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Leaking Legal Advice

By Joel Cohen and Katherine A. Helm

Daniel Ellsberg is probably the most famous whistleblower in American history.

After all, in 1971, Ellsberg leaked the Pentagon Papers to *The New York Times* and *The Washington Post*. The Nixon administration grossly overreacted with claims of national security, but the Supreme Court quickly refused to issue a prior restraint against the publication. In some respects, maybe because of Ellsberg's leaks, key legislation and court rulings have arisen in support of the whistleblower, e.g., in qui tam actions that reward private parties for successfully bringing suit on behalf of the government. Surprisingly, too, the suits can enable conspirators in the wrongdoing to get a big piece of the pie when they help expose wrongdoing that leads to giant recoveries for the government. And with the advent of Wikileaks, a website that encourages individuals to share highly sensitive government or military information with the world.

Few remember, however, that Ellsberg was actually indicted for revealing classified Defense Department information: Martyrdom has -- typically, should have -- its consequences. His case was only dismissed due to extreme prosecutorial misconduct, i.e., illegal wiretapping, breaking into the office of Ellsberg's psychiatrist, withholding discovery and actually offering the presiding judge the directorship of the FBI during the trial -- read: Nixon gone wild.

Yes, the Average Joe does want to see the disclosure of wrongdoing by those in government service, a sentiment that President Barack Obama prided himself on bringing to the Oval Office. And when disclosures do not involve national security or state secrets, Americans are generally willing to view the protection of government whistleblowers as a principle upon which we should pride ourselves, even if the law and government protocols are violated in the process. Indeed, the government is meant to serve society, not itself create threats to society. (Though, a cynic like Homer Simpson might liken the government to a stiff drink or few; as being "the cause of, and solution to, all of life's problems.")

What about private industry? Should the same whistleblower protections apply in the private sector, where the informants, well intentioned or not, are willing to expose company secrets or privileged communications between a company and its counsel? Imagine if, hypothetically, BP -- the whipping boy,

du jour -- received "privileged" advice a year ago from its counsel saying that the drilling system it was using was fatally flawed and prone to the kind of disaster that has now occurred. Who among us (save, of course, BP and its lawyers) wouldn't want some do-gooder, or even a disgruntled BP employee, or their outside counsel to leak that smoking gun proof that BP knew of the potential ticking time bomb? Wouldn't the man on the street typically want to incentivize or compensate someone to make that information public, at whatever cost to the "leaker" personally, or the company or its lawyers? The same goes for Toyota or any company whose product might potentially devastate so many people.

But where does it end? Would it truly be in the public interest for even confidential legal advice to be made widely available to journalists far and wide on a variety of issues (we shudder at the potential subject-matter waiver implications)? Does it depend on the client or reported violation or potential public safety threat at issue? Is it perhaps reckless to statutorily protect and reward loudmouth laymen who don't understand the value of clients being able to count on the confidentiality of the information they impart and advice they receive from their lawyers?

For example, Wal-Mart is now facing the largest sex discrimination class action in U.S. history. Some time before *Dukes v. Wal-Mart* was initiated, Wal-Mart went to Akin Gump Strauss Hauer & Feld for legal advice about its employment and promotion practices. According to a recent front page story in *The New York Times*, and that's all we have to go on, Akin Gump gave Wal-Mart very poor grades in a 1995 memo, six years before the lawsuit, making concrete estimates about how legally vulnerable the company would be to a suit by women and minorities for disparate employment practices. Akin Gump, the Times says, counseled its client on specific changes it should implement, with specific promotion goals, timelines and progress monitoring, to rectify what might prove to be problematic in a discrimination claim.. See, "Report Warned Wal-Mart of Risks Before Bias Suit," *New York Times*, June 3, 2010. Clearly, and importantly, Wal-Mart vigorously disputes the accuracy and value of the Akin Gump document.

And how does *The New York Times* know all this? Working with the assumption that the *Times* itself didn't purloin the document, likely either an unauthorized disgruntled employee of Wal-Mart, the recipient, or Akin Gump, the author, or even possibly a hacker, is the culprit. Thus the "leaker," setting aside the issue of legality, was willing to ignore the "confidential and privileged" headline that undoubtedly prefaced the report that Wal-Mart's employment policies violated the law.

Employment law experts are arguing over whether Wal-Mart will be able to successfully invoke the attorney-client privilege to prevent the memo's admission at trial. A proper ruling likely hinges on something we may never know: who leaked the document. Privilege could only have been waived by an authorized agent of the company, i.e., a person required to provide information to form the basis of legal advice. See, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). And, frankly, we believe it would be found inadmissible.

But this piece isn't about the evidentiary admissibility of the memo, and its not about the Wal-Mart case at all. It's about the realities of this kind of situation and the real world fallout of this kind of leak. So let's just assume, and put aside the Wal-Mart case, the likely possibility that an unauthorized disgruntled person working for a law firm, its client, or a hacker, or someone else who can't waive privilege for the client, leaks a privileged document. What effect can such a leak have on the litigation strategy or case resolution? How will a public company's shareholders view it? Could it strengthen plaintiffs' settlement demand, or the government's litigation posture? How will it impact the public persona of a company? Imagine what a public leak of

damaging legal advice would have meant for BP; it could well be determinative of a company's viability. And for every modern corporation going forward: What can be done to guard against such leaks?

Companies must protect themselves against the potential public outrage over a less than stellar report from counsel, especially when the company disagrees with the advice, but how? As the Supreme Court noted in *Upjohn*, "corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392. Not seeking advice isn't an option. Corporations can't live without their counsel, and they also can't do what the government does to protect itself against whistleblower actions: trumpet the reports of their abominable failures themselves. When some government agency releases a report about, say, efforts to beef up national cyberdefense, intellectual property protection or border security, they are letting the public know that current policies are lacking, but also that taxpayer dollars are needed to make improvements.

Protected legal advice to a corporation is different. Shareholders are entitled to know many things, but absent an affirmative act of exposure to the public by a company action, i.e., a public safety issue, the confidential information a company imparts to and the advice it receives from its counsel should remain private, confidential and privileged. In circumstances where the law allows a company's employee or counsel to utilize otherwise privileged information to vindicate their own rights, it should only be so far as to defend their conduct and otherwise kept under seal and should not be used offensively to mount a case against the company. Otherwise, how is a company to adjudge its actions under the law, if every potential request for advice opens them up to vulnerability to a suit over those questioned actions?

Companies are never permitted to use the attorney-client privilege to conceal crimes or frauds anyway. Good-faith attempts to achieve compliance with the law should be viewed as just that. The law should vigorously punish scofflaws who publicly disseminate privileged communications in order to force a favorable settlement. However, even sanctions against the "leaker" are entirely ineffective at repairing a company's ruined reputation.

A tension exits between the layman as informant and the lawyer. The Average Joe probably doesn't care about the long-term impact of his "leaks" on the corporation. Lawyers, however, care about their clients. Unlike Average Joe, lawyers know the public policy value that inheres in encouraging clients to go to lawyers precisely to get professional advice to help them observe the law and limit their liability. Without society-in-general's proper recognition that legal advice must remain secret, the dispensation of that advice could end up embroiling a specific client in the very legal difficulties it sought counsel on how to avoid, and causing potential clients to refrain from seeking such advice. For this reason, that sound legal advice serves public ends and social policy.

It must be said clearly: the long-term value that confidentiality promotes will be undermined soon or maybe even way down the road, even when a privileged leak seems so beneficial to the public at large at the time. So, if a "privilege" leaker is identified, his incriminating fingerprints abounding, despite what *might* be his honorable motivation, deterrence is required. Given the limitations of the law, it may only be financial punishment, but it will help dissuade the next misguided soul, do-gooder or otherwise.

Finally, counsel must remind their corporate clients that regulatory compliance is a perennial process, which inevitably suffers absent protection of the attorney-client privilege. So too must counsel remember that any request by the client for attorney advice may well be vulnerable to a "leak." Once the attorney-client privilege is violated, information has been made public and the Rubicon has been crossed.

The broader public interests that are promoted by full and frank communication between attorneys and their clients will have been disserved. In high-profile cases especially, the administration of justice may be so compromised that the litigation, realistically, will have been over before it ever began.

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