porterwright

INTERNAL INVESTIGATIONS

DECEMBER 19, 2019

David Kelch
412.235.1497
dkelch@porterwright.com

Conducting effective internal investigations: In-house counsel checklist to preserve the attorney-client privilege and attorney work product

Introduction. Many in-house corporate counsel will be faced with an internal complaint, or with an external enforcement investigation, that will require the company to conduct an internal investigation. When conducting such an investigation, in-house counsel must take immediate precautions to ensure the application of the attorney-client privilege to investigation communications and to preserve it throughout the investigation and its aftermath. While it may become advantageous to later waive the privilege in part or whole, if the privilege is not established and preserved at the outset, there will be no decision to be made as the matter progresses. This article will provide a checklist to ensure the preservation of the attorney-client privilege throughout in-house counsel internal investigations.

Privilege and attorney work product in the corporate context. The attorney-client privilege has long been held to apply in the corporate

context. But, its contours are not clear, and whether the privilege protects an in-house counsel's communications is determined on a case-by-case basis. To protect the privilege, the corporate client has the burden of showing that the in-house counsel's communication (1) was between an attorney and his client, (2) was made for the purpose of providing legal advice to the corporation and (3) that the communication was intended to be, and was in fact, kept confidential. *See, e.g.*, *Pritchard v. County of Erie*.

Similarly, attorney work product is ordinarily protected from disclosure. The work product doctrine, originally recognized by the Supreme Court in *Hickman v. Taylor*, is codified in Federal Rule of Civil Procedure 26(b)(3). To qualify as attorney work product under Rule 26(b)(3) the material must have been prepared "in anticipation of litigation or for trial[.]"

Maintaining the attorney-client privilege in an in-house counsel-led internal investigation is not automatic

Risks to the privilege and work product protection in investigations. Maintaining the attorney-client privilege in an in-house counsel-led internal investigation is not automatic, and can be tricky. Investigations conducted or directed by in-house counsel increase the risk that the company's attorney-client privilege and work product protections will be waived. Leaving aside situations where privileged communications are shared with third parties thereby causing a waiver of the privilege, the difficulty in ensuring privilege protection can be traced to the in-house counsel's dual role.

In-house counsel frequently perform both a business and a legal function for the company. But, only in-house counsel's communications in their legal role can be privileged. An in-house counsel's communications relating to his or her business function are not privileged simply because the in-house counsel is an attorney. *See, e.g.* *U.S. Postal Serv. v. Phelps Dodge Refining Corp.* From the inception, therefore, of a corporate counsel-led internal investigation precautions should be taken.

porterwright

INTERNAL INVESTIGATIONS

Checklist for maintaining the privilege and work product protection in internal investigations.

1. *Investigation planning to maintain the privilege and work product protection*

    a. Make a decision whether to investigate quickly upon learning of the underlying triggering event. The more time that passes between the event and the initiation of the investigation, the less likely a court will agree that it was conducted in "anticipation of litigation." In *Banneker Ventures, LLC v. Graham*, the court cited Fed. R. Civ. P. 26(b)(3) requiring the production of 51 witness interview memos because they were not protected by the work-product doctrine as they were not conducted in anticipation of litigation since two years elapsed between receipt of a particular letter to the retention of counsel

    b. In-house counsel should draft an investigation plan, which explains the investigation's singular focus is to gather facts and, in light of those facts, determine how the company's legal risk and litigation exposure can be mitigated. It should also identify the government enforcement and litigations risks to the company from the underlying events. This will help provide support for a later claim by the company that investigation communications and documents were developed to provide legal advice and in anticipation of litigation.

    c. In-house counsel should control the investigation. The actions of business personnel or business groups in furtherance of the investigation should be done at the direction of in-house counsel with reference to the investigation plan.

    d. Identify whom the privilege belongs to. If the board has established a special committee for which the investigation is to be conducted, the in-house investigating counsel's client may be the special committee rather than the board or the company. In *Estate of Paterno v. NCAA*, the court found that there was no attorney–client relationship between Penn State and The Freeh Law Firm since it was engaged by the Penn State Board of Trustees to represent Penn State's "Special Investigations Task Force."

e. Form an investigation team that keeps non-lawyers to a minimum or clearly delineates that non-attorney investigators are acting at the direction, and for the benefit, of in-house investigating counsel. In *Crabtree v. Experian Info. Solutions, Inc.* the court held that the corporate attorney–client privilege applies to e-mails between non-attorney employees so long as a lawyer has "some relationship to the communication" and the e-mail would reveal the "substance of a confidential attorney–client communication."

f. Members of the investigation team should act only on instructions from in-house counsel.

g. In-house counsel should draft an investigation privilege memo to personnel that will be involved in the investigation. The memo should explain the contours of the privilege and work product doctrine and train team members on how to preserve them.

2. *Investigation-related communications and documents*

a. Label privileged communications and attorney work product as such. In top line write "Attorney-Client Privileged Communication," "Confidential" and/or "Attorney Work Product," and set it off with capital letters, bold or different font color.

b. Conversely, do not over-label. Do not label non-privileged communications as privileged (i.e. blanket privilege headings do more harm than good).

c. Preface communications appropriately. In the first line of body of e-mail, write, "I am writing to provide legal advice regarding [X]" or "I am seeking legal advice regarding [Y]."

d. For communications where legal advice is sought, business personnel should put in-house counsel recipient in the "to" vs. the "cc" line of the communication. But, note, adding counsel to a communication, whether in the "to" or "cc" line, will not automatically make it privileged.

e. Limit circulation of legal advice and privileged communications internally to those that need to know, and do not break confidentiality by circulating outside of company.

f. Avoid mixing business and legal advice. Discuss business matters in separate e-mails, separate memos, etc. In *Smith–Brown v. Ulta Beauty, Inc.*, the court held that in "mixed advice" e-mails from in-house counsel the privilege may be maintained if obtaining legal advice was "one of the significant purposes of the communication."

g. Where business and legal advice overlap, consider including a preface that the primary purpose of the communication is to provide legal advice.

h. Write smart. Written communications should balance effective communication of legal advice with the risk that it could eventually be in the hands of adversaries/court.

i. Consider sequestering privileged electronic documents in a separate database, or individually password-protect privileged documents, distributing the password to only those employees with a true "need to know" the information.

3. *Investigation interviews*

a. Counsel alone should conduct interviews where possible. If not possible, then make privilege more likely by having counsel direct the interviews, review the interview notes and summarize, and provide interview outline or topics for questioning. *See In re Kellogg Brown & Root, Inc.*, "agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."

b. An *Upjohn* warning must be given at the outset of all interviews.

c. Inform all interviewees that the purpose of the interview is to assist the company in obtaining legal advice.

d. Interview notes should contain only statements of facts learned in the interview and not attorney analysis or thoughts. Interview notes are likely discoverable because facts are not privileged.

e. Interview memoranda should memorialize what was learned in the interview but should also contain counsel's interpretations, mental impressions, thoughts and analysis. At the beginning of each interview memorandum, it should include an appropriate work product preface, such as: "This Memorandum of Interview does not contain a verbatim account of the interview questions and responses. The notes of this interview have been edited and reorganized for the sake of clarity. Further, this memorandum reflects the thoughts, opinions, and mental impressions of counsel, and will be used to assist in the investigation and any future related litigation defense efforts. Thus, it is entitled to the highest level of attorney work product protection and attorney-client privilege."

f. If the interviewee is an aggrieved employee, caution is warranted, especially if the interviewee is represented by counsel. In *Smith v. The Technology House, Ltd.*, the court found a recording of an interview was not privileged because the employee was sexually harassed, had counsel and was adverse to the company even though they were still an employee.

4. *Internal investigation report*[1]

a. Consider making an oral internal investigation report (rather than a written one) of the investigation's findings to "need to know" company management.

b. If written, the internal investigation report should be communicated with the above checklist in mind (i.e. privilege label, "legal advice" preface), and should be distributed only to those in the company who need to know.

c. Any public release of only "findings of fact" from the investigation should be done after careful review of applicable case law. Ostensiby a release of "findings of fact" is not a release of attorney-client communications. But, at least one court has found that even "findings of fact" waived the privilege since it "fully reflected the themes, core findings, and failings identified in the investigation[.]" *Doe v. Baylor Univ.*

porterwright

INTERNAL INVESTIGATIONS

Conclusion. The specter of litigation hangs over nearly every internal investigation, whether it is routine or exceptional. As a result, companies should seek to preserve privileged communications and work product associated with the investigation to the greatest extent possible. As discussed above, prudent steps taken by in-house counsel in structuring, directing, conducting and reporting the investigation can maximize the potential that the investigation remains confidential, even after later challenge. Some extra effort at the outset by corporate counsel can preserve the attorney-client privilege and attorney work product at all stages of an investigation matter.

For more information, please contact David Kelch or any member of Porter Wright's Corporate & Internal Investigations Practice Group.

1. Making an investigative report to the government regarding the investigation's findings may result in a waiver of the privilege and work product protection. How to protect these privileges in these circumstances is outside the scope of this article, but caution should be exercised and an opinion from outside investigation counsel may be warranted.