cir. 2007) (rejecting whistleblower claim by government employee who was licensed as a lawyer and allegedly disclosed government misconduct to Justice Department officials and federal district court clerk); Buckley v. Social Sec. Admin., 125 Fed. App'x. 988, 989–90 (Fed. Cir. 2005) (rejecting government lawyer's whistleblower claim after he allegedly made an internal disclosure); DeLeonardo, 2006 M.S.P.B. 269 (2006) (remanding for further consideration of government lawyer's claim that she was retaliated against for internal whistleblowing).

208. Cramton writes:

> Although the whistleblower provisions deal expressly only with retaliatory actions of the employing agency, the application of professional discipline by a state disciplinary board is likely to be precluded. If that were not the case, the federal goal of assuring disclosure of official wrongdoing would be subverted by state law, which expresses a contrary policy of protecting confidences. The supremacy clause assures that the federal policy of disclosure prevails over the inconsistent state policy of confidentiality.

Cramton, *supra* note 10, at 312. Cramton noted that no lawyer had attempted to defend disclosure using the Whistleblower Protection Act and acknowledged that there was uncertainty about the interaction of whistleblower protection with the confidentiality duty. *Id*. at 314–15.

209. 28 U.S.C. § 530B(a) (2000) states that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Act of Oct. 21, 1998, Pub. L. No. 105-277, Sec. 101(b), § 801(a), 112 Stat. 2681, 2681–118 (codified at 28 U.S.C. § 530B(a) (2000)).

section), has argued that government lawyers are permitted to make whistleblowing disclosures because the confidentiality rule has an exception permitting disclosure of information in order "to comply with other law."[210] But Radack's argument would be persuasive only if the federal whistleblowing law actually required government employees to blow the whistle on government wrongdoing. A third commentator, James Moliterno, recently asserted that the federal whistleblowing statute functions as the government's consent to lawyers' disclosure of wrongdoing.[211] But Moliterno never addresses whether the statute's provision restricting disclosures that are "specifically prohibited by law" prevents government lawyers from blowing the whistle externally.[212]

What is the proper application of the whistleblowing statute to government lawyers? For purposes of blowing the whistle on wrongdoing, are lawyers no different from other government employees? Does their professional duty of confidentiality simply melt away in the face of information evidencing "a violation of any law, rule, or regulation, . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety"?[213] Does the restriction on disclosures "specifically prohibited by law" apply to information that is covered by a lawyer's ethical duty of confidentiality? If so, then a government lawyer may blow the whistle only through internal disclosure to the specified government officials.

The Merit Systems Protection Board, the administrative agency that adjudicates whistleblower claims, has ruled that when the statute specifies

---

210. Radack, *supra* note 10, at 133–35 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2007)).

211. Moliterno, *supra* note 10, at 644–47.

212. In addition, Moliterno incorrectly asserts that another statute, 28 U.S.C. § 535(b), allows government employees—including lawyers—to disclose criminal misconduct to those outside the government. *Id*. at 644 ("Statutes such as 28 U.S.C. § 535(b) . . . are express waivers of confidentiality . . . ."). But § 535(b) requires government employees to make such disclosures to the Attorney General, not outside the government. 28 U.S.C. § 535(b) (2000 & Supp. V 2005) states:

> Any information, allegation, matter, or complaint witnessed, discovered, or received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, or the witness, discoverer, or recipient, as appropriate . . . .

Moliterno is not the only commentator to misconstrue this statute. Steven Berenson also asserts that "to the extent that [28 U.S.C. § 535(b)] trumps the broader duty of confidentiality owed by an attorney to their clients, it . . . represents a narrowing of the scope of confidentiality that government attorneys can offer to their clients." Berenson, *supra* note 10, at 40 (footnote call number omitted). But this statute does not trump confidentiality at all because it requires reporting of wrongdoing within the client to the Attorney General, not reporting outside of the client.

213. 5 U.S.C. § 2302(b)(8)(A)(i)–(ii) (2000).

disclosures that are "specifically prohibited by law," it refers only to disclosures that are prohibited by statute or by executive orders dealing with classified information.[214] Legislative history supports a narrow reading of this provision, as Congress was concerned that agencies would restrict the ability of employees to blow the whistle on wrongdoing by issuing regulations mandating confidentiality.[215]

Congress did not differentiate between government lawyers and other government employees in its whistleblower protection. One may question whether it is appropriate to allow government lawyers to be as free to publicly disclose alleged government misconduct as are other government employees.[216] As Roger Cramton has noted, government lawyers should be able to reveal an alleged "cover-up of corrupt conduct," but the federal whistleblowing statute may go "too far in eroding the loyalty and confidentiality that government lawyers owe to the governmental client."[217] In light of a lawyer's obligation to communicate with her client,[218] should not a lawyer be required to attempt to solve the problem internally, and go outside only if internal measures are ineffective?[219]

As a policy matter, the federal government's whistleblower protection seems to go too far in allowing government lawyers to blow the whistle externally without first requiring them to try internal whistleblowing. Until Congress does differentiate between government lawyers and other government employees in its whistleblower protection, the federal statute signals the government's consent to its lawyers' disclosure of government wrongdoing.

This Part has discussed in detail how the federal government's Whistleblower Protection Act applies to executive-branch lawyers. State

---

214. Kent, 56 M.S.P.R. 536, 542–43 (1993) (disclosure prohibited by Federal Acquisition Regulation was not "specifically prohibited by law" under whistleblower statute).

215. *Id.* (discussing legislative history); Cramton, *supra* note 10, at 311–12 (same).

216. Courts are split on whether corporate in-house counsel should be treated the same as other corporate employees for the purpose of retaliatory discharge claims, which are the common law analog to statutory whistleblowing claims. *Compare* Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 495–96, 504–05 (Cal. 1994) (permitting corporate in-house counsel to pursue retaliatory discharge claim as long as the claim can be established without breaching attorney-client privilege), *with* Balla v. Gambro, Inc., 584 N.E.2d 104, 105–09 (Ill. 1991) (prohibiting corporate in-house counsel from bringing retaliatory discharge claims).

217. Cramton, *supra* note 10, at 309, 213 ("If these are permitted disclosures, the confidentiality duties of lawyers employed by the federal government have been significantly eroded.").

218. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2007).

219. *See id.* 1.13 (requiring an entity lawyer to disclose wrongdoing up the chain of command within the entity, and permitting the lawyer to make external disclosure if the entity's leadership fails to adequately address the wrongdoing); *see also* Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, CAL. L. REV. (forthcoming 2008).

and local government lawyers may receive similar protections, depending on the scope of the applicable whistleblower laws and their state ethics rules.[220] A similar analysis of particular state and local whistleblower protection laws would be required to determine whether those laws serve as the government's consent to disclosure by government lawyers.

2. *Common-Law Doctrines Regarding the Disclosure of Government Wrongdoing*

The coverage of whistleblower statutes is broad, but not comprehensive. But even government lawyers who fall outside the protection of whistleblower statutes may be able to disclose past government wrongdoing. Two lines of common-law decisions support the government lawyer's ability to disclose past government wrongdoing. First, in construing the government's evidentiary privileges, courts have found exceptions to those privileges for government wrongdoing. Second, courts have permitted lawyers for a fiduciary to disclose the fiduciary's wrongdoing to the beneficiaries. The following section addresses these common-law doctrines.

The norm of exposing government wrongdoing surfaces not just in whistleblower protection statutes, but also in court decisions construing the government's evidentiary privileges to allow the exposure of government wrongdoing. These courts have found that a government's very legitimacy depends on its abiding by its own laws.[221] They have found a "strong public interest in honest government and in exposing wrongdoing by public officials"[222] and have concluded that concealing government wrongdoing "would represent a gross misuse of public assets."[223] One long-time observer put it this way: "'[I]f there is wrongdoing in government, it must be exposed. . . . [The government

220. WESTMAN & MODESITT, *supra* note 199, at 66–76.

221. *In re* County of Erie, 473 F.3d 413, 419 (2d Cir. 2007) ("[P]ublic officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority . . . .").

222. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997).

223. *Id*. at 915–21 (denying White House claim of attorney client privilege in Independent Counsel's investigation); *see also In re* A Witness Before Special Grand Jury 2000–2, 288 F.3d 289, 293 (7th Cir. 2002) (denying former Illinois Secretary of State George Ryan's assertion of attorney-client privilege in federal criminal investigation ("It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power.")).

lawyer's] duty to the people, the law, and his own conscience requires disclosure . . . .'"[224]

One finds these statements in cases dealing with the government's evidentiary privileges.[225] Across a range of different evidentiary privileges, courts have limited the government's ability to keep secret information about government officials' wrongdoing. This Part examines governmental attorney-client, deliberative-process, state-secrets, and presidential-communications privileges. In each of these areas, courts have rejected governmental privilege where the privilege would prevent disclosure of government wrongdoing.

In the last decade, four federal appellate courts have examined whether governments can assert attorney-client privilege in the face of federal grand jury investigations of alleged corruption.[226] The first two of these decisions arose out of Independent Counsel Kenneth Starr's investigation of the Clinton White House[227] and involved a federal executive-branch lawyer disclosing information about alleged wrongdoing to another federal executive-branch lawyer, the Independent Counsel, through the mechanism of a grand jury subpoena. Since most executive-branch employees have a statutory obligation to disclose evidence of wrongdoing to the Attorney General,[228] and the Independent Counsel stood in the role of the Attorney General for matters under its jurisdiction,[229] these cases might be seen as simple applications of the mandatory-reporting statute in the Independent Counsel context. Alternatively, one might argue that there was no breach of lawyer confidentiality in these cases at all, as long as one conceives of the lawyer's client as the entire executive branch.[230] But the courts in these cases did not base their decisions on these theories. Instead,

224. *In re* Lindsey, 158 F.3d 1263, 1273 (D.C. Cir. 1998) (alterations in original) (quoting Weinstein, *supra* note 176, at 160).

225. *See, e.g.*, *In re* Sealed Case, 121 F.3d 729 (D.C. Cir. 1997).

226. In addition, the Sixth Circuit ruled that the City of Detroit could assert attorney-client privilege to prevent disclosure in a grand jury investigation, but remanded for further determination of whether the city council's private meeting with its lawyer was legal under state open government laws. *In re* Grand Jury Subpoena, 886 F.2d 135, 138–39 (6th Cir. 1989). Similarly, New Jersey appellate court allowed a locality to assert attorney-client privilege in a state grand jury investigation. *In re* Grand Jury Subpoenas Duces Tecum by Sussex County on Farber, 574 A.2d 449, 454–55 (N.J. Ct. App. Div. 1989) [hereinafter *In re Farber*].

227. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 913–14, 915–21 (rejecting President Clinton's claim of the privilege); *see also In re* Lindsey, 158 F.3d at 1263 (same).

228. 28 U.S.C. § 535(b) (2000 & Supp. V 2005). *But see* Dam, *supra* note 198, at 7 (asserting that although this statute requires agency heads to report criminal violations to the Attorney General, it does not require government employees to report them to the agency head).

229. *See* 28 U.S.C. § 510 (2000).

230. *Cf.* Paulsen, *supra* note 11, at 487.

the courts seemed to assume that the client was a particular government agency, and that disclosing the information would breach the lawyer's confidentiality obligation to that agency.[231] The courts justified allowing this breach of confidentiality with general statements about the repugnance of keeping government wrongdoing secret.[232]

The remaining two appellate cases involved federal criminal investigations of corrupt state governments. In a case arising out of a federal investigation of former Illinois Secretary of State George Ryan, the Seventh Circuit ruled that the state's interest in lawyer confidentiality must give way to the federal government's interest in rooting out government wrongdoing.[233] In a case involving former Connecticut Governor John Rowland, the Second Circuit ruled that the state's interest in lawyer confidentiality prevailed over the federal government's law enforcement interest, relying in part on a Connecticut statute indicating that the state government can assert attorney-client privilege in any governmental proceeding.[234]

With respect to all three types of executive privilege (presidential communications, deliberative process, and state secrets), courts have rejected government claims of privilege where application of the privilege would conceal government wrongdoing. The Supreme Court ruled in *United States v. Nixon* that President Nixon's claim of the presidential-communications privilege had to give way to the governmental interest in uncovering evidence of wrongdoing.[235] In a case rejecting a claim of the deliberative-process privilege, a federal district court noted that while there is a public interest in the deliberative-process privilege, there is also a competing public interest in ensuring "the basic right of the citizen to petition his government for the redress of grievances."[236] With respect to

231. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 915–21 (referring to "the White House" as the client).

232. *In re Lindsey*, 158 F.3d at 1263 (referring to "the public's interest in uncovering illegality among its elected and appointed officials").

233. *In re* Witness Before Special Grand Jury 2000–2, 288 F.3d 289, 294 (7th Cir. 2002).

234. *In re* Grand Jury Investigation, 399 F.3d 527, 533–36 (2d Cir. 2005). The argument for limiting government attorney-client privilege would seem to apply with equal force in civil litigation where there are allegations of wrongdoing by government officials, but courts have not accepted these arguments. *See, e.g.*, *In re* County of Erie, 473 F.3d 413, 419 (2d Cir. 2007) ("[I]n civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or a corporate entity.").

235. United States v. Nixon, 418 U.S. 683, 703–16 (1974); *see also In re* Sealed Case, 121 F.3d 729 (D.C. Cir. 1997).

236. Rosee v. Bd. of Trade, 36 F.R.D. 684, 689, 690 (N.D. Ill. 1965) (permitting disclosure of otherwise privileged government documents because plaintiff alleged official misconduct and "has shown (1) that there is a reasonable basis for his request and (2) that the defendant government agents

both the presidential-communications and deliberative-process privilege, the executive branch itself has publicly disclaimed any desire to withhold information that would disclose government wrongdoing.[237] Similarly, in a case arising out of the government's unlawful, warrantless surveillance of a private citizen in 1963, the government admitted that its conduct had been illegal but nonetheless claimed the state-secrets privilege shielded documents regarding the surveillance.[238] The district court refused to recognize this claim of executive privilege because it would prevent discovery of government conduct that was admittedly illegal.[239]

The cases described above all deal with a government's evidentiary privileges and exceptions to those privileges allowing one arm of the government to compel disclosure of information related to government officials' misconduct. Such exceptions to evidentiary privileges do not necessarily imply an analogous exception to a confidentiality duty.[240] But these exceptions do suggest that the government has a lessened interest in keeping confidential information about its own misconduct.

Additional support for the government lawyer's ability to reveal wrongdoing can be found in cases dealing with the obligations of lawyers who represent fiduciaries. A lawyer who represents a fiduciary may reveal

---

played some part in the operative events"); *see In re* Sealed Case, 121 F.3d at 746 (stating that the "[deliberative process] privilege disappears altogether when there is any reason to believe government misconduct occurred").

237. *See, e.g.*, Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Executive Department and Agency General Counsels 1 (Sept. 28, 1994) ("In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings."); MORTON ROSENBERG, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 13 (2007), *available at* http://www.fas.org/sgp/crs/secrecy/RL30319.pdf; *see also* Exec. Order No. 13,292, § 1.7 3 C.F.R. 196, 200 (2003) (prohibiting government officials from using security classification to "conceal violations of law, inefficiency, or administrative error" or "prevent embarrassment to a person, organization, or agency"). Elsewhere in the national security sphere, the executive orders authorizing the classification of national security–related information explicitly forbid government officials from using the classification system for the purpose of keeping secret government wrongdoing or other embarrassing information.

238. Black v. Sheraton Corp. of Am., 371 F. Supp. 97, 101 (D.D.C. 1974) (referring to the government's "admitted misconduct").

239. *Id*. at 101 (rejecting government's claim of state-secrets privilege regarding FBI's warrantless surveillance because government "[sought] to shelter improper, unauthorized acts from disclosure"). On the other hand, the government has often succeeded in asserting the state-secrets privilege as a shield against civil litigation challenging unlawful government conduct. *See, e.g.*, ACLU v. Nat'l Sec. Agency, 493 F.3d 644 (6th Cir. 2007), Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978).

240. While there is widespread recognition of a crime fraud exception to attorney-client privilege, some states still do not recognize an exception to lawyers' confidentiality obligation for client fraud. *See, e.g.*, MO. RULES OF PROF'L CONDUCT R. 4-1.6(b) (2007).

the fiduciary's wrongdoing to the beneficiary.[241] Since government officials are fiduciaries of the public, these court decisions suggest that government lawyers may disclose government officials' wrongdoing to the public.[242]

This Part has argued that both whistleblowing statutes and common-law doctrines support government lawyers' ability to disclose government wrongdoing. Applying this analysis to Jesselyn Radack's disclosure discussed at the beginning of this Part, she may have believed that the government made an incomplete disclosure to the federal court hearing John Walker Lindh's criminal case. But, as discussed later in this Article, she should have pursued her concerns within the Justice Department prior to breaching confidentiality. The following Part asserts that government lawyers may disclose information that would be subject to mandatory disclosure under freedom of information laws.

B. Open Government Laws Should Be Construed as Client Consent to Disclosure

Jeffrey Toobin, a federal prosecutor, wrote a memoir about his experiences working on the Iran-Contra investigation.[243] *While working on that case, Toobin was subject to two separate confidentiality regimes: the legal ethics obligation of confidentiality*[244] *and the secrecy and prepublication-review requirements for government officials who have access to highly classified national security information.*[245] *In connection with the latter obligations, Toobin submitted his manuscript to the Central*

---

241. Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 949. For a discussion of some parallels between representation of fiduciaries and representation of fiduciary entities, see Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 FORDHAM L. REV. 1319 (1994).

242. *See* Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 73–77 (government officials owe fiduciary duties); Green, *supra* note 67, at 269 ("Whether one views the client as the government, a government agency or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public. It may then be suggested that the government lawyer owes some derivative duties to the public . . . .").

243. JEFFREY TOOBIN, OPENING ARGUMENTS—A YOUNG LAWYER'S FIRST CASE: UNITED STATES V. OLIVER NORTH (1991).

244. Toobin was licensed in New York and thus subject to the N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101 (2007) (requiring lawyers to maintain the confidentiality of client confidences and secrets).

245. See discussion of these obligations in *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983), and *Snepp v. United States*, 444 U.S. 507 (1980).

Intelligence Agency, which reviewed it to ensure that it did not contain any confidential national security–related information, and it passed that review.[246] *His former supervisor, Iran-Contra Independent Counsel Lawrence Walsh, was concerned about the disclosure of information about the Independent Counsel's office. Walsh threatened to file a bar disciplinary complaint if Toobin went forward with publication. Toobin and his publisher filed suit preemptively, seeking a declaratory judgment that publication would not violate his ethical obligation of confidentiality. Walsh countersued, claiming that publication would breach lawyer confidentiality, grand-jury secrecy, and the federal regulation barring employees from disclosing nonpublic government information. While the district court refused to rule on the legal ethics claim, it rejected Walsh's argument that grand-jury secrecy was so broad that it prohibited the manuscript's physical descriptions of the prosecutors and rejected Walsh's regulatory claim because it found that the only nonpublic government information revealed was trivial.*[247] *This district court decision has no precedential value, however, because the appellate court eventually vacated it in response to the publisher's decision to publish the book before the appellate court had an opportunity to hear the oral arguments in the case.*[248] *Although Walsh sent a draft ethics complaint to Toobin's then-current employer (the federal prosecutor for the Eastern District of New York), he never did file a complaint with bar authorities.*

One difference between governments and private clients is the way they control their information. This difference is significant because lawyers are permitted to disclose client information if the client consents. Private individual clients generally have an ad hoc approach to controlling their information. A lawyer who represents a private client and wants to disclose particular information can seek that client's consent. Even in the case of an entity client, the lawyer could go to the appropriate representative of the entity and ask for consent to make the disclosure.[249] That individual can make the decision of whether to grant or withhold the entity's consent on an ad hoc basis.

---

246. Penguin Books USA, Inc. v. Walsh, 756 F. Supp. 770 (S.D.N.Y. 1991).
247. *Id*. at 783–84.
248. Penguin Books USA, Inc. v. Walsh, 929 F.2d 69, 74 (2d Cir. 1991).
249. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) & cmt. 1, 1.6(a) (2007).

Governments, on the other hand, generally have a complex legal regime for the control and disclosure of their information. A government official cannot consent to a lawyer's disclosure of this information without first considering that complex legal regime. This regime can be divided into four categories: laws that prohibit the government from disclosing information, laws that require the government to disclose information, laws that require the government to disclose certain information upon specific request, and laws that exempt some information from mandatory disclosure upon that request.

Some statutes and regulations prohibit the government from disclosing information.[250] These include laws that protect information about individuals' privacy, such as the Privacy Act,[251] statutes that prevent the government from revealing information from individuals' tax returns,[252] and statutes, executive orders, and regulations that prevent the government from revealing security-related information, such as the requirements that the Director of National Intelligence protect intelligence sources and methods and that atomic and cryptographic information be safeguarded.[253] In addition, executive-branch regulations prohibit employees from disclosing "nonpublic" information for their own or a third party's benefit.[254] The difficulty comes in determining which government information is considered to be "nonpublic."

A second category of information-related laws actually *requires* the government to disclose certain information. For example, at the federal level each executive-branch agency is required to disclose a description of how it is organized, statements of its functions and procedures, descriptions of forms, "statements of general policy or interpretations of general applicability,"[255] statements of policy and interpretations, final opinions and orders made in the adjudication of cases, and manuals and

250. *See, e.g.*, Hollywood v. Superior Court, 49 Cal. Rptr. 3d 598, 607 (Cal. Ct. App. 2006) (disqualifying prosecutor who "virtually gave the entire [prosecution] file, owned by the public, to the filmmakers" who were considering making a film about a case against a capital defendant, perhaps in violation of laws restricting dissemination of documents to third persons), *cert. granted*, 149 P.3d 737 (Cal. 2006).

251. 5 U.S.C. § 552(a) (2000).

252. 26 U.S.C. § 6103 (2000).

253. 50 U.S.C. § 403-1(g)(1)(d) (2000) (intelligence sources and methods); 42 U.S.C. § 2272 (2000) (atomic energy information); 28 U.S.C. § 798(a)(1) (1992) (cryptographic information).

254. 5 C.F.R. § 2635.703 (2007); *see* OFFICE OF INSPECTOR GEN. DEP'T OF INTERIOR REPORT OF INVESTIGATION: JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS, 21–22 (2007) (concluding that government official violated 5 C.F.R. § 2635.703 when she shared with industry lobbyist draft policies that were not subject to disclosure under FOIA).

255. 5 U.S.C. § 552(a)(1) (2000).

instructions that affect members of the public.[256] Similarly, the federal government and the states have myriad open meeting laws requiring much of the government's business to occur in public.[257]

A third category of information-related law requires the government to disclose information upon request. The Federal Freedom of Information Act (FOIA) imposes this obligation on all executive-branch agencies, but exempts the legislative and judicial branches.[258] But some of what the government giveth with one hand, it taketh away with the other. The Federal FOIA has nine exceptions, the most important of which are the following: where a statute prohibits the government from disclosing the information;[259] where an executive order authorizes the government to keep the information secret;[260] where an evidentiary privilege would protect that document from disclosure in litigation;[261] certain law enforcement documents;[262] and personnel or medical files that, if released, would constitute a violation of personal privacy.[263]

It is by no means obvious how open government laws should mesh with the law of attorney-client confidentiality. But courts and commentators have tackled this type of issue scores of times in an attempt to harmonize open meeting laws with the law on attorney-client privilege. Courts generally acknowledge the conflicting principles behind these two areas of law and attempt to find an accommodation between these two principles.[264]

---

256. *Id.* § 552(a)(2).

257. *Id.* § 552(b). A list of state open meeting laws can be found at the National Freedom of Information Coalition, http://www.nfoic.org/foi-center/state-foi-laws.html.

258. 5 U.S.C. § 552. A list of state freedom of information laws can be found at the National Freedom of Information Coalition, http://www.nfoic.org/foi-center/state-foi-laws.html.

259. 5 U.S.C. § 552(b)(3) (2000).

260. 5 U.S.C. § 552(b)(1) (2000).

261. 5 U.S.C. § 552(b)(5) (2000).

262. 5 U.S.C. § 552(b)(7) (2000).

263. 5 U.S.C. § 552(b)(6) (2000).

264. *See, e.g.*, State v. U.S. Dep't of Interior, 298 F.3d 60, 63 (1st Cir. 2002) (discussing "the tension between the substantive provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the application of the attorney-client and work-product privileges"); Dunn v. Ala. State Univ. Bd. of Trs., 628 So. 2d 519, 529–30 (Ala. 1993) (despite state open meeting law, state university board of trustees can meet in secret with its attorney in order to obtain attorney's legal advice on pending litigation), *overruled on other grounds by* Proctor v. Riley, 903 So. 2d 786, 791 (Ala. 2004); Laman v. McCord, 432 S.W.2d 753, 756 (Ark. 1968) (attorney-client privilege, which is codified in the state's civil code, did not create an exemption to the state's open meeting law); Roberts v. City of Palmdale, 853 P.2d 496 (Cal. 1993) (applying attorney-client privilege exception to California Public Records Act, CAL. GOV'T CODE, § 6250 (West 2007), and the Ralph M. Brown Act, CAL. GOV'T CODE § 54950 (West 2007)); Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 492 (Cal. Dist. Ct. App. 1968) (open meeting law "did not abolish the statutory opportunity of boards of supervisors to confer privately with their attorney on occasions properly

Government employees who make unauthorized disclosures of government information can be disciplined administratively or by bar authorities if they are lawyers, and they can even be subjected to criminal prosecution under limited circumstances. The government has criminally prosecuted leaks of national security and other information as thefts of government property.[265]

This Article argues that to determine the scope of a government lawyer's confidentiality duty, one must look not just at legal ethics doctrine but also at the government's information-control regime. Dozens of courts have taken a similar approach in a related legal context: determining the scope of the government attorney-client privilege. State courts across the country have determined what information state and local governments can claim to be privileged by looking closely at state open meeting laws and coming to an accommodation between these open government laws and the traditions of confidential lawyer-client relations.[266]

As discussed above, the government, like any client, can consent to disclosure of information that would otherwise be protected by lawyer confidentiality. But, unlike other clients, the government's decision about consent is constrained by its legal regime for the control of its information. To determine the scope of the government's consent to lawyer disclosure,

---

requiring confidentiality"); Neu v. Miami Herald Publ'g Co., 462 So. 2d 821, 824–26 (Fla. 1985) (state sunshine law applied even to city council meetings with city attorney, preventing application of attorney-client privilege to those meetings); Harris v. Balt. Sun Co., 625 A.2d 941, 947 (Md. 1993) (construing lawyer confidentiality obligation to prohibit only disclosures that could harm client in case involving FOIA request to state public defender's office); Prior Lake Am. v. Mader, 642 N.W.2d 729, 737 (Minn. 2002) (open meetings law has exception for meetings with attorney, but "only when there is a need for absolute confidentiality"); McKay v. Bd. of County Comm'rs, 746 P.2d 124, 128 (Nev. 1987) (state open meeting law prohibits county board from meeting with its attorney in private); Okla. Ass'n of Mun. Att'ys v. State, 577 P.2d 1310, 1314–15 (Okla. 1978) (local government could meet in secret with attorney despite state sunshine law); *see also* Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861, 863–64 (W. Va. 1995) (reprimanding state attorney general for revealing information in violation of lawyer confidentiality even though the information would be subject to mandatory disclosure under state freedom of information law).

265. United States v. Morison, 844 F.2d 1057, 1060–63, 1076–80 (4th Cir. 1988) (Defense Department employee leaked satellite photos to newspaper convicted of theft of government property and espionage); Ashcroft v. Randel, 391 F. Supp. 2d 1214, 1217–18 (N.D. Ga. 2005) (Drug Enforcement Agency employee leaked government documents to press pleaded guilty to theft of government property).

266. *Roberts*, 853 P.2d 496; *Sacramento Newspaper*, 69 Cal. Rptr. at 492; Maxwell v. Freedom of Info. Comm'n, 794 A.2d 535, 538 (Conn. 2002); *Neu*, 462 So. 2d 821 at 824–25; *Prior Lake Am.*, 642 N.W.2d at 731; *In re Farber*, 574 A.2d 449, 455 (N.J. Ct. App. Div. 1989) (harmonizing open meeting law with attorney-client privilege); *McKay*, 746 P.2d 124; *Okla. Ass'n*, 577 P.2d at 1314–15; Markowski v. City of Marlin, 940 S.W.2d 720, 725–27 (Tex. App. 1997); *see also Harris*, 625 A.2d at 947–48 (harmonizing state public defender's confidentiality duty and his disclosure obligation under state FOIA).

one must examine the government's information-control regime. Government consent occurs as follows: If the information-control regime requires the government to disclose particular information (such as an agency's final decision in an adjudication[267]), then the government has consented to disclosure of that information.[268] If the government is prohibited from disclosing particular information, then the government has withheld its consent. But a great deal of government information will fall between these two extremes and the government will have the discretion to disclose or withhold the information. If the information is subject to mandatory disclosure upon request, then, as a substantive matter, the government has consented to disclosure. But as a procedural matter, the government lawyer should seek the assent of a disinterested government official.[269]

In addition, unlike private sector clients, governments generally have policies favoring disclosure of information unless there is a specific reason not to disclose. Demonstrative of this policy are freedom of information laws, which set out a general right of access to government records and then specify exceptions to that right of access. In other words, when someone seeks disclosure of government information, there is a presumption that the government will make the information available. Where the government refuses to disclose it, the burden is on the government to justify the refusal.[270] This presumption in favor of disclosure is consistent with principles of robust democratic government. It also has a constitutional basis, in that the First Amendment requires that government employees be permitted to discuss their work unless there is a good reason that such disclosures cannot be allowed.[271]

One jurisdiction has already made explicit this type of exception to confidentiality in the government context. Lawyers licensed by the District of Columbia are permitted to disclose "when . . . *required* by law or court

267. 5 U.S.C. § 552(a)(2) (2000).

268. Cramton, *supra* note 10, at 294 ("[A] government lawyer's duty of confidentiality does not extend to information that the government has made available upon request to the public. In terms of the professional ethics rules, the government in effect has consented to disclosure.").

269. Glavin, *supra* note 10; *see* Snepp v. United States, 444 U.S. 507, 510–13 (1980) (former CIA employee breached his fiduciary obligation by failing to comply with agency's prepublication review procedure even though his disclosure contained only information that would be subject to mandatory disclosure under FOIA).

270. 5 U.S.C. § 552(a)(4)(B) (2000) (where a requester appeals an agency's denial of information, "the burden is on the agency to sustain its action").

271. McGehee v. Casey, 718 F.2d 1137, 1143–47 (D.C. Cir. 1983) (rejecting former CIA employee's challenge to CIA's decision preventing him from disclosing confidential national-security information).

order,"[272] but a government lawyer may also disclose when "*permitted* or *authorized* by law."[273] This language seems to suggest that a government lawyer may disclose information whenever disclosure would be permitted under open government laws, such as the FOIA.[274]

Applying this analysis to Jeff Toobin's memoir (discussed at the beginning of this Part), Toobin's disclosure appears to be consistent with the types of information that are subject to disclosure under the FOIA. Also, Toobin followed a disclosure-approval procedure similar to the procedure that the next Part recommends be adopted for all government lawyers.

IV. THE NEED FOR AN ORDERLY PROCEDURE FOR DISCLOSURES

The previous Part identified two ways in which a government lawyer's duty of confidentiality is different from that of a private sector lawyer: government lawyers may reveal information about past government wrongdoing and may reveal information that the government client must reveal under freedom of information (FOI) laws. But the substantive standard is only part of the story. There also needs to be a procedure for making such disclosures. With regard to misconduct, state supreme courts need to set up a procedure requiring the lawyer to give the government advance notice of her plan to disclose, similar to the current procedure for entity lawyers disclosing misconduct.[275] With regard to information

---

272. D.C. RULES OF PROF'L CONDUCT R. 1.6(e)(2)(A) (2006) (emphasis added). The D.C. Court of Appeals adopted a revised set of professional rules effective Feb. 1, 2007. Alberto Mora's disclosure of information occurred prior to the effective date of the new rules, and so this Article analyzes his conduct using the version of the D.C. Rules that were effective in 2006. All other discussion of the D.C. Rules in this article will refer to the 2007 version.

273. *Id*. R. 1.6(e)(2)(B) (emphasis added).

274. A comment accompanying the rule suggests a narrower interpretation. The comment states that this provision "is designed to permit disclosures . . . which the government authorizes its attorneys to make in connection with their professional services to the government," *id*. R. 1.6 cmt. 37, suggesting that this provision is aimed only at disclosures that are necessary for the government lawyer to carry out her responsibilities. On the other hand, the D.C. confidentiality rule already has another exception for disclosures that are "impliedly authorized . . . in order to carry out the representation." *Id*. R. 1.6(e)(4). In light of the existence of this "impliedly authorized" exception, the government-lawyer exception should be read as permitting government lawyers to disclose information that may be disclosed under the open government laws.

275. Model Rule 1.13(b) states:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not

covered by FOI laws, governments need to set up a procedure so that someone other than the lawyer wishing to disclose makes the determination whether this information must be disclosed under the law. Otherwise, lawyers attempting to apply the FOI laws themselves are likely to have a bias favoring disclosure.[276] This Part sketches out a few ideas about the appropriate procedures for government lawyers' disclosing government wrongdoing and other government information.

A. Procedures for Disclosing Government Wrongdoing

> *Lieutenant Commander Matt Diaz had spent eighteen years in the Navy when he was assigned to be a legal advisor at Guantanamo in 2004. While there, he became concerned that the U.S. government was treating prisoners inhumanely and violating their rights under the Geneva Conventions and the U.S. Constitution. Earlier, a human rights organization had filed a lawsuit on behalf of the prisoners, requesting a list of all those being held at Guantanamo. The government had resisted that demand. Just before his Guantanamo assignment was to end, Diaz anonymously sent a list of the Guantanamo prisoners to a lawyer at the human rights organization. The lawyer turned the list over to the judge in the case, who gave it to court security personnel. Fingerprint analysis pointed to Diaz, who was eventually convicted after a court martial. Diaz said, "Obviously I chose the wrong path . . . . [M]y career is in . . . much more serious jeopardy than it would have been if I had raised the issue to my chain of command."*[277]

There are better and worse ways for government lawyers to blow the whistle on misconduct. Contrast the approach of Navy JAG Matt Diaz, who, without consulting other government officials, secretly and anonymously sent a list of Guantanamo detainees to a human rights organization, with that of Navy General Counsel Alberto Mora, who joined with other government employees who also opposed mistreatment

---

> necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

276. *See* Glavin, *supra* note 10, at 1836–43.

277. Brooks Egerton, *Losing a Fight for Detainees*, DALLAS MORNING NEWS, May 18, 2007, at 1A; *see also* Ari Shapiro, *Navy Lawyer's Guantanamo Leak Trial Begins* (Nat'l Pub. Radio broadcast May 14, 2007) (audio available at http://www.npr.org/templates/story/story.php?storyId=10173248).

of prisoners and argued internally for a change in policy.[278] Diaz was prosecuted and sentenced to six months in prison for the unauthorized release of defense information.[279] Mora received a "Profile in Courage" award from the JFK Library.[280] Diaz's situation points out the need for an orderly procedure for disclosures.

This Article has argued that, as a substantive matter, government lawyers are permitted to disclose government wrongdoing. But even if a government lawyer's confidentiality duty has an exception for wrongdoing, the lawyer still must communicate adequately with and be loyal to her client.[281] Because of these other duties, the lawyer needs to take certain steps prior to disclosing government wrongdoing. Responsible officials may not even be aware of the wrongdoing, and the lawyer should alert such officials to the problem prior to disclosing the wrongdoing to the public.[282] If the wrongdoing is ongoing, the government needs to make changes so that it does not continue the misconduct. If the wrongdoing has already occurred, the government may need to rectify the harm that the past wrongdoing has caused. In either case, the client deserves the opportunity to plan for the forthcoming disclosure of the wrongdoing.

In light of these considerations, the lawyer needs to bring the wrongdoing to the attention of a responsible party within the government client prior to disclosing the wrongdoing outside the client. The responsible party should be given the opportunity to make the appropriate changes to prevent future wrongdoing or remedy the harm caused by the past wrongdoing. Only after ensuring that a responsible party has received notice would it be appropriate for the government lawyer to disclose the wrongdoing outside the client.

Outside disclosure should proceed first to another government official or entity that properly has the authority to respond to the specific allegations of wrongdoing. For example, if Cindy Ossias had attempted to convince the California Insurance Commissioner of the need to change his

---

278. Egerton, *supra* note 277.

279. Tim Golden, *Naming Names at Gitmo*, N.Y. TIMES MAGAZINE, Oct. 21, 2007, at 78. For an interesting analysis of the Diaz case, see Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law?*, HOFSTRA L. REV. (forthcoming 2008).

280. John Shattuck, *In Search of Political Courage*, BOSTON GLOBE, May 22, 2006, at A11.

281. MODEL RULES OF PROF'L CONDUCT R. 1.4 (b) (2007) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *Id*. R. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

282. *Id*. R. 1.4 cmt. 6 ("When the client is an organization or group, . . . the lawyer should address communications to the appropriate officials of the organization.").

policies and had been unsuccessful, then she could have appropriately approached either the state attorney general, state auditor, or state legislature, all of which would have had authority to investigate the alleged misconduct. Only if other government agencies are unwilling or unable to take action may the lawyer then disclose the misconduct to the public or the press.[283] This step-wise disclosure approach is more moderate and nuanced than that present in most state and federal whistleblower protection statutes, which permit disclosure to anyone.

This proposed procedure is similar to—but not exactly the same as—the procedure prescribed for entity lawyers in the new legal ethics rule for entities that the American Bar Association adopted after Sarbanes-Oxley.[284] Under the rule, an entity lawyer must attempt to remedy the illegal conduct within the entity client. Only if the entity client fails to take appropriate action may the lawyer disclose information outside the client.[285] Under this proposed procedure for government lawyers, the lawyer must first bring the information to the attention of an appropriate actor within the government client. That official may happen to agree with the lawyer's legal assessment and therefore begin taking corrective action.[286] On the other hand, the official may convince the lawyer that the alleged wrongdoing was not actually illegal.[287] One lawyer who could have benefited from this approach was Joyce Crandon, who was general counsel of the Kansas Office of the State Banking Commissioner, a bank regulatory agency. Another agency employee told Crandon that a deputy commissioner had obtained loans from two of the regulated banks and Crandon believed that the loans were illegal under federal and state banking laws. But she did not raise this concern with the deputy commissioner or the commissioner. Instead, she reported it to the Federal Deposit Insurance Corporation (FDIC). The Commissioner learned that Crandon reported this situation to the FDIC while he was meeting with the

283. For an example of partial step-wise disclosure, see Carol D. Leonnig & Josh White, *An Ex-Member Calls Detainee Panels Unfair Lawyer Tells of Flawed 'Combatant' Rulings*, WASH. POST, June 23, 2007, at A3 (describing how naval reserve lawyer Stephen E. Abraham repeatedly complained to his commander about problems with the Combatant Status Review Commissions at Guantanamo before providing an affidavit about those problems for a habeas proceeding on behalf of one of the Guantanamo prisoners). Abraham's approach was not completely step-wise; he could have gone outside the client to Congress before going to court.

284. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

285. *Id*. R. 1.13(c).

286. Compare discussion of the State Department's "Dissent Channel" in Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2328–30 (2006).

287. *Cf*. Crandon v. State., 897 P.2d 92, 103–04 (Kan. 1995).

FDIC, and he proceeded to fire Crandon. A state court rejected her wrongful discharge claim, finding that she had improperly disclosed confidential information.[288]

Under this proposed procedure, if the lawyer has given internal notice, then, after a reasonable time has passed, the lawyer may publicly disclose the wrongdoing even if the government has taken remedial action. This different result reflects the different values at stake in entity and government representation. The entity procedure is aimed at having the lawyer take action to ensure that the entity protects itself from disloyal servants.[289] If the entity succeeds in remedying the situation, there is no need for the lawyer to make a public disclosure. This proposed government procedure is simply aimed at giving the government a heads-up prior to the disclosure of wrongdoing.

The substantive standard—permitting lawyers to disclose government wrongdoing—reflects the fact that governments do not have a legitimate interest in keeping wrongdoing secret. This procedural requirement—requiring lawyers to notify responsible government officials prior to public disclosure—will both help the government plan for disclosure and help prevent the government lawyer from making the kind of mistake that Joyce Crandon and Matt Diaz made. The substantive standard serves to protect the public from government wrongdoing. The procedure serves to protect governments from overzealous government lawyers.

In light of the statutory and common-law support for the government lawyer's ability to disclose government wrongdoing, state supreme courts should amend their professional rules to clarify that government lawyers may disclose past government wrongdoing and to create an appropriate procedure for such disclosure. The rule should clarify that a government lawyer must first exhaust the internal process before disclosing the wrongdoing outside the government.

An explicit exception would assist lawyers in clarifying their legal obligations. Setting out a specific and orderly procedure for these lawyers to follow is necessary because the government ought to be given the benefit of notice of forthcoming disclosure.

---

288. *Id*. at 94–100. The Kansas Supreme Court affirmed the trial court's rejection of Crandon's wrongful discharge claim, but did not find that Crandon had violated the professional ethics rules. It found that Crandon acted with "reckless disregard for the truth or falsity of the disclosure" when she reported the allegations to the FDIC before investigating the truth of her suspicions. *Id*. at 102–04.

289. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 3 (2007).

B. Procedures for Disclosing Information that Must Be Released Under Freedom of Information Laws

> *Darrell McGraw was the elected Attorney General of West Virginia and representing the Division of Environmental Protection (DEP) in litigation to enforce state landfill laws. During a meeting with the landfill owner, a representative of the DEP indicated that its position on landfill requirements might change. Attorney General McGraw later revealed this possible DEP change in position to a member of the public who was part of an environmental group. That revelation could have undermined the political ability of DEP to make the change, so DEP filed ethics charges against McGraw based on this unauthorized disclosure.*[290] *McGraw argued that DEP had already revealed this information to the opposing party in a case and that this information would have had to be disclosed under the state FOIA. But the West Virginia Supreme Court ruled that the information was still subject to confidentiality under Rule 1.6 of West Virginia's Rules of Professional Conduct and that the duty of confidentiality under that rule was not subject to waiver through disclosure to third parties as was the attorney-client privilege.*[291] *The court publicly reprimanded Attorney General McGraw for the unauthorized disclosure.*[292]

If one accepts the assertion that the government lawyer's confidentiality obligation does not, as a substantive matter, cover information that must be disclosed under FOI laws, then it would seem that Darrell McGraw did not violate his duty of confidentiality. But this

---

290. Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 852–58 (W. Va. 1995).

291. *See* W.VA. RULES OF PROF'L CONDUCT R. 1.6.

292. *McGraw*, 461 S.E.2d at 860–61, 862 n.25, 864 (noting that "FOIA sets forth specific procedures for requesting and obtaining public records"). See discussion of this case in Foster Cobbs Arnold, *The "Public Record/Third Party Rule" of the Duty of Confidentiality: Situations in Which the Rule Arises and Attitudes Toward Its Application*, 23 J. LEGAL PROF. 399, 405–06 (1999).

The inability of the West Virginia Attorney General to authorize his own disclosures may reflect the fact that the West Virginia Attorney General does not have the same kind of decision-making authority that the U.S. Justice Department has. The *McGraw* court explained that in West Virginia, there is "a traditional attorney-client relationship between the Attorney General and the state officer he represents." *McGraw*, 461 S.E.2d at 862. The court also noted that "the role of the Attorney General is not to make public policy in his own right on behalf of the state[,] but rather to exercise his skill as the state's chief lawyer to zealously advocate and defend the policy position of the officer or agency in the litigation . . . ." *Id*. (internal quotations omitted) (quoting Manchin v. Browning, 296 S.E.2d 909, 920 (W. Va. 1982)). Lawyers who by statute are given more decision-making authority may also have the ability to consent to disclosures on behalf of their clients.

Article asserts that there is also a procedural component to the duty of confidentiality in order to ensure that the lawyer is not making a biased judgment about application of the FOI laws. The Supreme Court has recognized a similar procedural component to a confidentiality duty imposed on government employees who have had access to classified information. In *Snepp v. United States*, the Court imposed a constructive trust on book royalties earned by a former CIA employee who published his book without first submitting it to the agency for prepublication review.[293] Even though the book did not contain any confidential information,[294] the Court nonetheless found that Snepp violated his fiduciary duty to safeguard confidential information by refusing to submit to the designated prepublication-review procedure.[295] Similarly, government lawyers need to deal with both a substantive confidentiality standard as well as procedures for protecting confidential information.

In order to implement this FOI exception in an orderly fashion, governments need to adopt a procedure for reviewing requests for disclosure. The federal government does not have such a procedure in place for government lawyers.[296] But two federal agencies do have similar procedures in place: the Securities and Exchange Commission (SEC) has a screening procedure for its employees who have had access to confidential investigations and the CIA has a prepublication-review procedure for employees with security clearances. The SEC regulation prohibits its employees from using "confidential or nonpublic information" when writing, lecturing, or teaching, and implements that prohibition by requiring employees to submit all publications and prepared speeches to the SEC General Counsel's office for review.[297] Similarly, the CIA

293. 444 U.S. 507, 510 (1980).

294. *Id*. at 509–10 (government stipulated that Snepp's book did not reveal any classified information).

295. *Id*. at 508 (finding that his "promise [to submit the manuscript for prepublication review] was an integral part of Snepp's concurrent undertaking 'not to disclose any classified information'").

296. *But cf.* Pillard, *supra* note 132, at 712 (noting that the Justice Department's Office of Legal Counsel publishes the opinions it issues only after "seek[ing] permission from the requestors").

297. 17 C.F.R. § 200.735-4(e)(1)–(2) (2007). *See also* 5 C.F.R. *§* 2635.703(a) (2007), which prohibits all executive branch employees from "the improper use [by any executive-branch employee] of nonpublic information to further his own private interest or that of another." The regulation further states that nonpublic information includes information that is

- routinely exempt from disclosure under the FOIA,
- otherwise protected from disclosure by statute, Executive order or regulation,
- is designated as confidential by an agency, or
- has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

5 C.F.R. § 2635.703(b).

requires its employees to submit all writings related to the CIA to its Publications Review Board, which vets the documents to ensure that they do not contain any confidential national security information.[298] While these review procedures are not without problems,[299] they do provide an authoritative answer to the question of whether the government employee can disclose particular information.

CONCLUSION

It is not uncommon for current and former government lawyers to disclose information that appears to be covered by their professional obligation of confidentiality. In their memoirs, these lawyers generally do not acknowledge their professional confidentiality obligation.[300] The actual practice of current and former government lawyers and the degree to which they acknowledge and comply with their professional duty of confidentiality are issues that deserve further attention.

This Article has examined the content of the government lawyer's professional duty of confidentiality, and in particular how that duty interacts with whistleblower protection and open government laws. It examined the complex question of the identity of a government lawyer's client, noted that many government lawyers make decisions that are normally reserved for clients, and found that those lawyers can appropriately consider the public interest in making those decisions.

The Article began with the story of Alberto Mora, who told a reporter about the internal Defense Department legal debates over the treatment of prisoners at Guantanamo. This information about the content of a lawyer's advice to his client would be subject to the attorney-client privilege, and thus is not subject to mandatory disclosure under the Freedom of Information Act.[301] But Mora was describing what he saw as misconduct on the part of other government officials. Under the analysis in this

298. *See* McGehee v. Casey, 718 F.2d 1137, 1139 (D.C. Cir. 1983); United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972) (upholding requirement that former CIA employees submit manuscripts for prepublication review for classified information).

299. *See* Adam Liptak, *Agent in Leak Case Sues C.I.A. for Blocking the Release of Her Memoir*, N.Y. TIMES, June 1, 2007, at A18; Dana Priest, *Suing Over the CIA's Red Pen: Retired Operative Says Agency Unfairly Edited His Book*, WASH. POST, Oct. 9, 2006, at A15.

300. *See, e.g.*, JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW & JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007). Goldsmith acknowledges his confidentiality duty based on national security classification, *id*. at 12, 219, but not his duty of confidentiality as a lawyer. While Goldsmith does not analyze his professional duty of confidentiality, he does point out that his memoir continues a long tradition of memoirs by former government lawyers. *Id*. at 221–23 (citing twenty-nine memoirs as well as law review articles, interviews, and testimony).

301. 5 U.S.C. § 552(b)(5) (2000).

Article, as a substantive matter, Mora would be able to disclose government misconduct. As a procedural matter, Mora attempted to address the problem within the government, going all the way up to the Defense Department's General Counsel.[302]

As a substantive matter, government lawyers may disclose government wrongdoing and may reveal information that is subject to disclosure under freedom of information laws. But as a procedural matter, state supreme courts and governments need to establish procedures for government lawyers to follow when disclosing wrongdoing or other information that would be subject to disclosure under freedom of information laws.

---

302. Mayer, *supra* note 1, at 35.