



# Maintaining the Attorney-Client Privilege in Internal Investigations

# **OVERVIEW OF THE ATTORNEY-CLIENT PRIVILEGE**

# Elements of the Attorney-Client Privilege

1. Communication
2. Between privileged persons
3. Made in confidence
4. Intended to receive or give legal assistance

# Communication

- Applies to oral, written, and wordless acts
- Communications, not facts, are protected
  - Facts include names of witnesses, technical data, steps taken in the investigation and result of an investigation
  - Inclusion of facts in documents prepared by, or circulated to, counsel does not make facts privileged

# Hypothetical

- An HR employee (“HR Rep”) investigated and responded to a charge of sex discrimination that a plaintiff filed with the EEOC. During the HR Rep’s deposition, plaintiff’s counsel inquired about his investigation. Defense counsel objected and instructed the HR Rep to not answer any questions concerning actions taken at the direction of counsel. Due to this instruction, the HR Rep did not answer: (1) whether he checked employee emails; (2) what documents his investigation produced; (3) who he interviewed; (4) if he took notes; and (5) whether he reviewed personnel files.
- Is any of the requested information protected by the attorney-client privilege?

# Between or Among Privileged Persons

- Attorney-client privilege protects communications between client and counsel
  - Counsel includes its authorized agents, such as paralegals and assistants
- Privileged communications with employee of a business
  - Communications between counsel and the corporation's employees (even low- or mid- level employees) are privileged if the communications are:
    - Not made in the presence of third parties;
    - Pertain to matters within the scope of the employee's duties; and
    - Made at the behest of corporate superiors or corporate counsel to help counsel provide legal advice to the corporation

# Between or Among Privileged Persons

- Between Employees

- Privileged communications may be shared between non-attorney employees and remain privileged when the communications are:

- Shared to relay information requested by an attorney for the corporation and
- Only shared with employees whose roles within the corporation make their receipt of the communications necessary to inform the corporation of legal advice or allow it to act on that advice

- Non-Employees

- Agents of a lawyer for purposes of litigation or corporate due diligence (e.g., economists, consultants, accountants) may be considered privileged persons – **provided they are retained for the purpose of enabling counsel to impart legal advice**





# Hypothetical

- During the HR Rep's deposition, plaintiff's counsel asks the rep about the contents of his conversations with counsel and the employees involved in the investigation of the sexual harassment claim to which defense counsel objects and instructs the HR Rep to not answer
- Is any of the requested information protected by the attorney-client privilege?

# Between or Among Privileged Persons

- Former employees
  - Do not have the authority to assert or waive the privilege on behalf of the organization
  - Pre-separation privileged communication between former employees and counsel continues to be protected
  - Post-separation communications concerning conduct or knowledge arising out of the employee's work or if it concerns conversations with corporate counsel that occurred during the employees employment may be privileged



# Between or Among Privileged Persons

- Ethical obligations for communicating with former employees
  - An attorney must be careful not to seek to induce a former employee to violate the privilege attaching to attorney-client communications
    - Such an attempt could violate the Pennsylvania Rules of Professional Conduct Rule 4.4. Respect for Third Parties:  
“In representing a client, a lawyer shall not use... methods of obtaining evidence that violate the legal rights of [a third person].”

# In Confidence

- In confidence:
  - Outside the presence of third parties
  - Communication distributed to only “need-to-know” agents within the company
- Hypothetical: Counsel exchanges several drafts of a settlement communication with the client, the final draft of which is conveyed to opposing counsel
- Are the initial drafts protected under the attorney-client privilege?

# For Purposes of Obtaining or Providing Legal Advice

- Privilege is restricted to those instances where the client secures primarily legal, not business, advice or services
  - This distinction is critical for in-house attorneys
  - Just because a document is marked privileged and confidential does not make it privileged
  - Likewise, an attorney's presence at a meeting or receipt of a communication does not render a communication privilege

# Hypothetical

- Employee submits an anonymous complaint to her employer which is investigated by the legal department. In a subsequent legal action, the plaintiff-employee seeks the production of investigative meeting notes between a non-legal employee and in-house counsel wherein counsel gave out simple administrative tasks for the non-legal employee to perform in aid of the investigation. The plaintiff also seeks the production of email threads between in-house counsel and non-legal employees charged with managing the plaintiff's medical leave.
- Is any of the requested information protected by the attorney-client privilege?

# COMPARE OTHER PROTECTIONS



# Duty to Maintain Confidentiality

- May be state specific – for example, PA Rule of Professional Conduct 1.6 – Generally, a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent
- South Carolina
- Connecticut

# Duty to Maintain Confidentiality

- Broader than attorney-client privilege
  - Applies outside of legal proceedings
  - Applies to all communications between attorney and client related to the representation
  - But applies only to the attorney, not as a defense against disclosure

# Work-Product Doctrine

- Avenue for protection of investigatory documents if you can prove:
  - (1) the company was in or anticipated litigation at the time AND
  - (2) the creation of the documents was primarily motivated by the litigation rather than by some other purpose
- Applies to documents prepared by non-attorneys even if not requested by an attorney
- Broader than attorney-client privilege
  - Documents can be shared without resulting in waiver
- Narrower than attorney-client privilege
  - Can be overcome if adversary cannot obtain the information without undue hardship

# Primarily Motivated by Litigation

- What does it mean for the creation of a document to be primarily motivated by litigation as opposed to some other purpose?
  - Theoretical possibility of litigation is not enough
  - But actual litigation need not have commenced
  - Agency matters, such as EEOC charge, is sufficient



# Work-Product Doctrine Hypothetical

- Hypothetical: An in-house attorney is notified of potential litigation related to a violation of locality's predictive scheduling and paid sick leave ordinance. In-house counsel works with HR to update policies governing predictive scheduling and paid sick leave in various jurisdictions and draft notes outlining potential violations in various jurisdictions
- Are the in-house attorney's notes of conversations with HR regarding potential violations of predictive scheduling and paid sick leave in various jurisdictions protected by the work product doctrine?

# **CONDUCTING INTERNAL INVESTIGATIONS**

# Whether Internal Investigations Should be Conducted Under Claim of Privilege

- Factors to consider:
  - Level of employees at issue
  - Seriousness of allegations
  - Risk of litigation
  - PR risk
  - Availability of attorneys



# Investigating Tips to Maintain Privilege

- Involve counsel directly or through “Deputization Memo”
- Mark documents “Confidential-Attorney/Client Privilege” or “Confidential- Attorney Work Product”
- Send equivalent of legal hold memo to employees
- Notes taken by attorneys should include the attorneys’ impressions
- Consider affidavits by counsel to support the attorney-client privilege

# Challenges to the Attorney-Client Privilege

- Legal advice vs. business advice
  - *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981), made “clear that fact finding which pertains to legal advice counts as professional legal services”
- No litigation or threatened litigation

# Upjohn Warnings

Counsel must make clear:

- You are a lawyer conducting an interview to gather facts for purposes of providing legal advice
- Identify who you represent – the Corporation, NOT the person being interviewed
- The communications about to take place are protected by the attorney-client privilege and must be kept in confidence (other than the witnesses' own attorney)

# Upjohn Warnings (con't):

- The privilege belongs to the Corporation, not the individual being interviewed
- The Corporation can waive the privilege without the individual's knowledge or consent, and may need to share the information with a third-party
- The individual understands and consents to the interview proceeding

Should the Upjohn warning be oral or  
in writing?

Under what circumstances might  
counsel want to put the Upjohn  
warning in writing?

# Exceptions to the Privilege

- If the client seeks legal advice for the purpose of committing or concealing a crime or fraud
- When advice of counsel is at issue
- Sword and shield doctrine (selective disclosure)
- Inadvertent disclosure

# Waiving the Privilege

- The attorney-client privilege belongs to the client, not the attorney
- The power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors
- When to consider waiver:
  - Faragher/ Ellerth doctrine
  - Defending against negligence claim for failure to address coworker harassment
  - FLSA good-faith defense
  - If company intends to share investigation results with the government

# Hypothetical

- An employee submits an internal complaint of sexual harassment by a coworker, which is investigated by the company at the direction of counsel. The employee is subsequently terminated for performance reasons and brings a lawsuit for sexual harassment. Upon receiving the complaint, the employer conducts another investigation at the direction of counsel into former employee's allegations. As a defense, the employer alleges that it properly investigated the allegations made by the plaintiff and exercised reasonable care to prevent and/or correct the alleged harassing behavior. The plaintiff seeks the production of all witness statements gathered during both investigations.
- Are any of the witness statements protected by the attorney-client privilege and/or work product doctrine?