

Attorney Client Privilege Issues in Investigations

Panelists

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Privilege Issues That Arise During Internal Investigations

- ◆ “We here explore the treacherous path which corporate counsel must tread under the attorney-client privilege when conducting an internal investigation”
 - ▶ *United States v. Ruehle*, 583 F. 3d 600, 601 (9th Cir. 2009)

What is the Attorney-Client Privilege

- ❖ The ***attorney-client privilege*** may be invoked with respect to:
 - ▶ (1) communication;
 - ▶ (2) made between privileged persons;
 - ▶ (3) in confidence; and
 - ▶ (4) for the purpose of obtaining or providing legal assistance for the client
- ❖ Designed to encourage open and honest communication
- ❖ The party asserting the privilege has the burden of demonstrating it should apply

Work Product Doctrine

- ❖ A qualified protection from discovery for materials collected or prepared by counsel in the course of preparing for possible litigation
- ❖ Elements
 - ▶ Documents and other tangible items
 - ▶ Prepared in anticipation of litigation or for trial
 - ▶ By or for another party or by or for that party's representative
- ❖ Can be overcome by a substantial need showing plus undue hardship

Applicability

- ❖ When does the attorney-client privilege apply in internal investigations?
 - ▶ A primary purpose of the communication must be obtaining legal advice
 - ▶ A communication seeking business, as opposed to legal advice, will not be shielded by the privilege
 - ▶ In-house counsel are protected by the privilege, *but* since in-house counsel often serve in both legal and business capacities, courts will consider the nature of their communications

Preserving Privilege

❖ *Key Concepts*

- ▶ Have counsel direct the investigation to maintain privilege
 - Investigation undertaken at the direction of legal counsel for the purpose of obtaining legal advice
 - Note: Privilege question in context of compliance function (and CCO)
- ▶ Distributing communications broadly to non-lawyers can waive privilege
 - Purpose of communication and job responsibility of non-lawyer receiving the communication
 - “To” or “cc” field
 - Careful distribution is best practice

Preserving Privilege

- ❖ Maximize Privilege Protections by:
 - ▶ Clear requests for legal advice
 - ▶ Clear provision of legal advice
 - ▶ Keep legal advice separate from business advice
 - ▶ Careful consideration of “To” and “cc” fields and distribution lists
 - ▶ Narrow dissemination of in-house counsel advice or edits to documents
 - ▶ Educate internal clients to avoid waiver
 - ▶ Protect documents
 - Mark privileged and confidential
 - Maintain privileged materials separate from business materials
 - Limit access to privileged materials

Who is the Client?

❖ Corporation

- ▶ In ***Upjohn Co. v. United States***, 449 U.S. 383 (1981), the Supreme Court broadly affirmed the applicability of the attorney-client privilege to corporations
 - “[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Upjohn*, 449 U.S. at 393

❖ Privilege belongs to company, not employee

Who is the Client?

◆ Board

- ▶ Generally, the Board is considered to be part of the corporation for privilege purposes

◆ Special Committee

- ▶ Some authority suggests that if a special committee orders the investigation, the privilege belongs to the committee and disclosure to the full board may constitute waiver
 - To reduce risk – committee counsel should consider not reporting the most sensitive privileged information to the full board to retain privilege, unless necessary

Who Controls the Privilege?

- ❖ When an employee is interviewed during the course of an investigation, who controls the privilege, the company or the witness?
- ❖ Interests of the company can sometimes differ from interests of the employee
 - ▶ Desire to obtain information from witness who might not talk if information is going to be disclosed to others in company or third parties

Witness Interview Issues

❖ *Upjohn* warnings

- ▶ Investigating attorney represents the company
- ▶ Conversation covered by attorney-client privilege, but privilege belongs to the company
 - Likely extends to interviews with former employees
 - May not extend to interviews with non-employees, such as consultants
- ▶ Interview should be kept confidential
- ▶ Confirm the witness' understanding

❖ Notes

- ▶ Company's decision regarding what to do with the information, including whether to disclose information to Government
- ▶ Consequences of failure to cooperate or being untruthful

Witness Interview Issues

- ❖ Questions that may arise during interviews
 - ▶ “Should I be talking to you?”
 - ▶ “Do I need my own lawyer?”
 - ▶ “Can I tell you something ‘off the record’?”
 - ▶ “Does this look bad for me?”
 - ▶ “What happens to me if I refuse to talk to you?”
- ❖ Responses
 - ▶ Avoid any appearance of potential dual representation
 - ▶ Avoid any comments that could be construed as “legal advice”
 - ▶ Avoid statements assessing interviewee’s position

Witness Interview Issues

Potential Issues

- ❖ Can company counsel represent both the company and a “constituent” of the company?
- ❖ Does the privilege extend to interviews of former employees?
 - ▶ Yes, generally
 - ▶ If the former employee was communicating with company counsel regarding something within the scope of his past employment then there is an argument that the privilege applies
- ❖ Should you interview a potential whistleblower?

Witness Interview Issues

- ◆ Documenting Witness Interviews
 - ▶ Mark as Attorney-Client Communication and Attorney Work Product
 - ▶ Make clear that interview memos contain counsel's mental impressions
 - ▶ Recognize that memos could become public
 - ▶ Make a clear record that the *Upjohn* warning was given and that witness understood the warning

Waiver

The privilege (and ability to waive) belongs to client

- ◆ Complicated when client identity is less clear
 - ▶ **Joint representations**
 - All jointly represented parties must join in any waiver of a jointly owned ACP (need unanimity)
 - Can waive own communications but not joint communications
 - ▶ **Common interest arrangements**
 - No one member can waive joint communications – similar to joint representation
 - Can waive the privilege protecting their own communications that they have shared with others
 - ▶ **Corporate setting**
 - Can be complex – as an entity it must work through its agents
 - Board of Directors and management are generally empowered to waive privilege

Waiver

❖ Intentional Express Waiver

- ▶ Disclosure of privileged communications to third party
- ▶ In investigation, consider disclosure to government
 - Government
 - Historical facts – no waiver
 - Privileged communications – potential waiver

❖ Unintentional Express Waiver (Inadvertent Waiver)

- ▶ How to avoid

QUESTIONS?



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