



OVERVIEW CONSIDERATIONS FOR PROTECTING PRIVILEGES IN INTERNAL INVESTIGATIONS

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When facing an internal investigation, it is essential for a corporation and its employees to be fully aware of the potential advantages and pitfalls regarding attorney-client privileges and work product protections during each stage of the investigation.

APPLICABLE PRIVILEGES IN CORPORATE INVESTIGATIONS

The attorney-client privilege is an evidentiary rule encouraging the exchange of full and frank information between attorney and client by protecting the information exchanged from disclosure to others typically defined as: (1) Communications; (2) between lawyer and client; (3) for the purpose of rendering legal advice; and (4) an intent that the communication be confidential.

Another protection applicable in the corporate setting is the work product doctrine. This doctrine applies to documents and other materials prepared in anticipation of litigation or for trial. Information prepared under the work product doctrine is protected from disclosure unless the party requesting disclosure can prove a substantial need for the information and an undue hardship in obtaining the same information through other means.

SHOULD THERE BE AN INTERNAL INVESTIGATION?

A corporation may have no choice but to initiate an internal investigation if the government is already investigating the corporation or if a private lawsuit has been commenced.

A corporation may choose to conduct a proactive internal investigation for several reasons including: the anticipation of a governmental investigation, compliance concerns, reporting issues, or employee complaints. The board of directors has a duty of care in the management of the corporation, and should order an internal investigation for any threat to the compliance of that duty.

There are advantages to conducting a proactive internal investigation. A proactive investigation will permit more time for a thoughtful and complete investigation, allowing for the implementation of proper investigative procedures and making it less likely that information obtained from the investigation will be leaked or otherwise escape the attorney-client privilege and work product protections.

There are also disadvantages to conducting an internal investigation in a proactive manner. The investigation may reveal a situation worse than originally anticipated, and the corporation will be forced to deal with the results. It is in this situation that potential waiver of privileges becomes a substantial threat in internal investigations. In many instances, unless the proper precautions are taken with respect to privileges, information discovered in the investigation is fair game for discovery by the government or a private party in a potential lawsuit. Once a corporation decides to commence an internal investigation, precautions must be taken to protect the information that will flow from the investigation.

DEFINING THE SCOPE OF THE INVESTIGATION

Making clear at the outset what the scope of the investigation will be is important for several reasons in connection with attorney-client privilege and work product protections. A clearly defined scope allows for the identification of individuals within the corporation who will need to be involved in the investigation, either as a facilitator or as a potential witness. If the relevant individuals are identified early in the investigation, more planning can be done to address how the information should be collected and documented. The information should flow

through an attorney to make it more likely that the information will have the attorney-client privilege attach to protect the information from disclosure.

A clearly defined scope also allows for timely document and email preservation notices to be sent to the departments or individuals that will be subject to the investigation. If the relevant documents have been destroyed because there wasn't proper notice, the government may view the destruction as intentional and charge the corporation with obstruction of justice. The existence of information withheld as privileged is likely less of a credibility issue than the destruction of potentially relevant evidence.

Finally, the scope of the investigation should be defined in the context of seeking legal advice. Whether it be from in-house counsel or an outside attorney, the documentation surrounding the scope of the investigation should be clear in that regard. Any documentation linked to the investigation has a better chance of being considered attorney-client privileged or work product protected if it can be linked to the need for legal advice, regardless of whether or not the documentation has come directly from an attorney. If it was prepared at the direction of an attorney for the purposes of providing legal advice, there is a strong argument that it is privileged.

WHO SHOULD BE INVOLVED IN THE INVESTIGATION?

In-house Counsel

A corporation may be tempted to rely on its in-house attorney to handle the internal investigation. The use of in-house corporate counsel presents many challenges regarding attorney-client privileges and work product protection issues.

One challenge relates to the nature of the in-house attorney's role within the corporation. Many corporate attorneys are responsible for not only legal advice, but business advice as well. In-house counsel may be overseeing entire departments of non-legal employees. Courts have determined that attorney-client privileges do not attach to what is considered purely business advice. When it comes to communications containing mixed business and legal advice, many courts will require production of the mixed communication if it cannot be established which portions contain legal advice and which are of a business nature.

Another set of challenges with respect to the use of in-house counsel involve the perceived relationship between individuals within the corporation and the potential belief that they as individuals are represented

by in-house counsel, when in fact they are not. If the in-house attorney has actually represented individuals that may be part of the investigation, there may be a conflict of interest and that particular attorney should not be used in the investigation.

Outside Counsel

The best way to ensure that communications exchanged during an internal investigation are protected by the attorney-client privilege is to use outside counsel. There are other advantages to using outside counsel as well. Outside counsel will provide a fresh perspective on potential problems with compliance programs and other procedures in place, which likely gave rise to the need for the investigation. Furthermore, hiring outside counsel that specializes in internal investigations may be the most efficient and ultimately cost effective way to conduct the investigation.

There are disadvantages to hiring outside counsel as well. It will likely take a considerable amount of time for outside counsel to become familiar with the particular business practices of the corporation and formulate a plan for implementing the investigation. Additionally, employees may not (and probably should not) trust outside counsel. An employee may withhold relevant information based on this lack of trust.

Regardless of whether the investigation is headed up by an in-house attorney or outside counsel or a combination of the two, each written communication to the board or other corporate representative relating to the investigation must relate only to the investigation and contain legal impressions or advice relating to the investigation.

Experts and Consultants

Oftentimes there will be a need for an expert or consultant in the investigation, such as a forensic accountant or an IT professional. If the need arises, the expert or consultant should be retained directly by counsel and the relationship should be reflected in a formal engagement letter. This will further establish attorney-client and work product protections stemming from the work conducted by the expert or consultant.

THE INVESTIGATION

The investigation will involve interviews with individuals within the corporation, and special considerations must be made during those interviews. Courts have set forth guidelines for communications with individuals under which the information obtained will be protected by the corporation's attorney-client privilege. It must be made clear

that the interview is being conducted at the direction of the board for the purpose of obtaining legal advice and should remain confidential. To remain within the attorney-client privilege, the information obtained from the individual should relate to the individual's corporate duties and be necessary for the investigation. The privilege belongs to the corporation not the individual employees. The corporation may divulge information that may incriminate the individual and the individual should be made aware of that fact.

The moment it becomes evident that an individual is involved in the wrongdoing, counsel should inform the individual that they may seek independent legal counsel, and that the corporation will not be representing them. When it comes to the payment of legal fees, the individual should be informed that the corporation is not responsible for the attorney fees.

RESULTS OF THE INVESTIGATION

Whether to issue a report summarizing the results of the investigation may be troublesome, especially if the corporation is not currently under investigation by the government. If the investigation was carefully conducted a report may be protected as attorney-client privileged and as work product. However, providing the report to the government may demonstrate credibility and cooperation to gain favorable consideration.

CONCLUSION

Although there is no guarantee on how the government or court will receive a corporation's assertion of attorney-client privilege and work product protection claims, the corporation at the very least will possess more options if the assertions are made intelligently and with purpose from the very beginning of the investigation.



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