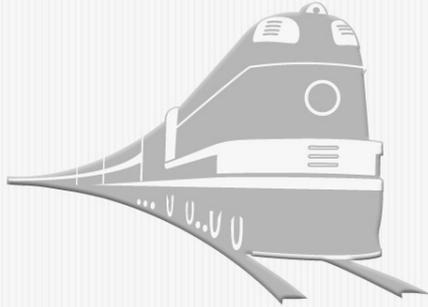


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Crisis Management and Internal Investigations

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The Basics of the Privilege

- » The corporation, not its constituents, is the client
 - Model Rule of Professional Conduct 1.13;
Restatement of the Law Governing Lawyers,
Section 96
- » The attorney-client privilege belongs to the corporation, not to individual officers or directors
 - *Upjohn Co. v. United States*, 449 U.S. 383 (1981);
Model Rule 1.13, Comment [2]

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Make Sure You Are Wearing the Right Hat

- » Application of the privilege to communications with in-house counsel will be narrowly construed
- » Such communications must be for the purpose of securing legal – not business – advice
 - *Santoni, In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 *Geo. J. Legal Ethics* 393 (1998); *Comment, An Analysis of the Troubling Issues Surrounding In-House Counsel and the Attorney-Client Privilege*, 23 *Hamline L. Rev.* 289 (1999)

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Be Careful When Employee Conduct Is at Issue

- » The distinction between the interests of the corporation and its constituents is critical to maintaining control of the privilege
 - A proper “*Upjohn*” or “Corporate Miranda” warning to affected employees must make that distinction clear
 - » Model Rule 1.13, Comment [10]
 - An improper warning could inadvertently give the employee control of the privilege
 - » *In re: Grand Jury Subpoena*, 2005 WL 1663786 (4th Cir. July 18, 2005)

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A Few Waiver Issues

- » Disclosure of privileged information to employees who do not “need to know of the communication in order to act for the organization” will constitute a waiver
 - Restatement of the Law Governing Lawyers, Section 73(4)(b)
- » Unauthorized disclosure of privileged materials by a disgruntled employee may (or may not) waive the privilege
 - ABA Formal Opinion 94-382 (1994); District of Columbia Legal Ethics Opinion No. 318 (2002)

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A Few Waiver Issues

- » “Selective” waiver of the privilege to the government (or external auditors) may not work
 - *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (Cal. App. 2004); *In re: Columbia/HCA Healthcare Corp.*, 293 F.3d 289 (6th Cir. 2002)

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Selected Conflict of Interest Issues

- » Multiple representation conflicts
 - Joint representation of the corporation and its constituents is permissible, absent a conflict
 - » Model Rule 1.13(g); Restatement of the Law Governing Lawyers, Section 131

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Selected Conflict of Interest Issues

- Whether a conflict exists between the corporation and its constituents is not always clear
 - » Counsel will typically not have a complete grasp of the facts when the multiple representation issue arises
 - » Conflicts may not come into focus until enforcement action is pursued

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Selected Conflict of Interest Issues

- If a multiple representation is contemplated, consider obtaining a conflict waiver from the individual that permits counsel
 - » To share all confidential information with the corporation
 - » The right to withdraw from representing the individual and continue to represent the corporation if direct adversity develops
 - » The right to use all information obtained from the individual for the benefit of the corporation, even if such information is detrimental to the individual

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Selected Conflict of Interest Issues

- Understand that such a waiver may not hold up
 - » Compare *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285, 37 Cal. Rptr. 2d 754 (6th Dist. 1995) (upholding a waiver that allowed a lawyer to continue to represent a corporate defendant after a conflict developed between it and a codefendant employee formerly represented by the same lawyer) with ABA Informal Ethics Opinion 1441 (1979) (finding a waiver allowing a similar adverse representation to be invalid)

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Selected Conflict of Interest Issues

- » Prior work conflicts
 - Carefully consider the use of outside counsel to represent the corporation with respect to issues in which their firm was previously involved
 - » A conflict of interest exists when “there is a significant risk that the representation of [a client] will be materially limited by...a personal interest of the lawyer.” Model Rule 1.7(a)(2)
 - » When the work of outside counsel’s firm is at issue there may be a tension between the corporation’s interests and the interests and objectivity of outside counsel, who may have some motivation to protect their firm’s prior work rather than carefully scrutinize it

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The Privilege and the Compliance Function

- » Does the corporation give up any hope of using the attorney-client privilege when the attorney's title includes "Chief Compliance Officer?" "Ethics officer?"
- » Is the government likely to recognize an attempt to protect audits and investigations conducted by the attorney/compliance officer?
- » What about issues identified in an audit, and targeted for further investigation by the attorney/compliance officer?

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The Privilege and the Compliance Function

- » Does it matter who asks for the legal advice or to whom the legal advice will be given once the investigation is complete and the analysis is rendered?
- » Is the compliance/ethics officer "acting as an attorney" and dispensing "legal advice" in that capacity?

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The Privilege and the Compliance Function

- » Courts have repeatedly found that the attorney must be acting as a legal counselor dispensing legal advice for which the client has an expectation of confidentiality
- » Courts have often looked at the multiple hats worn by corporate attorneys and the result has been the narrowing, even elimination of the privilege for many activities
- » Business activities, even though performed by an attorney, are not accorded the privilege

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The Privilege and the Compliance Function

- » Activities which constitute the dispensation of legal advice must be separated from business activities, and adequate documentation establishing the separation must be maintained
 - *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995)
 - » In this case, the court specifically held that communication between an outside tax advisor and the corporation's general counsel were not privileged because counsel also acted as business tax advisor to the corporation, such advice was normally sought from the outside tax advisor, and neither separate retainer agreements nor a separate tasking memo setting forth an expectation of privilege was generated for the particular work at issue

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The Privilege and the Compliance Function

- » *Bobosian v. Gulf Oil Co.*, Class Actions No. 71-1137, 1983 WL 1841 (E.D. Pa. May 20, 1983) held that corporate legal department files are not per se privileged
 - Privilege must be established on a document by document basis
- » The “control-group” concept still lives, and in order to establish privilege, attorneys should seek the required information from the source that is the most senior level in the corporation

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The Privilege and the Compliance Function

- » Only about 19% of ethics offices are staffed by attorneys and only three percent by persons with security backgrounds
 - *The Tyson Story: Building an Effective Ethics and Compliance Office*, John D. Copeland 5 Drake J. Agric. L. 305 (2000), citing Edward Petry, *Six Myths About the Corporate Ethics Office*, *Ethikos*, Mar./Apr. 1998, at 3

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Evolving Concept of Cooperation With the Government

- » Cooperation now may usually mean waiver of privilege
 - Who really benefits?
- » Cooperation may mean conditioning waiver of additional individual rights, including
 - Right to counsel
 - Right to remain silent
 - And perhaps more

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Evolving Concept of Cooperation With the Government

- » Mounting pressure from civil and criminal attorneys has resulted in the American Bar Association (ABA) requesting the Department of Justice (DOJ) and the Federal Sentencing Commission to rethink its policy on conditioning cooperation on waiver of privilege
- » October 2005 memorandum from the Acting Deputy Attorney General revises Department of Justice policy
 - Recommends that each United States Attorney's Office draft a policy for reviewing requests for waiver of privilege

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