# "I Am Not Your Lawyer"

## Five Difficult But Important Words You May Need to Say to Your Boss

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IT'S LATE IN THE DAY ON FRIDAY, AFTER an exhausting week. As you begin to pack your briefcase, your CEO rushes into your office waving a piece of paper. She looks flushed and slightly out of breath. She does not fluster easily. So you immediately brace yourself for bad news.

She hands you an AP wire article announcing that the FBI just raided the offices of your biggest competitor. According to the article, the FBI carted away computers and boxes of documents looking for evidence of a price fixing conspiracy. As you finish reading, your CEO tells you about a meeting she had last year with the raided-company's CEO. Apparently, the CEOs ran into each other in a bar during a trade association meeting. They mostly talked about their families and other non-business topics, except for the few minutes that they discussed an upcoming price increase announcement. Your competitor's CEO told your CEO that he had heard rumors that your company was planning to increase prices in the following quarter. He asked if the rumors were true. Your CEO confirmed that they were. Your competitor's CEO responded positively and said that he would similarly increase his prices next quarter.

Your CEO then explained that she didn't think the conversation was a big deal because she knew the rumors about the upcoming price increase were widespread. In light of the raid, however, she thought she needed to tell you about it. Then she told you about the e-mails the two CEOs exchanged during the next few quarters confirming future price increases. But, she said you shouldn't worry about those e-mails because she had already deleted them from her inbox. And after she heard about the raid, she called your competitor's CEO and confirmed that he previously deleted his copies too.

After she leaves, you decide that you should act quickly to protect the company from an indictment and an onslaught of civil lawsuits from its customers. After retaining outside counsel and conducting a thorough investigation, the company decides to apply for the Antitrust Division's Leniency Program. By being the first to confess its participation in a criminal antitrust violation and by agreeing to fully cooperate with the Division, the company and your CEO avoid criminal convictions, fines, and the possibility of treble damages in civil litigation.

Your CEO, however, continues to believe that she did nothing wrong. And she strenuously objected to the company's decision to apply for leniency. Indeed, she was irate with you for disclosing to the Antitrust Division her comments about her interactions with your competitor's CEO. Moreover, in the ongoing civil antitrust class actions subsequently filed against the company and your CEO, she contends that her conversation with you was privileged because she thought you were acting as her attorney when she confided in you. Is she right? Can your CEO withhold the substance of that conversation from discovery and a jury based on privilege? Probably not.

### *U.S. v. Norris:* Who Holds the Privilege?

In the recently decided case of *U.S. v. Norris*, the Third Circuit denied an executive's claim that his conversations with his company's counsel were privileged. A grand jury had indicted the CEO on charges of, among other things, obstruction of justice. The government alleged that company employees met with various overseas competitors to coordinate pricing in the United States. The government further alleged that after the company received a grand jury subpoena, the CEO and others at the company concocted a false explanation for their meetings with competitors and drafted fake summaries of those meetings, stating that the company rejected its competitor's efforts to collude on pricing. According to the government, the CEO encouraged others at the company to create those false summaries and to provide the fabricated story to the company's lawyers and any governmental investigative body.

Shortly after receiving the grand jury subpoena, the company hired outside counsel to conduct an investigation. During that investigation, outside counsel interviewed the CEO. During the CEO's subsequent trial,

the government sought to admit testimony from outside counsel concerning his interview with the CEO, arguing that the conversation was not privileged because outside counsel represented the company, not the CEO. Indeed, the outside counsel affirmed that he informed the CEO of that fact before beginning the interview. Moreover, the company did not object to outside counsel testifying about his conversation with the CEO.

The CEO, on the other hand, argued that the conversation was privileged and not admissible. The CEO contended that he believed outside counsel represented him personally, in addition to the company. And in support of that contention, he proffered an e-mail that he had received from outside counsel forwarding a letter in which outside counsel informed the Department of Justice that he represented not only the company but its employees as well.

The district court and the Court of Appeals for the Third Circuit disagreed. Both held that the CEO did not adequately establish that the attorney-client privilege attached to his interview with outside counsel. Accordingly, outside counsel was permitted to testify against the CEO. And the CEO was convicted of obstruction of justice and sentenced to 18 months in prison.

## Clear and Upfront Disclosure is Critical

It is not unusual for high level employees like a company's CEO to believe that inside and outside counsel represent them personally. As a result, those employees may mistakenly believe that anything they disclose to the company's attorneys will never be used against them personally. That mistaken belief may lead employees to disclose information that they would not otherwise have revealed had they known the company could later share the information with prosecutors. Thus, in any internal investigation, it is important to emphasize at the beginning of any interview that the attorney represents the company—not the individual—and that the individual may wish to obtain separate counsel.

Of course, providing that disclosure may impede the company's investigation. The employee may feel compelled to obtain separate counsel. Or she may decide not to voluntarily participate in your investigation. But that risk is outweighed by the risk of not fully informing your employee of the scope of the attorney's representation or, worse yet, the risk that the attorney may accidentally create an attorney-client relationship with the employee—which could subsequently create a conflict of interest for the attorney. Moreover, even if the employee is separately represented, the company could still work cooperatively with the employee under the common interest doctrine or by pursuing a joint defense.

Inside and outside counsel should consider the following when interviewing employees whose personal interests may conflict with the company's interests:

- *Clearly Define the Role of Inside and Outside Counsel Before the Meeting*: If inside counsel will be interviewing an employee as part of an internal investigation, be sure to establish that fact in any correspondence setting up the meeting. Likewise, outside counsel should establish in any correspondence with employees that counsel represents the company, not the employees.
- *Provide a Clear Upjohn Warning*: An Upjohn warning is akin to a civil Miranda warning. At the beginning of the interview, you should advise the employee that you represent the company, not the employee. You should further advise that although the interview may be protected by the attorney-client privilege or the work product doctrine, only the company holds those privileges and has the right to waive those protections.
- *Obtain Written Proof of the Warning*: To reduce the chances of a future dispute, ask the employee to confirm in writing that he received the Upjohn warning and have a witness confirm that he or she witnessed the employee sign the document.

Clearly establishing that the company's attorneys do not represent individual employees will correct any mistaken beliefs to the contrary. More importantly, that warning will protect your company's employees from disclosing information that could later be used against them in future criminal or civil proceedings. All it takes is five simple words.

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