Speakers

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Agenda

1. Privilege basics
2. Application for internal investigations
3. Traps for the international enterprise
4. Hypotheticals
Attorney Client Privilege (US)

- Communication
- Between a client and a lawyer
- Legal advice
- Confidentiality
- No crime/fraud
- No waiver
Dual Roles and Privilege

- What color is your hat today?
- Business or legal?
- Compliance or legal?
- Domestic or international?
- Looking behind the names – the “Predominant” purpose test.
Common Client Questions

- HEADER NOT ENOUGH
- THE ‘CC PARADOX
- The Sword / Shield Dilemma
  - Selective Waiver – if you base advice internally (or to your Board) on materials that you later want to claim to be privileged, you run the risk that …
  - Impact?
Work Product Doctrine

- Protects documents and other tangible things prepared in anticipation of litigation

- 2 Fundamental differences with the a/c privilege:
  - Must be in anticipation of litigation
  - No need for an attorney to be doing the work
  - Viewed in tiers: fact vs. opinion

- The investigator dilemma (see hypos)
Other Privileges to Consider

- **Marital (likely not relevant for what we do).**
  - But, depending on the issue, could be -- recent shareholder derivative suit where it became highly relevant...

- **Accountant-client privilege**
  - Minority view. But, under federal law (court by court, and limited), Missouri, Illinois, or …?
  - Take a look if your company regularly conducts audits …
Privilege and the Multi-National Company

- Disclaimer; but,
- Traps everywhere!
  - Does US law apply?
    - A US Court does not automatically mean US law.
  - What happens if the answer is, “no”?
    - Russia (privilege applies to external counsel only).
    - China (likely no privilege)
    - Japan, Hungary (attorney cannot be forced to disclose but if client holds communication, it may be forced to do so)
    - EU-specific courts (external attorneys only qualified to practice in state that is a member of the European Economic Area)
    - Brazil (ceases to exist if a client insults his lawyer) !!!
Please see your handouts
Employment

- Who is the client?
  - Issue an *Upjohn* warning when necessary, which specifies who the lawyer represents

- Former Employees
  - Privilege covers time while employee, but might not after employment relationship ends

- Employee Interviews
  - Privilege does not shield facts.
  - Investigators could become witnesses.
  - Notes are likely relevant too, especially if investigation is part of defense.
Internal Investigations

- Legal advice must be a primary purpose
- Helpful to have lawyers initiate, direct, and/or oversee the review
  - “Provision of legal advice” privilege element
  - Ensure non-lawyers are agents of lawyers
- Ensure findings only reported to people for whom it does not erode privilege
- Rules are often jurisdiction specific
Government Investigation / CID

- What to share internally?
- What to share with the government?
  - Balance cooperation with retention of privilege … may not be possible to retain privilege depending on your circumstance.
  - But,
    - Attempt to limit by sharing facts only, without opinion WP.
    - Negotiate a confidentiality agreement, if possible.
    - Mark all documents as being FOIA exempt
- Negotiate the scope of the CID to minimize impact on privilege
Preserving Privileges In a Merger

- In mergers under Delaware law, a selling entity’s privileges pass to the purchasing entity unless otherwise specified
  - *Great Hill* case
  - The parties may specify otherwise in their agreement

- Other jurisdiction’s rules vary, so be cognizant of that when choosing venue and governing law
  - For example, in New York, an acquired entity may still invoke its pre-merger privileges by default
Helpful Privilege Sources

Internal Investigations and Dual Role Issues:
- ACC Legal Resources: Top Ten Tips for Protecting the Privilege, February 2016.
- ACC Legal Resources: Attorney/Client Privilege for In-House Counsel, July 2011.
- Dallas Bar Association, Privilege Tips for In-House Counsel with Dual Legal and Business Roles.
- Pennsylvania Bar Association, Attorney-Client Privilege in the Corporate Setting: How to Keep Your Confidential Information Confidential.

Privileges after a Merger:
Helpful Privilege Sources

Government Investigations, Selective Waiver / Sword and Shield, and Privileges Abroad:

- In re Kellogg Brown & Root, Inc., 796 F.3d 137 (D.C. Cir. 2015).
- Solis v. Food Employers Labor Relations Ass’n, 644 F.3d 221 (4th Cir. 2011).
- U.S. v. Williams Companies, Inc., 562 F.3d 387 (D.C. Cir. 2009)
- In re Mutual Funds Investment Litigation, 251 F.R.D. 185 (D.Md. 2008) (citing, inter alia, In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988)).
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