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Key Developments: Attorney-Client Privilege and Work Product Protection

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Agenda

- What are these doctrines?
- Governmental, legislative and judicial responses
- Challenges faced by organizations in establishing and maintaining privilege and work product protection
- Practical approaches that organizations can take to protect themselves



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The Current Hostile Environment

- Government enforcement risks
- Shareholder suits
- Whistleblowers
- Civil claims and punitive damages
- State enforcement
- Media and public scrutiny
- Risks from trying to do right



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Available Protection

- Attorney-client privilege
- Work product protection
- Proprietary status - what it is and is not
- Other protections
 - Self-evaluative privilege
 - State statutory protections for compliance activities
 - Accountant-client privilege
- Never rely on privilege - think before you write



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Attorney-Specific Protection

- Attorney-Client Privilege
 - Communications between a lawyer and his or her client when client is soliciting legal advice
- Attorney Work Product Protection
 - The thought processes, impressions of attorneys
 - Can be imputed to internal non-lawyers
 - Can be imputed to consulting experts engaged by attorneys
 - These are bedrock legal principles



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History of Attorney-Client Privilege

- Goes back to Elizabethan era (*circa* 1558-1603)
- Rule of evidence
- Erosion by government
- Recent changes in government's approach



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General Elements to Establish Attorney-Client Privilege

1. Legal advice sought
2. From professional legal advisor in that capacity
3. Communications made for that purpose
4. In confidence
5. By the client
6. At the client's instance permanently protected
7. Unless the privilege is waived



Work Product Doctrine

- Protects information created in anticipation of litigation
 - Generally, attorney's mental processes
 - Specifically, memoranda, analyses, etc. that attorney creates
- Can apply to consultants engaged by counsel
- Unlike attorney-client privilege, both the attorney and the client can claim it



What is Not Privileged

- Facts
- Business advice
- Communications where the client is not seeking legal advice
- The client waives the privilege
 - Intentionally or inadvertently
- Advice that aids in the commission of illegal activity
- Note: The client has the burden of proving that the privilege applies



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Why These Protections Exist

- Encourage full and frank discussions between attorneys and their clients
- To protect not only the giving of legal advice, but also the giving of information to the lawyer so he or she can render sound advice
- In other words:
 - Candid discussions
 - Aimed at getting at the truth



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Why is Privilege Beneficial?

- Ensures that the lawyer's advice will be sought by organizational leaders on complex or questionable legal matters
- Lawyer will thereby have the opportunity to counsel legal compliance more effectively
- The privilege is not absolute, so there is a low risk that it will be overused or manipulated to commit illegal acts



Notable Exception

- Crime-Fraud Exception
 - If lawyer is participating in or furthering a crime or fraud then the privilege can be vitiated
- Thus, government concerns may be unfounded
 - If there is a crime or fraud involving the lawyer, the information becomes available
 - Great deterrent effect for both lawyers and clients



Waiver

- Attorney-client privilege and work product protection can be waived
- Government has routinely asked for waiver as part of cooperation
 - Corporations have the possibility of saving themselves by turning against individuals
 - Partial waiver probably does not work
 - No bright line test for when government asks for waiver



Effect of Waiver

- Entire subject matter may be exposed to government
- Hostile third-parties can obtain material
 - Whistleblowers
 - Competitors
 - Shareholders
 - Other government agencies
- Disclosure to otherwise “friendly” third parties
 - Lenders
 - Auditors



Application to Corporations

- United States Supreme Court in *Upjohn*
 - Absence of privilege would not only make it difficult for corporate attorneys to formulate sound advice, “but also threaten to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”
 - Note: Corporations do not have Fifth Amendment privilege



DOJ Investigating Corporate Fraud

Results. . . but at what expense?

“Coerced Waiver” and other pressures



Government's Historical Erosion

- 1999 "Holder Memorandum"
- 2003 "Thompson Memorandum"
 - "Principles of Federal Prosecution of Business Organizations"
 - Nine Factors
- 2005 "McCallum Memorandum"
- 2006 "McNulty Memorandum"



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Current Governmental Activities

- August 28, 2008 DOJ Announcement
 - DOJ revising "Principles"
 - Credit for cooperation will NOT depend on the corporation's waiver of attorney-client privilege or work product doctrine
 - Instead, disclosure of relevant facts
 - Prosecutors may not consider a corporation's advancement of attorney's fees to employees when evaluating cooperativeness
 - Joint defense agreement will not render a corporation ineligible for cooperation credit
 - Prosecutors may not consider whether a corporation has sanctioned or retained culpable employees in determining cooperation



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Impact of U.S. Attorney Manual Revisions

- Advice attorneys provide to officers, directors and employees will almost always remain confidential.
- Flexibility to conduct investigations regarding allegations of wrongdoing.
- Flexibility to develop ways to cooperate with government to protect the attorney-client privilege.
- If the corporation wants to obtain credit for cooperation:
 - Risk of waiver from disclosure of relevant facts gathered during an attorney-led investigation
 - Pay attention to joint defense agreements
 - Government will scrutinize the corporation's compliance program



Current Judicial Activity

- *United States v. Stein*, No. 07-3042-cr, 2008 WL 3982104 (2d Cir. Aug. 28, 2008) (the “KPMG Decision”)
 - Government’s “overwhelming influence” – State Action
 - “Such ‘overt’ and ‘significant encouragement’ supports the conclusion that KPMG’s conduct is properly attributed to the State.”
 - “But KPMG faced indictment and reasonably believed it must do everything in its power to avoid it. The government’s threat of indictment was easily sufficient to convert its adversary into its agent.”
 - 6th Amendment violation because the government “unjustifiably interfered with defendants relationship with counsel and their ability to mount a defense”
 - “[P]ost-indictment termination of fees ‘caused them to restrict the activities of their counsel,’ and thus to limit the scope of their pre-trial investigation and preparation.”



KMPG Decision: Impact to Organizations

- Internal investigations can be more predictable
 - Confidentiality and what will be subject to disclosure
 - More comfort seeking the advice of counsel will be protected by privilege
 - However, facts discovered during investigation must be disclosed to government if organization seeks cooperation credit



At What Expense?

- Undermine internal compliance programs
- 2006 Study by Association of Corporate Counsel, The National Association of Criminal Defense Lawyers and the ABA
 - 75% of corporate counsel responders felt that governmental agencies think it is appropriate to expect a corporation under investigation to waive attorney-client privilege or work product protection
 - 50-60% of corporate counsel responders have seen an increase in waiver requests as a condition of corporation



Legislative Activities

- Attorney-Client Privilege Protection Act of 2007 (H.R. passed)
 - Prohibits U.S. Attorneys or agents from considering five factors in determining cooperation:
 - Valid assertion of the attorney-client privilege or attorney work product
 - Advancement of attorney fees and expenses of an employee
 - Entry into a joint defense, information-sharing, or common-interest agreement with an employee
 - Sharing of relevant information with an employee
 - Failure to terminate or sanction an employee who has exercised a constitutional right or legal protection in response to a government request
- *Sen. Arlen Specter introduced a similar bill in June 2008*



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Legislative Activities

- June 2008 Specter introduced Attorney-Client Privilege Protection Act of 2008 (S. 3217)
- Specter's recent comments at a program sponsored by the Heritage Foundation
 - Re: S. 3217 – “Let’s get it done” “A lot of people are being prejudiced”
 - Re: Filip letter – “Vague and ambiguous”



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Judicial Activities

- Upjohn Co. v. United States
- United States v. Stein, et al.
 - Prosecutorial coercion
- Regents of the Univ. of Calif. v. Superior Court
 - Disclosure of confidential information to federal investigators to avoid federal indictment did not waive attorney-client privilege and work product protection in a related civil action



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Policy Concerns Regarding the Erosion

- Unnecessary government intervention with internal investigations
 - *BUT*: That is the tradeoff
- Increasing frequency of waiver requests
 - *BUT*: Perception or reality
- Distrust with employees
 - *BUT*: Not a new challenge



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Tension



Advocacy
vs.
Transparency



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Organizational Challenges

- Privilege vs. Compliance Program Goals
 - Communication
 - Transparency
 - Openness
 - Trust
 - Remedial Actions
 - Demonstrating Effectiveness



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How Can Organizations Protect Themselves?

- Define the role of counsel
- Develop guidelines on when to discipline employees
 - Paid and unpaid leave during investigation
 - Reasonableness of actions will be a factor
- You must address privilege at the beginning of an investigation
- You need a detailed, thoughtful work plan
- Anticipate that privilege may be waived, voluntarily or involuntarily
 - Write as if it were on the front page of the newspaper
- Control the flow of information
- Don't editorialize
- Think of the end game



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How Can Organizations Protect Themselves?

- Proper engagement letters
 - Internal or external
- No gang meetings
- No divulging of confidential information
- Mark documents **PRIVILEGED**
- Segregate documents and emails
- Keep a separate “non-privileged” file



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Thank You.

Questions?

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