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Current trends in corporate internal investigations, Part 1: Maintaining privilege and confidentiality

» Although legal advice is protected by the attorney-client privilege, any other type of advice, such as business advice, is not.

» An engagement letter should explicitly state that the purpose of the engagement is to conduct an investigation and provide legal advice to the client.

» In order to preserve privilege during an internal investigation, an attorney should always give an Upjohn warning to an employee before beginning an interview.

» When investigations result in the production of documents to a third party, such as government investigators, counsel should insist on provisions preventing waiver in the case of inadvertent production of privileged materials.

» Joint defense agreements should explicitly state that confidential communications between outside counsel and the client remain privileged, even when discussed with joint defense counsel.

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This is the first of a 3-part series.

Companies initiate internal investigations in response to a variety of triggering events, including law enforcement inquiries, lawsuits, whistleblower complaints, hotline tips, exit interviews, and other circumstances that give rise to allegations of misconduct by company personnel. Not every issue or allegation warrants a full-blown internal investigation, but more substantial issues that trigger an internal investigation often call for assistance from outside counsel. During these sensitive internal investigations, companies must be careful to maintain attorney-client privilege and attorney work product protections, lest the investigators' notes, conclusions, and recommendations be turned over to law enforcement or used as evidence in subsequent civil cases.

This article discusses current trends and best practices for companies in maintaining privilege and confidentiality in corporate internal investigations. Part 1 outlines some practical tips for maintaining privilege during internal investigations. Part 2 discusses the impact of the

DC Circuit Court's decision in *United States ex rel. Barko v. Halliburton Co.* on privilege and confidentiality issues in internal investigations. Part 3 discusses some recent case law following the *KBR* decision.

Maintaining privilege during internal investigations

Although the attorney-client privilege can and often does apply equally to employees' communications with in-house and outside counsel, in the internal investigations context, the independence of the lawyer often correlates with the likelihood of privilege attaching. The use of outside counsel generally adds a layer of independence to the investigation process that cannot be achieved with in-house counsel or non-attorney investigators. Companies run the risk of waiving the attorney-client privilege if an investigation is not conducted in the appropriate manner, by the appropriate individuals, with the appropriate safeguards in place. The following, in no particular order, are various insights on how to avoid waiving the attorney-client privilege during internal investigations.

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Identify the client and the individuals overseeing the internal investigation

When engaging outside counsel to conduct an investigation, it should be: (1) done promptly after litigation is threatened, (2) entirely clear who the client is, and (3) clear who counsel reports to. Timeliness is important. In *Banneker Ventures, LLC v. Graham*, the court found that an internal investigation conducted "over two years" after litigation was threatened was not conducted in anticipation of litigation and thus was not privileged attorney work-product.[1]

In most cases, the client will be the company itself, and counsel will report to a specific executive, in-house counsel, or special investigations committee. When individual employees require counsel, investigations counsel should not represent those individuals. Potential conflicts of interests could arise due to poorly defined roles or engagements and can undermine the credibility of an investigation. In particular, conflicts may arise if officers/directors of the company and/or in-house counsel were involved in any alleged wrongdoing under investigation. For example, waiver of the attorney-client privilege may result if counsel reports the findings of an investigation to individuals (e.g., members of management or the board) who have engaged in conduct that is adverse to the interests of the company.[2] Thus, if at any point during the investigation, outside counsel believes that the overseer of the investigation may be substantially involved in the events being investigated, outside counsel should recommend an alternative overseer.

Be hesitant about non-lawyers assisting or conducting an investigation

By using a non-lawyer in the investigation process, the attorney-client privilege may be lost. In order for the investigation to be privileged, the purpose of an investigation must be to provide legal advice to a client. Thus, an attorney needs to have active role in directing the investigation. Even having a lawyer advise how to carry out an investigation will not necessarily make the findings of the investigation privileged, especially if the investigation is conducted by non-attorneys. For example, in *United States v. ISS Marine Servs., Inc.*, the Court held that an investigation conducted by Internal Audit personnel was not covered by the attorney-client privilege and was not protected by the work product doctrine.[3] The Court also stated that "when an attorney is absent from the information gathering process 'the original communicator has no intention that the information be provided [to] a lawyer for the purposes of legal representation.'"[4]

Though non-lawyers may be employed to assist in the investigation, counsel must ensure that the non-lawyers act as agents under the direction and control of counsel and assist counsel in providing legal advice to the client. An attorney must direct and control the non-lawyer acting as an agent, but counsel need not "observ[e] and approv[e] every minute aspect of [the nonlawyer's] work."[5]

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For example, communications between an accountant and the attorney who hired him are privileged if the attorney hired him to assist the attorney in providing legal advice to the client. Accordingly, when the use of non-lawyers is necessary in the course of an investigation, counsel should directly retain the non-lawyer and memorialize the agreement in writing, stating that the purpose of the retention is to assist counsel in providing legal advice to client. Counsel should have one such agreement with each non-lawyer employed. If counsel decides to use the client's employee as a non-lawyer agent, an agreement reflecting this should be memorialized. There should be correspondence that clearly conveys to the employee that he/she is working at the behest of counsel and that the employee is to assist counsel in providing legal advice to the client.

Clearly identify the purpose of the investigation

Outside counsel's engagement letter should explicitly state that the purpose of their engagement is to conduct an investigation and to provide legal advice to the client.

Counsel should provide only legal advice

Notably, while legal advice is protected by the attorney-client privilege, any

other type of advice, such as business advice, is not. Courts have struggled to establish bright-line rules between legal and business advice. Furthermore, it is more difficult to draw this line when in-house lawyers have dual roles, because they typically mix legal and business functions. Because of this, companies should preferably employ outside counsel to conduct internal investigations. Moreover, companies should not seek business advice, nor should counsel provide it, in order to maintain the privilege.

Attorneys should give the client's employees an Upjohn warning

In order to preserve privilege, an attorney should give an Upjohn warning to an employee before beginning an interview. There are multiple parts to an Upjohn warning. The interviewer, preferably counsel, should state to the employee/interviewee:

- that counsel represents the company and not the employee personally;
- that the purpose of the interview is to learn about facts which will enable counsel to give legal advice to their client;
- that the conversation is privileged;
- that the privilege belongs solely to the client, and it is entirely up to the company whether to waive that privilege; and
- that the conversation should be kept confidential in order to preserve the attorney-client privilege.

The importance of providing an Upjohn warning is illustrated in *United States v. Ruehle*,[6] in which outside counsel conducted an internal investigation and interviewed William J. Ruehle, an employee of the client. During the interview, Ruehle made statements that he later sought to suppress at his criminal trial. Ruehle argued that the statements were privileged, because outside counsel had represented himself and other individual officers in shareholder suits, and that outside counsel failed to advise him that his statements could be disclosed to third parties. The court found no record that outside counsel ever gave Ruehle an Upjohn warning. In so finding, the court gave weight to the fact that the interviewing attorney's notes did not state that an Upjohn warning was given.[7] Furthermore, even if the attorney gave an Upjohn warning, the court found that it was inadequate because the attorney failed to inform Ruehle that they were not representing him and his statements could be shared with third parties, including the government, for the purpose of a criminal investigation.[8] Although the decision was reversed on the grounds that Ruehle knew

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his statements would be disclosed, the case illustrates the harsh consequence of failing to give an adequate Upjohn warning.

Ask the right questions

If interviewing a former employee, ask only questions regarding events that occurred during his/her employment. Many courts (though not all) have held that communications with former employees are covered by the attorney-client privilege *if* the communications concern events that occurred within the scope of the former employee's employment.[9]

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> [A] communication is privileged at least when…an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment.[10]

Most lower courts have followed the Chief Justice's reasoning and granted the privilege to communications between a client's counsel and the client's former employees,[11] but cite federal cases denying the privilege as to communications with former employees when "the former employee had ceased being employed by the client before the relevant conduct occurred."[12]

This is particularly true when the former employee has ongoing obligations to the company. Thus, counsel should determine the former employee's likelihood of cooperation and confidentiality before proceeding with an interview. If there is no valid contract forcing an employee to cooperate and maintain confidentiality, the client will have no remedy against a former employee who breaches confidentiality after the interview (potentially affecting the privilege). Based on this, outside counsel may choose to not interview a particular employee if his/her confidentiality is doubtful. Counsel should be aware of the fact that confidentiality clauses in contracts may not be used to prevent someone from reporting information to the Securities and Exchange Commission; such clauses are invalid under Dodd-Frank Wall Street Reform and Consumer Protection Act.[13,14]

Interview summaries and memoranda

Memorialization of interviews is of paramount importance. Interview summaries and memoranda should not be verbatim transcripts. Interview summaries or memoranda allow others who were not present to be aware of the contents of the interview. They also serve as a refresher for those who were present at the time. When memorializing the contents of an interview, outside counsel should ensure that the interview is not recorded or transcribed. A transcript is far more likely to be discoverable than a document that contains outside counsel's thoughts, mental impressions,

and opinions. Furthermore, the document should expressly state that it is not a verbatim transcript. As explained above, it should also state that an Upjohn warning was given, include the language of the warning, and indicate that the interviewee understood and agreed to continue the interview.

Inadvertent production of privileged materials

When investigations result in the production of documents to a third party, such as government investigators, counsel should insist on including provisions preventing waiver in the case of inadvertent production of privileged materials. Internal investigations can require the production of hundreds of thousands of documents and, in all likelihood, at least one of those documents will be privileged and inadvertently disclosed. Such a provision should state, in unequivocal language, that the client maintains the right to recover inadvertently disclosed documents. However, this provision should be seen only as a safeguard and not a substitute for reviewing documents in advance of production.

Joint defense agreements

Given the size of modern multi-national corporations and the complexity of their business operations, it is not uncommon for multiple law firms to conduct an internal investigation, particularly when multiple companies are involved in the alleged misconduct. Joint defense allows the investigation to proceed at a quicker pace and makes the investigation more efficient. Nevertheless, a joint defense can destroy privilege, because confidential information will be disclosed between joint defense counsel. Thus, joint defense agreements should explicitly address this issue by agreeing that confidential communications between outside counsel and the client remain privileged or attorney work product—even when discussed with joint defense counsel.

Privilege laws abroad

In-house counsel should be aware that in numerous foreign jurisdictions, in-house counsel do not have the same privileges as in the United States. For example, the European Court of Justice held that in-house counsel's communications with company management were not privileged because in-house counsel are unable to exercise independence from the companies that employ them.[15] Thus, counsel, both outside and in-house, should research privilege laws in all jurisdictions where a claim may be brought against the client and in any jurisdictions where foreign governments may bring an investigation. ✳

Part 2, which discusses privilege and confidentiality issues in internal investigations, will appear in our August issue.

1. *Banneker Ventures, LLC v. Graham*, No. CV 13-391, 2017 WL 2124388, at *1, *2 (D.D.C. May 16, 2017)
2. *Ryan v. Gifford*, Civil Action No. 2213-CC, 2007 WL 4259557, at *3 n.2 (Delaware Chancery. November 30, 2007). Discussion available at http://bit.ly/kramerlevin
3. *See, e.g., United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121 (D.D.C. 2012). Discussion at http://bit.ly/DC-Court-Ruling
4. Id. at 130, quoting *Nesse v. Shaw Pittman*, 206 F.R.D. 325, 330 (D.D.C. 2002).
5. *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 81 (S.D.N.Y. 2006). Opinion and Order available at http://bit.ly/Rivastigimine
6. *United States v. Ruehle* 583 F.3d 600 (9th Cir. 2009). Available at http://bit.ly/ninth-circuit-order
7. *United States v. Nicholas*, 606 F. Supp. 2d 1109, 1111 (C.D. Cal.), reversed sub nom. *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009)
8. Id. at 1117.
9. *See Upjohn Co. v. United States*, 449 U.S. 383, 403 (1981). Available at http://bit.ly/upjohn-co
10. Id.
11. *In re Allen*, 106 F.3d 582, 605 (4th Cir. 1997) Opinion available at http://bit.ly/in-re-allen
12. Id. at 606 n.14
13. *See, e.g., United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004). Decision at http://bit.ly/hunt-v-merck
14. *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999). Order available at http://bit.ly/peralta-cendant
15. Case C-550/07P, *Akzo Nobel Chemicals. Ltd. & Akcros Chemicals. Ltd. v. European Commission*, 2010 E.C.R. I-08301. See http://bit.ly/akzo-nobel

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