Beyond the Basics

Privilege Issues to Consider in Internal Investigations

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1 Overview of the Privilege
## Attorney-Client Privilege & Work Product Doctrine

### Attorney-client privilege applies to:

1. **Communications** between company employees and in-house or outside counsel that (2) were intended to be and were, in fact, kept confidential and (3) were made for the purpose of obtaining or providing legal advice.

The privilege also covers confidential communications between and among employees discussing, relaying, or responding to legal advice.

### Work product doctrine applies to:

Documents that reflect the mental impressions, opinions, thoughts, analysis, or work of any attorney or any person working at the direction of an attorney.

The documents must have been prepared for or “in anticipation of litigation”.

A party may waive privilege or work product protection by voluntarily disclosing otherwise protected information to a third party or injecting protected material into a litigation.

### Joint Defense / Common Interest Doctrine:

Extends the attorney-client privilege to communications with third parties if the organization and the third party share a common legal interest and the communications are made in furtherance of that shared interest.
2 When is the Privilege Triggered?
Whistleblower Complaint

Jane Inhouse
(General Counsel)

Calisota University
Whistleblower Complaint

Jane Inhouse
(General Counsel)

Calisota University

Whistleblower
To whom it may concern,

I am very concerned that the University failed to disclose foreign grants that funded two researchers. There’s a couple of other things I would like to bring to your attention. I’ve heard that certain factual representations in progress reports to the NIH were inaccurate. I’ve also seen that some researchers are not complying with the University’s policies on procedures and funding.
Initiating the Investigation

Jane Inhouse
(General Counsel)

Max Carvalho
(Medical Research Director)
Privileged & Confidential

Our adherence to high ethical standards is important. Recently, a possible violation of these standards has been brought to my attention. Accordingly, we are initiating an internal investigation in which we will gather relevant information. We look forward to the full cooperation of all employees during this period.
Is Max’s email protected by the attorney-client privilege?
Does Max forwarding the email to Jane render it privileged?
What if Max had copied Jane on the email? Would that have made the email privileged?
Initiating the Investigation

Jane Inhouse (General Counsel)

Employees in the Research Department
Further to Max’s email below, relevant information must be preserved. Full cooperation with the investigation is of the utmost importance. Please know that the University takes its no retaliation policy very seriously, and whistleblowers acting in accordance with our policy will not be retaliated against.

Please address any follow up questions or communications to me, Jane Inhouse.
Initiating the Investigation

Whistleblower Log

Senior Management
Initiating the Investigation

Is the entry on Jane’s log privileged?
Should Jane add her impressions of the allegation in an effort to render the log privileged?
Does the complaint sufficiently raise the possibility of litigation such that the attorney-work product privilege is triggered?
Initiating the Investigation

**Factors relevant to whether the work product privilege is triggered:**

- The University’s policy requires that all whistleblower complaints are logged and investigated in the *ordinary course of business*
- Jane is supervising the investigation, but will use internal resources from the Internal Audit Department as well as from the Legal Department
- No litigation has been filed; no external regulator or other entity has initiated and investigation

**Triggering work product protections:**

- The possibility of legal liability is **not enough** to trigger work product protections
- Courts generally require that litigation be “**foreseeable**”
- Documents that would have been prepared in **substantially the same manner**, in the ordinary course of business, absent the prospect of litigation are not protected by the work product doctrine
Is the “foreseeable litigation” standard for work product production related to the level of anticipation required to trigger obligations to preserve records?
3 Structure of an Internal Investigation
Structure of an Internal Investigation

Preliminary considerations:

• Should the investigation be handled by the **Compliance or Legal Department**?

• What is the **purpose and scope** of the investigation?

• How will the University **use the results**?
It’s settled. An employee from Internal Audit will conduct the audit of the Research Department. However, Legal – and myself, in particular – will direct the investigation.
Mary, I am designating you to compile background information and conduct witness interviews.
Is the work that Mary, as a member of Internal Audit, performs covered by the attorney-client privilege?
Structure of an Internal Investigation

For an internal investigation to be considered privileged:

- The investigation must be conducted for the **purpose of providing legal advice**
- Attorneys must have an active role in **directing the investigation**
- **Non-lawyers** assisting with the investigation should act as **agents of the attorneys**, under the direction and control of the attorneys, and for the purpose of assisting the attorneys in providing legal advice to the company
Mary, please keep me apprised and involved with respect to all fact development, analysis, and conclusions reached in the investigation. Thank you.
Is there any particular guidance that Jane should give to Mary?
Mary, at this stage, please limit your interviews to gathering factual information. Make sure you document all facts learned in these discussions and do not characterize the information you receive.
4 Document Collections and Witness Interviews
Privileged & Confidential
Attorney Work Product
All documents described in the attachment (including hard copy documents as well as electronic data and documents) must be preserved, and all routine destruction or discarding of any such documents or data, whether pursuant to formal company policies or otherwise, must be suspended until further notice.
Privileged & Confidential
Attorney Work Product

All documents described in the attachment (including hard copy documents as well as electronic data and documents) must be preserved, and all routine destruction or discarding of any such documents or data, whether pursuant to formal company policies or otherwise, must be suspended until further notice.

Privileged & Confidential
Attorney Work Product

The University will be collecting documents in connection with an ongoing investigation. The collection and use of the documents collected is for the purpose of providing legal advice to the University.
Witness Interviews

Jane Inhouse
(General Counsel)

Whistleblower

Calisota University
Mary, I think it’s a great idea for you to meet with the whistleblower here at the University.
Witness Interview

Paralegal

Mary (Internal Audit)

Whistleblower
Witness Interviews

Does the presence of the paralegal waive the attorney-client privilege?
Witness Interviews

- Agents, subordinates, and contractors working under the direct supervision and control of an attorney are included within the scope of the attorney-client privilege.

- Communications with those working under the direct supervision and control of an attorney do not waive the privilege.

- A second person should always be present during witness interviews to document what is said and serve as a witness if there is ever a dispute as to what was said during the interview.
What warning should Jane give at the outset of the interview?
Upjohn Warnings

- Introduction should:
  - Discuss the purpose of the interview, including that the investigation is being conducted in order to provide legal advice to the company
  - Advise witness that counsel represents the company and not the employee
  - Indicate that communications between counsel and the employee are privileged and confidential, but the company can waive the privilege
  - Ensure that the interviewee understands the ground rules
- Should be reflected in the paralegal’s notes
- Always plain language, avoid legalese
Upjohn Warnings: Unrepresented Parties

ABA Model Rule 1.13(f)
- Governs instances where a lawyer has an organization as a client
- Section (f) requires lawyers to explain the identity of the client to the organization’s employees and other constituents “when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”

ABA Model Rule 4.3
- Governs interactions with unrepresented persons
- Requires lawyers dealing with unrepresented persons “not [to] state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”
Witness Interviews

If the witness asks if she needs to retain her own counsel:

- University counsel should consider informing the witness that she is entitled to a lawyer but that they cannot advise the witness on whether to do so, as they do not represent her.
- It may be in the University's interest to recommend good defense counsel.

Ethical obligations to consider:

- ABA Model Rule 4.3 governs instances where a lawyer is dealing with an interviewee that is not represented by counsel.
- ABA Model Rule 4.2 requires that a lawyer not communicate with a represented person about the subject of the representation if the lawyer knows the person is represented by another lawyer, unless the other lawyer consents to the contact or the lawyer is authorized to do so by law or a court order.
Witness Interviews

Wait, what is the purpose of this interview? I’m confused.

Jane Inhouse (General Counsel)

Employees in the Research Department
What is privileged: the interview itself, or Jane’s memorandum of the interview?
Can the University prohibit the whistleblower from disclosing information to others?
Witness Interviews: Attorney-Client Privilege

- The **University controls the privilege**, and may prohibit employees from disclosing privileged information to others.
- Unauthorized disclosures will not waive the privilege.
- The privilege covers communications with **former employees** so long as they relate to the former employees’ period of employment.
- Waiver is a potential issue if a former employee retains privileged corporate documents and the University does not take **reasonable steps** to protect against disclosure.
5 Reporting Investigation Findings
Reporting Investigation Findings

- The number of whistleblower complaints
- The number of complaints investigated
- A short description of ongoing investigations
Reporting Investigation Findings

Jane Inhouse  
(General Counsel)

• Received a complaint regarding the Research Department

• Investigated by Internal Audit, at the direction of the Legal Department

• Uncovered federal grant issues that might violate the False Claims Act

• Seeking advice from outside counsel
Is Jane’s update privileged?
“Dual-hatted” In-House Counsel

- Generally privileged if the “predominant” or “primary” purpose of the communications are to seek or provide legal advice

- Where non-legal elements are contained in predominantly legal communications, the communication can still be privileged

- Where the communication includes both legal and non-legal advice, the legal advice must be “more than incidental” to the business (or other) purpose of the communication

A communication involves legal advice if:

- Counsel is “applying law to a set of facts, reviewing client conduct based on the effect of laws or regulations, [or] advising the client about status or trends in the law.” See Neuberger Berman Real Estate Income Fund, Inc., 230 F.R.D. at 412; or

- Counsel is applying “legal principles to specific facts in order to guide future conduct” or otherwise rendering the type of services that a legal education qualifies a lawyer to render. See id.
Jane Inhouse
(General Counsel)

OneOfFour LLP
(Auditor)
Is information shared with outside auditors considered privileged?
Disclosure to Outside Auditors

• Disclosure of privileged communications to a third party generally waives the attorney-client privilege

• Most courts hold that disclosure of documents to outside auditors waives the attorney-client privilege

• However, the work product privilege may survive


• Even though attorney-client privilege was waived, the reports in question were protected work product:
  – Reports used by auditor to assess company’s internal controls and determine the investigation’s impact on the company’s financial statements;
  – Auditor was under an ethical and professional obligation to keep the reports confidential; and
  – Company and its auditor shared an interest in preventing, detecting, and rooting out corporate fraud
Disclosure to Outside Auditors

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SEC v. RPM International (2020):

• Work product protections for witness interview memoranda were waived where:
  – Company counsel relayed information learned during interviews to outside auditors;
  – The auditors memorialized this information in their own written notes; and
  – Company authorized the auditors to share those notes with the SEC
Would the communications be considered privileged if Jane decides to share the results with the government?
Disclosure to the Government

- Absent a non-waiver agreement with the government, the attorney-client privilege and work product protection are **likely to be waived**

- Even where there is a non-waiver agreement in place, there has been mixed reception by the courts

- Although several courts have rejected the **selective waiver doctrine**, others have upheld non-waiver agreements and precluded discovery under the selective waiver doctrine

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**SEC v. Vitesse Semiconductor Corp (2011):**

- Work product protections for handwritten witness interview notes were waived where company counsel provided oral summaries to the SEC that went into “very detailed, witness-specific information”

- Waiver “would probably not apply” if the oral summaries "merely provided general impressions”

**SEC v. Herrera (2017):**

- Oral downloads of witness interview memoranda could constitute the “functional equivalent” of the actual notes and memos
6 Takeaways
Takeaways

- Establish clear roles for in-house counsel
- Use “Attorney-Client Privileged” or “Attorney Work Product” banners in communications intended to convey legal advice
- Be mindful of the types of communications that courts typically recognize to be legal advice
- To the extent possible, communicate about legal issues and/or provide legal advice in communications that are separate from those intended to convey business or compliance advice
- To the extent possible, be explicit about the type of advice being conveyed
- Where applicable, make clear that the purpose of the communication is to convey legal advice
- Where appropriate, copy outside counsel on the communication
- Where an investigation involves both compliance and legal issues, the Legal Department should participate in determining how the investigation will be handled and whether it involves legal issues
Mayra Suárez’s litigation experience includes conducting internal investigations on behalf of U.S. and foreign corporations, audit committees and individuals in the U.S., Europe and Latin America. She also has defended clients in connection with allegations of unlawful antitrust practices and in investigations by the Department of Justice and the Securities and Exchange Commission related to the Foreign Corrupt Practice Act.

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