Current Ethical Issues for the In-house Gaming Attorney

By Barth F. Aaron

Although the concepts were established long ago, recently renewed attention has been given to several ethical issues as they relate to corporate or in-house counsel.

This discussion begins with a cautionary tale, that of Lauren Stevens, a former Vice President and counsel to GlaxoSmithKline, who was charged with lying to a government agency and obstruction of justice. Stevens had conducted an internal investigation in order to respond to a very broad FDA inquiry into whether GSK had illegally marketed its drug Wellbutrin for "off-label" uses. After conferring with outside counsel, Stevens provided the company's response to the FDA, which may very well have contained half-truths. She was indicted on four counts in a Federal indictment. Fortunately, at trial she was granted a directed verdict before the matter was submitted to the jury, the judge finding that Stevens was "not engaged to assist a client to perpetrate a crime or fraud." Instead, the privileged documents in this case show a studied, thoughtful analysis of an extremely broad request from the Food and Drug Administration and an enormous effort to assemble information and respond on behalf of the client. The basis of the court's ruling seems to be that the lawyer was acting as legal counsel to her client and did not affirmatively attempt to commit a fraud.

How would this case turn out if the agency was the Nevada Gaming Control Board and the company was a licensee or applicant for a gaming license? Start with Nevada Gaming Commission Regulation 4.020 which, while allowing an applicant the ability to claim any privilege, the claim of privilege in and of itself can be sufficient grounds for denial of a license. In addition, Nevada regulators expect self-reporting by licensees of any violations of law or regulation. The attorney representing the client before the Board and Commission

1) is subject to the automatic waiver of any privilege by the client, NGC Reg. 10.080,

2) is obligated "not to be intentionally untruthful to the board or commission" nor withhold any information which the board or commission is entitled to receive (which is everything!) nor interfere with the board's attempt to obtain the information, NGC Reg. 10.090,

3) certifies every application, report, affidavit, written argument, brief, statement of fact or other document submitted by the attorney to the board or commission NGC Reg. 1.110 and

4) on request of the board or commission, provides any information that the attorney has concerning violations of the Act or regulations *by any person.* NGC Reg. 10.120.

In addition, should the attorney gain knowledge that a client has not complied with the Act or regulations or the client has made a material omission or error in any application, report or other document submitted to the Board or Commission, the attorney is obligated to inform the client. NGC Reg. 10.100. Presumably should the client refuse to correct the error or omission or fail to self-report or correct the violation, the attorney should cease representation of the client, which creates an interesting dilemma for the in-house attorney – to quit the job or violate commission regulations and jeopardize her own license.

The attorney-client privilege and the in-house attorney.

When dealing with Nevada gaming, the attorney-client privilege does not exist for all intents and purposes. Many Nevada gaming licensees and gaming licensees in other jurisdictions are publicly traded companies. Some have operations overseas. What happens when the SEC, DOJ. EEOC, OSHA or other federal agencies come calling? What if the waivers provided by Nevada gaming regulation are not enacted or promulgated in the other jurisdiction?

The attorney-client privilege is the oldest privilege recognized by Anglo-American jurisprudence. In fact, the principles of the testimonial privilege may be traced all the way back to the Roman Republic, and its use was firmly established in English law as early as the reign of Elizabeth I in the 16th century. Grounded in the concept of honor, the privilege worked to bar any testimony by the attorney against the client. *Epstein, The Attorney-Client Privilege and the Work Product Doctrine 2 (4th ed. 2001).*

There are several policy justifications that have played a role in the development of the doctrine. At its most basic, the privilege ensures "that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered." *United States v. Grand Jury Investigation*, 401 F. Supp. 361, 369 (W.D. Pa. 1975). Thus, the underlying principle of

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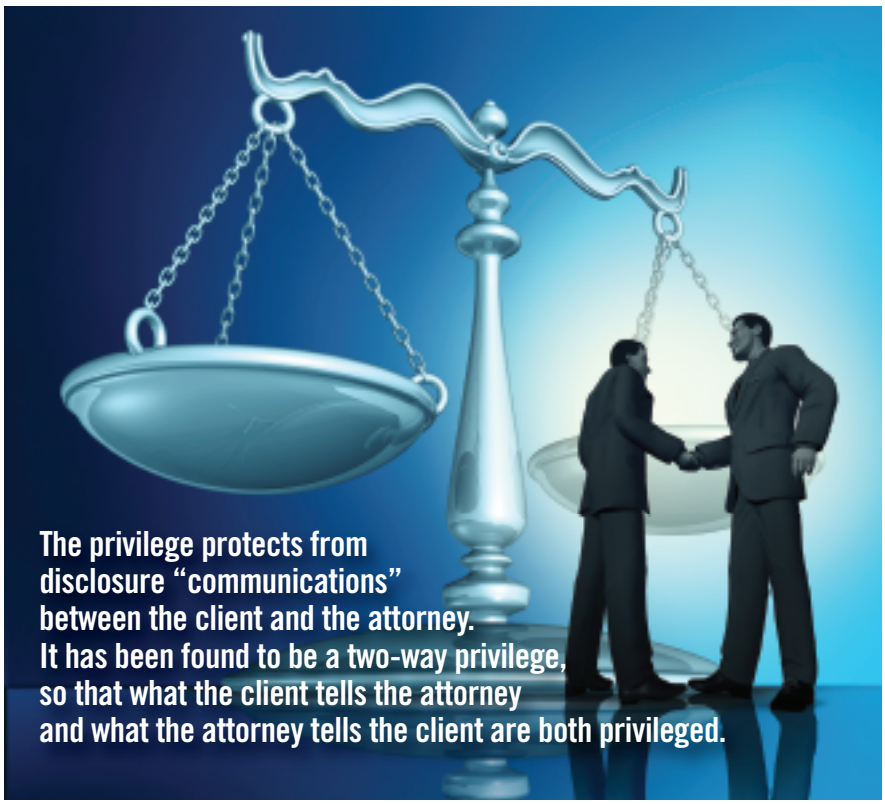
the privilege is to provide for "sound legal advice [and] advocacy." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In other words, shielded by the privilege, the client may be more willing to communicate to counsel things that might otherwise be suppressed. In theory, such candor and honesty will assist the attorney in providing more accurate, well-reasoned professional advice, and the client can be secure in the knowledge that her statements to her lawyer will not be taken as an adverse admission or used against her interest. Indeed, armed with full knowledge, we, as attorneys, are better equipped to effectively and competently represent our client.

Boiled down to its basics, the privilege provides: the attorney may neither be compelled to nor may he or she voluntarily disclose matters conveyed in confidence to him or her by the client for the purpose of seeking legal counsel. Likewise, the client may not be compelled to testify regarding matters communicated to the lawyer for the purpose of seeking legal counsel.

Although there is no single authority on the attorney-client privilege, the classic definition by Professor Wigmore is as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his [or her] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) except the protection be waived." *John Henry Wigmore, Evidence In Trials At Common Law § 2292*, at 554 (McNaughton 1961 & Supp. 1991).

What is the attorney-client privilege?

The privilege protects from disclosure "communications" between the client and the attorney. It has been found to be a two-way privilege, so that what the client tells the attorney and what the attorney tells the client are both privileged. *Schwimmer v. U.S.*, 232 F2d 855 (8th Cir.), cert denied, 352 U.S. 833 (1956); *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982), affirmed without op. 734 F. 2d 18 (7th Cir. 1984). However, the underlying facts are not subject to the privilege, only the communication with the attorney. Should the client be called to testify, she must still answer questions of "what happened" or "what did you see." What would be protected is, "What did you tell your attorney?" or "What did your attorney say?"



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The particular issues for the in-house attorney are found in two factors in Professor Wigmore's definition – is the advice being offered legal advice and was the communication made in confidence. The leading modern decision in the area is *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Traditionally, in recognition that corporations are fictional "persons" and are operated by a group of individuals, the courts used a "control group" analysis to determine who the corporate client was for purposes of the attorney-client privilege. This was a narrowly defined group of individuals senior in the corporate hierarchy who could direct the company and its activities and make binding decisions for the company. In *Upjohn*, another pharmaceutical company found that overseas employees had made payments to gain favor with local governments. The Chairman of the Board directed the General Counsel to conduct an investigation so that proper legal advice could be obtained. The company had notified the Securities and Exchange Commission and the Internal Revenue Service of the situation. The General Counsel conducted his investigation by issuing a questionnaire to employees of the company. The IRS issued a subpoena requesting, *inter alia*, the questionnaires. In the interim, the company had identified to the IRS the employees to whom the questionnaire had been addressed. The Supreme Court discarded the Court of Appeals control group analysis in favor of a more functional analysis considering whether the employee is acting in the scope of her employment, whether the communication is with an attorney for purposes of providing legal advice to the company and whether the information is also available from more senior (the traditional control group) personnel. In *Upjohn*, the Supreme Court held on

its facts that the information contained in the questionnaires was not otherwise available from more senior employees, the questionnaires were for the purpose of counsel obtaining the facts necessary and for the purpose of providing legal advice and were not subject to disclosure. However, the Court specifically found that nothing would stop the IRS from interviewing the overseas employees and obtaining the underlying facts known to them, just not by the "silver platter" route of obtaining what was provided to the attorney.

It is noted that the direction from the Chairman and the General Counsel's questionnaire all contained statements of confidentiality, which allowed the Court to find that the communication was meant to be confidential for the attorney's use only.

To be subject to the attorney client privilege, the communication must be intended to be confidential or private. It is fairly easy when the client is an individual – close the door to the office, do not copy anyone else on emails or letters and use other obvious aspects of an intent to maintain confidentiality. But what does a corporation do when there may be several department heads who need to be informed or there may be other employees, vendors, customers or others who receive the communication?

Unfortunately, the answer is "it depends." Here the courts look to the extent of the dissemination and whether those receiving the communication have a need to know. Most evidently, adding third parties such as customers or vendors to the communication is most likely to lead to a finding that the author did not intend the communication to be confidential. Likewise, broadly circulating the communication to employees who were not involved in the transaction or decision-making process is most likely to lead to the same conclusion.

However, various courts seem to analyze the situation differently. The view is now to determine whether (1) a lawyer's advice is requested and (2) whether that advice is legal advice. Courts now recognize that in-house attorneys serve multiple functions. In-house attorneys can be as much business advisers as they are legal advisers. A personal example of the author's is that he was asked on several occasions to review potential business targets, analyze their financial histories and operations and provide advice on whether it was a proper acquisition target. Almost none of that due diligence was legal analysis; it was almost entirely business oriented. Only that portion that related to regulatory matters or potential liabilities or possibly the structure of the deal (stock vs. asset purchase) would have any chance of being deemed legal advice.

Courts have adopted a so-called "primary or dominant purpose" analysis. *See N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 514 (M.D.N.C. 1986); *Teltron, Inc. v. Alexander*,132 F.R.D. 394, 396 (E.D. Pa. 1990) *("[must be able to] clearly demonstrate that the advice to be protected was given in a professional legal capacity."); U.S. Postal Serv. V. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156 (E.D.N.Y. 1994). Is the advice sought from the attorney primarily or dominantly legal or business? In the *U.S. Postal Serv. V. Phelps Dodge* case, the court asked the practical question of "whether the communication would have been made if it were not sent (or copied) to the attorney?"

Some practical suggestions to protect the attorney-client privilege in a corporate setting:

1) Limit the number of people to receive a communication seeking legal advice. Preferably, send it only to the counsel. Direct a separate email to business associates should they need to know.

2) Related, remember the dreaded "Reply All" button. It appears that more people have gotten into more trouble using "Reply All" than any other technology.

3) Clearly mark the communication as "Confidential" – but do not overdo it. Marking all correspondence to counsel as "Confidential" lessens its impact and will surely be ignored.

4) Clearly state that the purpose of the communication is to seek legal advice.

5) Attorneys, in replies, should also clearly mark "attorney-client privileged" when providing legal advice. Again, do not overdo it.

6) Some authors are recommending separating management positions from those of legal counsel, so the recommendation is the General Counsel should not also be the company Secretary. This would help clarify whether the advice is being sought from the lawyer and not the business manager.

7) Finally, remember that simply copying the attorney on the email will not make it magically protected.

Upjohn created another issue for in-house attorneys which usually arises in the process of an internal investigation.

Take this situation. The CEO comes to you, the newly appointed General Counsel of Newco Gaming, Inc., and reports that he has uncovered emails which seem to reflect that certain managers are receiving payments from vendors for preferential treatment. The CEO wants you to investigate.

Your first response is that outside counsel should conduct any internal investigations as that will help ensure confidentiality and preserve the attorney-client privilege. The response is an adamant "it's not in the budget, get it done yourself!"

So you proceed to review the emails the CEO obtained and outline the course of an internal investigation which includes interviewing several key employees. Wise to the methods of investigators, you have your paralegal sit in on all the interviews and you place the tape recorder on the conference table in front of the witness and clearly state that the interview is to be recorded and can be available for later use. During the course of one of the interviews, a procurement specialist, Doris Jones, informs you that she in fact was paid a "bonus" by John Smith, the Director of Purchasing, which she knew came from a vendor. She never reported the receipt of

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the vendor's "gift" contrary to the company's gift policy. In an interview, the Director of Purchasing freely admitted to requesting from vendors "compensation" to ensure the vendor would receive purchase orders from the casino. His tone indicated he thought there was nothing wrong with this and that in previous employment he had done the same as he was taught it was proper through his past employment.

Two footnotes. First, no one said everyone is smart. Second, you clearly advised the interview was to be recorded and placed the recorder in plain sight. What additional step should have been taken? The interviewer should have gotten the waiver of the recording in writing.

On your reporting the results of the investigation to the Compliance Committee of the Board (your gaming company does have a compliance committee, does it not? – in Nevada, it should[3]), the committee determines to self-report to the Gaming Control Board that there has been improper conduct in the purchasing department, that the company has already taken corrective action in strengthening its purchasing policies to expressly prohibit any form of gift from vendors, has appointed another procurement specialist as a compliance officer specifically for that department with the training necessary and has terminated the employment of the Purchasing Director and suspended Doris Jones for one week.

Although you are new to this position, you have worked in the past for the Gaming Control Board and you are able to convince the Board that sufficient corrective action has been taken and it decides that no disciplinary action will be taken against NewCo provided there are no other violations in the next twelve months.

However, John Smith now files a reverse gender discrimination charge with the Nevada Equal Rights Commission on behalf of the EEOC. The NERC investigator requests a response from the company. You prepare the response including a transcript of John Smith's interview. His discrimination charge is dismissed as there was a valid business reason for his termination. He files a complaint with the Office of Bar Counsel of the Nevada State Bar Association claiming you violated RPC 1.6 by improperly disclosing a client confidentiality because when Mr. Smith was speaking with you he believed you were his lawyer and asking questions to help keep him out of trouble. That was why he was so candid and cooperative. Not only does he want you punished, he wants to be compensated for his lost income.

Note that because there are no formalities to creating the attorney-client relationship but rather, the analysis is, "What did the client reasonably believe?" and "Did she reasonably believe you were her lawyer at the time of the communication?" RPC 1.6 generally prohibits the disclosure of information relating to the representation of a client unless the client gives informed consent or subject to exceptions that do not apply here. Note that the fraud/crime exception, which is also an exception to the attorney-client privilege, only applies prospectively to prevent the commission of future crimes or fraud, not retrospectively should the confidential communication reveal the past commission of crime or fraud.

Additionally, the attorney also violated RPC 1.13 which describes the ethical obligations when the organization is the client. Subparagraph (f) requires:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent.

One outgrowth of the *Upjohn* decision is what has become known as "Upjohn warnings." When speaking with an employee, especially when conducting an internal investigation, counsel should provide certain warnings or advice to the employee witness to avoid the situation just described. This applies to all counsel, but especially in-house counsel who have daily contact with many employees and as the local lawyer may become viewed as the person to go to for legal advice. The advice is to start any interaction with fellow employees where the tenor of the conversation is the seeking of personal legal advice with a statement that the corporate attorney does not represent the employee as the attorney represents the company, that the attorney can give some friendly informed advice (if the attorney so chooses) but the employee should seek advice from her own lawyer to confirm what to do before taking action on the situation.

Upjohn warnings have become somewhat more formalized. It is even suggested treating these warnings as a form of *Miranda* warning in the corporate setting and make them part of the boilerplate of the investigation process. The standard Upjohn warnings are:

- The lawyer represents the company and not the individual personally.
- The interview is part of an investigation being conducted for the purpose of providing legal advice to the company.
- The interview is protected by the attorney-client privilege that belongs solely to the company and not the individual.
- The privilege is subject to waiver at any time by the company without the individual's consent or knowledge.
- The substance of the interview is to be kept confidential, including as to other employees.
- The individual may want to retain outside counsel to represent her interests.

It is recommended that not only are these warnings read into the record at the start of any interview, but written confirmation from the witness acknowledging receiving the warnings is obtained.

It is noted that the next to last warning, to maintain the confidentiality of the interview has recently been found by the National Labor Relations Board to be a violation of an employee's organizational rights, turning on its head fifty years of Labor Act jurisprudence. It is a subject for

another day, but, at the time of the writing of this paper, perhaps the D.C. Circuit ruling in *Noel Canning vs. NLRB* will impact the validity of any recent NLRB determination. The Circuit Court ruled that the President's recess appointments to the Board were unconstitutional and impermissible.

The last concern to be addressed is contained in the second part of the *Upjohn* decision. The Supreme Court also addressed whether the questionnaires sought by the IRS as documents were privileged. This question implicates the Work-Product doctrine or privilege.

The Work-Product doctrine is separate and distinct from the attorney-client privilege. The former protects the work and thought processes of the attorney, while the latter protects communications with the attorney. In some respects, each is broader than the other. The Work-Product doctrine is not limited to communications between the client and attorney; it only protects that which is created in anticipation of litigation. To the contrary, the attorney-client privilege is not limited to communications in anticipation of litigation but applies to any confidential communications between the client and attorney. Similarly, the Work-Product doctrine can protect information or communications received from persons other than the client, such as experts or investigators.

"In anticipation of litigation" is interpreted broadly so that litigation need not have been commenced and any adversarial proceeding can be included, so administrative hearings and governmental investigations fall into the category of litigation.

The policy behind the work-product doctrine was stated by the US Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947). There the Court said:

> [I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.... This work is reflected of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways....

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. Id. at 510-11.

Thus, the Court recognizes that both fact and opinion can be covered by the Work-Product doctrine. Here there is a split. The attorney's opinion, or what reflects counsel's subjective beliefs, impressions, and strategies regarding a case should be absolutely protected. However, should facts not be otherwise available to the opponent, the recitation of fact can be ordered disclosed upon a showing of substantial need and undue hardship in obtaining the facts through other means.

"To the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification." *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982)

To summarize then, the attorney-client privilege protects from disclosure communications between a client and her attorney which are intended to be confidential, which is demonstrated by the client and attorney taking steps to ensure confidentiality. In-house counsel are faced with the dilemma of first knowing who their client is and second with being both a legal and business adviser. The work-product doctrine, which may cover the same tangible material as falls under the attorney-client privilege, protects that which is created in preparation for or anticipation of litigation by the attorney containing her thoughts, impressions, legal analyses, conclusions, trial tactics and related mental product and may cover the factual presentations relied on by the attorney. This recitation of facts could be discoverable should the adversary be able to show an inability to obtain the material facts without undue hardship. ♣

[3] NRS 463.720, implemented by NGC Reg. 5.045. See, *Creating and Implementing an Effective Gaming Compliance Program*, Rodefer, Nevada Gaming Lawyer, September 2011.

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Barth F. Aaron is admitted to practice law in Nevada, New Jersey and New York. He started in the gaming industry over 25 years ago as a Deputy Attorney General in the New Jersey Division of Gaming Enforcement. In private practice in Atlantic City, he represented a majority of gaming suppliers and vendors before moving in-house first as General Counsel for Aristocrat, Inc., the US subsidiary of the international "pokie" machine manufacturer Aristocrat Leisure Limited. He then concentrated in regulatory compliance as the first Corporate Director of Regulatory Compliance for Penn National Gaming on its entry into the casino gaming industry. Returning to a Chief Legal Officer position, Mr. Aaron was Secretary and General Counsel to Vision Gaming & Technology, Inc., a privately held slot manufacturer and then for Full House Resorts, Inc., a publicly traded gaming operator, where he served on a management team that transformed a small, unknown operator into a well-recognized regional competitor. Mr. Aaron now serves as a consultant to the gaming industry and is available to create, draft, review and audit internal controls, regulatory compliance programs, corporate governance programs and related legal compliance. He welcomes the opportunity to serve on Regulatory Compliance Committees and is available as a Regulatory Compliance Officer.