



Toward an Enforceable Promise of Confidentiality

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Ethics

Resource

Center

Fellows Program

Purpose of Today's Presentation

- **Define an issue where ethics and law overlap**
- **Present an idea that may lead to more effective ethics/compliance programs**
- **Urge you—as industry leaders/opinion molders—to participate in/support an initiative to effect the idea**



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The Idea

A privilege in the law of evidence that allows an organization to make an enforceable promise of confidentiality to its employees or other agents as part of a good faith effort to design, implement, operate, or assess a program to prevent and detect misconduct.

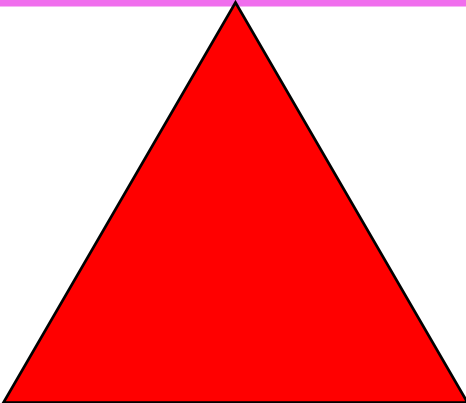


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The Conundrum

**Confidentiality
to Encourage
Seeking /
Reporting**

**Evidentiary
Demands of Law
Enforcement /
Civil Litigation**



Information



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The *Logic*

- **FSG .5 requires a “reporting system . . . to report misconduct . . . without fear of retribution.”**
- **Best practice: organization promises confidentiality**
- **Unenforceable/qualified promise is little better than no promise at all**
- **Privileged communications lead to more effective reporting systems**



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Why Promise Confidentiality?

- **Ethics/compliance program**
 - ♦ **Designing/Implementing**
 - ♦ **Running/Assessing**
- **Voluntary Disclosure Programs**
 - ♦ **“Responsible Organization”**
- **Organizational culture change**
 - ♦ **Foster trust/loyalty/reporting**



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Presentation Goals & Objectives

- **Present the value of protecting:**
 - ◆ **Reporting source's identity/communications**
 - ◆ **Information developed through an ethics/compliance program**
- **Demonstrate the need for a legislative privilege**
- **Offer alternative legislative models to advance these protections**



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Reporting v. Whistleblowing

- **Reporting**
 - ◆ Internal process
 - ◆ Done through Organizational Channels
- **Whistleblowing—*Qui Tam***
 - ◆ Public warning
 - ◆ About ‘serious’ wrongdoing or danger
 - ◆ Concealed within organization



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Reporting v. Whistleblowing II

- ***Qui Tam* despite effective program**
 - ♦ Conscience
 - ♦ Frustration
 - ♦ Greed
 - ♦ Revenge
- **Effective program despite *Qui Tam***
 - ♦ Prevent some wrongdoing
 - ♦ Detect wrongdoing earlier
 - ♦ Discourage government prosecution
 - Disclose earlier
 - Demonstrate good faith/develop trust



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Motives for Not Reporting

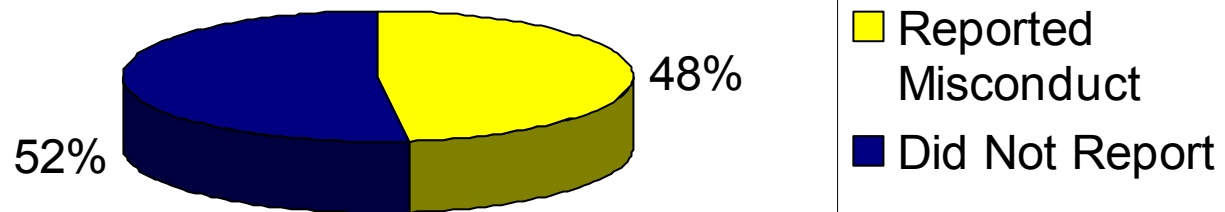
- **1994 Ethics Resource Center Survey**
 - ♦ 7600 households surveyed
 - ♦ 4065 responses
- **1997 Society of Human Resource Management - Ethics Resource Center**
 - ♦ 5000 HR professionals surveyed
 - ♦ 747 responses
- **2000 National Business Ethics Survey (ERC)**
 - ♦ 8341 households
 - ♦ 1491 usable interviews



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1994 ERC Survey

31% Observed Misconduct



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Why 52% did not report?

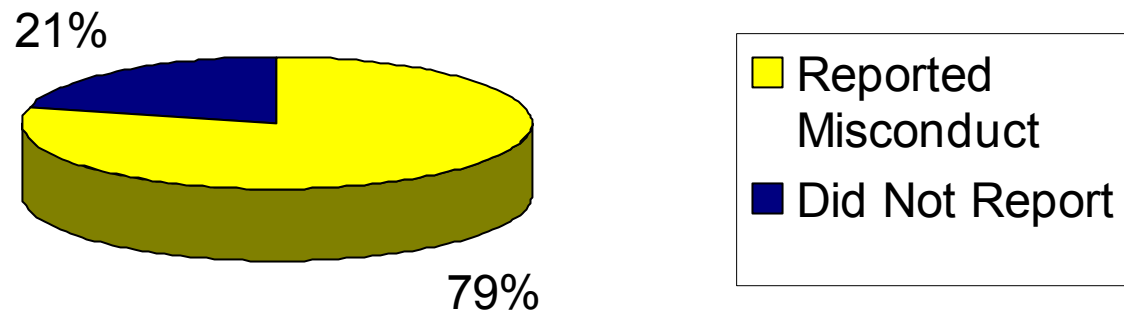
<i>Percent</i>	<i>Reason given</i>
41%	Feared retaliation and retribution from supervisor or management
38%	Did not trust organization would keep report confidential
24%	Feared retaliation and retribution from co-workers
25%	Did not want to be known as a whistleblower



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1997 SHRM/ERC Survey

46% Observed Misconduct



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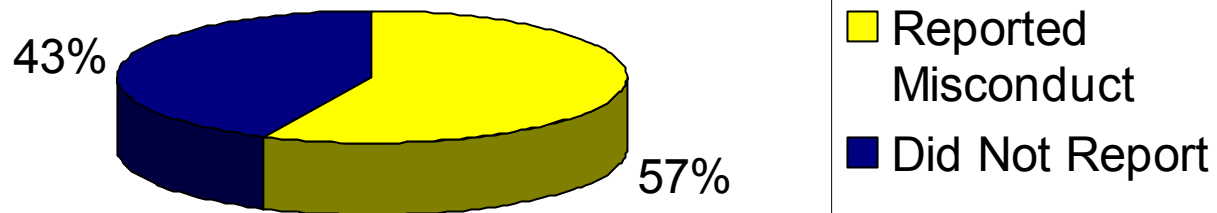
Why 21% did not report?

<i>Percent</i>	<i>Reason given</i>
96%	Feared being accused of not being a team player
68%	Feared retaliation and retribution from supervisor or management
55%	Did not trust organization would keep report confidential
38%	Feared retaliation and retribution from co-workers
20%	Did not want to be known as a whistleblower



2000 National Business Ethics Survey

56% Observed Misconduct



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2000 National Business Ethics Survey

- **31% observed misconduct in general**
- **56% observed specific misconduct**
- **Reporting of observed misconduct**
 - ♦ **Senior--76%**
 - ♦ **Middle--80%**
 - ♦ **Lower--45%**



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Why persons surveyed would not report

<i>Percent</i>	<i>Reason given</i>
31%	Believed management would view as troublemakers
35%	Believed co-workers would view as snitches
42%	Dissatisfied with management response



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Solution — Privilege or Immunity

- ***Privilege:*** Information protected from discovery to encourage employee/agent reporting
 - ♦ Identity of source
 - ♦ Content of communication
- ***Immunity:*** Relief from liability to encourage organizational self-evaluation



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Sources of Privilege or Immunity

- **Judiciary: Fed. R. Evid. § 501**
 - ♦ Reason
 - ♦ Experience
- **Administrative Agency:**
 - ♦ More effective/efficient regulation
 - ♦ Policy coordinated with DoJ
- **Legislature:**
 - ♦ Comprehensive
 - ♦ Certain



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So, What If We Can't Prosecute?

- **Public learns of problems it wouldn't have learned about**
 - ♦ **As soon, or**
 - ♦ **At all**
- **Organization/industry learns about**
 - ♦ **Inadequate standards**
 - ♦ **Lack of due diligence**
 - ♦ **Poor communication/training**
 - ♦ **Inadequate controls**
- **Employees learn they have responsibility—and it is safe—to come forward**



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Confidentiality & Privilege

“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is *little better than no privilege at all.*” (emphasis added)

***Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)**

***See also Jaffee v. Redmond*, 518 U.S. 1 (1986)**



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Case Law Extension of Privilege

- **Medical Peer Review**
- **Confidential Informant**
- **Limited Reporter Privilege**
- **Psychotherapist Privilege**
- **Self-evaluative Privilege**
- **Limited Ombudsman Privilege**



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Statutory Extension of Privilege Since 1996

- **Year 2000 Information Readiness and Disclosure Act**
- **Self-testing of Equal Credit Compliance**
- **Tax Preparer Privilege**
- **Census Information Privilege**



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Models — Privilege or Immunity

- **Reporting source protection privilege**
- **Neutral office confidentiality privilege**
- **Participant source protection privilege**
- **Good faith compliance program immunity**



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Model 1

- **Protect discovery of source's identity from outside and within organization**
 - ◆ **Shielded in all litigation, proceedings and hearings**
 - ◆ **Organization would not be required to confirm source's use of an in-house reporting system**
- **Only protects source who is not a wrongdoer**
 - ◆ **Similar to the government's Confidential Informant (CI) privilege**



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Model 1 (continued...)

- **Prudent organization should corroborate source's "tip" before acting**
- **Organization has standing to assert the privilege**
- **Failure to assert it does not give rise to a new cause of action by source against the organization**
- **In addition to all other privileges and protections**



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Model 2

- **A wrongdoer who reported to a “neutral office” could receive source protection**
- **Neutral Office does not conduct investigations**
- **Both organization and reporting source must consent to waive the privilege**
- **Protects both reporting source’s identity and substance of the conversation**



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Model 3

- **Protects source's identity who was also a “wrongdoer”**
- **Information communicated to in-house reporting system is protected**
- **Organization must use evidence independent of source's information to discipline the “wrongdoer” source**



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Model 4

- **Focuses on the organization; not reporting source**
- **Protect discovery/use of information developed through self-audit**
 - ♦ **Only for organizations that satisfy standards for an effective program**
 - ♦ **Court review is available to determine whether the program was truly compliant or a “sham”**



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Model 4 (continued...)

- **Provides criminal sanctions for organizations that abuse the immunity**



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Where We Go from Here?

- **Continue as incubator**
 - ♦ **Contact Agencies**
 - ♦ **Address Industry Groups**
 - ♦ **Host Coalition Building Conference (Fall 2000)**
- **Find industry advocate(s)**
 - ♦ **NDIA, DII, EOA, Healthcare**
- **Support industry advocate(s)**
 - ♦ **Research**
 - ♦ **Position Papers**
 - ♦ **Website Privilege/Immunity Clearinghouse**



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Where We Go from Here?

- **Urge United States Sentencing Commission to require promise of confidentiality as part of FSG.5**
- **Source funding for lobbying effort**



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Where We've Been So Far

- **APPE**
- **ERC Fellows**
- **DII**
- **EOA**
- **NDIA**
- **EOA Sponsors**
- **DoD IG**
- **Lobbying Proposal**
- **DII**
- **ABA (Admin/ Pub Cont Law)**
- **January 1999**
- **May 1999**
- **June 1999**
- **October 1999**
- **March 2000**
- **April 2000**
- **May 2000**
- **May 2000**
- **July 2000**



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Where We Plan to Go

- **HHS**
- **NDIA**
- **NASA**
- **Academy of Legal Studies in Business**
- **“Summit” Meeting**
- **EOA**
- **United States Sentencing Commission**
- **August 2000**
- **August 2000**
- **August 2000**
- **August 2000**
- **Fall 2000**
- **October 2000**
- **Fall 2000**



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