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an interview with
Michael D. Granston

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FEATURES

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COLUMNS

DEPARTMENTS

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Protecting the attorney-client privilege in corporate compliance matters

» Threats to the corporate attorney-client privilege have been increasing.

» Key employees should understand the elements of a privileged communication.

» Train non-legal employees about good email habits and the attorney-client privilege, when it applies, and how it can be waived by sloppy business practices.

» To protect a compliance investigation under privilege, it is important to issue a memorandum that describes the scope of the investigation and states that its purpose is to obtain legal advice.

» In situations where privileged information must be disclosed to a court and the risk is that the disclosure will waive the privilege in other contexts, Rule 502 of the Federal Rules of Evidence may provide a solution.

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For more than a decade, the corporate attorney-client privilege has been eroding. The nature of the corporate privilege—belonging to an entity that is only able to conduct business through the collective actions of individual directors, managers, or employees—seemingly makes government enforcers and, in some cases, the courts uneasy. This reaction likely results from a sense, whether justified or not, that the privilege is used, all too often, to shield questionable corporate activities from government scrutiny.

The attorney-client privilege is the oldest privilege. It protects confidential communications, and applying it to the traditional relationship of an individual client and his/her attorney is relatively straightforward. In contrast, in the corporate setting, applying the privilege and determining its contours can be complex, because the privilege can potentially cover communications across a large group of individuals and often involves attorneys who work directly for the entity and provide regular legal and business advice. As one court has noted:

Westling

Lee

> It is often difficult to apply the attorney-client privilege in the corporate context to communications between in-house corporate counsel and those who personify the corporate entity because modern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public

relations, and advertising issues, as well as purely legal issues.[1]

Whether the skepticism about the corporate attorney-client privilege is justified or fair, it is a reality for corporations, their in-house attorneys, compliance officers, and outside counsel. It has become commonplace for the government and other litigants to challenge a corporation's assertion of corporate attorney-client privilege or to argue that privilege has been waived or otherwise abrogated. Given this practical reality, vigilence in protecting the privilege is more important than ever.

Attorney-client privilege

Generally, courts have held that the attorney-client 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.[2]

More recently, another court distilled this test, holding a party must show: (1) a confidential communication, (2) to a lawyer or subordinate, (3) for the primary purpose of securing a legal opinion, legal services, or assistance in the legal proceeding.[3] It is well accepted, of course, that the attorney-client privilege applies to corporations.[4]

In light of these cases, it may be difficult to understand what makes applying the privilege in the corporate context so challeging. The answer lies in the "primary purpose" test, which requires that the primary purpose of the communication must be securing a legal opinion, legal services, or assistance in a legal proceeding. Determining whether this test is met when evaluating communications between an in-house attorney and other corporate officers or employees is often complicated.

In-house counsel and attorney-client privilege

In 2012, in a whistleblower lawsuit against the Halifax Hospital, which alleged that its compensation of employed physicians violated the Stark Law, the Court held that hundreds of emails and other documents created by or directed to in-house legal and compliance personnel were not protected by privilege. Recognizing that in-house lawyers often participate in extra-legal activities, the Court found:

> [c]ommunications between corporate client and outside litigation counsel are cloaked with a presumption of privilege. Communications between corporate client and corporate counsel—on the other hand—involve a much different dynamic and require the proponent to satisfy a 'purpose and intent' threshold test.[5]

The Court also observed:

> Simply labeling a document 'Confidential—Attorney Client Privilege' is not a sufficient basis for legally presuming or even logically assuming a primary legal purpose. And, simply funneling non-privileged information through an attorney does not automatically encase the document in the privilege. The content of

> the message must request legal assistance, and the information conveyed must be reasonably related to the assistance sought.[6]

With this ruling in mind, in-house counsel should review the manner in which communications take place between Legal department personnel and other corporate employees and should consider the following points:

- **It is not enough to "cc" the in-house lawyer on your email.** Train non-legal employees about the attorney-client privilege, when it applies, and how it can be waived by sloppy business practices. It is essential that non-legal employees understand that routine business communications are not privileged simply because they are sent to in-house counsel.
- **Label privileged communications.** All written communications seeking or providing legal advice should be clearly labeled as "confidential" and subject to the "attorney-client privilege." However, it is also important that these labels be used only when applicable. If they are overused, it could result in a court finding that such communications do not warrant protection.
- **When the purpose is legal advice, say it; when it's not, say it.** Where applicable, counsel should designate privileged communications to the corporation as being "for the purpose of rendering legal advice" and have those who communicate with in-house counsel designate privileged communications "for the purpose of seeking legal advice."

Privileged internal investigations

Courts have also held that the attorney-client privilege protects fact-finding by attorneys and their delegates in internal investigations. Indeed, recently one court held that the attorney-client privilege will apply to investigations conducted by in-house counsel "[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation."[7] The court noted:

> In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.[8]

In order to protect an internal investigation with the attorney-client privilege the following two steps should be considered.

Delegation

At the beginning of any privileged internal investigation, a best practice is to issue a delegation memorandum to the investigating personnel. In the case of outside counsel, this may be a memornadum to the client that memorializes the request to outside counsel for a privileged investigation. In some cases, this memorandum may also delegate some portion of the investigative activities to the in-house compliance or legal staff of the company under the direction of outside counsel. In the in-house counsel context, this could be a memorandum from management that memorializes the corporate client's request for in-house attorneys to conduct a privileged internal investigation. Importantly, in both cases the memorandum should describe the scope of the investigation and make clear that its purpose is to obtain legal advice.

Upjohn warnings—

Before any investigative interview, witnesses should be given what is commonly called

an Upjohn warning, which informs the witness that: (1) the attorney represents the company and not the witness personally; (2) the attorney is collecting facts for the purpose of providing legal advice to the company; (3) the interview is protected by the attorney-client privilege, which belongs exclusively to the company and not the employee witness; (4) the company may choose to waive the privilege and disclose the discussion to a third party; and (5) the witness must keep the discussion confidential and should not disclose it to any third party.

Voluntary disclosures and selective waiver

Voluntary disclosures have become commonplace for counsel representing healthcare clients in fraud and abuse matters. Generally, it is possible to work through the voluntary disclosure process without waiving the attorney-client privilege. Moreover, since 2008, when the Department of Justice issued the Filip Memorandum,[9] prosecutors have been prohibited from demanding waivers of privilege from corporations as an element of cooperation. More recently, when issuing the Yates Memorandum[10] in 2015, the Justice Department reaffirmed adherence to the Filip Memorandum, while distinguishing between privileged information/work product and unprivileged "facts" and by stressing the information a cooperating corporation must provide is limited to the facts.

Generally, it is possible to work through the voluntary disclosure process without waiving the attorney-client privilege.

Nevertheless, when navigating the disclosure process and its implications for the privilege, it is critical to understand that selective privilege waiver is disfavored. As a result, the decision to provide otherwise privileged information to the government, whether voluntarily or in response to a subpoena, typically results in a waiver of the privilege for the materials produced. In one recent decision, the court, joining a majority of other courts, rejected the defendant's argument that its voluntary disclosure of privileged information in response to a grand jury subpoena was only a selective waiver and should not operate as a waiver of privilege in third-party litigation.[11] Indeed, only a single federal appeals court has held that such a disclosure to the government amounts to a selective waiver that allows the party holding the privilege to continue to successfully assert it in other litigation.[12]

In situations where privileged information must be disclosed to the government and the attendant risk that the disclosure will waive the privilege in other contexts presents substantial risks, Rule 502 of the Federal Rules of Evidence may provide a solution. Rule 502(d) states: "A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."[13]

However, because Rule 502(d) only addresses litigation "pending before the court," there is some question as to whether the rule is intended to apply to situations where a party is providing information in response to a governmental subpoena or civil investigative demand. In the subpoena context, the aggrieved party seeking to avail itself of the protections of Rule 502(d) would have

to file a proceeding in federal court in order to provide a forum for the court to issue an order protecting the privilege and limiting the scope of any waiver. This could be accomplished by filing a motion to quash in federal court. Although Federal Rule of Evidence 502(e) limits the effect of an agreement between the parties to the litigation, it does not foreclose the prospect of the government and the subpoenaed party jointly agreeing to a Rule 502(d) order once a motion to quash is filed and, in turn, jointly asking the court to sign the order. Clearly, Rule 502(d) litigation is not appropriate in every case where there is a risk of privilege waiver, but it may be appropriate, particularly in cases where there is likely to be substantial third-party litgiation over the issues involved in the internal investigation.

Conclusion

By discussing the challenges that may confront companies that seek to protect the corporate attorney-client privilege when investigating compliance issues, we sought to increase awareness about the increasing likelihood of a privilege challenge. We are hopeful that companies that choose to implement the suggestions outlined above will increase the likelihood that any claim of privilege will be upheld.

1. *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 797 (E. D. La. 2007). Available at https://bit.ly/2zi2ept
2. Idem at 795.
3. See *United States v. Nelson*, 732 F.3d 504, 518 (5th Cir. 2013). Available at https://bit.ly/2MVHK7Q
4. See *Upjohn v. United States*, 449 U.S. 383, 390 (1981). Available at https://bit.ly/2NwdHET
5. *United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, et al.*, No. 09-cv-1002, 2012 U.S. Dist. LEXIS 158944 (M.D. Fla. Nov. 6, 2012) (citations and internal quotations omitted. Available at https://bit.ly/2KTFFZk
6. Idem (citations and internal quotations omitted).
7. *In re: Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758-59 (D.C. Cir. 2014). Available at https://bit.ly/2MVVBLg
8. Idem at 760.
9. Department of Justice: The Filip Memorandum. August 28, 2008. Available at https://bit.ly/2nJ5eCU
10. Department of Justice: The Yates Memorandum. September 9, 2015. Available at https://bit.ly/2nLMPa4
11. *In re Pacific Pictures Corporation*, 679 F.3d 1121 (9th Cir. 2012). Available at https://bit.ly/2KPoETv
12. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc hearing February 5, 1978). Available at https://bit.ly/2KRZO5n
13. Rule 502 of the Federal Rules of Evidence. Available at https://bit.ly/2MS7lOW