

INSIGHT: Attorney-Client Privilege Tips for Congressional Investigations

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Congress has not consistently recognized the application of privilege in its investigations, and takes the institutional position that it's not obligated to recognize privilege. Akin Gump attorneys say that with more investigations coming, especially on Covid-19 issues, companies and counsel need to understand the rules.

The 116th Congress has launched investigations targeting a variety of industries, but especially in light of the recent congressional response to Covid-19, we are on the cusp of an onslaught of investigations that will likely last for years, and will be as invasive as they are pervasive.

Companies and their counsel must remain cognizant of the crucial differences between a courtroom or a "traditional" government investigation, and the congressional arena.

One of the most important but nuanced considerations for companies and their counsel is the applicability (or not) of the attorney-client privilege in the congressional setting, which can create significant issues in any parallel civil, criminal, or regulatory matters.

Privilege in the Congressional Setting

The attorney-client privilege, recognized by state and common law, is intended to promote honest communication between clients and their attorneys. Generally, for privilege to apply, there must be: (1) a communication; (2) between privileged persons; (3) in confidence; (4) that is for the purpose of obtaining legal assistance.

It may surprise many to learn that, historically, Congress has not consistently recognized the application of privilege in its investigations, and that Congress takes the institutional position that it is not obligated to recognize privilege.

While courts have recognized Congress's broad power to investigate, derived from its authority to legislate (which includes the power to compel documents and testimony on virtually any subject on which it may legislate), the investigative power is not unfettered, being subject to certain constitutionally based limitations. Where this authority runs into the question of privilege is particularly thorny.

As a general matter, Congress takes the position that its constitutional authority to investigate supersedes applicable state or common law privilege, and that as a coequal branch of government Congress is not bound by this common law doctrine.

Ultimately, while many congressional committees do, in practice, recognize the importance of attorney-client privilege, Congress takes the position that its applicability to particular matters is determined by the congressional committee conducting the inquiry.

Recent Developments

Recent congressional investigations shed additional light on the application of the privilege. In 2016, the D.C. District Court refused to accept Backpage.com's privilege-related objections to a congressional subpoena. While the Senate committee's position was abandoned in later proceedings, and the district court opinion was vacated, the district court's argument that

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Backpage.com could have submitted a privilege log has led some to cite this as tacit recognition of the applicability of the privilege in the congressional context.

In 2020, in a now vacated D.C. Circuit concurring opinion issued in connection with the House Judiciary Committee's efforts to obtain testimony from former White House Counsel Don McGahn, it was suggested that McGahn might be able to oppose the committee's questioning in a hearing due, at least in part, to the attorney-client privilege, and then seek a court resolution of these issues.

Without concluding the privilege applied, the concurring opinion acknowledged the uncertain status of attorney-client privilege in congressional investigations.

Special Considerations Regarding Covid-19

Corporate recipients of congressional stimulus from the \$2 plus trillion CARES Act, like banks and other companies with proximity to the financial crisis in 2008, are certain to face congressional scrutiny—in fact, such congressional investigations have already begun, and there will be aggressive inspector general and other investigations occurring in parallel.

Against this backdrop, companies must be mindful of protecting privileged information in both congressional investigations and the parallel regulatory, civil, or even criminal proceedings that may follow.

The 2008 financial crisis investigations provide instructive, and cautionary, examples in this regard. In the wake of the financial crisis, one congressional committee sought and obtained privileged materials from Bank of America regarding its acquisition of Merrill Lynch. Ultimately, Bank of America waived privilege in the congressional investigation and even permitted its former general counsel to testify on such matters.

As such disclosures of privileged material may constitute a waiver in other parallel matters, counsel need to be very cautious navigating these difficult waters.

Advice and Practical Tips

When navigating a congressional inquiry, especially one that may implicate privileged material, counsel is typically best served to communicate with committee staff early in the process and raise potential privilege concerns. Early communication can often help to navigate the request in a way that may be able to address the committee's inquiry but also to protect potentially privileged materials.

Especially in circumstances where the privileged material does not go to the heart of a committee's inquiry, negotiation and discussion can be very productive.

In addition, committees may demand that counsel produce a privilege log mirroring, for example, a log that might be produced under the Federal Rules of Civil Procedure (even though the Federal Rules of Procedure and Evidence do not apply in the Congressional context).

A committee may also be amenable to a limited review of the privileged documents to "test" the privilege assertions. This type of modified in camera review might avoid full-scale production of requested materials subject to the privilege, and might also preserve—with careful navigation—arguments that the privilege has not been waived by such "production."

In this regard, counsel should carefully consider whether a formal subpoena is required for such material or whether an informal letter request (which is how many congressional committees begin their inquiries) is sufficient.

As with all things, especially with the aggressive investigative landscape now unfolding, communication and effective preparation are crucial for counsel helping clients navigate the difficult question of privilege in congressional investigations.

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