ATTORNEY-CLIENT PRIVILEGE AND THE SARBANES-OXLEY ACT

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ABSTRACT

This research examines the interaction between the Sarbanes-Oxley Act of 2002 (SOX) and attorney-client privilege. Attorney-client privilege prohibits an attorney from revealing incriminating information about their client without permission. If an attorney breaks attorney-client privilege, they could lose their license. The other piece of the interacting obligations on attorneys is SOX. SOX is a federal law that has provisions in it to protect whistleblowers. Whistleblowers are people who report wrongdoing that their company commits. SOX requires attorneys to become mandatory whistleblowers if they witness financial fraud. The obligation to report wrongdoing but also to keep information confidential overlaps for in-house attorneys. This overlap is oftentimes convoluted and not defined by precedent or legislation. Previous in-house counsel SOX whistleblower cases are examined to explore this overlap. Exploring these cases allows for important information to be gleaned for attorneys pursuing court cases and for companies to keep these situations out of court. This information provides advice and insight into an otherwise overlooked and complex area.
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>4</td>
</tr>
<tr>
<td>Background Literature</td>
<td>5</td>
</tr>
<tr>
<td>Methodology</td>
<td>15</td>
</tr>
<tr>
<td>In-House Counsel Sarbanes-Oxley Whistleblower Cases</td>
<td>18</td>
</tr>
<tr>
<td>Discussion of Findings</td>
<td>45</td>
</tr>
<tr>
<td>Conclusion</td>
<td>56</td>
</tr>
<tr>
<td>Works Cited</td>
<td>60</td>
</tr>
</tbody>
</table>
INTRODUCTION

Imagine working for a company that actively denied medical treatment to patients in order to maintain corporate profits. Imagine being a doctor whose job was to cut costs by not allowing a patient to receive a heart transplant. Imagine finding out about these illegal and unethical practices and reporting the activities to the public. Then imagine being fired from your job because of these actions. This is a true story, the story of Dr. Linda Peeno.

Peeno worked as a medical reviewer for Humana, a managed health care company that administers and markets health insurance in the United States (Hodges, 2013). During the course of her job, she realized Humana drove profits through denial of care. Such as denying patients heart transplants that needed them, because it would cost the company too much money, like in Peeno’s case (Hodges, 2013). The company would deny preauthorization forms requesting medical treatment because it would save the company money (Hodges, 2013). These medical treatments were sometimes necessary in order to save a patient’s life. Peeno testified before Congress on May 30, 1996:

I wish to begin by making a public confession: In the spring of 1987, as a physician, I caused the death of a man. Although this was known to many people, I have not been taken before any court of law or called to account for this in any professional or public forum. In fact, just the opposite occurred: I was "rewarded" for this. It bought me an improved reputation in my job, and contributed to my advancement afterwards. Not only did I demonstrate I could indeed do what was expected of me, I exemplified the "good" company doctor: I saved a half million dollars (Managed Care Ethics, 1996).

Peeno testified that through denial of preauthorization forms, she had helped kill a man because he died as a result of the denied health care. This behavior was rewarded
Attorney-Client Privilege and the Sarbanes-Oxley Act

Angelina Moore

in Humana, as it saved the company money—$250,000 to be exact (Hodges, 2013). Peeno was fired from her job and blacklisted from the managed care industry as companies did not want her name on their list of physicians because of her testimony (Hodges, 2013). Peeno’s credibility was also attacked when Humana released a press release stating that she was never a full-time, permanent employee, despite her six figure salary (Hodges, 2013). Humana’s basis for this attack was that Peeno was merely a part-time independent contractor, and therefore not a Humana associate (Hodges, 2013). As a result, Peeno lost her medical career and her livelihood. She is currently working as a teacher to make a living (Louisville Business First, 2007). Peeno was a whistleblower, and her story is not uncommon.

BACKGROUND LITERATURE

Whistleblowers, like Peeno, were not federally protected prior to 2002. Whistleblowers are defined as “anyone who has and reports insider knowledge of illegal activities occurring in an organization” (“Whistleblower”, 2015). Employees would suffer great retaliation as a result of trying to protect shareholders or the American public from the illegal and unethical activities in their company. Some employees were fired from their job, like Peeno, while others faced threatening and hostile treatment from their employers (“The Act”, 2012). A study done by the National Business Ethics reported that 22% of those who reported wrongdoing experienced retaliation and 46% of those who observed wrongdoing and chose not to report it did so because of fear of retaliation (McMillian, 2012). This fear of
retaliation encourages employees not to report. A study by Miceli, Near, and Dworkin found that wrongdoing is often unreported because the company did not respond to similar reports, they are demoralized by the company culture against whistleblowing, or the environment of the company signals that the organization tolerates bad behavior (2008). This study shows that there are other reasons, besides retaliation, that whistleblower are discouraged blow the whistle. This problem negatively affects companies and even the economy.

The government has tried to pass laws in order to protect whistleblowers from retaliation and promote a corporate environment that would allow whistleblowing if needed, but they often come up short. In 1978, the Civil Service Reform Act was passed in order to protect federal government employees from reprisal (Miceli, Near, & Dworkin, 2008). However, the Civil Service Reform Act did not have a lot of power in terms of enforcement of its regulations and thus was not effective in protecting whistleblowers. The Whistleblower Protection Act of 1989 was then passed, but this law only protected federal workers and not those employees in the private sector (Miceli, Near, & Dworkin, 2008). It was not until 2002 that a law was passed that actually had the strength to protect a wide range of whistleblowers. The most recent legislation passed to protect whistleblowers is the Sarbanes-Oxley Act of 2002 (McMillian, 2012). This directly resulted from economic disasters like Enron and WorldCom, because employees were too scared to speak up about illegal activities (Maleske, 2012). In the case of Enron, the company misstated their income and its equity value by a gross amount, so when the company declared bankruptcy, thousands
of people lost jobs and thousands of investors lost significant amounts of money ("The Fall of Enron", 2001). The company’s stock went from $90 per share to less than one dollar per share, and the company had more than $38 billion in outstanding debts (Folger, 2016). It was later uncovered that there were employees who knew about Enron’s fraud, but were too scared to blow the whistle on them ("The Fall of Enron", 2001). These economic disasters negatively impacted the United States economy, caused hundreds of people to lose their jobs, resulted in loss of trust in companies and the stock market, and hurt United States’s relations with international businesses (Maleske, 2012). Because of multiple corporate and account scandals, like Enron, the Sarbanes-Oxley Act of 2002 was passed (Maleske, 2012).

The Sarbanes-Oxley Act of 2002 (SOX) is a United States federal law. SOX applies only to public companies in the United States and those international companies that have registered with the Securities and Exchange Commission (SEC) ("The Act", 2012). SOX has several major components: the creation of the Public Company Accounting Oversight Board to monitor auditors and audits; the establishment of standards for external auditor independence from the company to limit conflicts of interest; the mandate of individual responsibility for senior executives; the enhancement of financial disclosures; the limitation of conflicts of interest for securities analysts; the creation of processes to restore investor confidence; the requirement of the Comptroller General and the SEC to perform various studies and summit reports; the creation of corporate and criminal fraud accountability; the enactment of the white collar crime penalty enhancement; and the creation of criminal
penalties for retaliation against whistleblowers (“The Act”, 2012). Senior executives can be held accountable for accuracy, there is a Board to monitor financial accuracy, and whistleblowers are more protected. Concisely, SOX created more safeguards against financial fraud.

These measures were put into place to allow for employees to safely report wrongdoing, as well as accountability on both the part of the executive and accountant in company matters. By creating a hotline or website for employees to report wrongdoings, they can share if they saw a discrepancy on a financial statement or other unethical/illegal behavior by the company. Whistleblowers who prevail under SOX are entitled to reinstatement, backpay with interest, complete “make-whole” compensation, special damages for emotional distress and loss of professional reputation, attorneys’ fees, and affirmative relief (Kohn, 2004). Whistleblowers who face retaliation may be terminated from a job or made to be in a hostile work environment because of what they did so these remedies help fix those problems. Section 1107 of SOX was created to enable courts to be able to criminally charge those companies that retaliate against whistleblowers.

Section 1107 of SOX states:

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, shall be fined under this title, imprisoned not more than 10 years, or both (18 U.S.C.A. § 1514A).
This section prevents employers from firing, excluding the employee from meetings, creating a hostile environment, and other forms of retaliation as a direct result of whistleblowing to a law enforcement officer regarding an alleged federal offense.

Section 806 of SOX also protects employees of publicly traded companies who provide evidence of fraud and allow them to take civil action against the alleged company (Kohn, 2004). *Lawson v. FMR, LLC* was a case that was filed under Section 806 (2013). The plaintiffs alleged their employer terminated them because they blew the whistle, but these plaintiffs sought civil action, not criminal, which is why the case was filed under Section 806 instead of Section 1107 (Aron, Baskin, Owen, & Swindell, 2013). This means that a whistleblower can either chose to file under Section 806, civil, or Section 1107, criminal.

SOX makes it a crime to retaliate against employee whistleblowers (Kohn, 2004). Whistleblowers can face retaliation in forms of termination from their job, hostile work environment, hindering of career progress, as well as other actions, like in the case of Linda Peeno (Bass, 2005). The whistleblower must file their claim of retaliation to the Department of Labor or another law enforcement officer within 90 days of the retaliatory action in order to seek damages (Kohn, 2004). It is then up to the Department of Labor to determine if the retaliation was a direct result of the whistleblowing, if the plaintiff is an employee of the company, and if the company is covered by SOX (Kohn, 2004). Failure to report through the appropriate channels, which is the Department of Labor, if the company is not covered by SOX, like a company that is not publicly traded on the United States Stock Exchanges, have been
reasons cases have been dismissed without trial. However, even with all the stipulations, lawmakers are optimistic about SOX’s ability to protect whistleblowers (Hodges, 2013).

SOX also stated requirements for corporate responsibility that directly relate to whistleblowers. Section 301 of SOX requires publicly traded companies to establish audit committees (Kohn, 2004). These audit committees are required to provide channels in which employees can anonymously and non-anonymously report questionable accounting or auditing matters, such as an anonymous hotline employees can call or a channel in which employees can report concerns to their ethics department (Kohn, 2004).

Section 307 of SOX establishes that any attorneys who appear or practice before the SEC are now mandatory whistleblowers (Kohn, 2004). This requires the attorneys to report “evidence of a material violation of securities law” or “breach(s) of fiduciary dut(ies)” or “similar violation(s)” to a corporation’s chief legal counsel or chief executive officer (Kohn, 2004). These violations could include the company embezzling money or failing to disclose information on the financial statement, like how much debt the company has. If these reports do not properly resolve the attorney’s concerns, the attorney is required to further report to the company’s audit committee or similar committee (Kohn, 2004). Like Section 1107 and 806, these activities are protected (Kohn, 2004).

Section 3(b) of SOX provides for a “broad grant of jurisdictional authority for the SEC and/or the Department of Justice to enforce (civilly or criminally) all of the
requirements contained in the Sarbanes-Oxley Act” (Kohn, 2004). This means that the SEC and Department of Justice have jurisdiction over SOX cases and can prosecute them, either in a civil procedure or criminal.

SOX was presented with a unique problem since its passage into law. This problem is attorney-client privilege. Attorney-client privilege can be defined as, “A legal privilege that works to keep communications between an attorney and his or her client secret” (“Attorney-Client Privilege”, n.d.). This allows the client to share confidential information with their attorney in order to obtain legal information, but protects the client from having their information shared with outside parties without their consent. Attorney-client privilege was set in *United States v. United Shoe Machinery Corp:*

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. (Tolbert, 2013).

This case defined attorney-client privilege as a relationship explicitly between an attorney and a person that shared information with that attorney, privately, in order to obtain legal advice. Attorney-client privilege also implies that the client did not consent to waive that privilege which can be done via a waiver. The client can chose to waive it individually, or, if the client is a corporation, the waiving must be done by the corporate management (Smith, Gambrell, & Russell, 2016). The issue of the
waiver is commonly done in the presence of a third party, and the court can also force a waiver if they deem an exception for crime or fraud (Smith, Gambrell, & Russell, 2016). An attorney would be unable to share the personal information of a client without their consent. This confidentiality pertains to corporate entities as well.

*Harper & Row Pubs, Inc. v. Decker* determined that an employee’s statement, when it is for advice sought by the corporation and at the direction of his superiors, is considered that of the corporation and therefore entails attorney-client privilege (1970). This means that the attorney would have attorney-client privilege with the whole corporation, and not just that employee who was seeking legal information.

What transpires between the attorney and the client is held in confidence and is not discoverable. In the past, attorney-client privilege has been protected against government encroachment in the corporate setting (Tolbert, 2013). In *Swidler & Berlin v. United States*, attorney-client privilege was protected over the public policy of uncovering alleged wrongdoing of the president (1998). In this case, the opinion of the ruling court was that the long-standing tradition of attorney-client privilege and its sanctity was more important than the disclosure of the violation of public policy. This case strengthened the importance of attorneys keeping client information confidential, even if they know information that could expose a violation.

SOX’s language, however, allows for leniency when it comes to in-house attorneys and their duty to hold their client’s information confidential. SOX covers attorneys in terms of their “fiduciary obligations to stockholders and the investing public” (Shine, 2007). This means that attorneys are obligated to protect the interest
of the public and stockholders, such as reporting fraudulent behavior. It is the interest of the public and stockholders to not be lied to by a company, like in the case of Enron. SOX states that in cases, such as Enron, if the attorney knew about the misstating of the financial statement, they would be obligated to report it to their supervisor or even the Department of Labor if the fraudulent behavior does not get addressed. This can cause in-house counsel to be in conflict with their client/employer because the attorney would have to violate the company’s confidentiality in order to report the fraudulent behavior. Those in-house attorneys are both employees protected by the whistleblower provisions of SOX and attorneys bound by attorney-client privilege. In-house attorneys also must comply with federal regulation of the various state bars and ethical obligations for attorneys to clients as defined by the Model Rules of Professional Conduct and the Model Code of Professional Responsibility (Fitzpatrick, 2011). The Model Rules of Professional Conduct contain the rules governing attorneys in the American Bar Association for lawyer-client relationships, role as counselor, role as advocate, transactions with persons other than clients, interactions with law firms and associations, public service, information about legal services, and maintaining the integrity of the profession (“Model Rules of Professional Conduct”, 2013). Attorney-client privilege is defined in the Model Rules of Professional Conduct: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…” (“Model Rules of Professional Conduct”, 2013). The Model Code of Professional Responsibility states:
The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance ("Model Code of Professional Responsibility", 2013).

While the two rules seem similar in the statement that an attorney should keep client matters confidential, they are not exactly the same. These conflicting obligations result in ethical issues for in-house counsel whistleblowers/potential whistleblowers (Fitzpatrick, 2011). Attorneys struggle with breaking confidence in order to protect the stockholders and public, or keeping confidence and protecting their employer, the company. The Model Rules of Professional Conduct has been applied differently in these cases than the Model Code of Professional Responsibility.

The American Bar Association Model Rules of Professional Conduct allows in-house counsel to disclose “information relating to the representation of the client in the process” (communication that the client disclosed to their attorney in confidence) for whistleblower claims, and the disclosures must be limited “to the extent the lawyer reasonably believes necessary… to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client” (Fitzpatrick, 2011, p. 73). This means that, theoretically, an attorney could provide confidential information that their client gave them to use in their defense, like if an attorney was a whistleblower and used confidential information to demonstrate why they are a whistleblower and how they are protected under SOX. This is seen in Jordan v. Sprint Nextel Corp., where the court help that in-house counsel could pursue his SOX claim even though he would have to use privileged client information (2014). However, the Model Code
of Professional Responsibility is not always as flexible in waiving attorney-client privilege for the sake of disclosing information that would normally be protected under SOX (Fitzpatrick, 2011). This can be seen in *Wise v. Consolidated Edison Company of New York, Inc.* where they would not allow a case to precede if confidential client information would be disclosed in the process (2001). In this case, the plaintiff, the attorney, would have had to disclose confidential company information to show that he was justified in whistleblowing, but the court determined that the information would break attorney-client privilege and therefore was not allowed (Fitzpatrick, 2011). This causes problems for in-house attorneys are whether or not to become whistleblowers, because they are not sure if they will be protected.

The proposed study will analyze the outcomes of the limited in-house counsel SOX cases available and provide information and suggestions on how in-house counsel cases are treated and ways attorneys can protect themselves.

**METHODOLOGY**

The study will be conducted in two parts. The first part will be to analyze the details and outcomes of in-house counsel cases filed under the whistleblower provision of SOX. These cases will be looked at in-depth in order to glean the specifics of each case and what can be learned from the outcome of each case. The second part of the study will be to offer suggestions and provide discussions for ways both attorneys and corporations can keep SOX whistleblower cases out of the courtroom in order to resolve them within the company. After both parts of the study
are conducted, the conclusion will provide a summarization of the lessons gained from each in-house SOX whistleblower case looked at, as well as a list of suggestions offered. The conclusion will serve as advice to attorneys as they consider these types of cases.

**Subjects.** The cases selected were SOX whistleblower cases that were filed by in-house counsel against their former employer. To be considered a SOX whistleblower case, the case must be filed under the Sarbanes-Oxley Act under Section 806 or Section 1107. For a SOX case to be accepted under the whistleblower provision, the whistleblower must believe there was a violation of the law, must have communicated that violation either to the proper channels in the organization or to the public, and must have suffered retaliation as a direct result of communicating the violation (“The Act”, 2002). This means that the complainant must think the company did something wrong, alerted their supervisors, and suffered backlash because of their action, like the case of Linda Peeno. Failure to meet the requirements would result in the case not proceeding to trial or for further judgement. This study will look at all the in-house counsel SOX whistleblower cases currently filed under SOX. The cases must also involve an in-house attorney filing the case and being the plaintiff as the company the plaintiff works for being the defendant. The cases vary in locations and years and were chosen because they are the only cases currently that deal specifically with in-house counsel and attorney-client privilege conflicts.

**Variables Collected.** After the cases have been identified, information will be collected on each case. The information collected would be the title of the case, the
ruling, the date, and what violation the whistleblower reported, among other information. This study will discuss each case and each case’s outcome. After the outcome is discussed, the lesson that can be learned from each case will be discussed—whether that is mistakes the plaintiff made in the case or what the company did successfully to protect themselves from liability. The resulting cases will be examined to see if there are particular factors that would forecast whether attorney-client privilege will be waived in in-house SOX whistleblower cases.

Information will also be collected in the form of advice for in-house attorneys and corporation by examining the cases. This information will be in the form of advice to both parties on how to keep SOX cases out of the courtroom in the first place, as the limited number of cases makes it unreliable in terms of generating a generalization on whether attorney-client privilege will be waived in in-house SOX whistleblower cases. This information will be drawn from employment law attorneys, scholars in the field, and officers within corporations. The section will serve as a discussion for best practices both attorneys and corporations can take to protect them against the need for litigation. The result would be a list of advice that both corporations and attorneys can use moving forward.

**Limitations.** This study faces some limitations. The analysis of attorney-client privilege and in-house counsel under the Sarbanes-Oxley Act and the cases filed under the section are relatively new and sparse. SOX was recently passed in 2002, so there is only over a decade of cases to be analyzed. It is difficult to determine trends in the whistleblower cases of SOX due to the relatively short time between its
inception in 2002 to today. This limits the study to looking at limited, past cases that were released to the public. This study also cannot analyze cases that were not reported. This limits the data included in finding trends to that information which is available, which may be incomplete, but still useful to in-house counsel. These limitations should not limit the helpfulness to in-house attorneys, as the area has not been analyzed and any questions answered would be better than none.

IN-HOUSE COUNSEL SARBANES-OXLEY WHISTLEBLOWER CASES

The interaction between attorney-client privilege and the Sarbanes-Oxley Act is a serious issue, even though it has not been thoroughly litigated. Information companies believe to be confidential may in fact be discoverable. Examples of this situation are shown below, where companies have incriminating evidence they believe their in-house attorneys cannot bring to court because of attorney-client privilege. Attorneys who think they are protected by the Sarbanes-Oxley Act may in fact not be protected. Past research done on the subject is inconclusive on whether attorney-client privilege can be waived. Waiving attorney-client privilege would allow in-house attorneys to use confidential information in pursuing Sarbanes-Oxley whistleblower cases. Examples of where attorney-client privilege was waived for in-house counsel and where it was not are found in the cases below. This study will examine all the in-house counsel Sarbanes-Oxley Act whistleblower cases that have been litigated thus far—the details of the case, the reasoning of the court, and the implications of the case. After examining the cases, it is hoped that a general trend will emerge showing
whether or not courts allow attorney-client privilege to be waived in order for in-house counsel can pursue SOX cases. There is a delicate line between keeping information confidential and allowing clients to be honest with their attorneys and being transparent within a corporation for the sake of the shareholders.

There are several stages of filing a SOX whistleblower claim. Each stage has critical turning points that would result in the claim being dismissed. Using the only four recorded SOX in-house attorney whistleblower cases, this study will examine where issues, like courts not allowing confidential information to be admissible in court or the plaintiff not accurately proving a burden of guilt of the defendant, can occur in different stages in the process of a case. This is done in order to give insight to both in-house attorneys and corporations about what pitfalls attorneys face in their claims, what corporations can do to make them liable for litigation, as well as general information about what happens with the waiving of attorney-client privilege. This information can help corporations and attorneys understand how to either avoid the need to whistleblower by fixing the problem inside the corporation or how to fulfill the requirements under SOX needed to ensure success in filing a claim.

**Stage One: Having a Claim.** There are certain requirements that must be met in order to file a claim. A claim requires retaliation (in the form of discharge, demotion, being harassed, and other discriminatory practices) for engaging in protected activity (18 U.S.C. § 1514A). Protected activity includes an employee of the company reporting financial fraud or securities violations relating to a possible commission of a federal offense to a law enforcement officer (18 U.S.C. § 1514A).
Issues arise even during this stage of filing a SOX claim. This was the case in 

_Harkness v. C-Bass Diamond, LLC._

Cynthia L. Harkness was hired at Fieldstone as their General Counsel (United States District Court for the District of Maryland, 2010). Harkness received word in 2005 of an employee, Michael Sonnenfeld, who informed an outside investor that Fieldstone was about to restate its earnings, which would be a violation of Regulation FD, insider trading, if that investor was informed before Fieldstone made the public announcement (United States District Court for the District of Maryland, 2010). Sonnenfeld actually hired Harkness to manage Fieldstone’s legal department as they had plans to become a publicly-traded company (United States District Court for the District of Maryland, 2010). Harkness interviewed Sonnenfeld about the information she had heard and he stated that he believed non-public information to an investor “was permissible as long as the investor was told he could not trade based upon the information” (United States District Court for the District of Maryland, 2010).

Harkness reported this information to Jonathan Michael, who was the Chair of the Fieldstone’s Audit Committee, to receive guidance and support (United States District Court for the District of Maryland, 2010). After these events, Sonnenfeld became hostile to Harkness by starting to write her untruthful annual reviews, removing some of her responsibilities, barring her from meetings and receiving significant legal information, and criticizing her legal advice (United States District Court for the District of Maryland, 2010). These hostile behaviors from Sonnenfeld to Harkness did not occur prior to Harkness’s reporting of the potential wrongdoing.
Harkness informed Fieldstone’s Audit Committee that she believed Fieldstone may have violated securities laws by intentionally keeping her uninformed of major events, meetings, and information within the company (United States District Court for the District of Maryland, 2010). Harkness was terminated in 2006 and filed a complaint against Fieldstone with the Department of Labor, alleging retaliation for protected activity under the Sarbanes-Oxley Act. Harkness brought the lawsuit to the United States District Court for the District of Maryland, after the required 180 days as pursuant with SOX requirements (United States District Court for the District of Maryland, 2010).

Fieldstone, now C-Bass Diamond, LLC, moved for a summary judgement stating that Harkness did not state a prima facie case of retaliation because the activity was not protected; there is no causation (United States District Court for the District of Maryland, 2010). This means that C-Bass Diamond was trying to prove that Harkness did not meet the minimum requirements to show that there was retaliation against her because she engaged in protected activity. C-Bass Diamond was trying to say that her activity was not protected, so any action taken after could not be considered retaliation. Rule 56(c) of the Federal Rules of Civil Procedure states: “Summary judgement should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law” (Federal Rules of Civil Procedure 56(c)). The Supreme Court clarified this rule in Anderson v. Liberty Lobby, Inc. by noting that there needs to be a genuine issue of material fact (such as the
activity not be protected, which the court will settle), not just some alleged fact
dispute, in order to defeat the motion (477 U.S. 242, 1986). This means that it is not
enough for the plaintiff and defendant to disagree over what happened. The defendant
has to actually show that there is an issue, like that the activity as the plaintiff states
does not meet the requirement. In order to state a prima facie claim for retaliation
under the SOX, the employee must allege that:

(1) the employee engaged in protected activity; (2) the employer knew,
actually or constructively, of the protected activity; (3) the employee suffered
an unfavorable personnel action; and (4) the circumstances raise an inference
that the protected activity was a contributing factor in the personnel action (29
C.F.R. § 1980.104(b)(1)).

Harkness’s report to the Audit Chair about Sonnenfeld was found to not be protected
activity under SOX (United States District Court for the District of Maryland, 2010).

Harkness could not prove that she possessed an objectively reasonable belief
that Sonnenfeld engaged in any wrongdoing, as she was not sure herself because she
was not sure of the securities law (United States District Court for the District of
Maryland, 2010). To have an objectively reasonable belief, Harkness would have had
to show that she believed Sonnenfeld’s behavior did violate Regulation FD. However,
Harkness did not check if Sonnenfeld’s behavior did violate Regulation FD; therefore,
Harkness could not prove that she subjectively believed Sonnenfeld committed any
wrongdoing. Harkness did not research whether Regulation FD was violated, seek
outside securities counsel’s help, or direct members of her legal staff to research the
question (United States District Court for the District of Maryland, 2010). As an
attorney, it would have been reasonable for Harkness to figure out whether or not there
was a violation in order to meet the requirement for an objectively reasonable belief in order to be protected under SOX. Harkness just overheard information and reported it, but did not investigation to see whether that information would even qualify as a violation. As an attorney, Harkness should have known where to research securities violations, but she neglected to do so. However, she still decided to report it as a violation even if she was not convinced it was a violation. Because of this reasoning, Harkness was found to have not have engaged in a protected activity and therefore could not be protected under SOX.

This case shows the importance of an in-house attorney doing their due diligence before bringing a SOX whistleblower case to court. Due diligence would be to make sure that the reported information could be a violation. As an attorney, Harkness has a larger due diligence to fill as she knows the law so should know who to ask or where to look to determine if the overheard information could be a violation. She did not figure out whether she believed it was a violation, so therefore she did not do her due diligence. She should have use her legal training to see if a violation occurred, reached out to her network and ask, or looked up the answer as she was trained as an attorney and would have the resources and capabilities to do so.

The court did not even need to rule on whether retaliation occurred or if compensation is needed in Harkness’s case, because she had issues with engaging in protected activity in the first place—the first step needed in having a successful SOX claim. The court also decided that a “reasonable belief” is subjective. A layperson may have had a reasonable belief that wrongdoing occurred in the above case, but as
Harkness was an attorney, her knowledge of the law would raise her to a higher level to prove reasonable belief (United States District Court for the District of Maryland, 2010). This means, while a non-attorney may have been able to pursue this case, Harkness, as an attorney, should have the knowledge to reasonably believe violation which would be stronger than a non-attorney’s knowledge. For example, a cars salesperson would know the make and model of the car they are selling, but a layperson may not. That raises the level of knowledge for a cars salesperson, as they would know the difference between brands where a layperson may not. To put it simply, the cars salesperson would reasonably believe on a higher level than a layperson based on their knowledge, and the reasonable belief standard for a layperson would be lower as their knowledge is not as high. This is important for attorneys to understand, as they will be held to a higher standard than the common belief of a “reasonable person.” The court did not articulate the precise standard, but noted that people, depending on their occupation, will be viewed differently in determining whether that person though they were reporting a violation (United States District Court for the District of Maryland, 2010). Harkness, as an attorney, should know whether or not Sonnenfeld could have violated securities law because she has the legal knowledge in that field. She should have researched the violation and the laws surrounding it, as well as reach out to other attorneys. The court did not say if the case would have been ruled differently if Harkness was not an attorney, but made sure to specific that the person himself must have a reasonable belief—reasonable for that person. This means that as an attorney, Harkness needed to prove reasonable belief
coming from a person with knowledge in legal matters. Harkness would be seen as “more” reasonable than a layperson as she has the background knowledge that others do not. The court granted the summary motion, without investigating whether there was a prima facie showing of causation, and Harkness, even though she attempted to do the right thing, was not protected under SOX. This case may not directly answer the question of whether in-house attorneys are protected under SOX, but this case can shed light on reasons why in-house attorney SOX whistleblower cases failed.

The activities did not qualify in *Harkness v. C-Bass Diamond, LLC* as protected because the plaintiff did not research the violations or specify what exactly was violated. The court ruled that Harkness, as a person with knowledge in the legal field, needed to research the violations and specify what was violated in order to prove that she had reasonable belief a violation even occurred. Because Harkness was an attorney with knowledge of the law and how to research violations, she should have done so; therefore, there was an issue arising out of the claim stage. Harkness should have researched the securities law to figure out if a violation occurred by Sonnefeld, and if there was a violation, what exactly he did that violated the law. It is important for attorneys to realize that as someone who is educated in the law, they are held to a higher “reasonable belief” standard. In this case, Harkness’s reasonable belief standard was higher than a layperson because she reported Sonnenfeld as violating the law and as an attorney, she should have either known the law, known who to ask, or known how to research the law in order to determine if a violation occurred. Harkness testified that she did not know if a violation occurred (United States District Court for
Attorney-Client Privilege and the Sarbanes-Oxley Act

Angelina Moore

the District of Maryland, 2010). As a lawyer, she had the legal knowledge to know if a violation occurred. A layperson may not have the knowledge or resources to investigate these claims a bit deeper like Harkness could have. It is not enough to say someone did something illegal, but the person has to reasonably believe illegal activity was occurring. The court found that, since Harkness did no research, she could not have reasonably thought that a violation occurred—especially by being an attorney and knowing how the law works. This is an issue that would not affect other professions, so it is vital that attorneys seeking a claim under SOX are aware that as an attorney, their reasonable belief standard is that of an attorney, meaning that they should use their legal knowledge in reporting a violation. The above case shows how important it is that in-house counsel is educated on their position in the company as an employee, what activities are protected, and how to actually address the claim.

Stage Two: Waiving Attorney-Client Privilege. In-house attorneys face a unique second stage that other whistleblowers do not have to face. They are performing a different role than the plaintiff. In-house attorneys are bound by attorney-client privilege. All attorneys are bound by attorney-client privilege, but in-house attorneys are also bound as employees of the company which means they are an employee and a client. As an employee, they should be allowed to be protected under SOX, like outside counsel would not be, but are also held by attorney-client privilege, just like other attorneys. This means that their relations with their clients, the company and the fraud that the attorney would report, would be protected by attorney-client privilege and the attorney would not be able to talk about the fraud or specifics
in their claim for risk of violating this privilege (Tolbert, 2013). However, attorneys are also bound by SOX to report any financial wrongdoing on behalf of the company (U.S. Securities and Exchange Commission, 2003). The issue then arises in the court stage whether or not the evidence collected that violates attorney-client privilege is protected. To have a claim, the plaintiff must show evidence, but to show evidence, the plaintiff may have to reveal confidential information. It is up to the courts to decide whether or not that confidential information is allowed.

*Jordan v. Sprint Nextel Corporation* is a case that deals with this issue of allowing confidential information to be used in a Sarbanes-Oxley whistleblower case where an in-house attorney is the plaintiff. Jack R. T. Jordan was employed by Sprint Nextel Corporation where he was an in-house attorney for their Corporate Secretary and Corporate Governance group (Administrative Review Board, 2009). Jordan was asked by his supervisor to grant a waiver of Sprint’s ethics policy for a senior officer (Administrative Review Board, 2009). He was opposed to this filing of inaccurate information with the Securities and Exchange Commission and reported such to his supervisor regarding the violation of Securities and Exchange Commission rules about disclosing executive compensation (Administrative Review Board, 2009). He also reported his concerns to Sprint’s General Counsel, the Chief Executive Officer of the company, and the Board of Directors (Administrative Review Board, 2009). Jordan said because of his activities, he was threatened termination and was denied a raise and a promotion (Administrative Review Board, 2009). He took his case to the Office of Safety and Health Administration, but it was dismissed on December 21, 2005. The
Office of Safety and Health Administration, specifically the Secretary of Labor, is the first place to take a Sarbanes-Oxley Act case (Administrative Review Board, 2009). The case was dismissed because they did not find the case had merit as the court did not think a violation had occurred (Administrative Review Board, 2009). He then he filed his claim with the Department of Labor’s Office of Administrative Law Judges (Administrative Review Board, 2009).

At this point in the case, Jordan did all he could to have a successful SOX whistleblower claim. He made sure the activity he was reporting was in the realm of what he reasonably believed to be a violation of SOX, reported the alleged wrongdoing to the appropriate channels, reported the claim within the 90 day timeframe, and appealed appropriately. However, Jordan, being an in-house attorney, faced the issue of whether attorney-client privilege could be forcibly waived by the courts in order to allow Jordan to use confidential information in making his case against Sprint. An attorney may not typically think of forced disclosure of confidential information, so it is not their duty to minimize the type of damning information that could come to light. An attorney just needs to be aware, before filing a claim, that there is a chance the damning evidence may not be permissible in court (Administrative Review Board, 2009).

On February 10, 2006, Sprint brought up this issue when they filed a Motion to Dismiss, or alternatively a Summary Judgment with the Administrative Law Judges, because Jordan could not establish his claim without using documents and statements that are covered by attorney-client privilege (Administrative Review Board, 2009).
This means that the Administrative Law Judges denied the Motion to Dismiss, but granted the motion to send the case to the Administrative Review Board for interlocutory review, which is an appeal of a ruling that is made before all claims are resolved to all parties, the issue of whether Jordan could use documents and statements covered by attorney-client privilege (Administrative Review Board, 2009). The court did not dismiss the case, but instead sent it to the Administrative Review Board to be looked over. The court ruled that the case had merit, so the Administrative Review Board could rule on it. The court looked at the Securities Exchange Commission’s rules, Part 205, for implementing the Sarbanes-Oxley Act, particularly Section 307, in their decision:

An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer’s board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section (17 C.F.R. § 205.3(d)(10)) (Administrative Review Board, 2009, p. 8).

This section talks about the protection of the law when the report is about a material violation. Material information is that information specified in Section 307 as a violation that is significant, like financial fraud (Administrative Review Board, 2009). This section also notes that “by communicating such information to the issuer’s officers or directors, an attorney does not reveal client confidences or secrets or privilege or otherwise protected information related to the attorney’s representation of an issuer” (Section 205.3(b)(1)) (Administrative Review Board, 2009). This language makes it seem that Jordan would not be allow to use material that is considered confidential, even if he is reporting evidence that he has been discharged because of
reporting a violation. This would make it seem that Jordan could not use any confidential, and essential, information in order to pursue his claim. However, the Securities Exchange Commission’s rules also let an attorney “to use any Part 205 report of a ‘material violation’ or response thereto ‘in connection with any investigation, proceeding, or litigation in which the attorney’s compliance’ with SOX Section 307 and its implementing regulations is in issue” (Administrative Review Board, 2009, p. 8). A material violation would be a significant violation of the law, like an employee trying to commit financial fraud to shareholders (Administrative Review Board, 2009). This language would make it seem that Jordan could use protected information in his case.

The court used the language found in SOX, the Securities Exchange Commission’s rules for implementation of SOX, and a court case titled Willy v. Coastal Corporation in order to come up with a decision. Willy v. Coastal Corporation was used because it was a case where attorney-client privilege was waived to pursue an offensive suit, a suit where the employee is the one that brings the suit against the employer and offers the confidential information instead of a defensive suit where the confidential information would be forcibly given up. The Administrative Law Judges’ conclusion is as follows:

Congress created a statute which requires attorneys to report conduct the attorney reasonably believes constitutes a violation of federal securities law, a breach of fiduciary duty, or any similar violation by the attorney’s employer or an agent of the employer. 15 U.S.C. § 7245. At the same time, Congress provided that individuals who report such violations are to be protected from retaliation by their employer for having undertaken the actions [such as] required by the Act. There is no exception in the statute for attorneys, and Congress could not have intended that attorneys employed by publicly traded
corporations be required to report suspected wrongdoing, but that they then be denied the whistleblower protection of Sarbanes-Oxley because the wrongdoing they reported was discovered while performing legal work for their employer” (Administrative Review Board, 2009, p.10-11).

The Administrative Law Judges said that attorney-client privilege can be waived in in-house SOX whistleblower cases, because otherwise attorneys would not be protected under SOX in the above excerpt. To put it simply, SOX protects whistleblowers. If in-house counsel cannot waive attorney-client privilege, they would not be protected and therefore SOX would be largely ineffective. An attorney would not be able to report the wrongdoing if it meant that attorney-client privilege would be compromised.

Congress would not have written a law that did not include attorneys, even though they are employees of publicly-traded companies, from protection for helping stop financial fraud. What this means is not allowing confidential information would stop in-house attorneys from being able to pursue whistleblower cases. If attorneys cannot pursue whistleblower cases, then they would not be protected under the law which is the opposition of what Congress wanted occurring to the Administrative Law Judges.

The Administrative Law Judges only ruled on whether confidential documents and statements could be used in Jordan’s case, so then the case was remanded, which means sent to previous court, for further proceedings consistent with the new ruling (Administrative Review Board, 2009).

While this issue is still up in the air, in Jordan v. Sprint Nextel Corp. it was ruled that the documents for the case, including confidential information about the company’s finances and the violations that occurred with the inaccurate information reported to the Securities and Exchange Commission, that were covered by attorney-
client privilege could be used (Administrative Review Board, 2009). This case is a landmark case in the discussion of in-house attorneys filing SOX whistleblower cases, because this was the first definitive case where the topic was addressed in court. However, this topic is still highly debated in literature, research, and in the court as there is a delicate balance between being transparent within a corporation and protecting the integrity of the profession of attorneys and allowing clients to feel comfortable being honest with their lawyers. There is not enough research to definitively say whether attorneys are protected by SOX over attorney-client privilege, or if in-house attorneys are bound by attorney-client privilege and could get in trouble if they break the privilege in order to pursue their SOX claim. This study will further discuss how in-house attorneys and corporations can protect themselves from dealing with this controversial topic by avoiding the need for whistleblowers in the first place.

**Stage Three: Court Proceedings.** Once the claim is covered under SOX, was filed correctly, and attorney-client privilege waived, which can only be waived for in-house attorneys, the last stage of filing a SOX claim is bringing the case to court. Even if the attorney followed the requirements for a SOX claim, there is still a chance that the defendant may prevail at the end of the trial. The two below cases illustrate issues that have occurred with in-house attorneys.

*Kalkunte v. DVI Financial Services, Inc.* is an example of a successful in-house whistleblower case. Sheila Kalkunte filed against DVI Financial Services, Inc. and AP Services, LLC for violation of Title VII of the Sarbanes-Oxley Act (Administrative Review Board, 2009). Kalkunte worked with DVI as a contract
attorney in 2001 and moved to working as an in-house associate general counsel in 2002 (Administrative Review Board, 2009). By August 2003, Kalkunte became familiar with DVI’s operations and litigation issues after the turmoil the company went through with DVI’s independent auditors, Deloitte & Touche, resigning abruptly (Administrative Review Board, 2009). During this time, Susan Gibson’s, DVI employee, testimony that DVI’s accounting system was being tampered with (Administrative Review Board, 2009). During this time, Steve Garfinkel, DVI’s chief financial officer, also disclosed to Kalkunte that some employees in senior management had engaged in multiple instances of improper activities (Administrative Review Board, 2009). Kalkunte was alerted of multiple instances of violations and was suspicious because their auditors resigned abruptly. This caused Kalkunte to take action.

Kalkunte then faxed a memorandum to the DVI’s board of directors’ audit committee detailing the improper delinquency reports that DVI management made and that documents were now being shredded (Administrative Review Board, 2009). The reports were improper because they displayed inaccurate information in order to show the company in a better, albeit false, light (Administrative Review Board, 2009). Arnold & Porter, outside, special counsel, were then hired to defend against the allegations, but neither the audit committee nor Kalkunte heard anything more about the investigations or the findings (Administrative Review Board, 2009). It was then discovered that the trustee in bankruptcy had objected to the retention and payment of the outside counsel, and shortly after DVI filed for bankruptcy and the president and
chief executive officer, Michael O’Hanlon, resigned (Administrative Review Board, 2009). Although many employees were laid off, Kalkunte was kept on and put in charge of processing orders that would allow DVI to pay law firms during bankruptcy proceedings (Administrative Review Board, 2009). However, the application changed, which now included new requirements that Kalkunte would have to fulfill, without Kalkunte’s notification (Administrative Review Board, 2009). Kalkunte was not notified of the changes needed, which means he was doing the application incorrectly.

Without Kalkunte being told of the changes, he could not properly file the paperwork needed to keep the outside counsel. The outside counsel was still needed to find and report on any company wrongdoing. Kalkunte also was told: “There is no investigation going on right now… because they’re not getting paid” by Mark Toney, DVI’s chief credit officer (Administrative Review Board, 2009). Kalkunte was basically being told that the investigation was off because the outside counsel was not being paid, and it seemed that Toney did not want the outside counsel to ever be paid. This means that the wrongdoing that occurred was not being investigated. Kalkunte thought the wrongdoing was being investigated by the outside counsel when in fact, Toney removed the outside counsel from the case. If Toney did not want the outside counsel to be paid, it would make sense that Kalkunte was not notified about changes in the very paperwork that would ensure that the outside counsel could get paid. Kalkunte then contacted the board of directors with Toney’s comments and the board of directors told Toney that Kalkunte accused Toney of wanting to withdraw the filing
that would enable DVI to pay Arnold & Porter as special counsel (Administrative Review Board, 2009).

Shortly after, Kalkunte was discharged with the rationale that her position was no longer needed in the company, even though Kalkunte was the only employee laid off, and because of performance issues (Administrative Review Board, 2009). Kalkunte was the only employee being laid off, which makes the downsizing rationale seem poor. In short form, Kalkunte was fired because she reported that the outside counsel was not investigating the wrongdoing case like they were supposed to, because Toney, an employee within the company, called them off. This would like the wrongdoing go unpunished and perhaps continued.

December 5, 2003, Kalkunte filed a complaint with OSHA that her termination was a result of disclosing conduct Kalkunte reasonably believed to be securities fraud, which is covered by SOX (Administrative Review Board, 2009). The Secretary of Labor found that Kalkunte was indeed an employee of DVI which was a publicly traded company, so the company must follow SOX (Administrative Review Board, 2009). The Secretary of Labor also found that Kalkunte engaged in protected activity because she reasonably believed there was fraud or securities violations occurring because of testimony she heard from employees, DVI employees shredding documents, and the improper delinquency reports that were filed (Administrative Review Board, 2009). Kalkunte could reasonably believe wrongdoing was occurring because she heard testimony and then the evidence began to be shredded, which would make the employees seem guilty of something. It was also found that Toney knew
that Kalkunte had engaged in protected activities. Toney found out that Kalkunte accused him of wanting to pull the bankruptcy filing, and three days later Toney discharged Kalkunte which is evidence of pretext and retaliatory animus (Administrative Review Board, 2009). Kalkunte just needed to show that the protected action, her reporting of wrongdoing, was a contributing factor of the retaliation; she did not need to prove that it was the only action leading to her termination (Administrative Review Board, 2009). This means that Kalkunte could have had other factors leading to her termination, but reporting of the wrongdoing needed to be part of that contribution. The Secretary of Labor ruled that Kalkunte was protected under the Sarbanes-Oxley Act, which is in agreement with the Administrative Law Judges, but disagreed with the award of damages. The Secretary of Labor and the Administrative Law Judges both agreed that Kalkunte was protected. However, they came to different conclusions on how the employee should be awarded damages. This means that both courts ruled in favor of Kalkunte, but disagreed about how to award her damages, which is outlined below.

The court ruled that the activity was protected under SOX and the plaintiff required restitution because they did the right thing and were penalized by the company for it (Administrative Review Board, 2009). However, Kalkunte could not be reinstated to the company as DVI went out of business, and because DVI went out of business, Kalkunte was not entitled to front or back pay (Administrative Review Board, 2009). If a company is out of business, they would not be able to get money either expected earnings for front pay or money from back pay because the company
went under. The court gave Kalkunte lost wages through December 2004, which was when DVI terminated the last of its employees, as well as gave her costs to cover reasonable attorney’s fees and damages for Kalkunte’s “pain, suffering, mental anguish, the effect on her credit [because of her loss of employment] and the humiliation that she suffered” (Administrative Review Board, 2009).

The above case shows all the necessary requirements that needed to be fulfilled in order to have a successful SOX whistleblower claim. As Kalkunte was able to use privileged information, as well as made sure she reported the incident through the appropriate channels before the statute of limitations expired, she was able to successfully make her claim under SOX. However, as the reader can see, the decision on where the circumstances allow the claim to be successful, and what damages will be awarded, vary greatly depending on the circumstances.

*Van Asdale v. International Game Technology* is another example of a successful whistleblower case where the in-house attorney was protected from the company’s retaliation because they were a whistleblower (United States Court of Appeals for the Ninth Circuit, 2009). Shawn and Lena Van Asdale appealed the district court’s summary judgment in their case against their former employer, International Game Technology, on their claim of retaliatory discharge under the Sarbanes-Oxley Act of 2002 (United States Court of Appeals for the Ninth Circuit, 2009). This means that Shawn and Lena Van Asdale filed together under SOX against International Game Technology. International Game Technology tried to say there
was no case, so they wanted a summary judgement without a trial, but the Asdales filed their appeal against this.

Shawn and Lena Van Asdale were both in-house intellectual property lawyers who were hired to International Game Technology in 2001. International Game Technology was working on merging with Anchor Gaming (United States Court of Appeals for the Ninth Circuit, 2009). In September of 2001, Bally Gaming started advertising a slot machine with a “bonus wheel” that Anchor claimed infringed on a patent they held (United States Court of Appeals for the Ninth Circuit, 2009). Shawn began investigating the claim as part of his department’s due diligence before the merger, but he and the company felt it was fine to go through the merger with Anchor Gaming anyway (United States Court of Appeals for the Ninth Circuit, 2009). In August 2003, the United States Patent and Trademark Office gave International Game Technology a new patent, but Shawn found that there was an Australian version of Bally Gaming’s “bonus wheel,” called the Australian Flyer, that would invalidate International Game Technology’s new patent and undermine their claim against Bally Gaming (United States Court of Appeals for the Ninth Circuit, 2009). This was a concern because the benefits of the merger between International Game Technology and Anchor Gaming could be overvalued, which means that Anchor Gaming could be worth less if they did not own the patent to the “bonus wheel”. The merger was valued based on the value of the patent. However, if the patent was not owned by Anchor Gaming, the merger would be valued wrong. If a company is overvalued, that
could cause shareholders to place more money into the company when it is not deserved, inflating the value of the company because of the merger.

During this time, the management changed after the merger with David Johnson becoming the new General Counsel (United States Court of Appeals for the Ninth Circuit, 2009). David Johnson worked for Anchor Gaming previous to the merger (United States Court of Appeals for the Ninth Circuit, 2009). Shawn and Lena both met with Johnson on November 24, 2003 to discuss the patent and the Australian Flyer, because they were concerned the merger was overvalued and that would set the company up in a potential fraudulent situation (United States Court of Appeals for the Ninth Circuit, 2009). If Anchor Gaming was overvalued, then the financial projectors set by the company would be false which would be financial fraud. Within a few months of the meeting, both Shawn and Lena were terminated by Johnson (United States Court of Appeals for the Ninth Circuit, 2009). Johnson testified that he wanted to terminate Shawn earlier because he was no longer needed in the company, but he was on a business trip, and that Lena became “odd” after Shawn’s termination so she was let go as well (United States Court of Appeals for the Ninth Circuit, 2009). By “odd”, Johnson testified that Lena was not as engaged in her work and seemed distracted (United States Court of Appeals for the Ninth Circuit, 2009).

When deciding on the case, the court spent a lot of time discussing the problem with attorney-client privilege and the fact that the Van Asdales could not have a case without using privileged information (United States Court of Appeals for the Ninth Circuit, 2009). The court looked at a case, Balla v. Gambro, Inc., which prohibited
attorney-client privileged documents in the Illinois Supreme Court and saw that it had been declined to be used in federal cases (United States Court of Appeals for the Ninth Circuit, 2009). The decision rendered in Balla v. Gambro, Inc. was just used in that case, as opposed to becoming a precedent for future, federal cases. Using the decisions rendered in Willy v. Administrative Review Board and Kachmar v. SunGard Data Systems, Inc., where in-house attorneys were able to pursue their case even though it involved privilege information, the court decided that this should also be the case in Van Asdale v. International Game Technology (United States Court of Appeals for the Ninth Circuit, 2009). The court ruled that the Shawn was an employee of a publicly traded company that was bound by SOX, his conversation with Johnson about materials that should have been disclosed in the merger counted as protected activity, and Shawn reasonably believed violations may be occurring (United States Court of Appeals for the Ninth Circuit, 2009). Basically, Shawn believed that the nondisclosure of important information pertaining to the merger was a wrongdoing on behalf of the company and it was his duty under SOX to report it. These three pieces, after the attorney-client privilege piece has been decided, are needed in order to even have a claim under the Sarbanes-Oxley Act. To have a SOX case, there needs to be retaliation against an employee of a publicly traded company who was a whistleblower. Since Shawn was found to have a claim under SOX, the next step was to see if he was able to use confidential information to support his claim.

However, Johnson must have known about the protected action in order to retaliate against Shawn as a result of the action. Johnson needed to deliberately
retaliate against Shawn because Shawn reported wrongdoing. Johnson said that neither Shawn nor Lena mentioned anything about potential fraud in their meeting (United States Court of Appeals for the Ninth Circuit, 2009). This means that Johnson did not think he retaliated because he did not even know that Shawn and Lena reported any wrongdoing, as he stated in court (even though the court found this to be pretext). This directly contradicts Shawn’s affidavit saying that Johnson knew about the alleged fraud, the lying about the company’s finances, occurring (United States Court of Appeals for the Ninth Circuit, 2009). As it is not the court’s place to make a determination on whose statement to endorse, there is not a genuine issue of material fact in the conversation that occurred between the Van Asdales and Johnson, so the court assumed that the disclosures were related to shareholder fraud (United States Court of Appeals for the Ninth Circuit, 2009). Because the disclosures were related to fraud, and the Van Asdales reasonably believed that fraud had occurred, the behavior was considered protected. The court ruled that as long as the Van Asdales thought they were being retaliated against because they reported wrongdoing, then they have a claim, even if the retaliator denies it. This means that Johnson can protest that he retaliated against the Van Asdales, but if the Van Asdales had reasonable belief that wrongdoing occurred, they are protected.

This still leaves the issue of whether the retaliator knew about the protected activity. One could argue that the termination of the Van Asdales was circumstantial because the Van Asdales were not fired at the same time immediately after the wrongdoing occurred, except both of the Van Asdales had a history of high
performance marks in the company and their termination was so close to when they had the discussion with Johnson (United States Court of Appeals for the Ninth Circuit, 2009). International Game Technology was not able to prove by clear and convincing evidence that the Van Asdales would have been terminated regardless of protected activity, so the appellate court threw out the district court’s granting of a summary judgment. The court did not find that the termination of the Van Asdales was circumstantial, but yet the result of a case of some action—which could have been the Van Asdales’ whistleblowing. This means that the court found enough evidence that retaliation because of whistleblowing occurred that would warrant the case going to trial. The court agreed that the Van Asdales had a case and remanded the district court to rule on the case (United States Court of Appeals for the Ninth Circuit, 2009). This means the Court of Appeals decided the Van Asdales’ case had merit and the lower court should rule on it.

Although Van Asdale v. International Game Technology does not necessarily rule on the side of the plaintiffs, it is an important case because it shows how all the requirements are needed for a SOX case to even be considered, let alone won. It should be noted that after the case was decided in the United States Court of Appeals for the Ninth Circuit, it was remanded to the district court and the district court ruled in favor of the plaintiffs and awarded them monetary damages (United States Court of Appeals for the Ninth Circuit, 2009). This case also ruled on if attorney-client privilege can be waived in a SOX case filed under the whistleblower provision. The court found that this situation warranted waiving attorney-client privilege so the
plaintiffs were able to present a case for protection under SOX; without waiving attorney-client privilege, the Van Asdales would not be able to state their case because of lack of evidence (United States Court of Appeals for the Ninth Circuit, 2009). This case shows how important it is to report information through the appropriate channels, like reporting the information to people above the superior if they are not responding, and have a reasonable belief that a violation has occurred. The Van Asdales, being in-house attorneys, also had to make sure that they did not violate attorney-client privilege until the courts said it could be waived.

The activity was protected in both cases, was filed using the appropriate channels before the statute of limitations expired, and therefore the case was ruled in favor of the plaintiff. Basically, the plaintiff met the requirements of a Sarbanes-Oxley Act claim. The two above cases demonstrate how important it is that the in-house attorney knows the Act thoroughly and is following the law in order to have a successful claim. These two cases also affirm that there are some situations where attorney-client privilege can be waived in order to pursue a SOX whistleblower case. It is vital to waive attorney-client privilege in in-house whistleblower cases because the evidence the in-house attorneys would present in court to prove that retaliation against them occurred is protected by attorney-client privilege. Without the privilege being waived, there would not be evidence and the whistleblowers would not be protected. As it is explicitly stated in SOX that whistleblowers will be protected, attorney-client privilege would need to be waived to do such.
More time and more cases need to be decided in order for a more definite answer to arise on whether or not in-house attorneys are protected by the whistleblower provision of SOX. The above cases can give insight to in-house attorneys struggling with deciding to report financial wrongdoing of their company how past in-house counsel whistleblower cases under SOX faired. The key takeaways are to make sure the attorney is prepared under the law, fulfills the requirements for a claim as expressed under SOX, and is expressly allowed to waive attorney-client privilege. It is the opinion of the author to try to work out disputes within the corporation, if an attorney, before risking loss of license if pursue the claim in court and risk violating attorney-client privilege.

There is no general trend on whether or not courts will waive attorney-client privilege for in-house counsel Sarbanes-Oxley whistleblower cases. The above cases provide insight on the type of cases the court has ruled on and how they ruled, but there is not a conclusion that can be drawn. Because it is very uncertain whether the company will be able to keep their information confidential or whether in-house counsel can waive attorney-client privilege to use confidential information in their trial, it would be best to keep these types of cases out of the courtroom. Taking a case to court can cost the company a lot of money and risk of loss of goodwill for the company. Taking a case to court can also cause an attorney to lose their license because they were not able to waive attorney-client privilege and used confidential information. In order to keep the cases out of the courtroom, the next section will provide advice on how to settle cases within the company.
DISCUSSION OF FINDINGS

This section will discuss the findings of the above data and how attorneys and corporations alike can protect themselves from whistleblower claims. If attorneys are able to work with the corporations and there are appropriate channels in order to report financial wrongdoings, attorneys and corporations can work together and avoid the courts. As evident by the above cases, there is not a set or even slightly consistent answer to whether or not attorney-client privilege will be waived in Sarbanes-Oxley in-house counsel whistleblower cases. This means that attorneys may not be protected if they take their cases to court, and it also means that corporations may not be able to keep their information confidential to be able to protect themselves in court. The best advice this study can provide for both attorneys and corporations is ways to keep whistleblower cases out of court for attorneys and to improve upon measures to protect whistleblowers for in-house counsel. The following sections are broken into advice for attorneys and advice for corporations.

In-House Attorneys. The cases discussed above in this document lend valuable insight into the ways in-house attorneys protect themselves from unsatisfactory outcomes as a result of being a whistleblower. This section will discuss ways to protect oneself as an in-house attorney who is a whistleblower using the findings from the above cases for suggestions for how to protect oneself in court. There will also be other suggestions for keeping these cases out of the courtroom.

An important realization in-house attorneys must have is that they are held to a higher standard than the layperson when it comes to proving they have a SOX
whistleblower claim. In *Harkness v. C-Bass Diamond, LLC*, the attorney in question was not granted protection under SOX because the court ruled that Harkness, as an attorney, should know what is protected under SOX and therefore if they are not educated, they are not found to have fulfilled the reasonable belief requirement of SOX (United States District Court for the District of Maryland, 2010). This means that an attorney cannot plead ignorance under the law and still qualify as reasonable belief of wrongdoing, because an attorney would not be ignorant of the law.

Attorneys must educate themselves on the Sarbanes-Oxley Act and what is protected behavior. This will protect them from a situation arising like that in *Harkness v. C-Bass Diamond, LLC*. Attorneys should also educate themselves on other requirements of the Act. Issues have been found in cases for whistleblowers in general in the claims stage for SOX, but not for in-house attorneys specifically. SOX has specific requirements for reporting the alleged illegal behavior to the appropriate authorities in order to be protected. This reporting must occur within the 90 day timeframe since the incident. This advice may seem simplistic in nature, but it is vital for attorneys to meet the requirements under SOX in order to be successfully protected under SOX.

One question that cannot be answered definitively, which would hinder the protection of an attorney under SOX, is whether or not confidential information can be waived in order for the in-house attorney to use in their case. As seen in *Jordan v. Sprint Nextel Corp.*, there are cases where the attorney may have a claim, but cannot pursue it because attorney-client privileged information is not allowed as part of the case (Administrative Review Board, 2009). An example of how formerly privileged
information might be waived to allow the attorney to use it in a whistleblowing case would be like the situation above where the court ruled that privilege needed to be waived so the attorneys could be protected under SOX, which was the purpose of SOX. However, there have been other cases, like *Kalkunte v. DVI Financial Services, Inc.* and *Van Asdale v. International Game Technology* where attorney-client privilege has been waived so the in-house attorney could pursue their case (Administrative Review Board, 2009; United States Court of Appeals for the Ninth Circuit, 2009). Privilege was waived because the in-house attorneys would not be able to pursue their case otherwise, and the SOX was made in part to help protect whistleblowers. This was demonstrated above in the court ruling on *Willy v. Coastal Corporation*. If attorney-client privilege is preventing an in-house attorney whistleblower from being protected, then it stands to reason that it will be waived. This does not happen in all the cases, however, but privilege did get waived in *Kalkunte v. DVI Financial Services, Inc.* and *Van Asdale v. International Game Technology* for this reason. As it is still risky for an in-house attorney to bring a whistleblower case to court, the rest of this discussion will talk about ways to make things easier for in-house attorney whistleblowers.

There are multiple remedies for protected whistleblowers under SOX which explicitly includes reinstatement as a prevailing remedy. SOX even requires OSHA to require reinstatement of the former employee prior to de novo hearings. This must remain effective while the Administrative Law Justice’s rulings are reviewed by the Administrative Review Board (Fitzpatrick, 2011). Reinstatement is defined as
restoring the employee to their former positions and duties in the company

(Fitzpatrick, 2011). The Administrative Review Board has made a statement that reinstatement is the favored remedy for whistleblowers, not front pay:

“Although reinstatement is primarily a ‘make-whole’ remedy for a prevailing complainant in a discrimination case, intended to return the complainant to the position that he or she would have occupied but for the unlawful discrimination, reinstatement also serves as an important deterrent to other discriminatory acts that might be committed by the offending respondent. As the Supreme Court observed in a leading Title VII case, courts have ‘not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future” (Fitzpatrick, 2011, p. 68).

The courts in this issue want to make sure that not only are the complainant’s rights being protected, but reinstatement also sets a precedent that employees who face termination because of whistleblowing will be given their jobs back. This would deem SOX as effective in the legislature’s mind. The legislature wrote the law to prevent another Enron scandal, and by encouraging whistleblowing by protecting whistleblowers, the legislature would see this situation as positive as that is why they created the law. However, reinstatement over front pay faces multiple issues in reality.

Front pay, as defined by the Administrative Review Board, is money paid to the complainant for loss of job, calculated by plaintiff’s work history, work expectancy, life expectancy, applicable discount rate, and other factors needed to determine future earnings if the employee had not been unlawfully terminated (Fitzpatrick, 2011). Front pay allows the employee to gain relief because they faced retaliation for their whistleblowing. However, there is a problem with the
Administrative Review Board’s commitment to reinstatement over front pay. With reinstatement, the employee has to deal with the negative consequences of whistleblowing. These include: the employee going back to the company that ignored their concerns, created a culture of mistrust and insecurity, may have tarnished their reputation inside and outside the company, and unlawfully terminated them (Katz, 2011). This causes issues on the employee’s end as they do not always fit well back in with the company.

Other employees could view and treat the whistleblower differently, like not including them in social plans or treating them with near hostility. Reinstatement can also cause issues because of the lengthy processes of litigation (Katz, 2011). The employee would be out of work for the length of the litigation process. They could lose touch with up-to-date technology in the company, lose connections they made in the company, and generally need to play catch-up after the litigation process ends if they are reinstated. They are also out that income coming in during the litigation process as well, which could cause financial hardship during that time. The company could have changed a lot since the employee left, gone out of business, or other changes in situation, like loss of business friends, that may cause the employee discomfort/prevent them from successfully going back to work for the company. For these reasons, reinstatement may not be a suitable remedy for the employee and front pay would be a better remedy for the retaliation. This is where front pay would be a better solution over reinstatement. Reinstatement should not be the prevailing remedy
over front pay because it can cause the employee to not be sufficiently “made whole” or properly compensated for what happened to them.

For attorneys, besides taking advice from previous in-house counsel whistleblower cases, there is not much on the attorney’s end to give advice to for keeping whistleblower cases out of court. There is advice for courts on how to best remedy whistleblower situations. There is also advice for corporations about what they can change to keep whistleblower cases out of court.

**Corporations.** Corporations can do a lot to prevent whistleblowing cases from going to court. It is in the corporation’s best interest to work with the whistleblower outside of the courtroom. If a corporation loses a whistleblower case, they open themselves up to enormous financial penalties, loss of goodwill in company, and overall lower in company morale (Fitzpatrick, 2011). The corporation is seen as a “bad” company which could make the employees that work there less motivated to stay in the company. The corporation could also be charged to pay financial penalties as well. Also, because the right safeguards were not put into place or checked, the company has also opened itself up to financial fraud that would require a whistleblower to call attention to it. If an employee sees something wrong, like financial fraud occurring, they should be able to anonymously report it. However, if there are no safeguards in place, like financial reporting or a structure to deal with reports of financial fraud, an employee would be forced to become a whistleblower. A corporation can take steps to ensure that the right channels are set up to keep the company out of situations that financial fraud would occur, but also set up channels so
that if financial fraud occurs, it can be reported and dealt with appropriately instead of escalating to the courtroom. “ Appropriately” could include taking the employee’s whistleblowing seriously, investigating the claims, and dealing with them in the corporation. This prevents the whistleblower needing to take their employer to court.

The first step a company can take to protect themselves against whistleblowing is changing the company perspective about whistleblowing. D. Bruce Shine, General Counsel of the United Food and Commercial Worker’s International Union’s Textile and Garment Council, notes, “Too often we find a mentality in the business world that the corporate structure will crumble to dust if any acknowledgement of wrong doing is admitted” (Shine, 2007, p. 3). The problem with this perspective is that people are afraid to admit wrongdoing at the earliest stage that it can allow the wrongdoing to escalate into a serious violation. This perspective can also stop people from reporting the issue early on, or if it is reported, management can be prone to ignoring the situation. All of these scenarios are detrimental to the company in some way, whether that be letting the wrongdoing continue, losing great employees, harming the company’s reputation, or causing the company to lose money. As the earlier court cases showed, it is in the company’s best interest to admit to themselves wrongdoing has occurred and to try to fix the problem within their company without the need for litigation. If wrongdoing is admitted, it can be fixed without the need to bring the case to court which could result in negative effects, such as loss of company goodwill and employees as a result of media attention of the case.
Training the employees of the company about wrongdoing and the consequences of not reporting wrongdoing go hand-in-hand with changing the perspective of the company. In order to change the perspective that wrongdoing is something that should be kept hidden, employees should be trained on how to spot wrongdoing, how to report the wrongdoing, and the consequences not reporting the wrongdoing does for the company. There should also be training on the perceived consequences employees fear they will receive. This could be done by education about the protections in SOX, as well as education on the protections the company has put in place so employees remain safe if they do report wrongdoing. Training on ethics and company policies would also help this situation. Employees receive training on a variety of different materials, but their rights as an employee and how their actions, or lack of actions, affect the company are not typically highlighted in training (Fitzpatrick, 2011). Employees should learn how their lack of support for whistleblowers can create a hostile environment, as well as learn the resources available to them if they see suspicious behavior. Management should also receive special training about their responsibilities as officers in the company, their obligations under SOX, and consequences for them and the company if they fail to fix and acknowledge wrongdoing taking place in the company. They should also receive ethics and policy training. This will help motivate managers to not cover up wrongdoing. This will also educate managers on how to behave when they find themselves in precautious situations. Employees and management can act as checks for one another that can help prevent cover-ups. Together with changing company
perspective, training will provide the hard information and tools to be able to act upon the change in perspective. This can help ensure issues are taken care of without the need for litigation. Litigation is needed when corporations and employees cannot/will not figure out the situation between themselves. With training and checks, it will help employees and corporations find the tools and motivation to work together.

Shine, in 2007, recommends having Human Resource executives and in-house counsel report directly to the Chief Executive Officer, as this helps eliminate the risk of other executives refusing to admit wrongdoing and causing the need for whistleblowers (Shine, 2007). Reporting directly to the Chief Executive Officer would force the CEO to deal with the whistleblowing, as opposed to reporting it to someone lower who could try to cover it up. The CEO knows if they fail to deal with the whistleblowing, they could be criminally charged, which motivates action (Shine, 2007). If the company is able to fix the wrongdoing in-house, there is not a need for the case to go to court and risk damage to the company’s reputation and finances. As seen in Van Asdale v. International Game Technology, Shawn and Lena Van Asdale reported their concerns to David Johnson, General Counsel (United States Court of Appeals for the Ninth Circuit, 2009). Johnson was involved in trying to make his department look good, and did not want to admit wrongdoing, so he terminated the Van Asdales and did not take their concerns seriously. It is not a fail proof solution, but if the Van Asdales were able to report directly to the Chief Executive Officer, it could fix “corporate structures which provide a structure lending itself to ‘hide or cover up’ legal issues and HR concerns are recipes for disaster” (Shine, 2007, p. 4).
This is assuming the corporation will admit to the wrongdoing and not retaliate against the whistleblower. However, there is a small chance of that happening, because executive officers are bound by SOX to fix wrongdoing or face criminal charges. Instead of trying to cover up issues and force the need for whistleblowers to come forward, corporations should be enticed, through fixing the corporate structure, like directly reporting wrongdoing to the CEO and provide checks on managerial decisions, to fix issues on their own without the risks, uncertainty, and fees that come with litigation. Knowledge of potentially facing criminal charges, as well as the benefit of not going to court, could entice the corporation to admit to wrongdoing so they can work with the employee to solve it.

Corporate structure should also ensure that there are checks in place, whether that is within departments or within a separate group, like a SOX control group or an independent audit committee, that will check against any wrongdoing or cover-ups that may be occurring (Fitzpatrick, 2011). A SOX control group or an independent audit committee would be able to receive and deal with reports of wrongdoing without corporate interference. This means that the control group or audit committee could take the actions steps necessary without having to worry about how it would make them look to their bosses. This requirement is outlined in SOX for purposes of securities violations and financial fraud, but it should be strengthened to include more protection, like ensuring that outside counsel is called in for every case of whistleblowing about wrongdoing, against the wrongdoings and cover-ups that could be occurring against whistleblowers. Shine mentions the need for checks, specifically
outside personal conducting investigations, for this reason: “Too often internal investigations are side tracked by those with a career professional or financial interest in being assured the truth does not see the light of day. The only procedure to prevent such, particularly when the issue is significant or involves major corporate figures, is an independent outsider without a ‘dog in the race’ conducting the internal investigation” (Shine, 2007). Outside personnel, as part of the corporate procedure for dealing with whistleblower allegations, can also act as a check for making sure cover-ups are not occurring. Besides changing perspective, changing the corporate reporting structure can help keep whistleblower cases from needing to go to court.

To help prevent cases escalating to litigation, companies can also form an ethics committee. The ethics committee should be formed by executive department of the company to ensure as minimal hoops to jump through for the committee as possible. This also goes along with the earlier suggestion about reporting wrongdoings directly to the CEO. Multiple employees across departments should be appointed to the committee as that will ensure a variety of experiences and ideas that would help other employees navigate ethical situations. Many companies already have ethics committees, but they can be strengthened in the area of whistleblowing. The committees should be able to provide the guidance, as well as act like a checking function, so that employees are not led astray into illegal behavior because they started with an issue that may be unethical, but not illegal. The ethics committee could help employees navigate precarious situations that could be legal, but may be unethical. The ethics committee could also act as a check when wrongdoing is reported to make
sure it is being handled appropriately. By sufficiently laying out guidelines to remain ethical as well as allow for a company culture that promotes ethical behavior, whistleblowing could be less often to occur because the employees are better educated on what is right and what is wrong as well as the employees are confident that they have a source they can share their concerns with that would address them properly without retaliation.

A company can also lessen their chances of whistleblowing escalating into litigation with an anonymous hotline. Employees could anonymously report any wrongdoing they felt was happening so the company could look into the issue, but yet the employee can remain anonymous and lessen the fear of retaliation. In environment of safety, employees should hopefully feel safe enough to report. With the threat of retaliation gone, the employees could be more enticed to share about concerns they have as well as feel that they are in an environment that cares about its people and its company. This could lessen the need for cases to go to court, because the company has the opportunity to appropriately deal with the situations they are alerted of, and the employee is protected from retaliation by being anonymous. This hotline can be managed either by the ethics committee or employee relations, as they are equipped with the resources to deal with potentially unethical or illegal situations.

CONCLUSION

This thesis examined the interaction between attorney-client privilege and the Sarbanes-Oxley Act of 2002. Attorney-client privilege is the professional rule to not reveal information about the representation of a client unless the client explicitly
Attorney-Client Privilege and the Sarbanes-Oxley Act

Angelina Moore

waives their privilege ("Model Rules of Professional Conduct," 2013). The Sarbanes-
Oxley Act (SOX) is a federal law that has provisions in it to protect whistleblowers
and provide remedies for those whistleblowers that are retaliated against ("The Act,”
2012). These two obligations on attorneys overlap for in-house attorneys. The in-
house counsel is obligated under SOX to report wrongdoing, but attorney-client
privilege keeps them from revealing confidential information that would allow them to
pursue a case against their employer over retaliation. In order to answer the question
on whether attorney-client privilege will be waived for in-house counsel
whistleblowers, previous in-house counsel whistleblower cases filed under SOX were
examined.

There are four previous in-house counsel whistleblower cases filed under the
Sarbanes-Oxley Act. These cases are Harkness v. C-Bass Diamond, LLC, Jordan v.
Sprint Nextel Corporation, Kalkunte v. DVI Financial Services, Inc., and Van Asdale
v. International Game Technology. From these cases, it was deemed indeterminate on
the question of whether attorney-client privilege would be waived for in-house counsel
whistleblowers. Because it is indeterminate, it is best for in-house counsel to try to
solve their issues within the company. It is also in the company’s best interest to work
out issues with the whistleblower without bringing it to court. The company would
lose money in litigation as well as open the company up to bad public image. In order
to help attorneys and corporations stay out of the courtroom, this paper also provided
advice on how to do so.
It was found from the cases that the best thing in-house counsel can do for themselves is to educate themselves on the Sarbanes-Oxley Act. That way the attorneys are prepared if they need to go to court, but also ensures they have taken the steps necessary that the company has all the information necessary to right the wrongdoing. Corporations can provide training to managers and employees to change their perspectives about whistleblowing being negative, as well as educate managers and employees on SOX and what they can and cannot do. Corporate structure could also be adjusted to provide checks on any reports of wrongdoing that are sent to a manager, so that it is harder to cover up wrongdoing and retaliating against employees. Setting up an ethics committee and an anonymous hotline would also provide resources to employees to prevent future wrongdoing and the need for whistleblowers. An ethics committee can help those employees who face a situation where they do not know what to do. A manager could reach out to the committee for advice to make sure they are staying not only within the law, but within the ethical guidelines set by the company. Other employees could reach out to the ethics committee to bounce ideas off of and see if a violation they saw is actually a violation and how it should be reported. The ethics committee provides an outlet for employees to ask those questions that could lead them to making the ethical decision and preventing wrongdoing. An anonymous hotline would encourage those employees who want to report information to report it without the fear of retaliation or the fear that other people would find out it was them. This can prevent future wrongdoing because the wrongdoing would be reported without someone needed to publically whistleblow and
risk retaliation. This advice could provide very useful to in-house attorneys and corporations as they try to navigate the world of business and SOX.

This study is very important to the business and legal field. SOX is still a fairly new law whose effects are still being studied. The overlap of attorney-client privilege and SOX is even more new and there is even less to study. Providing a comprehensive report on the cases in this overlap as well as providing advice will be useful to in-house counsel and attorneys alike as this information is not readily available. The information can help keep corporations and employees out of court, which is best for both the employee and the employer. This information can also be used to shine light on situations other corporations and employees have faced in this realm. By shining light on other whistleblowing situations, the need for whistleblowing could be prevented.

There is still more that can be studied. As implementing SOX is still fluctuating, and the business world is rapidly involving, there should be more cases emerging in this field. As more cases emerged, more cases can be studied. With more data, there can eventually be an answer to the question on whether or not attorney-client privilege will be waived in in-house counsel Sarbanes-Oxley whistleblower cases. This field should be monitored for more information that could serve as additional advice for attorneys and corporations in order to keep improving on the workplace for both employees and shareholders.
WORKS CITED


