Can We Keep a Secret?
Protecting the Privilege in Fraud Investigations

The intricacies of attorney-client privilege are funny. But not "ha-ha" funny. More "psych, you're not protected" funny.

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Overview

- **The Contours of the Privilege**
  - What it is
  - What it isn’t
  - Confidentiality and Work-Product Distinguished

- **Potential Pitfalls**
  - In-House Counsel
  - Internal Investigations
  - Government Investigations

- **Practical Takeaways**

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**The Privilege: *What it is***

- **The Privilege Protects only:**
  - A *communication*;
  - Between a *client* and *attorney*;
  - For the purpose of securing or providing *legal advice* or opinion

- **Constant Tension for Courts:**
  - Privilege is an obstacle to the truth and forces courts:

  *To make difficult tradeoff[s] between the broad institutional goal of preserving the vitality of the adversary system and the sometimes incompatible goal of achieving justice in the matter before it.*

The Privilege: *What it is*

- **Corporations as Clients**
  - Majority: *Subject-Matter Test*
  - Minority: *Control Group Test*

- **Subject-Matter Test:**
  - Communication is privileged if made:
    - To secure legal advice;
    - By an *employee at the direction of a superior*;
    - The superior requested the communication to secure legal advice for the *corporation*;
    - Subject matter is within the *scope* of the employee’s duties; and
    - Communication not disseminated beyond *need-to-know* individuals.

The Privilege: *What it isn’t*

- **Common Misapplications:**
  - Facts
  - Existence of Relationship, Purpose and Foundational Issues
  - Documents / Tangibles Transmitted to Attorney
  - Fee Arrangements
  - Client Notes*
  - Attorney Notes*
  - Drafts of Documents
The Privilege: *What it isn’t*

<table>
<thead>
<tr>
<th>Privilege</th>
<th>Work-Product</th>
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<tbody>
<tr>
<td>It’s a privilege</td>
<td>It’s an exception</td>
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<tr>
<td>The client’s</td>
<td>The attorney’s</td>
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<tr>
<td>Stronger</td>
<td>Weaker</td>
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<tr>
<td><strong>Communications</strong></td>
<td><strong>Preparation for Litigation</strong></td>
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</table>
|  | | • *Not all notes*
|  | | • *Not all drafts*
|  | | • *Not all mental impressions*
Pitfalls: *Internal Investigations*

- **Peril of Two Hats**
  - Business vs. Legal Dichotomy (and its erosion)
    - In-House Counsel
    - Outside Counsel as Investigators

- **Increased Scrutiny by Courts**
  - Tax Returns
  - Patent viability reports
  - Investigative reports for internal use

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**Scenario 1: Privileged or Not?**

- Company conducts internal investigation and audit re: allegations of kickbacks to “determine how to proceed.”
  - Utilizes internal auditor rather than outside counsel
  - Communicates audit report to outside counsel for consultation on allegations
Scenario 2: *Privileged or Not?*

- Company’s in house counsel conducts internal investigation to analyze employee allegations of illegal kickbacks.
  - Key interviews conducted by non-attorneys
  - *Upjohn* warnings were not provided to interviewed employees
  - Outside Counsel not involved.

Scenario 3: *Privileged or Not?*

- School engages outside counsel to conduct internal investigation re: sexual abuse.
  - Interviewees given *Upjohn* warnings
  - Attorneys conducted interviews
  - Results of investigation privately disclosed to School Board
Pitfalls: Government Investigations

- **Waiver**
  - Involuntary: The ball is in your court
  - Voluntary: The ball is in the your client’s court

- **Transfer to New Organization**
  - Mergers and Acquisitions can transfer the privilege to new organization

- **The Yates Effect?**
  - Need to position organization relative to individuals
  - Pressure on clients to waive the privilege
  - Increased chance for invocation (intended or unintended) of Advice of Counsel
  - So what?

Pitfalls: Advice of Counsel

- **The Client-Attorney Privilege**
  - The privilege is the client’s privilege
  - Clients view our advice as legal authority to act
  - What happens when the Government increases pressure?

- **Advice-of-Counsel Defense**
  - Client can invoke justification for its actions: reliance upon legal advice from counsel
  - Privilege is automatically waived
  - Advice is scrutinized by Government and the Court
Takeaways: Practical Protections

- **Upjohn, Upjohn, Upjohn**
  - Never forgo an *Upjohn warning*
  - Isolate legal communications only to **need-to-know individuals**
  - Avoid **CC: and BCC: traps**
  - Integrate *Upjohn* into communications:
    - “response to your request for legal advice”

- **Precise Marking**
  - Casting too wide a net creates problems with clutter
  - Clutter creates risk