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Steven A. Lauer on

Hotlines and the Role of Privileged Communications

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Questions sometimes arise in respect of corporate compliance programs and the mechanisms that they often include for the receipt of anonymous or confidential reports of wrongdoing or suspected wrongdoing. Such mechanisms, often called "hotlines" or "whistleblowing hotlines," are required by law in certain circumstances and suggested by government agencies in others. The Sarbanes-Oxley Act requires that the audit committee of a board of directors of a publicly traded company "establish procedures for … the receipt, retention, and treatment of complaints received … regarding accounting, internal accounting controls or auditing concerns … and … the confidential, anonymous submission by employees ... of concerns regarding questionable accounting or auditing matters." *See* 15 U.S.C. §78*f*, added by §301 of Sarbanes-Oxley. The Sentencing Guidelines for Organizational Defendants promulgated by the United States Sentencing Commission, which are advisory for United States courts, indicate that one element of an "effective" corporate compliance program is "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation." *See* §8B2.1(b)(5)(C).

Is a report received over a hotline privileged or can it be privileged? If a company receives a report over its hotline and investigates the issues raised in that report, is that investigation privileged or can it be? Will conclusions arrived at upon completion of the investigation be subject to disclosure without the company's consent?

These questions require analysis of the general principles regarding privileged communications involving attorneys, especially in the context of an in-house law department. The two protective theories that might apply are (1) the Attorney-Client Privilege and (2) the Attorney Work Product Doctrine. The viability of those protections requires that documents in question (i) be prepared for appropriate purposes and (ii) be handled in certain ways so as to preserve the privilege. Neither the Attorney-Client Privilege nor the Attorney Work Product Doctrine protects from disclosure the facts unearthed through investigation or the facts that underlie counsel's advice because facts are not themselves privileged.

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Attorney-Client Privilege. The following rules, which are strictly construed by courts, apply to documents for which one might claim the protection of the Attorney-Client Privilege:

- The communication must be between a client and that client's attorney.
- The communication must relate to a request by the client for or the attorney's delivery to that client of legal advice.
- The communication must be made in confidence.

What do these rules mean for a report received over a corporate whistleblowing hotline or relative to such a report? Let's examine each requirement in turn.

1. A whistleblowing hotline probably would not be viewed as designed for the specific purpose of enabling a company's lawyers to provide legal advice to that company. A company generally establishes a hotline for business purposes, such as to satisfy regulatory or legal requirements like those in the Sarbanes-Oxley Act, rather than for the use of a company's attorneys to provide legal advice to that firm. Moreover, use of a hotline is not limited to individuals who are entitled to request such legal advice from the organization's attorney. Indeed, when establishing a hotline, a company does not intend to limit its availability to those who might come within the "control group" or even, in many instances, the company's employee population. Finally, hotlines typically do not connect a caller with a company's law department; non-law personnel, either inside the company or at an outsourced vendor, ordinarily receive the reports directly from callers. All of those facts militate against a court finding a typical hotline to be created for a purpose that comports with the privilege.

2. In respect of the second prong of the test, the communication must constitute a request by the client of the attorney for advice regarding a legal issue or, for the attorney's communication to the client, be for the purpose of providing legal advice in response to such a request. In the context of an organization, courts limit the number and types of people who can seek or receive legal advice on behalf of the entity. The individual who makes a report over a hotline may not come within the class of individuals entitled to request advice (use of a hotline is certainly not restricted to individuals so entitled), and; the individual generally does not know whether that re-

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port goes to an attorney for the company or to a person who holds another capacity, and may not even request advice at all (perhaps the individual is merely reporting some facts that might constitute a violation of law or procedure). Even when an individual calls a hotline in order to seek advice about an issue that might have legal implications, the call does not go to an attorney directly (in all but the most unusual situations), so that request probably would not qualify either.

In short, the hotline report probably cannot constitute a request for legal advice on behalf of the entity or part of the lawyers' efforts to provide such advice. Only individuals who are considered to be members of an organization's "control group" qualify to request legal advice of or to receive legal advice from the organization's attorney. The determination of who comes within the "control group" for this purpose may be based (i) on issues of corporate governance (*i.e.*, only an employee who holds one of a specified group of positions, generally senior-level officials), or (ii) on that in conjunction with the subject matter of the communication (*i.e.*, an employee in another position may be entitled to request or receive legal advice if the advice relates to a legal issue pertinent to his or her role within the organization). *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

3. Hotline reports often receive confidential treatment, whether due to a statutory mandate (such as that contained in the Sarbanes-Oxley Act, quoted above) or for other good business reasons. Does that confidentiality qualify, though, under the standards for the Attorney-Client Privilege? Probably not, because courts generally require that requests for advice and the advice itself be protected from exposure to individuals who do not fall within the privilege's intended parties. Protection that might otherwise be available under the privilege can be lost through inadvertence (accidentally allowing a privileged document to be read or accessed by individuals outside the permissible group), or inadequate safeguards against overbroad disclosure or dissemination. Since most hotline programs provide for access to the reports by members of a compliance department who are not functioning as attorneys for the organization, reports received in those programs probably would not be so protected.

Attorney Work Product Doctrine. The Attorney Work Product Doctrine applies to material aggregated or prepared by or for an attorney in anticipation of litigation. The attor-

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ney's anticipation of litigation must be reasonable, and the material must have been developed in order to prepare a client's legal position in respect of that litigation. Hotline reports originate with someone other than an attorney for the organization. For that reason, those reports themselves cannot constitute "Attorney Work Product" for which the doctrine was designed.

A hotline report might suggest to an attorney for the company the possibility of litigation, or at least a dispute, if the facts contained therein constitute or possibly constitute a cause of action against or in favor of the company. The report itself, while not privileged under this doctrine, might justify the commencement of an investigation or inquiry by or on behalf of the company's counsel that could result in material protected by this doctrine. Such a determination would be very fact-based, however, and generalization is not possible.

Even if a hotline report triggers an investigation related to existing or reasonably anticipated litigation, the company's lawyers must take certain steps to assure that the protection in fact applies. Proper labeling of the investigation, protection of the investigation and its results from exposure to individuals not entitled to review it, and other concerns should be borne in mind by the attorney responding to a hotline report. Such an investigative effort must be insulated from non-privileged activities and especially from the general operation of the hotline. Even when a compliance program is part of or reports to a law department, separation of privileged investigations from the compliance program's general operation and the compliance personnel, who have non-legal responsibilities in that program, would be the more conservative and safer route.

In short, a hotline itself will not, on its own, support the application of the Attorney Work Product Doctrine. The hotline does not exist at the behest of the attorneys for a company for purposes of or is limited to use in connection with anticipated or expected litigation. Since many hotline reports do not relate to litigation or potential litigation, the individual calls do not satisfy the requirements for the privilege either.

In short, the confidentiality that often attaches to reports received over a corporate whistleblowing hotline, on account of legal requirements or by virtue of a corporate policy or practice, does not equate with either the Attorney-Client Privilege or the Attorney Work Product Doctrine. Courts are likely to examine the specific standards developed under these two protective doctrines if faced with a demand by the government or a litigant for such a report and decide the matter on the specific facts of the situation and how they comport with those

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standards. Understanding those standards and how they might apply in such circumstances will enable you to anticipate such situations and plan accordingly.

See Steven A. Lauer, Setting Up a Hotline, in 1 Carole Basri, Corporate Compliance Practice Guide: The Next Generation of Compliance § 9.01 (Matthew Bender 2009)

See Joshua Weiss, Corporate Compliance and Attorney-Client Privilege, in 1 Carole Basri, Corporate Compliance Practice Guide: The Next Generation of Compliance § 19.01 (Matthew Bender 2009)

See Timothy Cercelle, Auditing, Monitoring and Reporting, in 1 Carole Basri, Corporate Compliance Practice Guide: The Next Generation of Compliance § 8.01 (Matthew Bender 2009)

See Kevin McGrath, Corporate Compliance and Internal Investigations, in 1 Carole Basri, Corporate Compliance Practice Guide: The Next Generation of Compliance § 18.01 (Matthew Bender 2009)

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About the Author. Steven A. Lauer is Corporate Counsel of Lumen Legal and Principal Value Consultant, Lumen Legal Consulting (www.lumenlegal.com). Mr. Lauer works with corporate law departments and law firms to assist them to better align and synchronize the cost and value of legal service delivered to corporations and other business entities. Steve served as Corporate Counsel for Global Compliance Services in Charlotte, North Carolina for over two years. Previously, he served for over two years as Director of Integrity Research for Integrity Interactive Corporation, in which capacity he conducted research, wrote white papers and otherwise worked with clients and potential clients of the company on issues related to corporate ethics and compliance programs. He also spent over two years as Executive Vice President, Deputy Editor and Deputy Publisher of The Metropolitan Corporate Counsel, a monthly journal for in-house attorneys. He received a B.A. from the State University of New York at Buffalo and a J.D. from Georgetown University Law Center.

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