Threats to Privilege

Strategies for Mitigating the Privilege Risks Associated with Disclosures to Common Third Parties

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1. EMPLOYEES AND POTENTIAL WHISTLE-BLOWERS

- Employees can put privilege at risk when serving as fact witnesses in internal investigations or as potential whistle-blowers.
- Under *Upjohn*, employee interviews are privileged if: 1) the witness knows the interview is privileged and confidential; 2) the interview is conducted in a confidential manner; and 3) the interview concerns matters within the scope of the employee's duties.
- Whistle-blower employees sometimes seek investigation updates involving privileged information or threaten to disclose privileged information to the press or government.
- To limit the risk of waiver, counsel should restrict communications with employees to matters within the scope of their employment and limit disclosure of attorney work product. When conducting interviews, counsel should explain that the investigation is confidential and that its purpose is to provide the company with legal advice.

What is Attorney-Client Privilege?

- Protects confidential communications between attorneys and their clients.
- Communications between company employees and the company's counsel are protected where counsel is gathering information needed to provide legal advice to the company. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
- Underlying facts or evidence, even if discussed by an attorney and client, are not themselves protected by the privilege.
- The privilege is held by the client alone and only the client may claim or waive it.
- Generally, the privilege is waived once the communication has been shared with a third party outside of the attorney-client relationship.

2. OUTSIDE AUDITORS

- Auditors may seek information about an ongoing investigation or the risk of litigation.
- An auditor is a third party and not an agent of counsel, so disclosures risk the attorney-client privilege.
- Most courts hold that work product protection remains in place because auditors are not adverse parties in litigation, but not all courts agree.
- Any disclosures should be carefully considered to provide auditors with what they need without risking undue waiver. In some cases, it may be advisable to focus on the process of the investigation while avoiding disclosure of investigative work product.

3. THIRD-PARTY CONSULTANTS

- Disclosing privileged materials and communications to third parties will generally waive privilege.
- Communications with a non-attorney third party can, however, remain privileged if they are confidential and necessary to the attorney's rendering of legal advice to a client, under a rule known as the *Kovel* doctrine.

- The third party should be engaged and supervised by the lawyers conducting the investigation. The engagement should be explicitly to aid the lawyer in providing legal advice, and the consultant should work under the direction of the legal team.

4. INSURANCE COMPANIES

- A company may have to disclose privileged information to its insurer when seeking a defense or coverage for losses incurred relating to an internal investigation.
- There is no special privilege relationship between insurers and insureds, and privilege protection will depend on the terms of the insurance contract.
- Generally, an insurance contract containing a duty to defend with no reservations regarding the types of claims covered is more likely to protect privileged communications between insurer and insured under the common interest doctrine.
- A company should understand the specific terms of its insurance contract and also be wary of the risk that it could become adverse to its insurer.

5. THE GOVERNMENT

- A company that uncovers wrongdoing may elect to disclose the issue to government regulators and seek credit for cooperation.
- In the US, privilege waiver is no longer expected as part of cooperation credit, but the government still seeks all relevant facts, including those learned during a privileged investigation. Disclosure may waive privilege, even as to the underlying documents or memos.
- Some companies have entered into confidentiality or "non-waiver" agreements with the government in an attempt to preserve privilege against non-governmental parties, such as plaintiffs in civil litigation.
- Non-waiver agreements are not uniformly enforced by US courts, however, so a company should weigh the benefits of cooperation against the risk of waiver—regardless of any agreement.

What is Attorney Work Product?

- The attorney work product doctrine protects the mental processes, thoughts, and opinions of counsel that are developed in anticipation of litigation. See *Hickman v. Taylor*, 329 U.S. 495 (1947); codified in Rule 16(b)(2) of the Federal Rules of Criminal Procedure and Rule 26(b)(3) of the Federal Rules of Civil Procedure.
- Excludes from protection materials prepared in the ordinary course of business or unrelated to litigation.
- Key factor: Whether the document or other material "can fairly be said to have been prepared or obtained because of the prospect of litigation" or whether it was prepared in the ordinary course of business.
- Work product may be shared with some third parties without waiver, but the protection is waived if it is shared with a potential litigation adversary.

Did You Know?

- Privilege applies to employee interviews taken by non-attorneys if "conducted at the direction of" company counsel.
- Protection from a non-waiver agreement between a company and the government is not guaranteed. Cases have come out on both sides, even within the same federal district court.
- A recent case held that providing mere oral summaries of witness interviews, made to the government, waived protections for counsel's notes and memos of those interviews.

Tips

- When it comes to third parties, the line between protection and waiver depends on the relationships involved. Clear documentation from the outset can provide valuable protection later.
- Marking documents as "Privileged & Confidential" may be a helpful signal, but there are no magic words. If the document is not actually kept confidential, it is no longer privileged.
- Certain whistle-blower protection laws prevent confidentiality agreements from requiring employees to seek company permission before reporting possible wrongdoing to the government.