**2.9: Agents as Clients**

*There's nothing wrong with having aspirations, nothing wrong with walking tall. But if misfortune deals the consequences, sooner or later, friend, you’ve got to fall.*[[1]](#footnote-0)

In theory, an attorney who represents an organization represents only the organization, and does not represent the organization’s agents. However, organizations can act only through their agents, and when attorneys represent organizations, they do so by providing legal advice to the organization’s agents, who made decisions on behalf of the organization. Attorneys must convince the organization’s agents to hire them. Attorneys must convince the organization’s agents to follow their advice. And attorneys must obey the decisions of the organization’s agents. It is easy for attorneys representing an organization to see its agents as their clients, rather than the organization itself.

But that is a terrible mistake. When attorneys represent organizations, they must never treat its agents as their clients. They must always represent the interests of the organization, and only the organization. Attorneys representing an organization must always act in the best interest of the organization, and they must ensure that its agents also act in the best interests of the organization. And if the interests of the organization conflict with the interests of its agents, the attorney must always pursue the interests of the organization.

Usually, the interests of an organization and its agents coincide, and the agents pursue the interests of the organization to the best of their ability. But that is not always the case. Sometimes, the interests of an organization and its agents diverge, and the agents pursue their own interests, at the expense of the organization.

Attorneys representing organizations must always be vigilant to ensure that the organization’s interests are aligned with the interests of its agents, and that its agents are acting in the organization’s interests, rather than their own. For example, if an agent wants to make a transaction on behalf of the organization that will benefit the agent at the organization’s expense, the attorney must object. Likewise, if the agent wants to disclose confidential information about the organization that will benefit the agent, but harm the organization, the attorney must object.

**Agents as Quasi-Clients**

Attorneys representing an organization must always be careful to ensure that its agents do not become quasi-clients. If an attorney is retained by an organization, then the attorney has an express attorney-client relationship with the organization. But in order to represent an organization, an attorney must provide legal advice to its agents, who will act on the organization’s behalf. Accordingly, the attorney must only provide legal advice relating to the interests of the organization, and must not provide legal advice relating to the interests of its agents. In fact, attorneys representing an organization should explicitly inform its agents that they represent the organization, and not its agents. And they should advise the organization’s agents to seek outside counsel, if their interests may diverge from the interests of the organization.

In theory, an attorney representing an organization who wants to interview an agent of the organization can prevent the agent from becoming a client by explicitly warning the agent that the attorney represents the organization, and does not represent the agent. This warning is often called an “*Upjohn* warning” or “corporate *Miranda* warning,” because its purpose is to inform agents of their right to remain silent. After all, an organization cannot force its agents to testify against themselves. But it can fire them, if they refuse to participate in an investigation.

If an attorney representing an organization provides legal advice to an agent of that organization, and the advice relates to the agent’s personal interests, rather than the interests of the organization, then the agent may become a quasi-client of the attorney. For example, if an attorney provides legal advice about the agent’s personal liability, rather than the liability of the organization, it may create an attorney-client relationship with the agent. That is awkward, because it can create a conflict of interest between the interests of the agent and the interests of the organization.

The American Bar Association has prepared the following model instructions, which attorneys can use to inform the agents of an organization that the attorney represents only the organization, and does not represent them personally. Warnings of this kind can help attorneys avoid creating an attorney-client relationship with the agents of an organizational client, but cannot eliminate the risk entirely. If the attorney provides personal legal advice to an agent of an organization, an attorney-client relationship may exist, despite any warning to the contrary.

| **American Bar Association White Collar Crime Committee Working Group**  **Model “*Upjohn* Warning” or “Corporate *Miranda*” Warning**  I am a lawyer for Corporation A. I represent only Corporation A, and I do not represent you personally.  I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.  Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.  In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss this discussion.  Do you have any questions?  Are you willing to proceed? |
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| **Questions:** |
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| 1. Does this model warning adequately explain that the attorney represents the organization and not its agents? |
| 1. If you were an attorney representing an organization, would you have any concerns about this warning? |
| 1. If you received this warning, would you answer any questions? Would you give candid answers? Would you obtain outside counsel? What if you were unaware of the subject matter of the inquiry? |

| [***In re Grand Jury Subpoena: Under Seal*, 415 F. 3d 334 (4th Cir. 2005)**](https://scholar.google.com/scholar_case?case=14724483698508048687) |
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| **Summary:** AOL started an internal investigation regarding its relationship with PurchasePro. AOL retained Wilmer, Cutler & Pickering to assist in the investigation. AOL’s general counsel (“GC”) told its employees that were interviewed that the GC represented the company, but could represent them if there was no conflict of interest. GC also told the employees that they could retain personal counsel at the company’s expense. The SEC began to investigate AOL’s relationship with PurchasePro. One employee, Wakeford, was deposed by the SEC and believed the attorneys represented both Wakeford and the company. Thus, Wakeford filed a motion to quash a subpoena; claiming that his statements were protected under the attorney-client privilege.The court denied Wakeford’s motion to quash because it found that attorney-client privilege in the subpoenaed documents belonged only to AOL. |

This is an appeal by three former employees of AOL Time Warner from the decision of the district court denying their motions to quash a grand jury subpoena for documents related to an internal investigation by AOL. Appellants in the district court [argued] that the subpoenaed documents were protected by the attorney-client privilege. Because the district court concluded that the privilege was AOL’s alone and because AOL had expressly waived its privilege, the court denied the appellants' motion. We affirm.

I.

In March of 2001, AOL began an internal investigation into its relationship with PurchasePro, Inc. AOL retained the law firm of Wilmer, Cutler & Pickering to assist in the investigation. Over the next several months, AOL’s general counsel and counsel from Wilmer Cutler interviewed appellants, AOL employees Kent Wakeford, John Doe 1, and John Doe 2.

The investigating attorneys interviewed Wakeford, a manager in the company’s Business Affairs division, on six occasions. At their third interview, and the first one in which Wilmer Cutler attorneys were present, Randall Boe, AOL’s General Counsel, informed Wakeford, “We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege belongs to the company.” Memoranda from that meeting also indicate that the attorneys explained to Wakeford that they represented AOL but that they “could” represent him as well, “as long as no conflict appeared.” The attorneys interviewed Wakeford again three days later and, at the beginning of the interview, reiterated that they represented AOL, that the privilege belonged to AOL, and that Wakeford could retain personal counsel at company expense.

The investigating attorneys interviewed John Doe 1 three times. Before the first interview, Boe told him, “We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. You are free to consult with your own lawyer at any time.” Memoranda from that interview indicate that the attorneys also told him, “We can represent you until such time as there appears to be a conflict of interest, but the attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it.” At the end of the interview, John Doe 1 asked if he needed personal counsel. A Wilmer Cutler attorney responded that he did not recommend it, but that he would tell the company not to be concerned if Doe retained counsel.

AOL’s attorneys interviewed John Doe 2 twice and followed essentially the same protocol they had followed with the other appellants. They noted, “We represent AOL, and can represent you too if there is not a conflict.” In addition, the attorneys told him that, “the attorney-client privilege is AOL’s and AOL can choose to waive it.”

In November, 2001, the Securities and Exchange Commission began to investigate AOL’s relationship with PurchasePro. In December 2001, AOL and Wakeford, through counsel, entered into an oral “common interest agreement,” which they memorialized in writing in January 2002. The attorneys acknowledged that, “representation of their respective clients raised issues of common interest to their respective clients and that the sharing of certain documents, information, and communications with clients” would be mutually beneficial. As a result, the attorneys agreed to share access to information relating to their representation of Wakeford and AOL, noting that “the oral or written disclosure of Common Interest Materials would not diminish in any way the confidentiality of such Materials and would not constitute a waiver of any applicable privilege.”

Wakeford testified before the SEC on February 14, 2002, represented by his personal counsel. Laura Jehl, AOL’s general counsel, and F. Whitten Peters of Williams & Connolly, whom AOL had retained in November 2001 in connection with the PurchasePro investigation, were also present, and both stated that they represented Wakeford “for purposes of the deposition.” During the deposition, the SEC investigators questioned Wakeford about his discussions with AOL’s attorneys. When Wakeford’s attorney asserted the attorney-client privilege, the SEC investigators followed up with several questions to determine whether the privilege was applicable to the investigating attorneys’ March-June 2001 interviews with Wakeford. Wakeford told them he believed, at the time of the interviews, that the investigating attorneys represented him and the company.

John Doe 1 testified before the SEC on February 27, 2002, represented by personal counsel. No representatives of AOL were present. When SEC investigators questioned Doe about the March-June 2001 internal investigation, his counsel asserted that the information was protected and directed Doe not to answer any questions about the internal investigation “in respect to the company’s privilege.” He stated that Doe’s response could be considered a waiver of the privilege and that, “if the AOL lawyers were present, they could make a judgment, with respect to the company's privilege, about whether or not the answer would constitute a waiver.”

On February 26, 2004, a grand jury in the Eastern District of Virginia issued a subpoena commanding AOL to provide “written memoranda and other written records reflecting interviews conducted by attorneys for AOL” of the appellants between March 15 and June 30, 2001. While AOL agreed to waive the attorney-client privilege and produce the subpoenaed documents, counsel for the appellants moved to quash the subpoena on the grounds that each appellant had an individual attorney-client relationship with the investigating attorneys, that his interviews were individually privileged, and that he had not waived the privilege. Wakeford also claimed that the information he disclosed to the investigating attorneys was privileged under the common interest doctrine.

The district court denied John Doe 1’s and John Doe 2’s motions because it found they failed to prove they were clients of the investigating attorneys who interviewed them. The court based its conclusion on its findings that: (1) the investigating attorneys told them that they represented the company; (2) the investigating attorneys told them, “we can represent you,” which is distinct from “we do represent you”; (3) they could not show that the investigating attorneys agreed to represent them; and (4) the investigating attorneys told them that the attorney-client privilege belonged to the company and the company could choose to waive it.

The court initially granted Wakeford’s motion to quash because it found that his communications with the investigating attorneys were privileged under the common interest agreement between counsel for Wakeford and counsel for AOL. Following a motion for reconsideration, the court reversed its earlier ruling and held that the subpoenaed documents relating to Wakeford’s interviews were not privileged because it found that Wakeford’s common interest agreement with AOL postdated the March-June 2001 interviews. In addition, the court held that Wakeford failed to prove that he was a client of the investigating attorneys at the time the interviews took place. The court based its conclusion on its findings that: (1) none of the investigating attorneys understood that Wakeford was seeking personal legal advice; (2) the investigating attorneys did not provide any personal legal advice to him; and (3) the investigating attorneys believed they represented AOL and not Wakeford. This appeal followed.

II.

Appellants argue that because they believed that the investigating attorneys who conducted the interviews were representing them personally, their communications are privileged. However, we agree with the district court that essential touchstones for the formation of an attorney-client relationship between the investigating attorneys and the appellants were missing at the time of the interviews. There is no evidence of an objectively reasonable, mutual understanding that the appellants were seeking legal advice from the investigating attorneys or that the investigating attorneys were rendering personal legal advice. Nor, in light of the investigating attorneys’ disclosure that they represented AOL and that the privilege and the right to waive it were AOL’s alone, do we find investigating counsel’s hypothetical pronouncement that they could represent appellants sufficient to establish the reasonable understanding that they were representing appellants. Accordingly, we find no fault with the district court's opinion that no individual attorney-client privilege attached to the appellants’ communications with AOL's attorneys.

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” “When the privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure.” Because its application interferes with “the truth seeking mission of the legal process,” however, we must narrowly construe the privilege, and recognize it “only to the very limited extent that excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.” Accordingly, the privilege applies only to “confidential disclosures by a client to an attorney made in order to obtain legal assistance.” The burden is on the proponent of the attorney-client privilege to demonstrate its applicability.”

The person seeking to invoke the attorney-client privilege must prove that he is a client or that he affirmatively sought to become a client. “The professional relationship hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.” An individual’s subjective belief that he is represented is not alone sufficient to create an attorney-client relationship. Rather, the putative client must show that his subjective belief that an attorney-client relationship existed was reasonable under the circumstances.

With these precepts in mind, we conclude that appellants could not have reasonably believed that the investigating attorneys represented them personally during the time frame covered by the subpoena. First, there is no evidence that the investigating attorneys told the appellants that they represented them, nor is there evidence that the appellants asked the investigating attorneys to represent them. To the contrary, there is evidence that the investigating attorneys relayed to Wakeford the company's offer to retain personal counsel for him at the company's expense, and that they told John Doe 1 that he was free to retain personal counsel. Second, there is no evidence that the appellants ever sought personal legal advice from the investigating attorneys, nor is there any evidence that the investigating attorneys rendered personal legal advice. Third, when the appellants spoke with the investigating attorneys, they were fully apprised that the information they were giving could be disclosed at the company’s discretion. Under these circumstances, appellants could not have reasonably believed that the investigating attorneys represented them personally. Therefore, the district court’s finding that appellants had no attorney-client relationship with the investigating attorneys is not clearly erroneous.

The appellants argue that the phrase “we can represent you as long as no conflict appears,” manifested an agreement by the investigating attorneys to represent them. They claim that, “it is hard to imagine a more straightforward assurance of an attorney-client relationship than ‘we can represent you.’” We disagree. As the district court noted, “we can represent you” is distinct from “we do represent you.” If there was any evidence that the investigating attorneys had said, “we do represent you,” then the outcome of this appeal might be different. Furthermore, the statement actually made, “we can represent you,” must be interpreted within the context of the entire warning. The investigating attorneys’ statements to the appellants, read in their entirety, demonstrate that the attorneys’ loyalty was to the company. That loyalty was never implicitly or explicitly divided. In addition to noting at the outset that they had been retained to represent AOL, the investigating attorneys warned the appellants that the content of their communications during the interview “belonged” to AOL. This protocol put the appellants on notice that, while their communications with the attorneys were considered confidential, the company could choose to reveal the content of those communications at any time, without the appellants’ consent.

We note, however, that our opinion should not be read as an implicit acceptance of the watered-down “Upjohn warnings” the investigating attorneys gave the appellants. It is a potential legal and ethical mine field. Had the investigating attorneys, in fact, entered into an attorney-client relationship with appellants, as their statements to the appellants professed they could, they would not have been free to waive the appellants’ privilege when a conflict arose. It should have seemed obvious that they could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all representation and to maintain all confidences. Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees. However, because we agree with the district court that the appellants never entered into an attorney-client relationship with the investigating attorneys, they averted these troubling issues.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Why did the court hold that no attorney-client relationship existed? Do you agree with its conclusion? |
| 1. What information should an attorney representing an organization be required to provide to the agents of that organization in order to ensure that the agents understand that the attorney represents the organization, and does not represent them? |
| 1. Does it make sense for attorneys representing an organization to say they can represent an agent of the organization unless there is a conflict? |
| 1. The court stated: “An individual’s subjective belief that he is represented is not alone sufficient to create an attorney-client relationship. Rather, the putative client must show that his subjective belief that an attorney-client relationship existed was reasonable under the circumstances.” So why did this court agree with the district court that the phrase “we *can* represent you” was not sufficient to form a belief from the client’s perspective that an attorney-client relationship was created? |

| [***United States v. Stein*, 463 F. Supp. 2d 459 (S.D.N.Y. 2006)**](https://scholar.google.com/scholar_case?case=16698696097688660319) |
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| **Summary:** Warley was a partner at KPMG. She was questioned in relation to an IRS investigation by attorneys hired by KPMG. The firm waived its attorney-client privilege and gave the government documents that described the attorneys’ communication with Warley. Warley says the attorneys were representing her and KPMG and her attorney-client privilege was compromised by the actions of KPMG and the evidence should be suppressed. Evidence suggests there was no *Upjohn* warning. Warley’s showing of her subjective belief that the attorneys represented her is insufficient to meet her burden of proving privilege. Thus, the court denied Warley’s motion for relief from the government’s alleged violation of her attorney-client privilege. |

Defendant Carol Warley was a partner in KPMG LLP, one of the world’s largest accounting firms. She was questioned in the course of an IRS investigation by attorneys hired by KPMG. When that investigation gave way to a threatened indictment of KPMG, the firm, in an effort to curry favor with prosecutors and avoid prosecution, waived its attorney-client privilege and gave the government documents embodying the substance of the attorneys’ communications with Ms. Warley. Warley contends that the attorneys were representing her as well as KPMG, that her attorney-client privilege was compromised by the actions of the government and KPMG, and that the evidence should be suppressed. She thus raises a troublesome question that arises whenever an employee of a business organization consults with counsel retained by the entity about matters involving both the employee and the entity — when does the lawyer represent the employee as well as the entity?

This problem could be avoided if counsel in these situations routinely made clear to employees that they represent the employer alone and that the employee has no attorney-client privilege with respect to his or her communications with employer-retained counsel. Indeed, the Second Circuit advised that they do so years before the communications here in question. But there is no evidence that the attorneys who spoke to Ms. Warley followed that course.

Facts

Ms. Warley was a partner of KPMG at all relevant times. In 2003, the IRS was investigating KPMG’s tax shelter activities, including some in which clients of Warley had participated. In the course of the investigation, Warley communicated with KPMG’s in-house counsel and with two law firms retained by KPMG, Kronish Lieb Weiner & Hellman LLP and King & Spalding LLP. Warley does not recall having been told that the attorneys represented only KPMG or that any privilege belonged solely to the firm and could be waived by the firm without her consent.

In September 2004, in circumstances that have been discussed elsewhere, KPMG waived its attorney-client privilege for communications relating to the IRS summons. It gave the government documents relating to these communications, and the government apparently intends to use them in prosecuting Warley and others. The government argues that KPMG's waiver was sufficient to allow it to obtain the documents and disputes Warley's claim of privilege.

Warley identifies two sets of allegedly privileged communications relating to which the government has documents. First, Warley was interviewed by attorneys from Kronish and King & Spalding on two occasions in August 2003. The government is in possession of a memorandum of these interviews prepared by a Kronish attorney as well as his handwritten notes. In addition, it has listed as a trial witness one of the Kronish attorneys present at these interviews.

The second allegedly privileged communication is an email exchange in January and February of 2003 between Warley and Steven Gremminger, an in-house attorney for KPMG, relating to the tax strategies under investigation. The government has a copy of this email string.

Both parties point to the substance of the communications to support their respective claims that privilege did or did not attach. Warley further relies upon KPMG’s 2003 partnership agreement, which provided that “the General Counsel shall act on behalf of all Members, except where a dispute arises between an individual Member and the Firm.” Finally, Warley alleges that counsel retained by KPMG jointly represented KPMG and her personally in two lawsuits prior to the events at issue here.

Discussion

A. Scope of Privilege

The question whether employee communications with counsel retained by the employer about matters relating to the employment are privileged vis-a-vis the employee — in other words, whether the employee has a personal attorney-client privilege that only the employee may waive — is troublesome because competing interests are at play.

On the one hand, an employee, like any other agent, owes the employer a duty to disclose to the employer any information pertinent to the employment. This includes an obligation “to assist the employer's counsel in the investigation and defense of matters pertaining to the employer’s business.” Moreover, an employer has a substantial interest in retaining freedom of action to respond to investigations and other legal threats, an interest borne of the desire to remain in business and of duties to other constituents of the entity. Allowing individual employees to assert personal attorney-client privilege over communications with the employer's counsel could frustrate an employer's ability to act in its own self interest, perhaps to the detriment of other employees, stockholders, or partners.

Nevertheless, there are weighty considerations on the other side of the scale. Once a government investigation begins, the interests of employees and of the entity may diverge. Indeed, that may be true in other circumstances in which employees communicate with employer counsel. Employees often are unaware of the potential personal consequences of cooperating with lawyers hired by their employers. Even more troublesome, they may cooperate with employer-retained counsel in the belief that their communications are protected by a personal privilege, sometimes as a result of a misapprehension of the law and occasionally perhaps as a result of deception, inadvertent or otherwise.

Courts have wrestled with this problem for some time now. In the absence of evidence that the employee was deceived by the employer as to the existence of a personal attorney-client relationship or as to a personal right to control the disclosure of privileged materials, circuits have employed different standards to determine when personal privilege attaches. Some have looked at whether the individual reasonably believed that there was a personal attorney-client relationship, although the Second Circuit has rejected this approach. Others have focused on whether the individual expressly requested personal advice or representation. In *In re Bevill, Bresler & Schulman Asset Management Corp.*, the Third Circuit enunciated a five-part test that has been adopted by at least two other circuits

First, the individual claiming personal privilege must show they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And, fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

Our circuit addressed the issue in *United States v. International Brotherhood of Teamsters*. The *Teamsters* court first noted that courts typically have said that the attorney-client privilege for an employee’s communication with corporate counsel about corporate matters belongs to the corporation, not the individual employee. Nevertheless, it said, courts have found a personal privilege where the individual met “certain requirements.” It quoted the Third Circuit's *Bevill* test as one such example and noted that other courts have required the employee “make it clear to corporate counsel that he seeks legal advice on personal matters.” Drawing upon all of these sources, the Circuit concluded that the individual before it lacked any personal privilege with respect to the communications at issue because he “neither sought nor received legal advice from his employer's counsel on personal matters.”

*Teamsters*’ holding thus rests on the scope of “personal matters.” But the meaning of that phrase has not been developed. Do “personal matters” involve solely the individual, with no impact on the entity's interests whatsoever? Or may they encompass matters that implicate both the individual and the entity? Although the facts of *Teamsters* suggest that the Circuit might have contemplated the former view, it did not expressly address the question.

Some guidance may be gained from circuits that have addressed this issue in the context of the fifth *Bevill* factor, which requires that the communication “not concern matters within the company or the general affairs of the company.” The Tenth Circuit concluded that this factor

only precludes an officer from asserting an individual attorney client privilege when the communication concerns the corporation’s rights and responsibilities. However, if the communication between a corporate officer and corporate counsel specifically focuses upon the individual officer’s personal rights and liabilities, then the fifth prong of Bevill can be satisfied even though the general subject matter of the conversation pertains to matters within the general affairs of the company. For example, a corporate officer’s discussion with his corporation’s counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer’s personal liability for jail time based on conduct interrelated with corporate affairs.

The First Circuit adopted the Tenth Circuit’s interpretation and discussed its application where communications involving the individual’s liabilities “do not appear to be distinguishable” from those concerning the entity’s interests. Acknowledging that both the employee and the entity could have an attorney-client relationship with the attorney with respect to such a communication, but noting also the fiduciary duty owed by a corporate officer to the corporation, the First Circuit concluded that “a corporation may unilaterally waive the attorney-client privilege with respect to any communications made by a corporate officer in his corporate capacity, notwithstanding the existence of an individual attorney-client relationship between him and the corporation’s counsel.” Thus, under the First Circuit formulation, individual privilege may be asserted successfully only when “communications regarding individual acts and liabilities are segregable from discussions about the corporation.” To hold otherwise, the court reasoned, “would open the door to a claim of jointly held privilege in virtually every corporate communication with counsel.”

The Tenth and First Circuits thus have argued persuasively that communications implicating personal liability for acts within the scope of an individual’s employment may be protected by individual attorney-client privilege, at least in some circumstances. It is an open question whether such communications involve “personal matters” within the meaning of Teamsters. But it is unnecessary to resolve that issue here. As discussed below, and particularly in light of the fact that the burden of proof lies with the party asserting privilege, Warley fails to meet any standard.

B. Warley’s Claims

To begin with, there is no evidence that Warley was deceived by KPMG or its attorneys about the nature of her relationship with counsel. Although she claims to have “understood that counsel were representing her personally as a partner in the firm,” her subjective belief alone does not support a conclusion that KPMG’s acts were responsible for that belief. Accordingly, the analysis of her claims rests on whether the communications involved “personal matters.”

Warley’s communications with counsel were about events and conduct within the scope of her work as a partner at KPMG, thus clearly implicating KPMG’s interest in responding to the IRS investigation. The events and conduct, however, also implicated Warley’s personal interests and liabilities, as is amply evidenced by her status as a defendant in this case. Warley’s communications thus present the difficult circumstance where both the individual’s and the entity’s interests are involved.

As discussed above, the scope of “personal matters” under *Teamsters* is unclear. Under a narrow reading, the fact that the communications implicated KPMG’s interests alone would require that Warley’s claim of privilege be rejected. Even under the approach adopted by the First and Tenth Circuits, however, Warley could not prevail on a privilege claim absent a showing that communications implicated her interests alone and were segregable from those involving KPMG’s interests. Nothing in the allegedly privileged documents or the affidavits submitted with this motion indicates that the communications focused on her personal interests alone. The Court therefore need not determine the parameters of “personal matters,” as Warley’s disclosures would not come within even a broad view of the term.

Warley nevertheless argues that her communications were privileged vis-a-vis herself because (1) the KPMG partnership agreement provides that “the General Counsel shall act on behalf of all Members, except where a dispute arises between an individual Member and the Firm,” and (2) counsel retained by KPMG represented both Warley and the firm in litigation on two occasions prior to the communications here at issue. But these contentions are not persuasive.

To begin with, the occasions on which Warley and KPMG were jointly represented occurred in circumstances in which Warley was a witness, not a party, to the litigation. The Court is not persuaded that representation of an employee by employer-retained counsel where the employee’s role is that of a witness in a lawsuit against the employer could give rise to a reasonable expectation on the part of the employee that all communications she might have with employer-retained counsel, even a long time thereafter, were made in the context of an individual attorney-client relationship.

Nor has Warley offered any evidence that she in fact subjectively relied either upon the language in the partnership agreement or the previous litigation experience in concluding that Kronish, King & Spalding, or Gremminger was representing her individually.

Conclusion

In the end, Warley’s showings amount merely to a claim of her subjective belief which, without more, is insufficient to meet her burden of proving privilege. For the foregoing reasons, Warley’s motion for relief from the government’s alleged violation of her attorney-client privilege is denied.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Did Warley believe KPMG’s attorneys represented her personally? If so, why was she wrong. Did anyone tell her that KPMG’s attorneys were not representing her personally? |
| 1. Why does Warley want to claim that the documents at issue are protected by the attorney-client privilege? Why can’t she make a privilege claim? Could KPMG have made a privilege claim over the same information? |
| 1. Should Warley have a malpractice claim against KPMG’s attorneys? |
| 1. Should the attorney-client relationship have to be in writing in order for someone to assert attorney-client privilege? Would a writing requirement solve these problems? Would it create any issues? |

**Further Reading:**

* [Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. Miami L. Rev. 109 (2010)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1717975)
* [Ashish S. Joshi, *Corporate Miranda: Clarifying Lawyers' Loyalty During an Internal Investigation*, American Bar Association (2009)](https://www.americanbar.org/groups/business_law/publications/blt/2009/09/07_joshi/)

1. Hüsker Dü, Friend, *You've Got to Fall*, Warehouse: Songs and Stories (1987). [↑](#footnote-ref-0)