

Morgan Lewis

2017 ANNUAL

PRIVATE FUND INVESTORS ROUNDTABLE

Ethics: Attorney-Client Privilege, the Work-Product Doctrine, and Employment Investigations

October 5, 2017

ETHICS: ATTORNEY-CLIENT PRIVILEGE, THE WORK-PRODUCT DOCTRINE, AND EMPLOYMENT INVESTIGATIONS

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Agenda

- Review concepts to help spot issues/protect you and the Company
 - Attorney-client privilege—for purposes of receiving legal advice
 - Work-product doctrine—in anticipation of litigation
- Protecting privilege/work product in employment-related investigations
- Identify potential traps
- Situations for discussion
- Best practices

Privilege Can Take a Variety of Forms...

- The attorney-client privilege
- The work-product doctrine

Why Should We Care?

- Essential to the flow of information between counsel and officers, directors, executives, managers, and supervisors regarding potential legal risks to or liability for the Company.
- Essential to the protection from disclosure of communications, opinions, and analyses regarding such potential legal risks and liability.
- Critical to preserving and protecting the integrity of the defenses and legal positions of the Company.
- Strategic and tactical concerns

The Governing Law

Federal Rule of Evidence 501:

Under state and federal law, specific rules apply in court that govern the *privilege* of a witness. Privileged communications — properly preserved — are protected from disclosure.

The Attorney-Client Privilege

- Boiled down, the attorney-client privilege can be reduced to five elements:
 - A communication;
 - Made between or among privileged persons;
 - In confidence;
 - For the purpose of seeking, obtaining, or providing legal assistance for the client;
 - With counsel acting in a legal capacity.
- Privilege does not protect the underlying information in the client's possession (e.g., what was observed, what actions were taken), just the communication to counsel.

Element 1: “A Communication”

- The communication can be oral or written, an action, or silence:
 - Memoranda
 - Emails/text messages/instant messages
 - Conference calls
 - Notes
 - In-person meetings
 - Pictures
 - A nod
- Privilege does not extend to the facts relating to the communication, such as the date, place, or identity of the persons present for, or privy to, the communication.

Element 2: “Privileged Persons”

- Officers, directors, executives, managers and supervisors;
- The Company's attorneys (outside counsel and in-house counsel) and their staff (e.g., legal assistants and paralegals); and
- Agents of the attorneys for purposes of the litigation (e.g., economists, consultants) — **PROVIDED THEY ARE RETAINED THROUGH COUNSEL**
- *Privilege does not generally protect communications between counsel and rank-and-file employees or nonemployees.*

Element 2: “Privileged Persons”

- In the corporate context, the client is the corporation—meaning the privilege belongs to the corporate entity itself, rather than to any individual corporate officer or employee.

Element 3: “In Confidence”

- One must reasonably expect the content of the communication to be confidential
- Although the information must be conveyed in confidence, the information itself need not be confidential
- Later disclosure to outside third parties or the presence of an outside third party may undermine this element, thus vitiating the privilege (e.g., vendor, contractor, nonmanager, manager’s spouse, friend)

Element 3: “In Confidence”

Recommended Best Practice

- **ALL EXPERTS SHOULD BE RETAINED BY COUNSEL** (so-called “derivative privilege”)
- Counsel’s agent for the purposes of rendering legal advice
- Multifactor test
 - Retention by counsel
 - Expert retained to assist attorney in digesting privileged information so attorney can render legal advice
 - Confidential information collected from Company by agent
 - Expectation of confidential treatment of Company information

Element 4: “For the Purpose of . . .”

- The communication must have been made primarily for the purpose of seeking or rendering legal advice
- The privilege does not protect communications between client and counsel where counsel is acting as business advisor, regulator, or personal friend
- Timing is everything! Cannot be applied retroactively

Element 5: “Counsel in Legal Capacity”

- The person from whom advice is sought must be an attorney
- A communication with a non-attorney may be privileged where that person is assisting counsel in rendering legal advice (e.g., legal assistants, paralegals, accountants)

Crime/Fraud Exception

- Legal advice sought to accomplish a future or ongoing fraud is not privileged, but...
- Legal advice sought in determining how to deal with accomplished or past bad acts is privileged

Subject-Matter Waiver

When is subject matter waived?

- General rule is that the attorney-client privilege is waived when the confidential information is **voluntarily** divulged to a third party.
- The established view is that once the privilege is waived to one party, it is **waived to all**.
- This complete waiver is justified because the privilege is considered to hinder the search for the truth. As such, it should be narrowly construed and applied only when necessary to achieve this purpose.

Subject-Matter Waiver

- The decision to divulge confidential information rests completely with the Company — not the individual officer, director, executive, manager, supervisor, or even attorney
- The privilege is that of the Company alone
- The Company must act to protect that privilege at all times and not disclose privileged communications to third parties

Upjohn Warnings

- Be clear on whom the client is and who is overseeing the investigation
 - Avoid a prosecutorial tone but make clear each of the following points:
 - I am a lawyer for the Company and do not represent you personally.
 - The purpose of the interview is to learn about [the issue] in order to provide legal advice to the Company.
 - This conversation is privileged, but the privilege belongs to the Company, not you. It is up to the Company whether to waive the privilege, including with respect to the government or other third parties.
 - The conversation should be kept confidential in order to preserve the Company's privilege.

The Work-Product Doctrine

- US law also recognizes the “work-product doctrine,” which is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure
- The doctrine covers “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation”
- The primary focus of the work-product doctrine is the protection of an attorney’s thought processes, mental impressions, and strategy regarding potential or actual legal proceedings

The Work-Product Doctrine

- Applies to materials prepared by an attorney, or on his or her behalf by an appropriate agent, ***in anticipation*** of litigation or trial
 - A mere theoretical possibility is not enough, but...
 - Actual litigation need not have commenced for the doctrine to apply
 - “Litigation or trial” can be before a court or an administrative agency
 - Applicable to investigations

Best Practices: What to Do

- Address communications directly to the lawyer when seeking legal advice (e.g., ensure that the lawyer's name is included in the "To" field on an email).
- Communications addressed to the lawyer and reports and analyses prepared for him or her should bear the heading: "Confidential: Attorney-Client Privilege."
 - Keep in mind that identifying a communication as privileged does not make an otherwise non-privileged communication privileged, nor does failing to mark a communication privileged waive the privilege.

Best Practices: What to Do

- Limit distribution of communications and documents to only those with a legitimate business reason to receive it.
 - Exceptions:
 - Privileged communications may be shared by non-attorney employees in order to relay information requested by an attorney.
 - Continue to copy the attorney on such emails and include him or her in meetings when the subject involves legal advice.
 - Documents subject to the privilege may be transmitted among non-attorneys so that the corporation may be properly informed of legal advice and act appropriately.
 - But forwarding or sharing for any other purpose potentially waives privilege.

Best Practices: What to Do

- In using email, monitor the auto-complete function when inserting the recipient's name to ensure that the email is sent to the correct party.
- Simply state the facts in your communication and be scrupulously accurate in your description of the facts.
- Preserve (do not destroy) all documents, emails, and related materials.
- Pick up the telephone or email counsel asking to speak by telephone.
- Update Corporate Policies and Procedures: Corporate policies and procedures should include a specific statement that all internal investigations are to be conducted for the purpose of obtaining legal advice.
- Ensure Attorney Direction and Oversight: Counsel should initiate and direct every internal investigation

Best Practices: What to Avoid

- Copying the lawyer on a communication when seeking legal advice instead of sending it directly to the lawyer.
- Sending a communication seeking legal advice to those without a legitimate business reason to receive it.
- Labeling a document as privileged if it is merely sensitive or uncomfortable.
- Including an attorney on a communication with a note that indicates that the attorney's inclusion is intended to make the document privileged.
- Attempting to make an otherwise non-privileged document privileged merely by sending it to an attorney.
- Labeling material as “work product” absent litigation or the specter of litigation.

Best Practices: What to Avoid

- Forwarding a privileged document to another employee unless requested by an attorney.
- Using the bcc function on email, which could result in inadvertent forwarding.
- Talking to the media and posting on social media.
- In drafting a communication, generally avoid:
 - Providing gratuitous characterizations, speculative theories, opinions, or editorial comments.
 - Stating legal conclusions, including describing something as “negligent” or “illegal” or asking if something is legal.
 - Stating that a practice violates a law, regulation, or Company policy.
 - Using negative connotations (e.g., “We dropped the ball.”).
 - Making disparaging comments.

Investigations Involving Employees

- Nearly all investigations involve employees
- Any legal claim that can be brought against a corporate entity by a private party, SRO, or government regulator or prosecutor can require an investigation
- Claims *by* employees:
 - harassment
 - discrimination
 - retaliation (including whistleblower retaliation)

Protecting Privilege and Work Product

- Decide whether protection is important
- Purpose of investigation, e.g.:
 - third party (nonemployee) alleges corporate wrongdoing
 - employee alleges corporate wrongdoing
 - employee complains of employment issue
- Far easier to intentionally waive later than to assert and try to support later

For privilege to apply...

- Investigation must be conducted for purpose of obtaining legal advice (and, for work product, in anticipation of litigation)
- Need not be sole purpose but must be significant purpose – *In re Kellogg Brown & Root* (D.C. Cir. 2014)

Cautionary Tale Cases

- *Koumoulis* (E.D.N.Y. 2014) – “predominant purpose was to provide human resources and thus business advice, not legal advice”
- *U.S. ex rel. Lutz* (D.S.C. 2017) – advice of counsel defense
- *Banneker Ventures* (D.D.C. 2017) – not in anticipation; waiver regarding most of interview memos by public disclosure of investigation report

Conduct Investigation at Request of Counsel

- To provide facts so counsel can give legal advice
- Must be legal issue in matter being investigated
- Risk of no privilege if non-lawyer conducts investigation
- Counsel expressly direct non-lawyers gathering facts
- In serious matters, counsel conduct investigation
- Either way, observe formalities of privilege/work product

Documenting Privilege/Work Product in Internal Investigations

- Communicate directly with lawyer
- Label communications properly
- Give *Upjohn* warning correctly
 - address it at end as well
 - consider written *Upjohn* warning
- Drafting fact-gathering documents
 - more likely to be discoverable
 - state that it is not verbatim record
 - include mental impressions

Disclosures and Waivers

- Risks in reporting to government
- Risks in other types of disclosures, e.g.:
 - Board of directors
 - Outside auditors
- Consider addressing limits of waiver in disclosure documents
- Use clawback provisions
- Include privilege/work-product protection in joint-defense agreements
- Note waiver limitation agreements between parties may not be effective as to third parties and the government

Additional Issues

- NLRB cases on directing employees to maintain confidentiality
- Limits regarding former employees
- Be alert to different privilege analysis in non-US jurisdictions

SITUATIONS FOR DISCUSSION

Scenario 1

Amy is a close confidant of her supervisor, Bill. Amy starts off the conversation stating that she has something to tell Bill, but that Bill must promise that he will not tell anyone what she is about to say. Amy goes on to complain that her co-worker Ken often tells her dirty jokes and puts his arm around her waist. Bill takes notes during the meeting and then sends an email to his superior, Ann, describing the situation and his belief that Ken has been harassing Amy and there have been other incidents involving other women in the office.

Scenario 2

John receives a call from an auditor requesting specific information on a recent trade. The auditor says he needs the information ASAP and would like to discuss the matter now. John conferences in in-house compliance counsel and together they answer all of the questions on the call. To be sure that he later recalls everything he said, John writes a memorandum to “files” detailing the conversation, including his thoughts that the Company may be facing serious exposure.

Scenario 3

Will receives a letter from a lawyer representing a former employee threatening to sue the Company because of how he was terminated. Will writes on a “sticky” pad sheet that the claim is frivolous and that the employee has “mental problems” and is “just ticked off because we didn’t pay him overtime because his work stunk.” He sends the letter with the sticky memo to his manager. Will also writes a letter to the attorney responding to the employee’s allegations.

Scenario 4

Steve, an in-house attorney, receives a notice that a former analyst has filed a charge of discrimination with the EEOC alleging that she and all other female analysts received less pay than their male counterparts. Steve contacts an economics expert to prepare a report of salary data for the analyst position companywide. Steve reviews the report and forwards it to outside counsel; in his cover email, he opines that the former analyst's claims appear to have some validity. Outside counsel then meets with the former analyst's managers and Company executives to determine how salaries for analysts are determined.

Scenario 5

Dan, a vice president, spends his day with outside counsel preparing for his deposition in a lawsuit against the Company. That night, he has dinner with a good friend and tells the friend he is nervous, discusses what he told the attorneys that day, and says that he thinks the Company really screwed up.

Scenario 6

Hannah, an accountant, is interviewed by Company attorneys investigating an anonymous hotline tip alleging the Company had made false and misleading statements in violation of the federal securities laws. Several months later, Hannah tweets a link to a *Wall Street Journal* article concerning a pending investigation by the SEC. Hannah states, “#Rotten #Greed #Notmycompany. Told the lawyers as much.” The investigation later settles.

Scenario 7

Serena works as an assistant to Bob, the Company Chair and CEO. She reports to Company human resources that Bob makes her uncomfortable, rubbing her shoulders and stroking her face, and “jokingly” suggesting that they meet in a bathroom so he can “have sex with” her. The Company then hires an outside law firm to conduct an investigation that results in a finding that Bob did not act inappropriately. Serena then brings a lawsuit and the same law firm is retained to defend the Company.

The outside law firm created electronic and handwritten notes during their investigation interviews, gathered documents, and generated several draft reports for comment. The law firm also submitted several invoices to the Company.

Scenario 8

Alexa, a trading assistant, and Sophie, a recruiter, work together at the Company and frequently text one another on their personal cell phones. Alexa receives an email from HR asking that she meet with the Company's outside law firm the following day for an interview about her work on a deal. Alexa then types herself an email about her role on the deal in preparation for the meeting. Later that week, Sophie texts Alexa asking how the interview went. Alexa texts back a synopsis of the interview.