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Attorney-Client Privilege and Work Product Doctrine in Internal Investigations: Latest Developments for Corporate, Securities and White-Collar Attorneys

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ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN INTERNAL INVESTIGATIONS

Latest Developments for Corporate, Securities & White Collar Attorneys

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AGENDA

1. Fundamentals of Attorney-Client Privilege & Attorney Work-Product
2. Foundational Cases
3. Practical Considerations
4. Selection of Recent Cases

FUNDAMENTALS OF ATTORNEY-CLIENT PRIVILEGE

- Attorney-client privilege protects:
  - confidential
  - communication(s)
  - between a lawyer and a client (or agents)
    - *U.S. v. Kovel* (2d Cir. 1961) (presence of third-party does not destroy privilege if assistance is necessary or highly useful for effective communication between client and lawyer – e.g., interpreter)
  - that is made for purposes of legal advice
- Intended to encourage full disclosure between clients and attorneys
- Protects communications, not facts

FUNDAMENTALS OF ATTORNEY-CLIENT PRIVILEGE

- Narrowly construed. Can be waived by:
  - Sharing communications with third-parties
  - Sharing legal advice with non-client
  - Including non-lawyer clients without need to know on communications
- Does not protect business advice
  - Privilege does not necessarily apply because (i) an email says “privileged” in subject line or (ii) a lawyer is copied on the email
- Confidential does not mean privileged

ABA MODEL RULE 1.06: CONFIDENTIALITY OF INFORMATION

- A lawyer shall <u>not</u> reveal confidential information relating to the representation without informed consent. But a lawyer may reveal information relating to representation in specific circumstances, including:
  - To prevent reasonably certain death or substantial bodily harm
  - To prevent crime or fraud furthered by lawyer's services
  - To comply with a court order
  - To secure legal advice about lawyer's compliance with ethical rules
  - To establish a claim or defense in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer (based upon the client's conduct), or to respond to allegations concerning the lawyer's services

ABA MODEL RULE 1.13: ORGANIZATION AS CLIENT

- A lawyer employed or retained by an organization represents the entity acting through its duly authorized constituents
- A lawyer will report to and accept direction from an organization's authorized constituents
- A lawyer shall proceed as reasonably necessary in the best interest of the organization without:
  - involving unreasonable risks of disrupting the organization
  - revealing information relating to the representation to outside persons
- A lawyer representing an organization must take reasonable remedial actions in certain circumstances

FUNDAMENTALS OF ATTORNEY-CLIENT PRIVILEGE: RELEVANT FEDERAL RULES

- FRE 501
  - Common and state law govern claims of privilege
- FRE 502
  - (a) Effect of disclosure in federal proceeding
  - (b) Effect of inadvertent disclosures
  - (c) Effect of disclosure in state proceedings
  - (d) & (e): Court orders / agreements regarding waivers

FUNDAMENTALS OF ATTORNEY WORK-PRODUCT PROTECTION

- A party is not entitled to obtain discovery of "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative" unless the party shows substantial need and an inability to obtain the substantial equivalent of the documents without undue hardship
  - Fed. R. Civ. P. 26(b)(3)
- Work-product doctrine is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye towards litigation free from unnecessary intrusion by adversaries.
  - *Hickman v. Taylor*, 329 U.S. 495 (1947)
- Fact vs. opinion work product

2. FOUNDATIONAL CASES

FOUNDATIONAL CASE: *UNITED STATES V. UPJOHN* (1981)

- IRS summons sought documents related to Upjohn's internal investigation into possible improper payments to foreign government officials
- Upjohn refused to produce documents due to privilege and work-product concerns
- Lower courts enforced summons
  - District Court found that privilege had been waived
  - 6^{th} Circuit found that privilege applied only to a "control group" – i.e., decision-makers at the corporation

FOUNDATIONAL CASE: *UNITED STATES V. UPJOHN* (1981)

- Supreme Court rejected the "control group" test for application of privilege in corporate context
  - Did not account for fact that privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."
- Held that responses to questionnaires sent to foreign managers and any notes taken of those conversations are privileged
- Remanded on issues related to work product

FOUNDATIONAL CASE: *IN RE KBR ET AL* (D.C. CIR. 2014)

- KBR employee filed a False Claims Act complaint
- During discovery, employee sought documents re KBR's internal investigation into alleged fraud; KBR refused to provide due to privilege / work product
- District Court:
  - Privilege did not apply because
    - Communications would not have been made "but for" the fact that legal advice was sought; and
    - KBR's investigation was undertaken primarily pursuant to regulatory law and corporate policy, not for purposes of legal advice
  - Ordered KBR to produce documents; KBR filed petition for mandamus

FOUNDATIONAL CASE: *IN RE KBR ET AL* (D.C. CIR. 2014)

- D.C. Circuit granted writ of mandamus & vacated order of production
  - KBR was "materially indistinguishable" from *Upjohn*
    - Investigation conducted under auspices of KBR Legal Dept.
    - Investigation initiated to gather facts and ensure compliance with law after being informed of potential misconduct
    - Interviewed employees were informed that investigation was being directed by Legal Dept. and asked to keep discussion confidential (the "*Upjohn* Warning")
    - Rejected contention that interviews needed to be conducted by attorneys
      - Sufficient if done at Legal Dept.'s direction

FOUNDATIONAL CASE: *IN RE KBR ET AL* (D.C. CIR. 2014)

- D.C. Circuit granted writ of mandamus & vacated order of production
  - Affirmed use of "primary purpose" test for analyzing privilege claims
    - District Court had concluded privilege would not apply unless <u>the sole purpose</u> of the communication was for legal advice (vs. compliance reasons)
  - Primary Purpose: Was obtaining or providing legal advice <u>a primary purpose</u> of the communication, meaning one of the significant purposes of the communication?
    - If so, privilege applies.
  - Court of Appeals permitted District Court to consider other reasons why privilege would not attach.

FOUNDATIONAL CASE: *IN RE KBR ET AL* (D.C. CIR. 2014)

- After remand, District Court entered two orders that required production of KBR internal investigation documents, finding:
  - KBR had impliedly waived privilege during 30(b)(6) deposition, which included investigation as a topic
  - KBR witness testified that he had reviewed investigation documents and that KBR had notified U.S. DOD about possible violations of the Anti-Kickback Act, but that KBR had not produced a copy of the report to DOD
  - KBR's counsel repeatedly instructed the witness not to answer questions about the contents of the investigation on the basis of privilege / work product

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FOUNDATIONAL CASE: *IN RE KBR ET AL* (D.C. CIR. 2014)

- After the deposition, KBR moved for summary judgment, again acknowledging that it had made disclosures to the US Government
- District Court ruled KBR to produce investigative documents because:
  - KBR had impliedly waived privilege by using the investigative documents in its filings
  - KBR had waived privilege when witness reviewed documents (FRE 612)
  - KBR had waived privilege under the “at issue” doctrine
  - Documents were discoverable “fact” work product
- KBR files a second writ of mandamus

FOUNDATIONAL CASE: *IN RE KBR ET AL* (D.C. CIR. 2014)

- D.C. Circuit grants writ of mandamus
  - FRE 612 balancing test was inappropriate because witness did not review materials during deposition or testify about substance
    - Privilege and work product could be defeated by noticing deposition on topic of investigation (which violates *Upjohn*)
  - Witness's general assertions not enough to justify waiver
  - Investigation report contained mental impressions that warranted protection; not just "fact" work product
- Court denied KBR's request for reassignment

3. PRACTICAL CONSIDERATIONS

PRACTICAL CONSIDERATIONS

<u>Initial Considerations That Affect Analysis of Privilege / Work Product</u>

- Who is the client?
- Who should direct the investigation?
- Who should conduct the investigation?
- For what purpose is the investigation being conducted?
- To whom should the investigators report?
- Involvement of / reporting to other stakeholders (e.g., outside auditors)?

PRACTICAL CONSIDERATIONS

- Who should direct the investigation?
  - Internal counsel
  - Audit committee
  - Internal audit / finance / business unit

- Who should conduct the investigation?
  - Internal counsel / outside counsel
  - Internal investigator / external investigator
  - Internal audit / human resources

PRACTICAL CONSIDERATIONS

- Who should conduct the investigation?
  - *Cooper v. Richland Cty. Rec. Comm'n* (D.S.C. 2018) (investigative report prepared by outside counsel was protected by work product and plaintiff did not establish exception (i.e., substantial need/hardship))
    - No per se rule that investigation conducted by attorney is privileged or work product. Must be done for purpose of obtaining or providing legal advice. *See, e.g., Cicel (Beijing) Science & Tech. Co. v. Misonix* (E.D.N.Y. 2019)
  - *SEC v. Navellier & Associates, Inc.* (D. Mass. 2018) (third-party consultant's compliance review and mock audit was neither privileged nor protected by work product because no litigation anticipation at the time it was prepared)

PRACTICAL CONSIDERATIONS

- Who should conduct the investigation?
  - *Miller v. City of Los Angeles* (C.D. Cal. 2015) (city properly asserted work product over investigation conducted by consultant hired by city's attorney as an agent of the city)
  - *Koumoulis v. Indep. Fin. Mktg. Grp. Inc.*, (E.D.N.Y. 2014) (work product did not apply to internal investigation conducted by H.R. employee, even though employee consulted with counsel during the investigation about how to conduct the investigation)

PRACTICAL CONSIDERATIONS

- For what purpose is the investigation being conducted?
  - To provide legal advice
  - In anticipation of litigation vs. normal business operations
    - Consider memorializing in engagement letter
    - *E.g., Halladay v. Royal Caribbean Cruises* (S.D. Fla. 2020) (cruise line failed to establish that post-accident engineering report was prepared in anticipation of litigation; rather, it was "the type of report which a cruise ship operator would have assigned in the ordinary course of business after an accident, regardless of whether litigation was anticipated"; report was therefore ordered produced)

PRACTICAL CONSIDERATIONS

- Representational issues
  - Who is the client?
    - Importance of the *Upjohn* warning
      - *E.g., SEC v. Rashid* (S.D.N.Y. 2018) (court granted SEC's motion to compel where individual defendant could not establish "common interest," in part because of *Upjohn* warning given by company counsel)
  - Reporting issues
    - Protocols regarding sharing investigative information
    - Should anyone be excluded based on allegations of wrongdoing?
    - Other stakeholders (e.g., auditors, D&O insurers, etc.)

PRACTICAL CONSIDERATIONS

- Interview Notes & Memoranda
  - Most courts view as protected work product and may be considered “opinion” work product if they contain attorneys’ mental impressions and analysis (vs. a transcript of the interview)
    - *E.g., In re Cardinal Health Inc. Sec. Litig.* (S.D.N.Y. 2007) (quashing subpoena for investigative materials where notes contained mental impressions and analyses because such information is “classic, core work product”)
  - BUT … potential waiver of privilege if investigative information is shared with regulatory agencies

PRACTICAL CONSIDERATIONS

- Potential waiver if investigative information is shared with regulatory agencies
  - Subject matter waiver is possible
    - FRE 502(a): If a disclosure is made … to a federal agency and waives attorney-client privilege or work product protection, the waiver extends to undisclosed communications only if:
      - the waiver is intentional
      - the disclosed and undisclosed communications or information concern the same subject matter, and
      - they ought in fairness to be considered together.
        - Often considered a "sword and shield" issue
  - *Pearlstein v. Blackberry Ltd.* (S.D.N.Y. 2019) (per 502(a), ordering production of certain privileged communications that contained information that had been shared with SEC)

PRACTICAL CONSIDERATIONS

- Possible privilege waiver by sharing information with regulatory agencies
  - *In re Banc of California Sec. Litig.* (C.D. Cal. 2018) (ordering production of counsel's notes / memoranda of interviews after interview summaries shared with SEC)
  - *In re GM LLC Ignition Switch Litig.* (S.D.N.Y. 2015) (protected interview memos and attorney notes from production in litigation even though final report was produced to government)
  - *In re Weatherford Int'l Sec. Litig.* (S.D.N.Y. 2013) (court ordered production of materials actually disclosed to SEC and factual work product underlying attorney interview notes; but opinion work product protected)
  - *Gruss v. Zwirn* (S.D.N.Y. 2013) (ordering production of interview notes and summaries because portions of them were voluntarily and selectively disclosed to SEC in PowerPoint presentation)

PRACTICAL CONSIDERATIONS

- Confidentiality agreements are helpful but not foolproof
  - *In re Pacific Pictures Corp.* (9th Cir. 2012) (privilege was waived as to documents produced to DOJ despite existence of confidentiality agreement)
  - *Zwirn* (S.D.N.Y. 2013) (defendants waived privilege and work product protection as to attorney notes and summaries of interviews, excerpts of which were voluntarily provided to SEC; confidentiality agreement with SEC did not restrict SEC's use of disclosed information)
  - *In re Steinhardt* (2d Cir. 1993) (recognizing that confidentiality agreements may be effective)

PRACTICAL CONSIDERATIONS

- Disclosure to outside auditors
  - *U.S. v. Ruehle* (9th Cir. 2009) (statements by CFO to interviewing company counsel not privileged where CFO knew that statements would be shared with outside auditors)
- Disclosure to public relations consultant
  - *Pearlstein v. Blackberry Ltd.* (S.D.N.Y. 2019) (narrow exception to waiver if public relations consultant is assisting lawyers during grand jury investigation)
- Putting investigation & report “at issue” (e.g., reasonableness of investigation)
  - *Doe v. USD No. 37* (D. Kan. 2019) (granting motion to compel production of investigative report prepared by outside counsel after school district defendant put investigation and report “at issue” pursuant to *Faragher v. City of Boca Raton* affirmative defense (which waived privilege and work product protections))

4. SELECTION OF RECENT CASES

RECENT CASES

- *Jane Doe v. Baylor University* (W.D. Tex. 2017)
  - Baylor University hired law firm to investigate Baylor's responses to Title IX complaints and related compliance issues
    - Baylor and law firm later amended engagement letter to specify that the firm was providing legal advice in anticipation of litigation
    - Following conclusion of investigation, Baylor released documents summarizing the facts found, and providing list of recommendations
  - Thereafter, 10 former students sued Baylor alleging that its response to the reports of sexual assault was negligent

RECENT CASES

- *Jane Doe v. Baylor University* (W.D. Tex. 2017)
  - Plaintiffs sought production of materials provided to, and produced by, the law firm in connection with investigation
  - Baylor objected on grounds of attorney-client privilege and work product protection
  - Plaintiffs argued:
    - No privilege or work product because law firm was not providing legal services in anticipation of litigation
    - Baylor waived privilege by making public disclosures regarding the investigation
    - Even if privilege attached to some communications, Baylor could not use a categorical privilege log

RECENT CASES

- *Jane Doe v. Baylor University* (W.D. Tex. 2017)
  - District Court: Attorney-client privilege applied to communications between Baylor and law firm because Baylor sought legal advice from law firm
    - Engagement letter: Baylor engaged law firm to review Baylor's compliance with federal law, which means legal advice
    - Subsequent amendment of engagement letter did not change scope of law firm work (supported conclusion that law firm always provided legal advice)
    - Court rejected plaintiffs' contention that conducting an independent investigation is distinguishable from providing legal advice (citing *Upjohn*)

RECENT CASES

- *Jane Doe v. Baylor University* (W.D. Tex. 2017)
  - **BUT** Baylor waived privilege by disclosing the law firm's findings and recommendations
    - The "Findings of Fact" were a "publication of evidence of the communication"
      - Not "generic statements" about consulting with counsel; a summary of the entire investigation
    - "Baylor chose to publicly release a detailed summary of [law firm's] investigation that disclosed, among other things, attorney-client communications. While the information contained in those summaries was previously confidential, Baylor's decision to prepare and release a summary of those communications indicates its intentional waiver of that confidentiality."
  - Sword and shield problem

RECENT CASES

- *Jane Doe v. Baylor University* (W.D. Tex. 2017)
  - **BUT** Baylor waived privilege by disclosing the law firm's findings and recommendations and scope of waiver was a "subject matter" waiver
    - "When a party waives the attorney-client privilege, it waives the privilege as to all communications that pertain to the same subject matter."
    - "Because of [Baylor's repeated disclosures regarding the investigation], and because of the level of detail publicly released about the investigation as a whole, the Court concludes that the waiver encompasses the entire scope of the investigation, and all materials, communications, and information provided to [law firm] as part of the investigation."

RECENT CASES

- *Jane Doe v. Baylor University* (W.D. Tex. 2017)
  - Work product doctrine protected law firm's documents because they were created in anticipation of Title IX litigation
    - Evidence showed that its decision to hire the law firm to investigate Title IX compliance was primarily motivated by its anticipation of litigation, not part of a "routine practice" of the university – e.g.,
      - News reports of sexual misconduct by Baylor football players
      - Declaration from university general counsel and regents

RECENT CASES

- *Jane Doe v. Baylor University* (W.D. Tex. 2017)
  - Baylor did <u>not</u> waive work product protection
    - "waiver is more narrow in the context of the work-product doctrine…[and] is generally limited to instances where the quality and substance of an attorneys work product have been directly placed at issue in the litigation by the party asserting the privilege"
  - Baylor did not rely on the law firm's work as part of its litigation defense
    - Speculation by plaintiffs that Baylor would use the investigation in the future was insufficient at the current time (although the Court said it would entertain a new motion if Baylor did rely on the investigation in defending the litigation)
    - Plaintiffs had not carried burden of "substantial need"
  - Litigation and disputes regarding production of law firm material remain ongoing

RECENT CASES

- *In re Smith & Nephew Birmingham Hip Implant Litig.* (D. Md. May 2019)
  - Attorney-client privilege and work product applied to:
    - “Briefing document” prepared by outside counsel (at inside counsel’s request) to provide legal advice to company board of directors regarding litigation
    - Minutes of board meetings concerning presentation of “Briefing Document”
    - PowerPoint presentations related to “Briefing Document” – <u>even though</u>
      - Presentations inadvertently produced (FRE 502 “clawback”)
      - Presentations shared with consulting firm hired to help prepare for presentation to FDA

RECENT CASES

- *Cicel (Beijing) Science & Tech. Co. v. Misonix Inc.* (E.D.N.Y. 2019)
  - U.S. medical device maker sued by Chinese distributor after U.S. company terminated contract with distributor allegedly because of FCPA-related concerns
  - U.S. company had hired law firm to conduct an internal investigation into conduct by Chinese company, and ultimately disclosed concerns to DOJ / SEC
  - In litigation, Chinese company sought materials related to internal investigation
    - U.S. company argued that the materials were protected by work product and privilege

RECENT CASES

- *Cicel (Beijing) Science & Tech. Co. v. Misonix Inc.* (E.D.N.Y. 2019)
  - Court:
    - U.S. company retained counsel for primary purpose of providing legal advice, so communications with investigation counsel are privileged
      - Law firm personnel provided *Upjohn* warnings to witnesses
    - Law firm also retained in anticipation of litigation, including government investigations and possible civil litigation, so investigative materials (e.g., emails and memos derived from investigation) are protected by work product
      - Notes of interviews reflect the mental impressions of lawyers and "are entitled to the highest level of work product protection"

RECENT CASES

- *Cicel (Beijing) Science & Tech. Co. v. Misonix Inc.* (E.D.N.Y. 2019)
  - Court:
    - U.S. company provided SEC/DOJ with underlying documents about Chinese company's business practices and U.S. company's concerns about those practices, but not privileged materials
    - U.S. company produced the materials to the Chinese company in the litigation

RECENT CASES

- *Parneros v. Barnes & Noble, Inc.* (S.D.N.Y. 2019)
  - Former CEO of bookstore chain sued company for breach of contract (for failure to pay severance) and defamation after he was terminated for allegedly harassing executive assistant
  - CEO sought documents company withheld as privileged, including
    - Documents prepared as part of GC's investigation into allegations against CEO
    - Notes from June 2018 meeting with potential acquirer of company
    - Drafts of press release announcing CEO's termination
    - Report prepared by outside counsel for company board of directors in advance of board meeting at which decision was made to terminate CEO
    - Minutes of board meeting at which Board voted to terminate CEO

RECENT CASES

- *Parneros v. Barnes & Noble, Inc.* (S.D.N.Y. 2019)
  - Applying NY law, the court held:
    - Notes of interviews prepared by GC and other corporate officer (who conducted interviews at GC's request) were protected by attorney-client privilege
    - GC's notes of meeting with potential acquirer were <u>not</u> privileged nor protected by work product (ordered to be produced)
    - Draft press releases send to GC and/or outside counsel for legal advice were privileged, but other drafts were not protected by work product (not in anticipation of litigation) (ordered to be produced)
    - Outside counsel report, along with drafts and related communications, were privileged (including relevant, redacted portions of board minutes)

RECENT CASES

- *Parneros v. Barnes & Noble, Inc.* (S.D.N.Y. 2019)
  - Applying NY law, the court held that the company had <u>not</u> waived privilege by:
    - stating in press release that the CEO had been terminated for violating of company's policies and that Board took action with advice of outside counsel
    - placing the advice of counsel "at issue" in the litigation
    - individual director's deposition testimony concerning his knowledge of the CEO's alleged conduct

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