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Association of Corporate Counsel
Delaware Valley (DELVACCA) Chapter

DELVACCA PRESENTS

The Attorney-Client Privilege and Corporate Internal Investigations: Issues for In-House Counsel

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Chapter of the Year
AWARD WINNER
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Agenda

- Review Attorney-Client Privilege basics.
- Using the elements of the privilege as a framework, examine how the privilege might or might not apply within an organization generally and in the context of internal investigations.
- Assume a narrow, “worst case,” application of these principles (which is not to say you could never prevail on a broader view).

Agenda

- Try to talk about how to deal practically with these issues in the real world.
- An important part of the exercise is simply to sensitize us to the issues.
- If you want to preserve the privilege, you need to plan to preserve it.
- The practical approach in a given case may be to assume from the outset that there will be no privilege because one or more elements will be missing.

Governing Law

- The details of the privilege can vary by jurisdiction.
- Decisional law, statutes & court rules. See, e.g., 42 Pa. C.S.A. § 5928; Fed. R. Civ. P. 26(b)(1); Fed. R. Evid. 502.
- In federal court, the law which provides the substantive rule of decision controls on the privilege issue. In state court, normal conflicts of laws principles apply.

Governing Law

- For purposes of this discussion, the Pennsylvania law of attorney-client privilege is substantially the same as federal, New Jersey & New York law.

Privilege Basics

- The ACP is "the oldest of the privileges for confidential communications known to the common law."
- Serves the purpose of "foster[ing] disclosure and communication between the attorney and the client."
- "[R]ecognizes that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client." Upjohn Co. v. United States, 449 U.S. 383,3 89 (1981); In re Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979). See also Restatement (Third) of the Law Governing Lawyers § 68, cmt. c.

Privilege Basics

- But, "the privilege obstructs the search for the truth and because its benefits are, at best, indirect and speculative, it must be strictly confined within the narrowest possible limits consistent with the logic of its principle." In re Grand Jury Investigation, 599 F.2d at 1235 (internal quotation omitted).

Privilege Basics

- The party claiming the privilege has the burden of proving that it applies. In re Grand Jury Empanelled Feb. 14, 1978, 603 F.2d 469, 474 (3d Cir. 1979).
- The privilege belongs to the client and only the client may waive it. See e.g., In re Grand Jury Proceedings, 73 F.R.D. 647, 652 (M.D. Fla. 1977)("The privilege . . . belongs to the client, not the attorney; and an attorney can neither invoke nor waive the privilege if his client desires the contrary.").

Privilege Basics

- What is privileged?
  - A communication from a client,
  - to an attorney acting as such or his/her subordinate,
  - of facts intended to be kept confidential,
  - for the primary purpose of obtaining legal advice.

Privilege Basics

- What is privileged?
  - not for the purpose of committing a crime or tort,
  - as to which the privilege is claimed,
  - and not waived. Restatement (Third) of the Law Governing Lawyers §§ 68-72, 78 & 82 (2000)("Restatement"). See also Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co., 32 F.3d 851, 862 (3d Cir. 1994).

Privilege Basics

- Attorney Work Product Immunity Distinguished.
- ACP = a communication of confidential facts by a client to a lawyer for the purpose of obtaining legal advice. Restatement §§ 68-72
- AWP = material developed by a lawyer in anticipation of litigation containing mental impressions and strategy. Hickman v. Taylor, 329 U.S. 495, 509-13 (1947); In re Cendant Corp. Sec. Litig., 343 F.3d 658, 661-62 (3d Cir. 2003). See also Restatement § 87; Fed. R. Civ. P. 26(b)(3).

Privilege Basics

- Attorney Work Product Immunity Distinguished.
  - A particular communication or document could be protected by both ACP and AWP.
  - A document which is not protected by ACP could still be protected by AWP.
  - Details of AWP beyond the scope of this discussion.

Is there a communication . . .?

- For the privilege to apply at all, there must first be a "communication." Restatement § 68.
- "A communication within the meaning of § 68 is any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression." Restatement § 68

Is there a communication . . .?

- The privilege applies only to the communication and not to the facts themselves as they may exist outside the communication; i.e., you can't cover what you know with the privilege simply by communicating it to a lawyer. Upjohn, 449 U.S. at 395-96 (internal quotation omitted).

Is there a communication . . .?

- Because it is the "communication," and not its substance, which can be privileged, each "communication," even if concerning the same substance, stands on its own.
- For example, a communication of information by the client to the lawyer may be privileged, but a subsequent communication by the lawyer to the client may not if all the elements are not met.

Who is the Client?

- "Privileged persons within the meaning of § 68 are the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation."
  Restatement § 70.

Who is the Client?

- RPC 1.13(a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
- Whether intentional or unintentional, simultaneous joint representation of the organization and one or more constituents is possible. We want to avoid unintentional joint representation.

Who is the Client?

- Who is the organizational client?
  - Generally speaking, "a corporate 'client' includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary and affiliate corporations." In re Teleglobe Communications Corp., 493 F.3d 345, 370-71 (3d Cir. 2007).

Who is the Client?

- Unless,
  - The other entity isn't wholly-owned and there are divergent interests among the owners. Teleglobe, 493 F.3d at 366 (citing Trenwick Am. Lit. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 192 n.66 (Del. Ch. 2006)).
  - The other entity is insolvent and the interests of its creditors are divergent. Id.
  - The lawyer is specifically retained for more limited representation (e.g., counsel to the outside directors). Ryan, et al. v. Gifford, et al., 2008 WL 43699 (Del Ch., Jan. 2, 2008).

Who is the Client?

- Who are the organization's "duly authorized constituents"?
  - Traditional View: Limited to the "Control Group" of senior executives.
  - Emerging View: Extends to all agents of the organization who possess, or have a business "need to know" information being communicated. Upjohn.

Who is the Client?

- Upjohn is the seminal case on the attorney-client privilege in the context of an organizational client.
  - FCPA investigation by in-house and outside counsel.
  - Had a large group of employees at all levels complete a questionnaire and interviewed a smaller group.
  - SEC and IRS rejected claim of privilege beyond the "control group."

Who is the Client?

- Supreme Court rejects the "control group" test:
  - "In the corporate context, . . . it will frequently be employees who possess the information needed by the corporation's lawyers. Middle-level – and indeed lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties."

Upjohn, 449 U.S. at 391.

Who is the Client?

- After Upjohn the organization's privilege will extend to communications between counsel and employees at virtually any level so long as it involves matters within the scope of their employment and they understand that the purpose of the communication is the organization's obtaining of legal advice.
- Upjohn is becoming the general rule, but some jurisdictions still apply the "control group" test.

A Detour Down the "Two-Way Street"

- A communication from the client to the attorney can be privileged.
- What about a communication from the attorney to the client?
- The federal, Restatement and majority state view is yes in virtually all circumstances. See, e.g., In re Ford Motor Co., 110 F.3d 954, 965 n. 9 (3d Cir. 1997); Restatement § 69.

A Detour Down the "Two-Way Street"

- The minority view is the more limited "Derivative Privilege."
- An attorney to client communication is privileged only if its disclosure would disclose the substance of a prior, privileged communication from the client to the attorney. See, e.g., SEPTA v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 257 (E.D. Pa. 2008).

A Detour Down the "Two-Way Street"

- Pennsylvania law was surprisingly unclear.
- Along came Nationwide. Nationwide Mutual Ins. Co. v. Fleming, 924 A.2d 1259, 1269 (Pa. Super. 2007)(attorney to client communications enjoy, at most, only a derivative privilege), aff'd on other grounds by an equally divided court, 992 A.2d 65 (Pa. 2010).

A Detour Down the "Two-Way Street"

- Nationwide
  - Sues departing agents on the usual theories.
  - Agents counterclaim for tortious interference.
  - Three Nationwide e-mails discussing litigation strategy, two of which were from in-house counsel. All were limited to a "need to know" group.
  - Nationwide waives ACP as to two, but claims as to one ("Document 529").
  - Agents want to use Document 529 during bench trial which began **January 10, 2005**.

A Detour Down the "Two-Way Street"

- Nationwide
  - Trial court brings in another judge, who conducts an in-camera review.
  - Second judge holds that the ACP is available to the attorney to client communication, but that it was waived by the voluntary production of the other two e-mails (the "selective waiver" issue as to which more below) in an opinion issued **February 16, 2005**.
  - Nationwide takes an interlocutory appeal and the Superior Court stays the trial.

A Detour Down the "Two-Way Street"

- Nationwide
  - Superior Court panel (McCaffery, Todd & Bender, JJ.) hears argument on **September 20, 2006**.
  - On **May 21, 2007**, the Superior Court affirms, but on the basis that, given the plain language of 42 Pa. C.S.A. § 5928, the ACP didn't apply at all to the attorney-to-client communication.
    - Codifies common law privilege.
    - On its face covers only client-to-attorney communications.
    - The Legislature has spoken.

A Detour Down the "Two-Way Street"

- Nationwide
  - Nationwide takes another interlocutory appeal.
  - Four member Supreme Court hears argument on **March 6, 2008** (Todd & McCaffery must recuse and there was one vacancy).
  - On **January 29, 2010**, the Court splits 2-2, thus affirming the Superior Court.
    - Justices Eakin & Baer would affirm, but only on waiver.
    - Justices Saylor & Castille would reverse entirely, applying the privilege and finding no waiver.
  - So, after **five years** of litigation, what's the law of Pennsylvania? Hold that thought.

A Detour Down the "Two-Way Street"

- And then came Gillard. Gilliard v. AIG Insurance Co., 15 A.3d 44 (Pa. 2011).
- Court splits 5-2 and recognizes a two-way privilege:

  "[I]n Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing legal advice." 15 A.3d at 59.
- Clear holding. Not-so-clear reasoning.

Back on the Highway: Who is the Client?

- The fact that a given person may be a "privileged person" for the purpose of communicating facts to the attorney – because they have knowledge of the facts by virtue of their job – may not be a "privileged person" for the purpose of receiving a communication from the attorney – because they have no "need to know" as part of their job. See Restatement § 73.

Who is the Client?

- The Upjohn or "Corporate Miranda" warning prior to any investigatory interview:
  - I am the Company's lawyer (or am working at the direction of the Company's lawyer) and not your lawyer.
  - I can tell the Company anything you tell me.

Who is the Client?

- The Upjohn warning:
  - Anything you tell me is protected by the attorney-client privilege between me and the Company.
  - The Company, and only the Company, can waive that privilege and disclose something you've told me to third-parties. You may not do so on your own.

Who is the Client?

- In giving the Upjohn warning, you want to put the individual at ease, so you say something like: “I’m the Company’s lawyer, but don’t worry, my job here is just to get the facts and not to make any decisions.”

Who is the Client?

- R.P.C. 4.3(a):

  "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested."

- If the lawyer has been hired to be disinterested, he/she likely hasn't been hired to be a lawyer, but to be something else, another element of the privilege.

Who is the Client?

- So you give the Upjohn warning and the individual says: “Do I need my own lawyer?”
- Should you answer?
- How should you answer?

Who is the Client?

- R.P.C. 4.3(b):

  "During the course of a lawyer's representation of a client, a lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

Who is the Client?

- Standard response is to reiterate that the attorney represents the Company and that whether or not to retain individual counsel is a decision for the individual.
  ABA White Collar Crime Comm., "Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees" at 32 (2009).
- Under certain circumstances, it may be permissible to tell a witness to seek counsel (who can then advise them further on the issue), without offering the opinion that they "need" counsel (which is clearly legal advice).

Who is the Client?

- Under NO circumstances should an attorney or someone working for an attorney tell an unrepresented individual that they don't need or shouldn't obtain counsel.
- That is a recipe for disaster, or at least very likely joint representation.

Another Detour (But Not Quite Yet)

- What happens when the employee witness won't cooperate or puts conditions on his/her cooperation?
- Raises issues far beyond the attorney-client privilege.
- We'll return to this later.

Is the Lawyer Acting as a Lawyer?

- We've got a communication of facts from a client to a person who is a lawyer (or to a person working at the direction of a person who is a lawyer).
- That communication can't be privileged, unless
  - the person who happens to be a lawyer is actually acting as a lawyer and
  - that is why the facts are being communicated.

Is the Lawyer Acting as a Lawyer?

- Going back to Rule 1.13(a), there is no distinction in principle between in-house and outside counsel. Upjohn, 449 U.S. at 394-95.
- But in practice, things are different (and please don't shoot the messenger).

Is the Lawyer Acting as a Lawyer?

- The fact that the privilege is construed narrowly "is especially so when a corporate entity seeks to invoke the privilege to protect communications to in-house counsel. Because in-house counsel may play a dual role of legal advisor and business advisor, the privilege will apply only if the communication's primary purpose is to gain or provide legal assistance." Kramer v. Raymond Corp., 1992 WL 122856 at *1 (E.D. Pa. May 29, 1992)(Pollak, J.)(emphasis added).

Is the Lawyer Acting as a Lawyer?

- The attorney can be playing a "dual role" so long as the primary, but not necessarily sole, purpose of the lawyer's involvement is to give legal advice. Even where both legal and business concerns are involved, related attorney-client communications are still privileged as long as the matter "was infused with legal concerns and [a decision] was reached only after securing legal advice." In re Ford Motor Co., 110 F.3d 954, 966 (3d Cir. 1997).

Is the Lawyer Acting as a Lawyer?

- "To determine whether counsel's advice is privileged, we look to whether the attorney's performance depends principally upon [her] knowledge or application of legal requirements or principles rather than [her] expertise in matters of commercial practice." MSF Holding, Ltd. v. Fiduciary Trust Co., Int'l, 2005 WL 3338510, at *1 (S.D.N.Y., Dec. 7, 2005).

Is the Lawyer Acting as a Lawyer?

- In-house attorney's internal e-mail outlining anticipated questions by a regulatory agency in response to the publication of an article about plant discharges "does not reflect the exercise of a predominantly legal function as opposed to business advice in a regulat[ed] industry" and is not privileged. Rowe v. E.I DuPont de Nemours & Co., 2008 WL 4514092, at *9 (D.N.J., Sept. 30, 2008).

Is the Lawyer Acting as a Lawyer?

- The more titles and responsibilities the lawyer has in addition to a strictly legal role, the more difficult it will be to establish the privilege. See, e.g., TVT Records v. Island Def Jam Music Group, 214 F.R.D. 143 (S.D.N.Y. 2003).
- In TVT Records, the court noted that the in-house lawyers held titles like "business and legal affairs" and that "the titles indicate these representatives served within the company not only as lawyers, but as high-ranking business executives." Id. at 145.

Is the Lawyer Acting as a Lawyer?

- Myth Busters
  - "Business communications are not protected merely because they are directed to an attorney, and communications at meetings attended or directed by attorneys are not automatically privileged as a result of the attorney's presence." Kramer, 1992 WL 122856, at *1 (citing Super Tire Engineering Co. v. Bandag, Inc., 562 F. Supp 439, 441 (E.D. Pa. 1983)).

Is the Lawyer Acting as a Lawyer?

- Myth Busters
  - "The protective cloak of [attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client . . . ." Sampson v. School District of Lancaster, 262 F.R.D. 469, 474 (E.D. Pa. 2008)(quoting Hickman v. Taylor, 329 U.S. at 508).
  - Attorney Work Product may apply.

Is the Lawyer Acting as a Lawyer?

- Myth Busters
  - "What would otherwise be routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda." Lefta Assocs. v. Hurley, 2011 WL 2456616, at *8 (M.D. Pa., Jun. 16, 2011)(internal quotations and citations omitted).

Are the Facts Confidential?

- If the facts are already widely known, the mere fact that they, or documents containing them, are provided to counsel doesn't make them privileged.
- If it is anticipated that the facts will ultimately be disclosed to a third party, there is no expectation of confidentiality and the privilege doesn't apply.

Are the Facts Confidential?

- In the case of documents, if there is no reasonable effort to identify and treat them as confidential, the privilege argument is weakened.
  - See, e.g., In re: Grand Jury Proceedings, 2001 WL 1167497, at *10 (S.D.N.Y. 2001)("While the determination of whether a document is privileged does not depend on the technical requirements of a privileged legend, the existence of such a legend may provide circumstantial evidence that the parties intended certain communications to be privileged.").

Are the Facts Confidential?

- When is third-party disclosure anticipated?
  - The organization has a legal obligation to self-report to a regulator or other third party.
  - The organization intends to self-report to obtain the benefit of a "safe harbor" provision or procedure.
  - The organization intends to rely on the conduct of the investigation as a defense to the underlying claim (e.g., in a sexual harassment case) or to rely upon the "advice of counsel" defense. See, e.g., Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 537 (3d Cir. 1996); Rhone-Poulenc Rorer, 32 F.3d at 863; Restatement § 80.

Are the Facts Confidential?

- United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).
  - Internal investigation by outside counsel of options backdating allegations.
  - As planned from the outset, the report is disclosed to outside auditors and earnings are restated.
  - In subsequent criminal investigation of CFO, government seeks to interview outside counsel about discussions with the CFO during the internal investigation. The Company consented.
  - CFO then seeks to exclude as privileged.

Are the Facts Confidential?

Ruehle in the District Court

- Outside counsel testified they gave Upjohn warning.
- CFO testified he didn't recall it and thought they were his lawyers too.
- Court found no notes or other written record of Upjohn warning and credited CFO.
- Found communication privileged under CA state standards (presumption of privilege based on "reasonable belief of client").

Are the Facts Confidential?

- Ruehle in the Ninth Circuit
  - No privilege applies because it was always the plan to disclose the results of the investigation to outside auditors and perhaps others, CFO knew that and, therefore, the communication was not intended to be confidential.
  - Also of interest:
    - Federal multi-part test, not CA test, applies in Federal Court.
    - No presumption of privilege and proponent has the burden of proof.
    - Finding of no Upjohn warning clearly erroneous.

Crime/Fraud Exception?

- "The attorney-client privilege does not apply to a communication occurring when a client:

  (a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or

  (b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud." Restatement § 82.

Crime/Fraud Exception?

- "Under the crime-fraud exception, attorney-client privilege 'does not extend to communications made for the purpose of getting advice for the commission of a fraud or a crime.'" In re Green Grand Jury Proceedings, 492 F.3d 976, 979 (8th Cir. 2007)(quoting United States v. Zolin, 491 U.S. 554, 563 (1989)).
- The same is true of attorney work product immunity. Id. at 980.

Crime/Fraud Exception?

- Consistent with the principle that the privilege belongs to the client, the focus is on what the client intends or accomplishes.
- The exception does not require any knowledge of or participation by the lawyer in the client's crime or fraud. See, e.g., Clark v. United States, 289 U.S. 1 (1933).

Privilege Claimed?

- Were the participants in the communication told that it was intended to be privileged?
- If the communication is in, or is reduced to writing, is the privilege claimed on the face of the document?

Privilege Not Waived?

- "[U]nder traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else." Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1427 (3d Cir. 1991).
- Traditionally, even if the disclosure was inadvertent. In re Grand Jury, 475 F.3d 1299, 1305 (D.C. Cir. 2007)(citing In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989).

Privilege Not Waived?

- Who is a third party?
  - "joint clients" or "co-clients:" "[M]ultiple clients engaging one or more common attorneys to represent them [all] on a matter of interest to all." Teleglobe, 493 F.3d at 362 & n.15. See also Restatement § 75, cmt. c.

Privilege Not Waived?

- Who is a third party?
  - "Community of Interest" or "Common Interest": "A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice." Id. at 365 (emphasis added) (quoting Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974)).

Privilege Not Waived?

- Who is a third party?
  - "The community-of-interest privilege has completely replaced the old joint-defense privilege for information sharing among clients with different attorneys." Teleglobe, 493 F.3d at 363-64 & n. 20 (citing Restatement § 76, Reporter's Note, cmt. b).

Privilege Not Waived?

- Who is a third party?
  - As indicated above, a given individual could be a "privileged person" when communicating facts to the lawyer, but not when the lawyer later communicates in the other direction if the individual has no "need to know." Restatement § 73.

Privilege Not Waived?

- Who is a third party?
- Ryan v. Gifford, 2008 WL 43699 (Del. Ch. 2008).
  - Shareholder derivative action against directors relating to backdating of options.
  - Board establishes a special committee (of one) with its own counsel.
  - Committee counsel performs an internal investigation.

Privilege Not Waived?

- Ryan v. Gifford
  - "Committee" and its counsel meet with individual director defendants and their counsel and disclose the contents of the report.
  - Shareholder plaintiffs then seek production of the report; everyone claims privilege and work product.

Privilege Not Waived?

- Ryan v. Gifford
  - Delaware Chancellor orders production and denies interlocutory appeal.
  - Privilege existed between special committee and special counsel.
  - That privilege likely did not extend to the corporation.

Privilege Not Waived?

- Ryan v. Gifford
  - Even if Special Committee's privilege extended to the corporation, it was waived by disclosure to the individual defendant directors who were not meeting in their fiduciary capacity, but in their personal capacity as defendants.
  - Special committee and individual directors did not share a "community of interest" because committee was charged with being objective and directors were defending themselves.

An Aside on Shareholders

- A corporation may not be permitted to assert its attorney-client privilege in a later derivative or minority shareholder action. Teleglobe, 493 F.3d at 355 & n. 8 (citing Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970)(shareholders may invade the privilege for "good cause"); Valente v. PepsiCo, Inc., 68 F.R.D. 361, 367 (D. Del. 1975)(corporation may not invoke the privilege in litigation against minority shareholder "absent some special cause."

Privilege Not Waived?

- As a general rule, voluntary disclosure of privileged information to the government waives the privilege as to private litigants. Westinghouse, 951 F.2d at 1425-26).
- Westinghouse specifically rejected the concept of "selective waiver." See, e.g., Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977)(en banc).

Privilege Not Waived?

- When the privilege (or attorney work product immunity) "is waived, its scope extends to 'all communications on the same subject matter . . . so that a party is prevented from disclosing communications which support its position while simultaneously concealing communications that do not.'" Roberts, 254 F.R.D. at 378 (quoting Stanford v. Roche, 237 F.R.D. 618, 625 (N.D. Cal. 2006). See also Teleglobe, 493 F.3d at 361 ("When one party takes advantage of another by selectively disclosing otherwise privileged communications, courts broaden the waiver as necessary to eliminate the advantage).

Privilege Not Waived?

- Revised Fed. R. Evid. 502 seeks to avoid the harshest results of the "All or Nothing" view.
- Applies to both ACP and AWP.
- An intentional waiver in a federal proceeding or to a federal agency waives the privilege only as to the disclosed communication or document unless the undisclosed material concerns the same subject matter and "they ought in fairness to be considered together."

Privilege Not Waived?

- Fed. R. Evid. 502
- Other disclosures in a federal proceeding or to a federal agency are not waivers if (a) inadvertent, (b) party took reasonable steps to prevent disclosure and (c) party promptly took reasonable steps to remedy (including, in litigation, Fed. R. Civ. P. 26(b)(5)(b)).

Privilege Not Waived?

- Fed. R. Evid. 502
- Disclosures in a state proceeding are not a waiver in a federal proceeding if (a) would not have been a waiver under this rule if made in a federal proceeding or (b) not a waiver under law of that state.

Privilege Not Waived?

- Fed. R. Evid. 502
- A federal court in litigation pending before it can provide by order that a particular disclosure will not operate as a waiver and that is controlling in federal and state proceedings.
- An agreement as to non-waiver is binding only on the parties to the agreement absent a court order.

Privilege Not Waived?

- In the federal system, only an Article III Court, and not an administrative agency, can make binding decisions regarding the applicability of the Attorney-Client Privilege in response to a federal subpoena. See, e.g., NLRB v. Interbake Foods, L.L.C., 2009 WL 3103819, at *2 (D. Md., Sept. 22, 2009).

Privilege Not Waived?

- Compelled, Coerced or "Encouraged" Waivers.
  - Beginning in 1999, significant controversy over the extent to which DOJ (or SEC or others) can demand that a corporation waive ACP or AWP as the price of "cooperation credit."
  - "Holder Memorandum" (1999)(willingness to waive and to turn over all internal investigation materials is a specific consideration in "cooperation" decisions made by prosecutors).

Privilege Not Waived?

- Compelled, Coerced or "Encouraged" Waivers.
  - "Thompson Memorandum" (2003) (strengthened the Holder Memorandum and made compliance by prosecutors mandatory).
  - "McNulty Memorandum" (2006) (acknowledged importance of ACP and AWP and instructed prosecutors to seek waiver only when there is "a legitimate law enforcement need" and not because "it is merely desirable or convenient").

Privilege Not Waived?

- Compelled, Coerced or “Encouraged” Waivers.
  - The Attorney-Client Privilege Protection Act (passed the House 2007)(Sen. Specter) would have precluded any federal prosecutor or agency from seeking a waiver of privilege, considering a valid assertion of privilege or various other defensive steps).

Privilege Not Waived?

- Compelled, Coerced or "Encouraged" Waivers.
  - "Filip to Specter Letter" (2008)
    - "Cooperation" will be measured by the extent to which a corporation discloses relevant facts and evidence, not its privilege waivers.
    - Federal prosecutors will not demand "Category II" privileged material (McNulty Memorandum: attorney notes, legal advice and similar information) as a condition of "cooperation."

Privilege Not Waived?

- Compelled, Coerced or “Encouraged” Waivers.
  - “Filip to Specter Letter” (2008)
    - Additional issues related to treatment of involved employees.
    - A-CPPA then died in the Senate
  - Current state of the law.

The Employee Cooperation Detour

- “I don’t want to have anything to do with this” or “I won’t rat out a fellow employee.”
- “I’m not going to talk to you without talking to my lawyer or without my lawyer present.”
- “I’m asserting my Fifth Amendment rights against self-incrimination.”
- “I won’t meet with you without my own witness.”

Refusal to Cooperate

- "[A]n agent has a duty to use reasonable effort to provide the principal with facts the agent knows, has reason to know, or should know when . . . the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal . . . ." Restatement (Third) of Agency § 8.11.

Refusal to Cooperate

- "[I]n most states, [an employee's] refusal to cooperate with an internal investigation constitutes a breach of the employee's duty of loyalty to the corporation and is good grounds [for dismissal]." Duggin, "Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview," 2003 Colum Bus. L. Rev. 859, 907 (2003)(internal quotations omitted).

Refusal to Cooperate

- Such refusals are routinely found to constitute unprotected conduct and to provide a legitimate, non-discriminatory reason for termination in the face of a claim of employment discrimination.
  - Haulbrook v. Michelin North America, Inc., 252 F.3d 696, 706 n.3 (4th Cir. 2001)(employee's refusal to communicate with superiors about necessary accommodations without his attorney present not protected activity under the ADA);
  - Merkel v. Scoville, Inc.,, 787 F.2d 174, 179-80 (6th Cir.), cert. denied, 479 U.S. 990. (1986)(employee's refusal to cooperate with employer's internal investigation was a legitimate, non-discriminatory reason for discharge).
  - Staub v. The Boeing Company, 919 F. Supp. 366, 370 (W.D. Wa. 1996)(employee's refusal to attend an internal meeting to discuss his future without his counsel present is not protected under the ADA).

Refusal to Cooperate

- Where it's a close call, some courts look to whether the employer's code of conduct, compliance procedure or other policies require cooperation in an internal investigation as a condition of employment.

Requests for Counsel

- "I'm not going to talk to you without talking to my lawyer or without my lawyer present."
- An employee has no Sixth Amendment right to counsel in an investigation by a private employer. Buerger v. Southwestern Bell Telephone Co., 982 F. Supp. 1247, 1251-52 (E.D. Tex. 1997).

Requests for Counsel

- Some courts see a distinction between a reasonable request to consult with counsel and a demand that counsel be present for the interview.
  - Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1086 (3d Cir. 1996)(discharge for refusal to testify in a deposition without a chance to consult personal counsel may be a pretext for retaliatory discharge, particularly where there was no written company policy requiring cooperation in litigation).
  - Jackson v. Lake County, Illinois, 2002 WL 80851 (N.D. Ill. 2002), subsequent op., 2003 WL 22127743 (N.D. Ill. 2003) (employee's refusal to participate in a potentially unlawful demand by the employer without a chance to consult counsel engaged in protected activity).

Requests for Counsel

- Potential Benefits to Permitting Employee Counsel
  - With an unusually shy or frightened witness, particularly one who is not the target of the investigation, the interview may be more productive with employee counsel than without.

Requests for Counsel

- Potential Benefits to Permitting Employee Counsel
  - Eliminates any confusion about representation or possibility of joint representation.
  - Particularly when interviewing senior management whose actions are at issue and are used to company counsel being “their” attorney.
  - Privilege issues can be addressed with Common Interest Agreements; DOJ no longer views as “non-cooperation.”

Requests for Counsel

- Employer Payment for Employee Counsel
  - Particularly for officers and directors, may be a statutory or by-law requirement.
  - Some states may require for all employees requiring counsel within the scope of their employment.
  - Reimburse v. Advance
  - Again, DOJ no longer views as "non-cooperation," after United States v. Stein, 435 F.Supp.2d 330 (S.D.N.Y., Jun. 26, 2006).

Self-Incrimination

- An employee has no Fifth Amendment right against self-incrimination:
  - Vis-à-vis a private employer.
  - In an employee discipline matter.
  - In a matter involving or potentially involving only civil liability.

Self-Incrimination

- If the matter involves potential criminal liability, it may be an issue for the (particularly public) employer if the issue is not directly related to a business need of the employer. See, e.g., Slochower v. Board of Education, 351 U.S. 944 (1956)(termination of public employee for invoking Fifth Amendment rights in HUAC investigation unrelated to job duties violated due process).

Employee Witnesses

- When the interview is scheduled or after you give the Upjohn warning, the individual says
  - "I won't meet with you unless I can have my co-worker Jane in here as a witness."
- In a unionized workplace, the employee has the right to a co-worker witness at an interview with management which reasonably could result in discipline. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

Employee Witnesses

- Whether a non-union employee has that right depends on who is in control of the NLRB when the case gets there.
- The current answer from the Bush Board is, "No." IBM Corp., 341 NLRB 1288 (2004).
- That answer has changed four times since 1980 and can be expected to change at this Board's first opportunity.

Employee Witnesses

- Weingarten Qualifications and Limitations
  - Limited to an investigatory interview which could lead to discipline; doesn't apply to a meeting to impose discipline.
  - The fellow employee is there as a witness and not an advocate.
  - An employee cannot insist on a witness, or a particular witness, if it unreasonably delays the interview.
  - The employer is always free to proceed without the interview.

If you Insist

- Any warning about disciplinary consequences should come from, and any discipline should be imposed by, someone other than the attorney/investigator.
- Document. Document. Document.

Practical Pointers

- You know the elements of the privilege and how it can be lost.
- You are largely in control of whether those elements will or won't exist. Don't surrender that advantage lightly or mistakenly.

Practical Pointers

- Don’t begin an investigation without a plan (an auditor doesn’t begin an audit without one) which, if the privilege is sought, documents as many of the elements as possible.
- Try to establish at the outset the purpose of the investigation and the ultimate use to be made of the results.

Practical Pointers

- Based upon the purpose, try to decide from the outset whether you even want to try to assert a privilege as to any or all related communications.
  - Is it realistic to think you can prove that the purpose is related to legal advice v. a business decision?
  - Will there be an obligation to self-report anyway?
  - Will there likely be some PR or other benefit to disclosing the details?

Practical Pointers

- If you do want to try and preserve the privilege, select the participants and structure the investigation with reference to the elements of the privilege
  - In-House v. Outside Counsel?
  - Which In-House Counsel is more purely a lawyer?
  - Regular v. Special Outside Counsel?

Practical Pointers

- Consider any benefit to breaking down a single investigation into multiple parts conducted by different people for different purposes.
  - You can't waive the privilege on an issue in one investigation and preserve it in another, but you could conceivably isolate one or more discrete and troublesome issues in their own investigation with a better chance of preserving the privilege.

Practical Pointers

- If it's not in writing, it may never have happened; if it is in writing, it certainly did. Make sure you write only the right things.
  - Document the elements of the privilege at every opportunity.
  - The simplest way to ensure that you don't have to produce a troublesome document is not to create it in the first place.

Practical Pointers

- The entire world doesn't need a daily update on what you're doing and certainly doesn't need it in writing.
  - Who really has a "need-to-know?"
  - It's not about demonstrating how hard you're working.
  - "CYA" memos and e-mails may accomplish precisely the opposite.

Practical Pointers

- Document the fact that the lawyer is acting as a lawyer.
  - Key language in outside counsel's retainer letter. See, e.g., Sullivan v. Warminster Twp., 274 F.R.D. 147, 151(E.D. Pa. 2011)(counsel's engagement letter specifically provided that the firm was being retained to investigate and provide legal advice in connection with the matter).
  - No reason why an in-house attorney's assignment to an investigation can't similarly be in writing.

Practical Pointers

- Document the fact that the lawyer is acting as a lawyer.
  - All written communications to the lawyer = “At your instruction and for the purpose of enabling you to provide legal advice, . . .”
  - All written communications from the lawyer = “You have requested [or I have been assigned to provide] legal advice concerning . . .”

Practical Pointers

- Document the fact that the lawyer is acting as a lawyer.
  - Even when principally reporting the factual results of an investigation, the lawyer should identify some of the legal issues implicated and, if possible, offer some legal advice, even if only as to recommended next steps to sharpen the advice.

Practical Pointers

- Document the Upjohn Warning and the relevant elements of the privilege before each witness interview.
  - At least prepare a written script for reference.
  - Consider reading it verbatim and recording the fact in the interview notes.
  - Consider providing it in writing and getting a written acknowledgment.

Practical Pointers

- Make and document an Upjohn-equivalent statement of the privileged nature of the communication at the beginning of a meeting or telephone conference.
- Document who participates in any such meeting or conference and their privileged role.
- A rubber “PRIVILEGED” stamp costs a lot less than a brief.

Practical Pointers

- "Claim the privilege" at every opportunity and document the fact.
  - Before a meeting with third parties, assert the privilege generally on behalf of the Company and disclaim the ability of any agent present to waive it, intentionally or inadvertently.
  - Assert the privilege generally and disclaim any intent to waive it when providing written responses to government inquiries, producing documents or responding to discovery requests.

Practical Pointers

- Attempt to limit the scope of necessary waivers or limited disclosures.
  - Consider any choice of jurisdiction (federal, state or which state).
    - If at all possible, disclose in a Federal proceeding or to a Federal agency to obtain the benefit of Fed. R. Evid. 502.
  - Try to identify and document a “community of interest” with the recipient.

Practical Pointers

- Attempt to limit the scope of necessary waivers or limited disclosures.
  - Seek a non-waiver agreement with the recipient even if only for evidentiary purposes.
  - Consider different versions of an investigative report with different contents for different audiences; everything doesn't have to be in one document.

Practical Pointers

- Avoid unintentional waivers.
  - To the extent humanly possible, restrict the use of e-mail to non-substantive matters, like scheduling, and don't transmit privileged documents by e-mail.
    - People just aren't careful.
    - Once e-mailed, the sender has no control over further distribution.

Practical Pointers

- Avoid unintentional waivers.
  - Limit the number and custody of reports and other documents.
    - Everyone with a “need-to-know” doesn’t necessarily have a “need-to-read.”
    - Everyone with a “need-to-read” doesn’t necessarily have a “need-to-keep-their-own-souvenir-copy.”

Conclusion

- Clearly understand the elements.
- Decide when and as to what information you wish to, and reasonably can, assert it.
- Plan, staff, conduct and document the investigation so as to establish the elements.

Conclusion

- Don’t be your own worst enemy.
  - Privilege issues arise most often because of something you do to yourself, not something someone else does to you.
  - This is the ultimate lesson of Nationwide.

Conclusion

- Nationwide.
  - Dispute was over “Document 529,” a legal strategy e-mail from in-house counsel to an otherwise appropriate group of executives and managers.
  - It spawned **five years** of interlocutory litigation and appellate briefs.
  - Why? What was such a big deal about Document 529?

Conclusion

- Nationwide
  - Remember the agents' counterclaim for tortious interference?
  - In the Document 529 e-mail, in-house counsel had opined that the company "cannot reasonably expect the lawsuits to succeed" and that the "primary purpose of the litigation is to send a message to current employees contemplating defection." Fleming, 992 A.2d at 66.

Conclusion

- The Real Questions Left Open by Nationwide:
  - How much did this five-year sideshow cost?
  - Where is the lawyer who wrote the 529 e-mail working today?
    - Probably not at Nationwide.

ATTORNEY-CLIENT PRIVILEGE

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