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Attorney-Client Privilege in Congressional Investigations

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For a litigator accustomed to practicing in court, representing a client in a Congressional investigation presents unique challenges, as the rules, procedures, processes, and customs differ vastly. One area of stark difference is the status and treatment of attorney-client privilege. Over the years, much has been said about whether the privilege does or does not apply in a Congressional investigation. The practical reality lies somewhere in between. While Congressional committees generally adopt the view that the privilege is not applicable as a matter of right, most view it as within their discretion to sustain an assertion under certain circumstances. Counsel must nimbly navigate the pitfalls to ensure that the privilege is properly asserted, that it is not waived or compromised in any fashion, and that the client is not prejudiced in actual or potential parallel proceedings.

Claims of Privilege

In practice, Congressional committees do, to varying degrees, regularly respect validly asserted claims of privilege by not insisting on production of information that would improperly intrude on the confidential nature of the attorney-client relationship. This is because most members of Congress and their staffs, many of whom are lawyers themselves, recognize that many of the basic societal values underlying common-law attorney-client privilege apply as forcefully in the Congressional setting. The attorney-client privilege promotes the public interest in the observance of law by encouraging full and frank communications between attorneys and their clients. Though some assert that the privilege should never apply because a Congressional investigation is not an adversarial proceeding, this view is far too narrow. For example, a lawyer might counsel a witness appearing before Congress on the witness's Fifth Amendment rights, and counsel's advice should be informed by full and frank communication with the client. Any discussions or communications between attorney and client related to the Congressional investigation itself should be, and are, viewed as falling into a different category of privilege — one on unquestionably firm ground — than the assertions of the privilege discussed below. It is simply not Congressional practice to request information or documents related to counsel's representation of the client in the Congressional investigation itself.

Subpoenas

Congress has the ability to issue subpoenas for testimony and/or documents, and such authority has been held to be inherent in Congress's legislative powers. Any refusal to produce documents and/or testimony, even on the grounds of the attorney-client privilege, can be met with stiff penalties, as Congress has the authority to bring criminal contempt charges in such cases. An individual withholding subpoenaed documents ultimately needs to risk criminal contempt charges in order to obtain a judicial ruling on a particular assertion of privilege. In practice, however, both sides usually stop short of the brink. While witnesses may disclose potentially privileged communications to avoid charges of contempt, Congress also has a compelling interest in not litigating because a test case could result in a conclusive determination that the privilege exists as a matter of right rather than being subject to Congressional discretion. In addition, committee staff, particularly those busy preparing for a hearing or the release of a report, are motivated to avoid a lengthy and time-consuming legal dispute. Given all of these factors, it is often in both the committees' and the witness's interests to reach a reasonable accord on issues of privilege, and more frequently than not this is accomplished. The discussion below details how this accord can be reached in practice.

What Counsel Must Do

As committee staff can handle claims of privilege in any number of ways, it is advisable for counsel to notify the committee as early in the process as possible of relevant documents or other communications where counsel anticipates asserting the privilege. Early notification will give counsel time to learn the committee's procedures with regard to privilege and comply with them from the outset of the document collection and information gathering process. It also gives more time to persuade committee staff of the validity of the claim.

In making privilege determinations,

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committees have tended to balance their need for the information and ability to get it through other sources against any harm to the client due to disclosure. As early in the process as possible, counsel should convey to committee staff the genuine risks associated with disclosure, such as waiver in actual or potential parallel proceedings (including investigations by state or federal prosecutors or administrative agencies and any civil litigation).

The Privilege Determination Process

While the privilege determination process does differ from committee to committee, it often involves one of three approaches, or a hybrid of them: 1) reliance by committee staff on counsel's assertion of privilege; 2) requiring submission of a privilege log; and 3) a preliminary review of the documents by staff, for privilege only, modeled on an *in camera* review by a judge. Irrespective of the approach a given committee opts to take, counsel always must be prepared to explain and defend the assertion of privilege. As in court, the burden is on the person asserting the privilege.

Generally speaking, the committee should make as minimally invasive an inquiry as is necessary to satisfy itself that a privilege exists; wherever possible, it should accept at face value a proper assertion of privilege. Often, when staff adopts a minimally invasive approach without requiring a privilege log or an *in camera* review, it stems from a long-standing working relationship with counsel based on mutual respect and honesty.

Frequently, however, committee staff will require that counsel produce a privilege log but not the underlying privileged documents. While committee staff will not always specify the types of information to be included in the log, Federal Rule of Civil Procedure 26(b)(5) provides a good model. Counsel will not necessarily receive follow-up questions from committee staff regarding the log. This can be because the log is clear on its face, and committee staff have accepted the representations of counsel. Other times, however, lack of feedback simply may suggest that there wasn't time to engage in substantive discussions of privilege in advance of the hearing, not necessarily that the privilege claim has been accepted. It is important to remember that staff work under tremendous time constraints, often preparing for a hearing or finalizing a report when the log is produced (typically with the last set of documents).

Committee staff also may require an *in camera* review of documents — a bit of a misnomer, because the documents are not reviewed by an independent third party, but by committee staff. (In certain circumstances, the review might be conducted by Members or Congressional counsel not directly involved in the investigation.) The *in camera* review may include all documents withheld as privileged, as identified in a privilege log, or just a subset of these documents. Alternatively, committee staff may simply request that counsel provide the committee with all documents (or a sample of representative documents) that counsel intends to withhold as privileged. Though there is no requirement that counsel be present during the review, committee staff typically are amenable to discussing specific documents and privilege designations with counsel, and the client is best served by counsel's active participation in the process.

In Camera Review

With an *in camera* review, committee staff are serving as both judge and jury. They should, and do, take this responsibility seriously. Given this dynamic, it is even more critical that counsel be entirely forthright and professional in any assertion of privilege. If counsel loses credibility because of overly aggressive or careless privilege designations, the negative impact on the working relationship with committee staff can complicate the investigation going forward. On the other hand, if counsel uses this process to establish his care and integrity, staff are more likely to accept the assertion of privilege.

In extraordinary cases, a committee might flatly deny attorney-client privilege without any opportunity for give-and-take with the staff. Counsel then faces the stark choice of simply producing the requested documents or information or litigating the privilege in a contempt proceeding.

An assertion of privilege may be respected by one committee but not another with respect to the same witness. Different witnesses may face inconsistent treatment of an asserted privilege in the same investigation in front of the same committee. And even when the privilege is accepted, various committees may use different processes and procedures to reach this conclusion. Congress, and its committees and staff, as well as counsel and the witnesses they represent, would all benefit from a regularization of the process. This can be accomplished, in part, by the further development of a specialized bar in the area of Congressional investigations — one that understands the constitutional basis and history of Congressional investigations and on which committees can rely to advance legitimate claims of privilege.