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Attorney-Client Privilege and the Work Product Doctrine in Internal Investigations

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Agenda

- Attorney-client privilege in the corporate context
- Common interest doctrine
- Work product doctrine
- The Yates Memorandum: implications for attorney-client privilege and internal investigations
- Waiver issues: *U.S. v. Wells Fargo Bank, N.A*. (S.D.N.Y. 2015)

Attorney-Client Privilege in the Corporate Context

- The attorney-client privilege may be invoked "with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client." Restatement (Third) of Law Governing Lawyers § 68
- In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court broadly affirmed the applicability of the attorney-client privilege to corporations.
  - "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law.'" *Upjohn*, 449 U.S. at 392 (*quoting* Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 910, 913 (1969)).
  - "[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.
- Privilege issues can become complex when a corporation is involved.

Attorney-Client Privilege in the Corporate Context

- Restatement standard
  - If the client is an organization, "privilege extends to a communication that: (1) otherwise qualifies as privileged . . .; (2) is between an agent of the organization and a privileged person . . .; (3) concerns a legal matter of interest to the organization; and (4) is disclosed only to: (a) privileged persons . . . ; and (b) other agents of the organization who reasonably need to know of the communication in order to act for the organization." Restatement (Third) of Law Governing Lawyers § 73
- Use of *Upjohn* warnings
  - An *Upjohn* warning will help establish the applicability of the privilege. *Upjohn* warnings also help ensure that employees have an accurate understanding of the attorney's role and of the use that may be made of information that they convey.
  - Related ethical rule: "When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees . . . or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents." N.Y. Rule 1.13(a)

Attorney-Client Privilege in the Corporate Context

- Key takeaways from *In re Kellogg Brown & Root, Inc*., 756 F.3d 754 (D.C. Cir. 2014)
  - In order for the privilege to apply, it's not necessary to show that the *only* purpose for the communication was to obtain legal advice. Rather, the privilege applies whenever "a significant purpose of the communication" was to obtain or provide legal advice. *Id*. at 388.
    - This rule has important practical implications for corporations, where there are often multiple reasons for the company to conduct an internal investigation.
  - In-house lawyers are "fully empowered" to engage in privileged communications, and "a lawyer's status as in-house counsel 'does not dilute the privilege.'" *Id*. at 386 (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)).
  - The privilege applies to statements made to non-lawyers (including investigators) if they are working at the direction of attorneys. *Id*.
  - In some circumstances, the privilege can attach even in the absence of specific *Upjohn* warnings. In *KBR*, employees knew that the legal department was conducting a sensitive investigation, that the information they disclosed would be protected, and that they were not supposed to discuss their interviews without prior authorization from the legal department. *Id*.
    - Note, however, that the case for the privilege becomes weaker in the absence of clear *Upjohn* warnings.

Common Interest Doctrine

- Disclosure of privileged material to a third party will not constitute a waiver if the disclosure falls within the common interest exception.
- Restatement standard:
  - "If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third parties. Any such client may invoke the privilege, unless it has been waived by the client who made the communication." Restatement (Third) of Law Governing Lawyers § 76
- Under New York law, the common interest doctrine applies *only* if communications are "in furtherance of a common legal interest in pending or reasonably anticipated litigation." *Ambac Assurance Corp. v. Countrywide Home Loans, Inc*. (N.Y. 2016). New York does not recognize common interest protection for communications shared outside a litigation context.

Work Product Doctrine

- "Work product consists of tangible written material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation." Restatement (Third) of Law Governing Lawyers § 87.
- "Opinion work product" is generally immune from discovery; "ordinary work product" is subject to disclosure if "the inquiring party: (1) has a substantial need for the material in order to prepare for trial; and (2) is unable without undue hardship to obtain the substantial equivalent of the material by other means." *Id*. §§ 88-89; *see also* Fed. R. Civ. P. 23(b)(3)(A), 23(b)(3)(B).
- *In re Kellogg Brown & Root, Inc*., 796 F.3d 137 (D.C. Cir. 2015)
  - The attorney-client privilege and the work product doctrine are analytically distinct, and should not be lumped together. "[T]here is nothing to be gained by sloppily insisting on both or by failing to distinguish between them." *Id*. at 149.
  - Factual work product is subject to disclosure on a showing of "substantial need" and undue hardship," but opinion work product (such as the synopsis in a report of an internal investigation) is subject to heightened protection. *Id*. at 148-50; *see also* Fed. R. Civ. P. 23(b)(3)(B) (if a court orders disclosure of work product, "it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of counsel or a party's representative).

The Yates Memorandum

- Since the 1990s, the DOJ's "Principles of Federal Prosecution of Business Organizations" have outlined non-binding considerations for charging business entities. The Principles emphasize corporate self-reporting and cooperation along with other factors.
- In September 2015, the DOJ updated the prior guidance in a document that has become known as the "Yates Memo."
- The overriding message in the Yates Memo is that the DOJ will aggressively seek to pursue criminal and civil charges against individuals in corporate cases. Companies are expected to assist the DOJ in this effort.
  - According to the Yates Memo, seeking accountability by prosecuting individuals has several important results: "it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."
- Key provision of the Yates Memo: to receive *any* cooperation credit, corporations must provide to the Department *all* relevant facts relating to the individuals responsible for the misconduct.
  - Fulsome investigation of individual misconduct is a "gating factor" to receive cooperation credit.

The Yates Memorandum

- Significant implications for internal investigations and the role of counsel
- Government requests for information in the internal investigation may encroach on the attorney-client privilege and work product protections.
  - In 2008, after painful history and judicial criticism, the DOJ abandoned the prior practice of pressuring companies for privilege waivers.
    - *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) and the Filip Memo (2008)
  - However, the current DOJ cooperation policy contains inherent tensions and difficulties in this same area
    - U.S. Attorneys' Manual § 9-28.720 (requiring disclosure of all "relevant facts," regardless of how they were obtained)
    - Both *Upjohn* and *Hickman v. Taylor*, 392 U.S. 495 (1947) arose from demands to produce interview memos prepared by counsel.
- Fed. R. Evid. 502(a) and limited waiver agreements
- Need for careful attention to conflict issues

Waiver issues: *U.S. v. Wells Fargo Bank, N.A.*

- What happens when an individual seeks to rely on privileged communications to defend against an accusation of wrongdoing by the government, but the company refuses to waive the privilege?
- Key takeaways from *U.S. v. Wells Fargo Bank, N.A.*, 132 F. Supp. 3d 558 (S.D.N.Y. 2015):
  - This scenario presents "a conflict between two indisputably weighty principles": the individual's ability to present a full defense versus the corporation's interest in preserving the confidentiality of privileged communications. *Id.* at 561.
  - At least in civil cases, the attorney-client privilege cannot be subject to a "balancing test," because such a rule would inject uncertainty into the existence or applicability of the privilege. *Id.* at 562-63.
  - Limitations under Fed. R. Evid. 502(d) might not be effective.
- The decision in *Wells Fargo Bank* is troubling and raises significant questions about fairness and due process.