

Understanding and Preserving Privilege During Compliance Investigations

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Overview of Potential Privileges

Attorney-Client Privilege

- Confidential attorney-client communications

Attorney Work-Product Doctrine

- Materials prepared in anticipation of litigation or for trial

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Purpose of Attorney-Client Privilege

- Protects confidential communications, oral and written, between an attorney and client obtaining legal advice
- Promotes freedom of consultation and encourages full discussion of the facts uninhibited by fear of disclosure

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Scope of Attorney-Client Privilege

Attorney client privilege requires:

- (1) A **communication**;
- (2) Made between **counsel** and client;
- (3) In **confidence**;
- (4) For the purpose of **rendering legal advice**.

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Burden of Establishing Privilege

- Privilege must be properly claimed
- Burden is on the party claiming the privilege
- Even inadvertent disclosure may waive the privilege if reasonable steps have not been taken
- Privilege log is essential

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What is Protected?

- Analysis on a case-by-case basis
- Communications for mixed purposes are at risk
- Communications with outside counsel generally are privileged
- Communications with in-house counsel are protected if for purpose of providing legal advice

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What is NOT Protected?

- Existing documents handed to the attorney or staff
- FACTS
- Business advice and business analyses of options
- Reports to management not involved unless provided in the course of providing management with legal advice
- Analyses and communications by CCO who is an attorney in compliance role

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Purpose Is Business Not Legal Advice

- Sending a document and requesting legal advice regarding the draft document does not necessarily show that the communication was privileged.
- "Rather, Defendants must show, irrespective of whether one or more lawyers sent or received the communication, that the communication was confidential and that the *primary* purpose of the communication was to relay, request or transmit legal advice." ***United States v. Davita, Inc.***, 2014 WL 4116590, at *3 (N.D. Ga. Mar. 31, 2014)

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Examples of Potentially Unprotected Communications

- Having the attorney engage the FMV appraiser may not protect the appraisal
- Stating simply that staff should conduct “an internal investigation” may be fact-finding and not directed by legal counsel
- Labeling all internal investigations as “attorney-client privilege” without attorney involvement may risk a finding of no privilege

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Reducing the Risk of Waiver

- An overly broad designation of documents as privileged may result in the loss of privilege even for documents that should otherwise have been protected.
 - A “privilege” label should not be placed on an existing document that is not eligible for protection.
 - A “privilege” label should not be placed on a communication or memo that is not legal advice, particularly if it is business advice.

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Avoiding Misuse of Email

- Communications between counsel and clients, especially emails, may not be protected if the communication simply recites facts or does not seek or render purely legal advice.
 - *Written communications should note that you are seeking advice on a legal question if applicable, and should be clearly labeled as such.*

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Avoiding Misuse of Email

- Copying an attorney does not create an attorney-client privilege
- Copying individuals who are not attorneys in email communications may destroy attorney-client privilege
 - *Limit the audience to those absolutely necessary for that particular communication.*
 - *Do not “cc” others except on a strict need-to-know basis.*

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Key Privilege Questions Analyzed

- Courts begin with basics of attorney-client privilege analysis applicable in any case
 - (1) Communication was between lawyer and client
 - (2) For the purpose of obtaining legal advice
 - (3) And confidentiality maintained
- Analysis typically focuses on two key questions
 - (1) Whether “primary” purpose of the communication was for legal advice; and
 - (2) Whether the communication was confidential

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Determining the Scope of Privilege

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., 2012 WL 5415108 (M.D. Fla. Nov. 6, 2012)

- FCA allegations based on Stark Law and AKS violations related to physician compensation arrangements
- *Privilege Concerns*. (1) Compliance referral log; (2) Documents not to/from attorney; (3) Documents related to audits and reviews performed by Case Management Dept.; (4) Documents relating to FMV determinations; (5) Documents produced to Govt.; (6) Emails; and (7) Crime-fraud exception documents

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Determining the Scope of Privilege

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr. (cont.)

- Compliance referral log
 - Halifax: Header and footer on log denote as “privileged and confidential” and log intended to facilitate discussions with Hospital’s GC; incident reports addressed to attention of GC
 - Court: None of logs evidenced legal advice sought or obtained; information characterized as “recording of fact”
- Documents not to/from an attorney
 - Halifax: Compliance operates under Legal Department’s supervision and oversight
 - Court: Halifax failed to demonstrate primary purpose/intent of each document was to seek or provide legal advice; “facilitating provision of compliance advice” not sufficient

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Determining the Scope of Privilege

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr. (cont.)

- Audits and reviews performed by Case Management Dept. & FMV determinations
 - Relator sought all audits and reviews performed by any other dept. other than Hospital’s Legal Dept. and all FMV analyses for physician compensation including drafts
 - Court: Documents largely not privileged; documents did not involve legal advice sought or obtained, no attorneys were involved in the communications, audits or analyses

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Determining the Scope of Privilege

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr. (cont.)

- Documents produced to Govt.
 - Govt: Halifax waived privilege with all documents produced in response to subpoenas issued in 2009 and 2010; Halifax never produced privilege log identifying documents withheld as privileged
 - Halifax first asserted privilege over certain produced documents in 2012
 - Court: “To the extent any of the documents produced in response to the Government’s 2009 and 2010 subpoena were protected by the attorney-client privilege, the privilege was waived.”

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Determining the Scope of Privilege

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr. (cont.)

- Email correspondence
 - Court reviewed random sample of emails and made case-by-case privilege rulings; noted that privilege log failed to “disassemble” and list each email in an email string separately
 - Court: Focused on its interpretation of the primary purpose of each of the communications at issue; found many not to be for the purpose of obtaining legal advice; noted instances where an attorney was copied or one of many recipients

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Determining the Scope of Privilege

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr. (cont.)

➤ Crime-fraud exception documents

- Exception recognizes that attorney-client privilege “does not protect communications made in furtherance of” fraud
- Relator: Halifax violated Stark by “providing improper financial incentives to staff physicians ... unrelated to their personal performance of services” and communications with counsel “evidenced an attorney aiding in the commission of a fraud”
- Court: Crime-fraud exception applied to email communications eventually forwarded to Relator reflecting Halifax seeking advice from counsel when Halifax was engaged in or about to be engaged in fraudulent conduct as advice was sought and obtained for purpose of making payments to the physicians

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Determining the Scope of Privilege

***In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014)**

➤ FCA Allegations

- Relator (former KBR employee) alleged KBR violated FCA by inflating costs and accepting kickbacks while administering government defense contracts

➤ Privilege Concerns at Issue

- Relator sought production of documents related to internal investigation into alleged fraud conducted by KBR pursuant to its Code of Business Conduct, which was overseen by Law Department

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Determining the Scope of Privilege

➤ KBR's Privilege Arguments

- KBR argued internal investigation was conducted for purpose of obtaining legal advice and protected by the attorney-client privilege
- Declaration by counsel submitted in support of privilege assertion

➤ Court's Analysis of Privilege Issue

- District court determined attorney-client privilege did not apply because KBR failed to show "the communications would not have been made 'but for' the fact that legal advice was sought"; rather, internal investigation was "undertaken pursuant to regulatory law and corporate policy"
- On writ of mandamus, D.C. Circuit concluded that the district court's analysis was "legally erroneous" and found the case indistinguishable from *Upjohn*
- Key question: "Was obtaining or providing legal advice **a** primary purpose of the communication, meaning one of the significant purposes of the communication"

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Determining the Scope of Privilege

U.S. ex rel. Schaengold v. Memorial Health, Inc.,

2014 WL 5767042 (S.D. Ga. Nov. 5, 2014)

➤ FCA Allegations: Hospital violated Stark Law with physician compensation arrangements

➤ Privilege Concerns at Issue

- Govt's complaint in intervention referenced draft PPT provided to prior counsel and counsel recommended removal of certain language from final non-privileged version of PPT; draft PPT produced to Govt. during investigation
- Hospital's new counsel demanded return of the draft PPT upon discovery of its production to Govt. and filed motion seeking return of the draft PPT
- Relator's complaint referenced retention of FMV consultant by Hospital's legal counsel to analyze Hospital's compensation structure

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Determining the Scope of Privilege

➤ Hospital's Privilege Arguments

- Hospital asserted that draft PPT was privileged because hospital executives provided the draft PPT to counsel and counsel advised that certain language be removed from the draft
- Declaration by counsel submitted in support of privilege assertion

➤ Court's Analysis of Privilege Issue

- Hospital required to show "primary purpose" of the communication was to relay, request or transmit legal advice
- Declaration of counsel stating that PPT was provided to counsel for legal review was insufficient to carry burden
- Communication referenced in relator's complaint regarding retention of FMV consultant not confidential and mere fact of retaining a consultant not privileged

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Good Faith Compliance with Law

U.S. ex rel. Barker v. Columbus Regional Healthcare Sys., Inc., 2014 WL 4287744 (M.D. Ga. Aug. 29, 2014)

➤ FCA allegations at issue

- FCA allegations against Hospital premised on failure to comply with Stark law and violations of the AKS in connection with physician compensation arrangements
- Hospital resolved FCA allegations for a maximum settlement amount of \$35 million and entered into 5-year Corporate Integrity Agreement

➤ Privilege issue considered

- Hospital intended "to offer evidence at trial that it believed its conduct was lawful"
- Hospital was not asserting "advice of counsel defense" and did not intend to rely on communications with counsel to support its defense
- Relator argued that Hospital "waived the attorney-client privilege as to any communications that relate to the legality of the transactions at issue"

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Good Faith Compliance with Law

➤ Hospital's Privilege Arguments

- Hospital asserted that its defense did not implicate waiver because: (1) not relying on advice of counsel; (2) not relying on communications with counsel; (3) simply denying relator's allegations does not inject the lawfulness of its conduct into the litigation; and (4) argued for a narrow application of waiver principles in healthcare context due to complex regulatory framework

➤ Court's Analysis of Privilege Issue

- Court explained that each of the substantive privilege arguments raised by Hospital had been rejected by the 11th Circuit; by claiming its conduct was lawful, Hospital injected the issue of knowledge of the law into the case and waived the attorney-client privilege
- Court found no basis to make exceptions to 11th Circuit precedent due to the complex regulatory framework applicable to the healthcare industry

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What Events Trigger an Investigation?

- Company contacted by Government
- Report by internal or external auditor
- Allegation from a company employee
- Complaint by customer, competitor, or other third party
- Abnormal trends in data or finances

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Whether to Conduct Internal Investigation

- Turns on nature and severity of the allegations
 - Scope of the problem
 - Potential overpayments
 - Systemic issue
 - Who is involved at the company
 - Consideration of patient safety
- Whether allegations arose from credible source and have basis in fact
- A credible indication of a violation of an important company policy should prompt an investigation

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Asserting the Privilege in Internal Investigations

- Key elements in analysis:
 - Was asserted holder of privilege a client (or seeking to becoming a client)?
 - ✓“Who is the client” for in-house counsel?
 - ✓Entity and Board of Directors, not CEO or other management colleagues
 - ✓Are all of legal entities in a health system clients of the in-house counsel?
 - ✓What about conversations with other interested parties (e.g., PE investor, lenders)
 - To whom was communication made?
 - ✓A member of the bar
 - ✓Acting as a lawyer in connection with the communication

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Asserting the Privilege in Internal Investigations

- Key elements in the analysis (cont'd):
 - What facts were communicated and in what context?
 - ✓ Shared by client (or client's representative)
 - ✓ Outside presence of strangers.
 - ✓ For the purpose of securing a legal opinion, legal services, or assistance in a legal proceeding. *i.e.*, **not** for the purpose of obtaining general business advice.
 - Has privilege been asserted and not waived by the client?
 - ✓ Documentation of intent to invoke and achieve the privilege is necessary, but not dispositive.
 - ✓ Care must be taken to avoid an inadvertent waiver.

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Who Should Conduct the Investigation?

- Compliance department
- Company counsel
- Outside counsel
- Internal/external auditors
- Outside clinicians/other experts
- Some combination of all of these?

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Who Should Conduct – Factors to Consider

- Nature and scope of alleged misconduct
- Seniority of individuals involved in conduct
- Need for specialized investigative skills and/or subject matter expertise
- Resources required to conduct the investigation

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Does the Investigator Need to Be an Attorney?

- Actual investigation need not be conducted by an attorney to establish and maintain privilege.
- Under Upjohn, attorney-client privilege applied to interview conducted by non-lawyers who were acting under the direction of counsel.
- Use of an attorney is not dispositive, however, because information gathered by attorney may not be privileged under certain circumstances.

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Who Should Conduct – Factors to Consider

- Under *Upjohn*, outside counsel involvement not condition precedent to application of attorney-client privilege
- Benefits of in-house counsel/compliance conducting investigation
 - Cost
 - Efficiency – familiarity with personnel, policies, culture
 - Less disruptive – may be received more openly by employees
- Benefits of outside counsel conducting the investigation
 - Communications clearly protected by attorney-client privilege and work product protected by work product doctrine
 - Independence, especially if alleged wrongdoing implicates individual with regular contact with in-house counsel/compliance
- Perspective of the government

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Witness Interview Issues

- When employee is interviewed during the course of an investigation, who controls the privilege, the Company or the witness?
 - Can the employee assert the privilege independently?
- Interests of the Company can sometimes differ from interests of the employee
 - Desire to obtain information from witness who might not talk if information is going to be disclosed to others in the company or third parties.

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Witness Interview Issues

The Corporate Miranda Warning

➤ ***Upjohn Co. v. United States***, 449 U.S. 383 (1981)

- Attorney advises the individual that the attorney represents the organization and not the individual.
- Necessary for the employee to understand the company can waive the attorney-client privilege at any time and disclose the contents of the conversation between the lawyer and the employee, even if the employee objects.

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What Warnings in Witness Interviews?

➤ Provide *Upjohn* warnings to witnesses.

- Counsel represents employer, not witness.
- Interview being conducted to provide legal advice to employer.
- Conversation is privileged.
- Privilege belongs to employer, not witness.
- Employer may decide to waive privilege and share information within company and with third parties, including the Federal government.
- Keep conversation confidential to assist in maintaining privilege.

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Witness Issues – Interviews by Government

- Does the Government have to contact company counsel before contacting current employees? What about former employees?
- Can company enter into a severance agreement with employee that contractually limits the employee's ability to talk to the Government or serve as a whistleblower?

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Communicating Results of Investigation

- Benefits of oral report
 - Written report memorializes facts as understood on a given date that may be contradicted by later discoveries.
 - Risk statements being taken out of context.
 - Written report may have to be produced to Government or third parties.
- Benefits of written report
 - Demonstrates that the company has undertaken a full review of the issues, understands the prescribed legal advice, and will implement recommended remedial action.
 - If the corporation wishes to self-report misconduct to the government, a written report can be useful.

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Cooperation and Waiver of the Privilege

- Companies often choose to report identified violations to appropriate regulatory authorities and wish to cooperate with regulators.
- *But*: Can companies do so without waiving the privilege?
- Companies can cooperate in a number of ways without necessarily waiving the privilege.
 - Can provide key documents which are not subject to the privilege.
 - Can meet with a representative of the regulator and share key findings as well as detail of the corrective or remedial actions taken by the company.
 - Can direct counsel to respond to questions from the regulator.

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Cooperation and Waiver of Privilege (cont'd)

- To what extent can a company cooperate without waiving privilege?
- Sharing memos that document key witness interviews?
 - Overall: Unclear. At least one Federal court concluded that providing witness interview memos to a regulator did not waive privilege of other interview memos. Other courts have found subject matter waiver.
- Can company selectively share privileged information and still assert the privilege with respect to those materials for other purposes?
 - Generally: No. Selective waiver of the attorney-client privilege has been fairly widely rejected.

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Final Tips

- Have General Counsel or designee create a written document which authorizes/directs the review.
- Provide and document *Upjohn* warnings when interviews start.
- Limit communication to a “need to know” group of key internal personnel.
- Limit communications outside the “need to know” group to the extent possible to avoid unintentional waiver.
- Use lawyers for key tasks (*e.g.*, for witness/employee interviews).
- Where non-lawyers are used, document that tasks were done at direction of counsel *and* assure that sufficient lawyer oversight of work is maintained (and could be proven).

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Questions

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