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Privileged Material in Audits and Investigations: Protecting Attorney-Client Communication and Work Product

Disclosures to Third Parties, Cross-Border Challenges, Implications of Cohen Raid and Mueller Investigation

WEDNESDAY, NOVEMBER 7, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Attorney Client Privilege at Risk in Investigations and Audits:

Preserving Confidential Information, Safeguarding
Work Product, Avoiding Inadvertent Disclosure

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Who has the Privilege: Understanding Ownership of the Attorney-Client Privilege in the Corporate Context

1. Privilege within the Corporation
2. Privilege Considerations During Employee Interviews
3. Protecting Communications Amongst Management
4. Former Employees and the Privilege
5. Third Parties in Investigations
6. The Garner Doctrine

Basics of Privilege Law

A communication between client and lawyer sent under confidential conditions for purposes of seeking or providing legal advice.

- Elements:
 - Communications can be privileged; facts are not.
 - Who is the client in the corporate setting?
 - Lawyer must be acting as a lawyer, not a business person.
 - Confidential nature of the communication must be intended and maintained.
 - Legal advice is privileged; business advice is not.

Who is the Client?

Rule 1.13 of the ABA Model Rules of Professional Conduct:

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents

- (b) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client 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.

Comment 10: Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

The *Upjohn* Principle



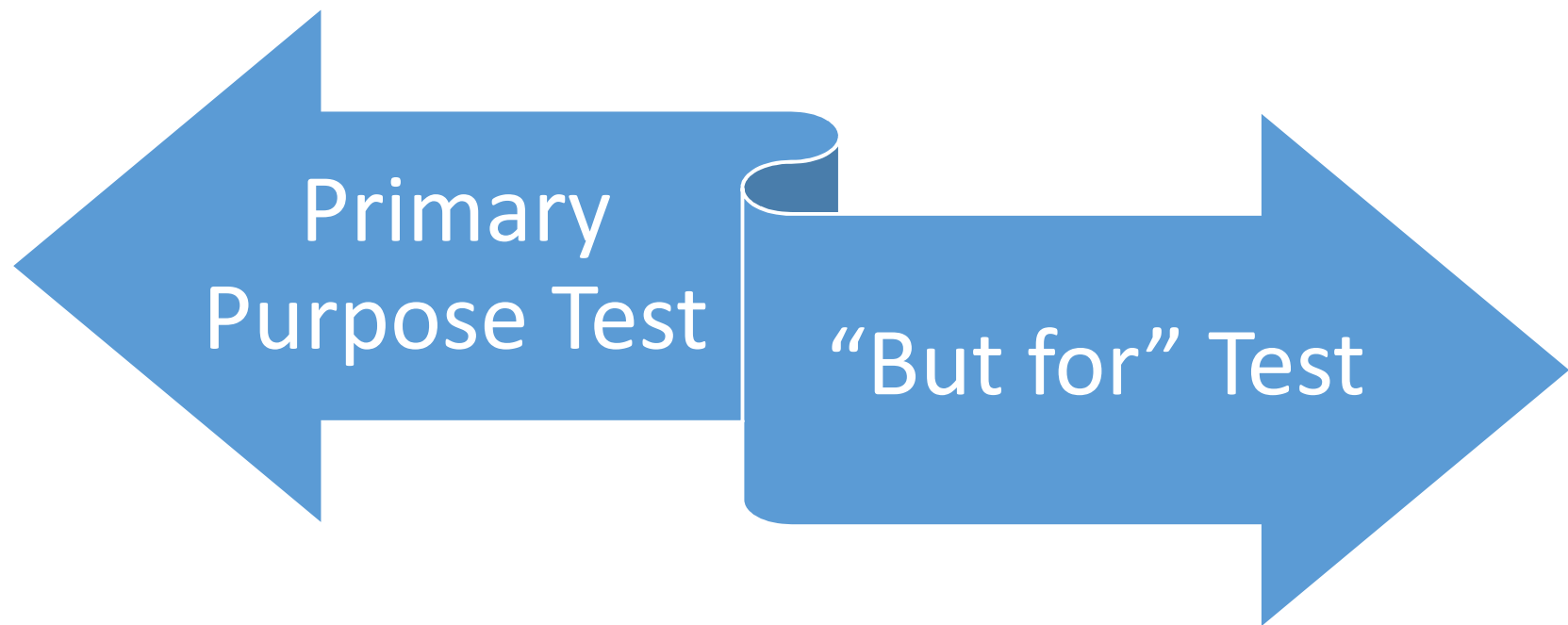
Communications with lower-level employees may be protected if:

- The communications are made to corporate counsel
- The communications are made at the direction of corporate superiors to secure legal advice from counsel
- The information communicated is not available from upper management
- The information communicated concerns matters within the scope of the employee's duties
- The employees are made aware that they are being questioned in order for the corporation to secure legal advice

Control Group Test

- Pre-*Upjohn* test for confidentiality
- Currently used to distinguish those who can direct lower-level employees to secure legal advice for purposes of *Upjohn*
- Some states consider it the appropriate standard even after *Upjohn*
- Control Group:
 - Upper management decision-makers
 - Employees in a position of control or who have a substantial role in determining what action the corporation should take in response to legal advice or who is “an authorized member of a body or group which has that authority”
 - *Philadelphia v. Westinghouse Elec. Co.*, 210 F. Supp. 483 (E.D. PA. 1963)

Purpose of Communication



In re Kellogg Brown Root

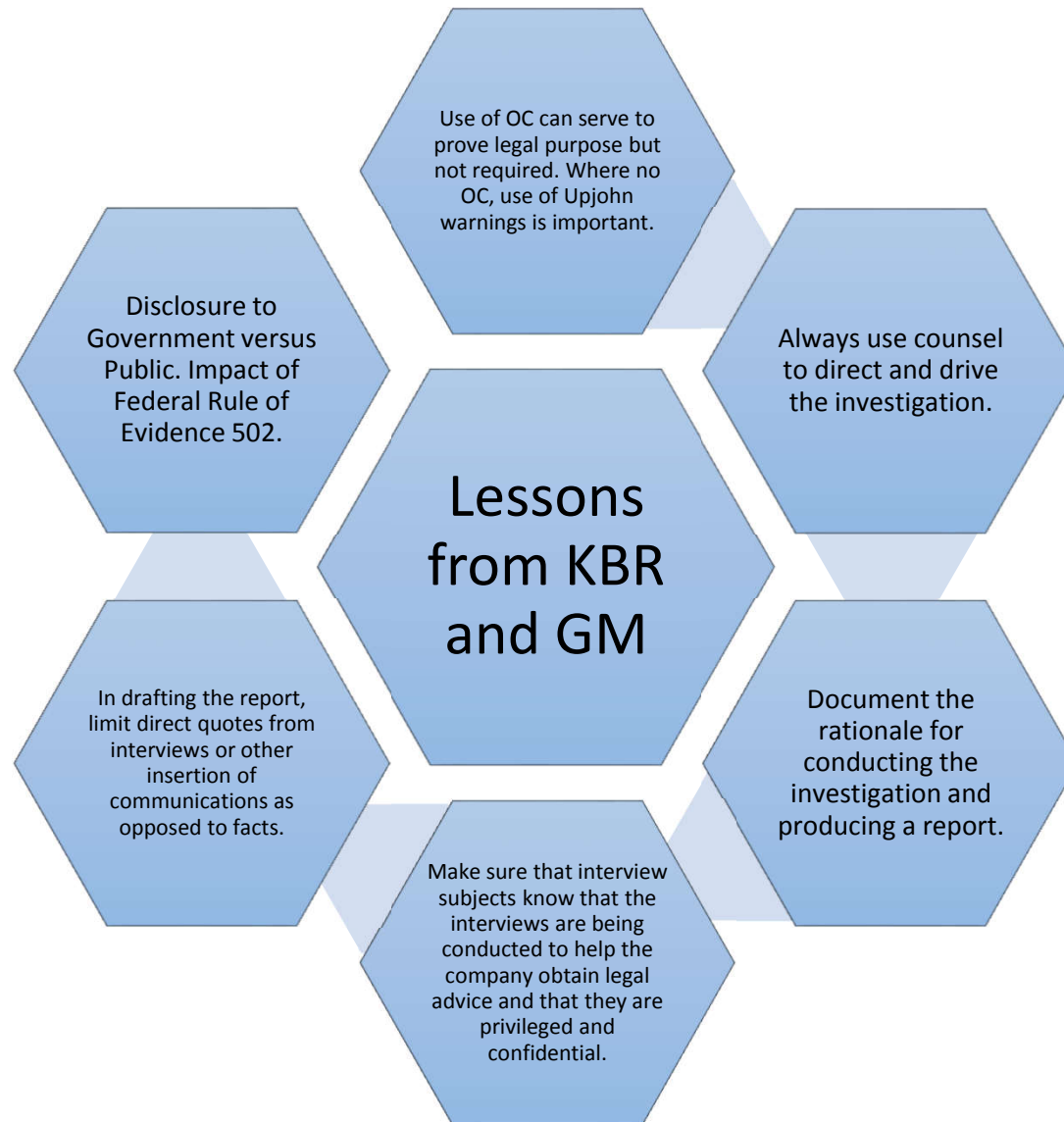
756 F.3d 754 (D.C. Cir. 2014)

- D.C. Circuit Court of Appeals reversed district court, upheld privilege.
- Although KBR did not involve outside counsel in the decision to investigate, nothing in *Upjohn* requires that outside counsel be involved.
- Although non-lawyer did conduct some of the KBR interviews they were acting under the direction of counsel at all times.
- While confidentiality documents executed by interview subjects did not expressly reference the fact that legal advice was being given this is not required, merely preferred.
- The Circuit Court rejected the “but for” test of privilege protection, instead looked to see if obtaining legal advice was a “significant” purpose of the internal investigation.

In re General Motors LLC Ignition Switch Litigation

- GM had outside counsel (two law firms) prepare a 315-page report based on their review of 41 million documents and interviews with 230 witnesses.
- GM distributed the final report to various agencies, one of whom published it on their website.
- Because the privilege protects communications - not facts - the privilege is not waived by public disclosure of facts uncovered in an investigation. Thus, the key issue was not whether GM intended to make the report public, but whether GM intended to disclose privileged communications underlying the report.
- The court rejected the but-for test advanced by plaintiffs, and instead found that the applicable primary purpose test did not require a showing that obtaining legal advice was the sole purpose behind the investigation.





The UK perspective: SFO v. ENRC



Litigation Privilege

- Litigation is in progress or reasonably in contemplation.
- The communications are made with the **sole or dominant** purpose of conducting that anticipated litigation.
- The litigation is adversarial, not investigative or inquisitorial.
- Adversarial criminal proceedings do not occur until there is sufficient evidence for a prosecutor to bring a case.

Legal Advice Privilege

- Only covers communication with those empowered to ask for legal advice.
- Interview notes with lower level employees not covered; mere preparatory.

In re Vioxx: Protecting Communications Amongst Management

In re Vioxx Prod. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007)

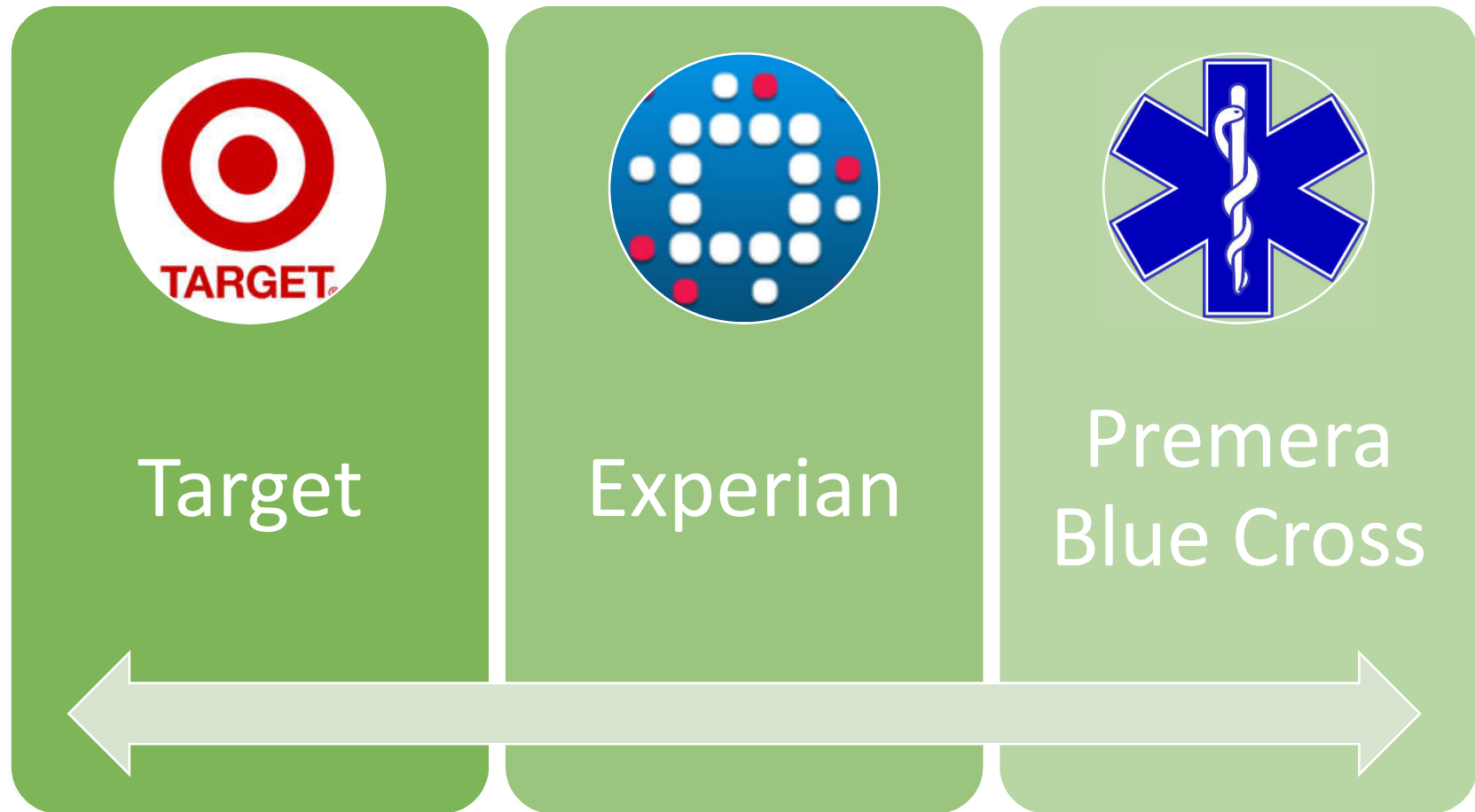
- Applies to communications to and from in-house counsel
- Only *legal* confidential communications with in-house counsel are protected by the attorney-client privilege
 - “An attorney’s involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction.”
- Ask: Is the primary purpose of the communication to obtain legal or business advice?

Use of Attorney as Conduit for Communication

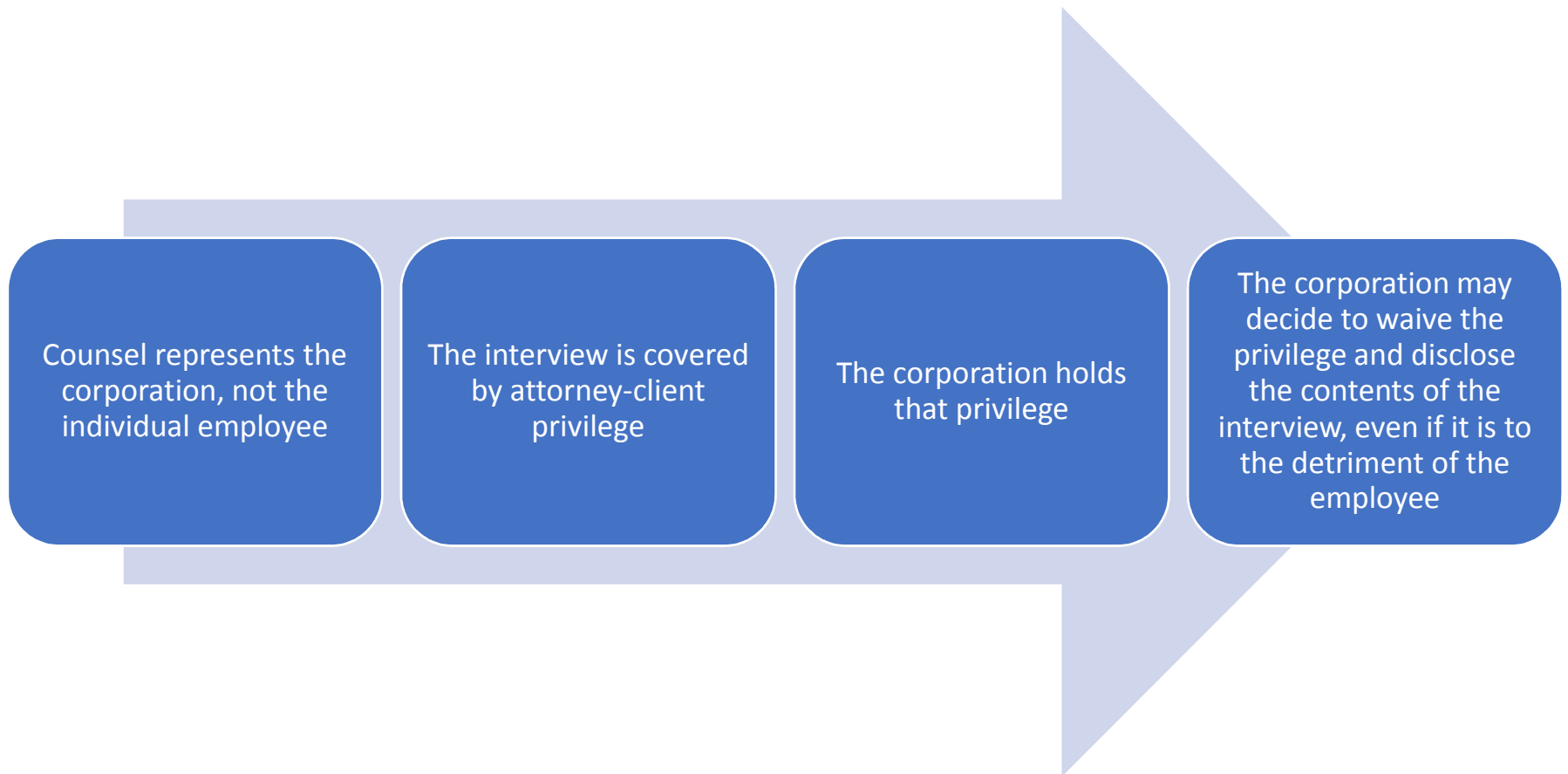
To preserve privilege for communications with in-house counsel:

- Refrain from mixing business discussions with legal advice
- Keep e-mail chains separate, so counsel is not on an e-mail also circulated to non-legal personnel
- Counsel should not circulate communications to non-legal personnel unless apprising them of legal advice (think need-to-know)
- Use “Privileged” and “Confidential” stamping appropriately
- Be clear that the communication involves legal advice
- Where you want to protect fact that lawyer got copy of otherwise unprotected document, use blind carbon copy to shield the fact the attorney received an e-mail

Data Breach Cases: Legal v Business Response



Upjohn Warnings



Special Committee as Separate Entity

- Used in derivative suits and investigations.
 - Board of directors appoint the committee
 - The committee must be comprised of one or more independent and disinterested directors
- As an independent entity it can waive its attorney client privilege
- *Ryan v. Gifford*, C.A. No. 2213, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007):
 - Special committee was formed to investigate alleged violations of stock option plans
 - Special committee shared its final report with the board of directors, some of whom were implicated in allegations
 - Special committee waived privilege because it “disclosed its communications concerning the investigation and the final report to third parties – the individual director defendants . . . whose interests were not in common with the client”

Crime-Fraud Exception

Communications between Counsel and Client are not protected if the communications are made in furtherance of a crime or fraud.

Thus, where counsel is viewed as taking part in an illegal or fraudulent scheme, there is no protection from disclosure.

Government lawyers have used this to go after in-house counsel accused of obstruction of justice. Arguing legal advice to destroy documents or withhold produceable documents is not protected.

Continued conversations with Former Employees

- Courts are mixed but communications may be privileged.
- For privilege to apply, the communications must involve relevant information needed by corporate counsel to advise the client.
- Some courts will not extend privilege to post-employment conversations because the former employee cannot be distinguished from other third parties.



How to treat communications dating from when person was still employed

- General rule: Prior privileged communications remain privileged
- Chief Justice Burger's concurrence in *Upjohn*:
 - "[A] communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment."
- Determine if the communication met the standards of privilege while the employee was still with the company
 - Does it satisfy *Upjohn*?

When can Third Parties be used without waiving privilege?

Investigation often will involve third parties

- Auditors
- Forensic Accountants
- Investigators
- Electronic Forensic Specialists / Data Analysis Vendors
- Agent of Counsel or Independent Purpose

Third parties may be used if:

- The agent is needed for legal advice
- The agent is acting under the supervision of the attorney

Joint defense/Common Interest privilege

- Corporation and former or current employees often share a legal interest
- Joint defense privilege protects information shared with co-defendants and their attorneys

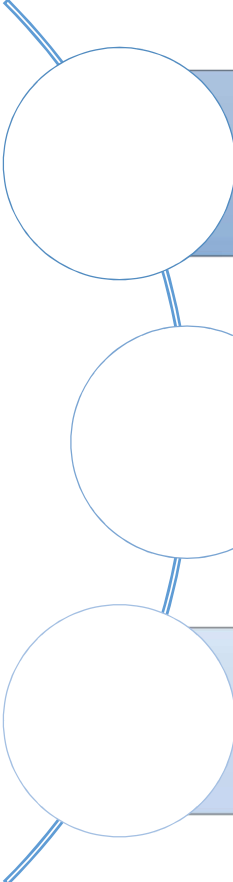
Garner Doctrine



- The attorney-client privilege is not absolute in the fiduciary context
Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970).
- Based on the ultimate commonality of interest between counsel and minority shareholders
 - Thus, a corporation cannot keep its minority shareholders from gaining access to information by claiming privilege
 - Indicia of Good Cause
- Not universal rule
- Courts are less clear on whether *Garner* applies to Work Product.

Waiver: How to Avoid Exposing Your Confidential Communications to Third Parties

Voluntary Disclosure: Government Investigations and Regulators



The voluntary disclosure of otherwise privileged communications to third parties constitutes a waiver of the attorney-client privilege.

Disclosure must be made by someone with authority to act as the Corporation's agent.

A non-authorized or former employee cannot waive privilege and an attempt to do so is not effective. Highlights need for *Upjohn* warnings.

- Litigation with Former Employees

“Voluntary” Disclosure to the Government

- Disclosure of privileged communications to a Government regulatory or law enforcement agency as part of cooperation generally constitutes a waiver of the privilege.
- Long history of “Memoranda” setting forth waiver requirements for cooperation credit for companies.
- 2009: New DOJ Corporate Charging Guidelines shifted focus to disclosure of facts. Issue is not waive but whether all relevant facts disclosed.
- DOJ not supposed to ask for non-factual communications except in cases of Crime-Fraud or Advice of Counsel
- Recent FCPA guidance in line with this.



Rule 502

- (a) Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver. - When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.



Back to GM

- Rule 502 of the Federal Rules of Evidence governs. That rule makes clear that disclosure in a federal proceeding or to a federal agency only operates as a subject matter waiver if:
 - The waiver is intentional;
 - The disclosed and undisclosed communications concern the same subject matter; and
 - They ought in fairness to be considered together.
- The court said that since GM had “neither offensively used the Valukas Report in litigation nor made a selective or misleading presentation that is unfair to adversaries in this litigation, or any other,” fairness did not require disclosure, especially given the millions of pages of documents related to the investigation that GM was preparing to turn over.

Auditors and Privileged Material

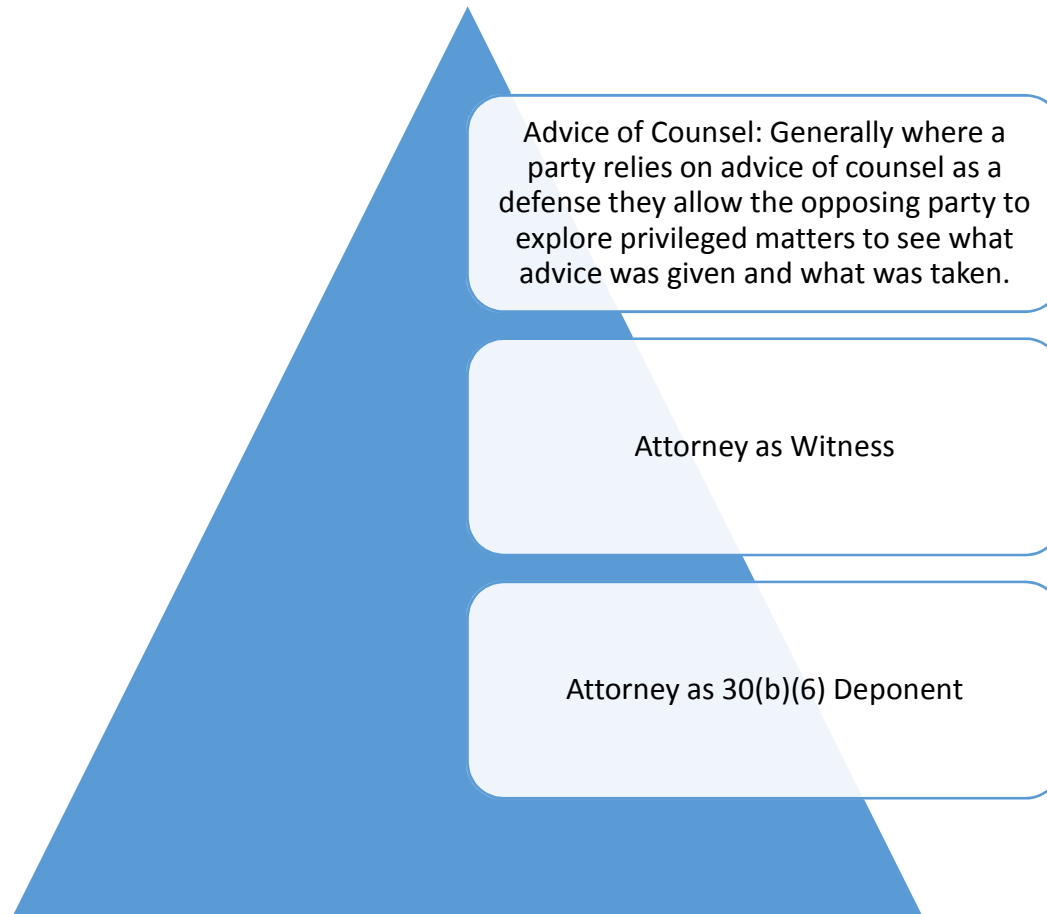
- Under Federal Common Law, the Attorney-Client Privilege Will Generally Be Waived Through Disclosure To An Auditor.
- Work Product doctrine may protect disclosure to auditors.
 - Key is document prepared “because of litigation”.
 - Minority view is the narrower “Primary Purpose” test.
- United States v. Textron, Inc., 553 F.3d 87 (1st Cir. 2009).
 - Not enough to simply relate to a matter that might be litigated. Must be prepared for use in pending or anticipated litigation.



Deloitte



Types of Implied Waiver



When can third parties be used without waiving privilege?

- Third parties may be used if:
 - The agent is needed for legal advice
 - The agent is acting under the supervision of the attorney
- Joint defense privilege
 - Corporation and former or current employees often share a **common legal interest**
 - Joint defense privilege protects information shared with co-defendants and their attorneys

Technology-Assisted Waiver of the Privilege

- Pervasive use of technology as a vehicle to communicate and store otherwise privileged information has affected the ability to assert privilege where the use exposes the information to third-parties, such as through:

Social Networking Sites

Cloud Computing

Mobile Devices (including messaging apps, group messaging, personal email accounts, etc.)

Technology and Privilege Issues at the Border

- *U.S. v. Touset*, 890 F.3d 1227 (11th Cir. May 23, 2018)
 - Eleventh Circuit Court of Appeals holds that the Fourth Amendment does not require any suspicion to justify forensic searches of electronic devices at the border by Department of Homeland Security
 - Bad facts make bad law? Case involved a suspected purveyor of child pornography returning from the Phillipines
 - Recognition that border searches of persons or packages rest on different considerations and rules of constitutional law from domestic searches
 - Court downplays intrusive nature of forensic searches of personal electronic devices
 - Distinguishes caselaw requiring reasonable suspicion for “highly intrusive searches of a person’s body” to searches of personal property
 - Issue destined for Supreme Court resolution?
 - Potential for inadvertent waiver? Not likely.
 - If your device is going to be searched – immediately put the agent on notice that it contains privileged communications and/or work product.

Best Practices for Preserving Privilege in Investigative Settings

What Can Be Done Before A Problem Arises?

- Train in-house counsel to understand relevant scope of privilege
 - What jurisdictions do you deal with?
 - Who within the company deals with legal?
- Establish policies and procedures to get counsel involved early in process
 - Guidelines for involving counsel
- Employee Training: What is and is not going to stay confidential if things go bad
 - Make sure everyone understands legal v. business distinction
 - Dangers of email

Investigation Planning

- Retaining Outside Counsel: Does it help preserve the privilege?
- Consider the structure and design of investigation
 - Control access to related communications and documents
- Documentation
- What to tell employees

In-House Counsel, Management and Third Parties During the Investigation

- Keeping communication within the legal umbrella
 - Who needs to know what is being done?
 - How do you deal with reports and updates?
- Coordinating PR and IR functions
- Coordinating communications with employees and individual counsel

Best Practices for Preserving Privilege

- Documentation and Handling of Confidential Information
 - Don't overdo it: Limiting assertions and overreaching
 - Process and controls
 - Segregation: Fact v. Opinion
- How to Deal with Waiver Requests
 - New Evidentiary rules and protections
- Managing Joint Defense Arrangements
 - Benefits
 - Dangers