

# Common Privilege Issues in Internal and Government Investigations

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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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First appeared as part of the conference materials for the  
46<sup>th</sup> Annual Corporate Counsel Institute session

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