

Common Privilege Issues in Internal and Government Investigations

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May 9, 2024
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Five Scenarios

- Disclosures to the Board of Directors
- Disclosures between and among Represented Employees
- Disclosures to Insurers
- Disclosures to the Government (voluntary & compelled)
- What to do when the government seizes privileged records

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Scenario No. 1 – Disclosures to the Board

You hire outside counsel to investigate a whistleblower complaint concerning alleged false representations in the company's SEC filings. Outside counsel completes its investigation and is asked to brief the Board of Directors.

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Attorney-Client Privilege: The Basics

Communication

Made between
Attorney and Client

Kept in
Confidence

For obtaining or
providing legal
advice

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Attorney-Client Privilege: Who's Protected?

- Communication between “attorney” and “client”
 - In-house counsel often wears multiple hats
 - Must be careful about which hat you are wearing
- Information provided by employees typically protected if:
 - Communication made to counsel acting as counsel
 - At direction of management for the purpose of securing legal advice
 - Concerning subject within the scope of employment
 - Employee knows purpose of the communication is for corporation to procure legal advice

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Attorney-Client Privilege: What's Protected?

- Legal advice and communications that will facilitate provision of legal advice
- What about mixed communications?
 - Supreme Court left open a circuit split on communications that include both legal and non-legal advice (In re Grand Jury, 2023)
 - Most circuit courts use the “primary purpose” test
 - D.C. Circuit uses the “significant purpose” test
 - Try to avoid these types of communications – separate out the privileged material where possible

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46th Annual Corporate Counsel Institute session

"Did You Just Waive Privilege? Protecting Privilege and Attorney Work Product"