Confidentiality Under Fire:

How In-House Counsel Can Survive the Onslaught Against The Attorney-Client Privilege and The Attorney Work Product Doctrine

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Introduction – Scope of Presentation

- What communications are protected by the attorney-client privilege?
- What is the attorney work product doctrine, and how does it differ from the attorney-client privilege?
- What are some of the “hot topics” in these areas?
- How do these rules apply in the context of a criminal investigation?
- Under what circumstances might a company want to waive the attorney-client privilege?

Attorney-Client Privilege
Generally

- A client – whether or not a party – has a privilege to refuse to disclose, and to prevent another from disclosing, a CONFIDENTIAL COMMUNICATION between the CLIENT and his/her LAWYER. (Evid. Code, § 954.)

- The privilege commences upon a client's first consultation and lasts as long as the holder is in existence. (Evid. Code, § 954.)

- As long as there is a holder in existence on behalf of a defunct entity client (corporation, partnership, LLC), the privilege survives the dissolution of the entity. (Evid. Code, § 953(d).)

Attorney-Client Privilege
Federal Law

- In federal question cases, privileges are determined under federal common law. The Ninth Circuit describes the attorney-client privilege as follows:

  "When legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at the client's instance, permanently protected from disclosure by the client or by the legal advisor, unless the protection be waived."

Who Counts As a "Lawyer"?

- "Lawyer" includes both a business entity's in-house and outside counsel.
- "Lawyer" includes counsel for an entity's wholly-owned subsidiary.
- BUT: In-house counsel not acting in a lawyer capacity are not subject to the privilege.

What Counts As a “Communication”?

- Communications between a corporation’s employees and its attorneys are privileged to the extent such communications are within the scope of the employee’s responsibility or the employee is a co-party with the corporation.

- Communications between corporate counsel and a corporate employee may be privileged if the employee (even if not a co-party to litigation) is the “natural person” to speak for the corporation on the subject of the communication.

Statements By Witnesses May Not Be Privileged "Communications"

- In general, communications to a corporate lawyer by an employee who is simply a witness to some occurrence do not constitute protected communications.
- However, if the employee's connection with the matter arises out of the fact that his/her statement or report is required "in the ordinary course of business," the statement is that of the corporation and may be protected.
- Such statements/reports are protected if their dominant purpose is for confidential transmittal to the corporation's counsel.

Deciding Whether a Statement Qualifies For The Privilege

- Example 1: P sued D for personal injuries because of a fall on a sidewalk. Corporate employee had performed work on the sidewalk and had given a statement about the incident to a corporate agent hired by the employer' insurer to investigate. The statements **were not** protected.

- Example 2: Hospital directed staff to report all incidents which might result in lawsuits to counsel on a form entitled "Confidential Report of Incident" Nursing director reported incident to administrator who reported to insurance carrier who reported to attorney. The report **was** protected.

Who May Assert The Privilege?

- Corporate officers may assert the privilege on behalf of the corporation.
- Corporation may assert privilege against its own shareholders. This is true even in a shareholders derivative action.

The "Crime Fraud" Exception (California Law)

- There is no attorney-client privilege if the attorney's services were sought or obtained "to enable or aid anyone" in the commission of a crime or fraud.
- This exception applies only where the client seeks legal assistance to plan or perpetrate a crime or fraud.
- Consummation of a crime or fraud is not required; an attempt is sufficient.

The "Crime Fraud" Exception (Federal Law)

- The attorney-client privilege does not apply to communications "in furtherance of intended or present continuing illegality."
- Federal courts will apply a two-pronged test for determining whether the crime fraud exception applies.

The "Crime Fraud" Exception (Two-Pronged Test)

- There must be a showing that the client was engaged in or planning criminal or fraudulent conduct when he/she sought the advice of counsel or that the client committed a crime or fraud subsequent to receiving counsel's advice.

- There must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

The Work Product Doctrine in California (Code Civ. Proc., § 2018)

- Any writing that reflects an attorney's impressions, conclusions, opinions or legal research or theories is absolutely protected.
- All other work-product is conditionally protected (i.e., protected unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing a claim or defense).
- Work-product includes that of an attorney's employees, agents, investigators, researchers, etc.
- The California work product doctrine applies to litigation AND non-litigation matters.

The Work Product Doctrine Under Federal Law (Fed. Rules Civ. Proc., rule 26(b)(3))

- Most work-product is only conditionally protected and may be produced upon a showing of good cause.
- Even opinion work-product may be discovered and admitted "when the mental impressions are at issue in a case and the need for the material is compelling."
- It includes materials prepared by the party or by any representative of the party, including a consultant, surety, indemnitor, insurer or agent.
- The federal rule protects **trial** preparation material that reveals an attorney's strategy (i.e., it does not extend to non-litigation work product).

Discussion of “Hot Topics”

- Ex Parte communications by opposing counsel.
- Internal employment investigations.
- Sarbanes-Oxley Act, 15 U.S.C. § 7245 (“SOX”).
- Criminal prosecution and targeting of corporations/effect on attorney client privilege.
- “Voluntary” waiver of the privilege in the face of government investigation.

Communications With Corporate Directors, Officers, Employees And Former Personnel

California Rules of Professional Conduct, rule 2-100

- It is unethical for counsel to communicate with an officer, director or managing agent of an opposing corporation that is represented by counsel.
- It is unethical for counsel to communicate with an employee of an opposing corporation if the communication concerns something which may be binding upon the corporation.
- Violation of rule 2-100 exposes counsel and his/her entire firm to possible disqualification.

Communications With Corporate Directors, Officers, Employees And Former Personnel

California Rules of Professional Conduct, rule 2-100

- However, it is not a violation or ground for disqualification for counsel to interview an opposing party's former officer, director or employee (who are not themselves represented by counsel) without opposing corporation's counsel's knowledge or consent.
- Such interviews may not make inquiries into privileged matters.
- If a corporation is concerned that a former officer, director or employee may disclose privileged information, it is incumbent upon the corporation to seek a protective order.

Internal Employment Investigations

- Issues concerning internal employment investigations are common in cases involving harassment claims.

- The adequacy of an internal employment investigation may be a defense to damages on a harassment claim based upon the “avoidable consequences” doctrine.

The “Avoidable Consequences” Doctrine

Under the “avoidable consequences” doctrine, the employer may **reduce** the amount of damages awardable on a harassment claim if the employer proves:

1. That it took reasonable steps to prevent and correct workplace harassment;

2. That the employee unreasonably failed to use the preventive and corrective measures; and

3. That a reasonable use of the employer’s procedures would have prevented at least some of the harm the employee suffered.

Privilege Issues Concerning Internal Investigations

- Where a corporation seeks to assert the avoidable consequences doctrine, plaintiff will likely seek production of the documents generated in the investigation.
- Courts will look carefully at claims that the documents generated in the investigation are privileged.
- Courts may rule that assertion of the "avoidable consequences" doctrine places the privileged material at issue, resulting in a waiver of the privilege.
- Even in this context, courts may uphold the privilege as to an attorney's analysis concerning the adequacy of the investigation (as opposed to the documents generated in the investigation itself).

Sarbanes-Oxley Act ("Reporting Up")

- **"Reporting Up":** Attorneys for PUBLIC companies who appear and practice before the Securities and Exchange Commission must report evidence of material violations of the securities laws or other breaches of fiduciary duties to the corporation's chief legal counsel or chief executive officer.

- If the chief legal counsel or CEO does not respond appropriately, the attorneys must report the evidence to the corporation's audit board or other appropriate committee of the company's board of directors.

“Qualified Legal Compliance Committee”

- A company may establish a committee of outside directors, known as a “Qualified Legal Compliance Committee.” (QLCC), to which SOX reports may be made (in lieu of reports made to the chief legal counsel or CEO).

- A lawyer who makes a report to a QLCC need not determine the appropriateness of the response and is relieved of taking further action.

Sarbanes-Oxley Act ("Reporting Out")

- **"Reporting Out":** an attorney appearing before the SEC "may" (under certain circumstances) reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent necessary:
  - to prevent the issuer from making a material violation;
  - to prevent the issuer from committing perjury; or
  - to rectify the consequences of a material violation.

Sarbanes-Oxley Act ("Reporting Out")

- The California State Bar committees contend the permissive "reporting out" provisions conflict with state ethics rules that preclude such disclosure.
- The SEC asserts that that the regulations preempt state law.
- If the regulations are held not to preempt state law, a California lawyer who follows the permissive "reporting out" rule may be subject to State Bar discipline and/or breach of fidiciary duty claims.

Proposed “Reporting Out” Rules

- The SEC has proposed two alternative “reporting out” rules to address what actions must (or may) be taken if an attorney who has reported evidence of a material violation under the “reporting up” rules does not receive a response.
- The SEC has not made a final decision on these proposals; it is monitoring the impact of the "reporting up" regulations.
- There is no definite time frame in place for the SEC to make a decision as to whether to move forward with either proposed "reporting out" rule.

The Proposed Rules Generally

- Under the first proposed "reporting out" rule, where an attorney has not received an appropriate response to a report, believes a material violation **is ongoing or is about to occur**, and believes that the material violation is likely to result in substantial injury, then the attorney ***must*** take specified actions, potentially including withdrawal from the representation, coupled with notification to the SEC of the withdrawal.
- Where the attorney has withdrawn, the issuer's chief legal officer must inform any new attorney that the previous attorney withdrew for professional considerations.
- Under the first proposed 'reporting out' rule, if the lawyer believes the conduct is not 'on-going,' the lawyer 'may' report to the SEC but is not obligated to do so.
- The first proposed rule states that giving any notice as described will not breach the attorney-client privilege.
- Under the second or alternative 'reporting out' rule the standard for the lawyer is allegedly higher. Rather than 'believing' that a material violation is likely, the attorney must 'reasonably conclude' that there is 'substantial evidence' of a material violation. Also, under this alternative, the attorney does not report his or her withdrawal but the issuer must.

Criminal Prosecution And Targeting Of Corporations

- In the wake of the Enron, WorldCom and Arthur Anderson controversies, there has been increased federal scrutiny of corporate activity.

- On July 9, 2002, President Bush established the Corporate Fraud Task Force to "oversee and coordinate the federal government's…commitment to seeking out and stamping out corporate fraud."

- On January 20, 2003, the Department of Justice revised its Corporate Prosecution Principles: the "main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."

Corporate “Cooperation” in Investigations

- The recent scrutiny of corporate cooperation has focused, in large part, on the corporation’s willingness to waive the attorney-client and work product protections to “cooperate” with investigating federal prosecutors.

- More generally, the Department of Justice will look at eight factors when deciding whether to prosecute an entity.

8 Factors Concerning Corporate Prosecution

1) Nature and Seriousness of offense.

2) Pervasiveness of wrongdoing.

3) Corporation's history of similar conduct.

4) Corporation's timely and voluntary disclosure of wrongdoing and willingness to cooperate in investigation of its agents including, if necessary, the **waiver of the attorney-client and work product privileges.**

8 Factors Concerning Corporate Prosecution (Continued)

5) The existence and adequacy of the corporation's compliance program.

6) Corporation's remedial actions.
   a) Implement compliance program.
   b) Replace responsible management.
   c) Discipline or terminate wrongdoers.
   d) Pay restitution.
   e) Cooperate with government.

8 Factors Concerning Corporate Prosecution (Continued)

7) Collateral consequences.

8) Adequacy of non-criminal remedies.

   a) Civil enforcement.

   b) Regulatory enforcement.

The 2003 "Thompson Memo"

New principles set forth in a 2003 memorandum instruct prosecutors to gauge the extent of the corporation's cooperation by considering:

- The corporation's willingness to identify the culprits within the corporation, including senior executives;
- Whether the corporation will make witnesses available;
- The corporation's disclosure of its internal investigation; and
- Whether the corporation will waive attorney-client and work-product privileges.

Some Fallout from the New Guidelines

- Regular practice of Assistant U.S. Attorneys to require corporations to waive their attorney client privilege and divulge confidential conversations and documents to prove cooperation with investigation.

- Government has been co-opting the corporate investigation and de Facto deputizing corporate or outside counsel to conduct the government's investigation.

Waiver of the Privilege

- Waiver extends to subsequent civil litigation as well as other federal and state regulatory agencies.

- Most courts hold that a waiver of the attorney-client privilege and/or work product doctrine in favor of the government during an investigation will thereby effect a waiver of the protections as to all parties.

“Selective” Waiver

- A few courts (starting with the Eighth Circuit) have allowed corporations to selectively waive the privilege.
- Many jurisdictions (including N.D. Cal.) have found that selective waiver is generally not permitted, regardless of the circumstances.
- A few courts have held (or suggested) that the production of work product-protected documents to the government pursuant to an explicit confidentiality agreement limiting the government’s ability to disclose the documents to third parties does not constitute a broad waiver of the work-product protection and preserves the protection.

10 Tips For Employer Counsel (Ex Parte Communications)

1. Beware of advising employees not to speak or cooperate with government investigators.
2. Advise employees that they are not required to cooperate with non-government investigators.
3. Advise employees that the company will not retaliate against them for participating in ex parte interviews.
4. Ask employees to report any ex parte contacts by adversaries to in-house counsel and management.
5. Ask employees to give the company an opportunity to participate in any interviews.

10 Tips For Employer Counsel (Ex Parte Communications)

6. Instruct employees not to reveal privileged communications.
7. Consider meeting with employees to discuss the facts and prepare for ex parte contacts.
8. Consider retaining counsel for the employees.
9. Send opposing counsel an early letter, instructing the adversary to contact the company only through counsel.
10. Consider adding these ground rules to confidentiality agreements with employees, including departing employees.

3 Tips For Employer Counsel (Internal Employee Investigations)

1. The investigator may have to be a witness; consider using an outside counsel who will not serve as litigation counsel.

2. If HR or managers are involved in the investigation, advise them that their actions and writings may become issues and evidence in litigation, except their communications with litigation counsel.

3. Make employees understand that company counsel is not representing them personally (unless they are specifically advised otherwise), and that any information obtained may be reported to management.

4 Tips For Employer Counsel (Sarbanes-Oxley)

1. Before reporting, consider obtaining the advice of independent outside counsel, in order to help justify whether to report, what to report, and how to report.

2. Be wary of exercising the permissive “reporting out” options unless it becomes clear that the SEC regulations preempt the California ethical rules.

3. Set up SOX compliance procedures before there is a problem.

4. Stay abreast of current developments. These issues continue to evolve, and the SEC may enact stricter rules in the future.

4 Tips For Employer Counsel (Criminal Proceedings)

1. Hire experienced white collar criminal defense counsel at first sign of government investigation.
2. It's never too early to start your own internal investigation.
3. Never question the prosecutor's or the agent's authority.
4. To the extent possible, "assist" the government in its investigation. Never do anything that could be considered as obstructing the government's investigation.

10 Tips For Employer Counsel (Protecting/Waiving the Privilege)

1. Assume results of the investigation will be made public and inform all those responsible for the investigation of this fact.

2. Carefully plan investigation so that all involved know that written communications should be drafted with an understanding of the other contexts in which such reports may be used.

3. To the extent possible, limit disclosure of privileged materials. A proffer from counsel may satisfy the government without effecting a waiver.

10 Tips For Employer Counsel (Protecting/Waiving the Privilege)

4. To the extent possible, memorialize facts establishing a non-adversarial relationship with the government agency to which disclosure has been made.

5. Enter into a written confidentiality agreement with the government, expressly preserving all privileges as against third parties.

6. Conform the method in which the internal investigation is conducted to reflect the real possibility that the privilege will someday be deemed waived based on government disclosure.

10 Tips For Employer Counsel (Protecting/Waiving the Privilege)

7. To the extent possible, maintain custody and control of the privileged materials.

8. Produce the minimum amount of privileged material necessary to make an adequate disclosure.

9. When defending privilege in court, enlist the support of the government agency to which disclosure was made.

10. Maintain a written record both of the privileged materials turned over to the government and of any privileged materials withheld.

Questions?