

WOMEN, & INFLUENCE POWER IN LAW™



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DEMONSTRATING LEADERSHIP AND NAVIGATING ETHICAL CONSIDERATIONS WHILE BEING FIRE- TESTED BY A GOVERNMENT INVESTIGATION

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How It All Begins.....

A tipster leaves an anonymous message on the whistleblower hotline of BG Corporation that the UK accounting manager is “smoothing revenues” again

The Comptroller suddenly resigns and writes a letter to the Chair of the Audit Committee complaining about earnings management by the CFO for Europe

The external auditors demand a restatement when they cannot confirm revenues booked at the end of the fiscal year

The GC gets a letter from the SEC captioned “In the Matter of BG Corporation” seeking a voluntary production of documents regarding BG’s 10-K including its financial statements and trades in the company’s stock by the COO

How It All Begins.....

You call the SEC staff attorney who tells you that she also wants to start scheduling interviews of BG's officers and employees

A lawyer for a former officer calls you to let you know that her client is being interviewed by the FBI tomorrow about BG's operations in Manila

You are the GC of BG Corporation -- Now What?

- Getting to the Root of the Problem, Taking Remedial Measures and Reducing Corporate Risk
- Ethical considerations, company policies and values
- Statutory or legal requirements to investigate
 - They will vary based on the jurisdiction
 - Sarbanes-Oxley certifications
 - Dodd-Frank and Bounties for Whistleblowers
- Responding to Regulatory or Enforcement Inquiries
 - Setting the tone
 - Providing comfort to regulators that company is proactively investigating potential wrongdoing and will address it appropriately

Now What?

- “Credit” for cooperation from SEC, DOJ, other US or foreign regulators
 - Voluntary disclosure programs and deferred prosecution agreements (DPAs)
 - FCA Cooperation Initiative
 - Minimizing potential sanctions or enforcement actions
 - Does the company need to waive privilege?

IMPLICATIONS OF AN INVESTIGATION

- In a global company, investigations prompted by most of the scenarios above may involve international operations and personnel
- Managing cross-border investigations presents challenges often unique to the implicated jurisdictions
- Managing multiple regulators, including in various jurisdictions, requires thoughtful approaches consistent with local laws, ethical requirements, and potentially conflicting approaches
- This will affect how witnesses are approached, how documents and information are gathered, whether and how the company's own investigations remain privileged, and how and to whom the results will be reported

DEFINING THE CLIENT, SCOPE AND GOALS

Establish identity of the “client” for purposes of the investigation and defining the scope

- Audit Committee or a Special Committee of the Board of Directors
- General Counsel’s office
- Internal Audit

Define the goal and of the investigation and establish lines of authority and supervision, but be nimble on needing to adapt

What are the roles of senior and junior in-house lawyers in dealing with investigations

“Manage the message” upward & downward within the company, and externally to regulators and to the public — Issue appropriate communications from investigation lead or CEO with local contact

SECURE EVIDENCE & PROVIDE NOTICE

- **Litigation holds — document preservation notices and retention procedures**
 - Identify universe of documents and employees to be covered by holds
 - Work with IT department to understand retention policies and to set holds so that documents will not be automatically or intentionally destroyed
 - Secure and collect data and physical evidence
 - Provide notices internally and be prepared to explain and guide
 - Consider requirements for public disclosures
- **Interview employees to identify sources for evidence**
 - Institute tracking system to identify and track sources for collection of documents and information
 - Obtain electronic documents and communications and image hard drives and, if warranted, personal electronic devices
 - Translation of documents may be warranted

THE YATES MEMO — HOW HAS IT REDEFINED COOPERATION AND DEALING WITH INDIVIDUAL OFFICERS AND DIRECTORS?

- What is the Yates Memo?
- Balancing company interests with interests of individual employees, officers and directors, and members of the board
- When are DOJ expectations for “cooperation” at odds with ethical obligations?
- What is the role of the General Counsel and other senior counsel as “gatekeepers”
 - Potential individual liabilities to navigate
- When is it time to recommend separate counsel?

DEALING WITH INDIVIDUAL EMPLOYEES

Do they need separate counsel?

- Model Rules of Professional Responsibility
 - Assess whether employees should be represented by their individual counsel for your interview
 - If criminal matter is pending, consider whether laws of the jurisdiction prevent or limit counsel's ability to conduct interview
 - When is "shadow" counsel appropriate and how does that work?
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- Who pays for their lawyers?
 - Indemnification obligations
 - Advances & Undertakings
 - Insurance claims and coverage
 - Joint Defense Agreements – when should you have one and how do they work?
 - Oral or written?
 - The delicate balance of collaboration vs. collusion

APPROACHING EMPLOYEE WITNESSES FOR INTERVIEWS AND INFORMATION

- Importance of the Upjohn Warnings:

Notify witnesses that:

- (1) counsel is retained by the company or its Audit Committee/Board;
- (2) communications are confidential subject to privilege;
- (3) company, who owns the privilege, may choose to waive the privilege and disclose information provided by the witness; and,
- (4) counsel does not represent the witness.

Memorialize in writing that you have provided the Upjohn warning and that it was understood

- Consequences of Failure to Provide Upjohn Warnings

APPROACHING EMPLOYEE WITNESSES FOR INTERVIEWS AND INFORMATION

- Labor laws in various countries may limit counsel's ability to approach and interview employees outside of the presence of their counsel or a union representative
- Other laws may limit the availability, use and/or subsequent disclosure of witness statements provided to counsel in an internal investigation to governmental authorities
- Cultural and language barriers and local customs may affect how witnesses will respond to the investigation. Do you need translators and/or local counsel within each jurisdiction?

Practical tip: Engage counsel or interpreters who can communicate to employees in their native languages

IMPORTANCE OF PRESERVING CONFIDENTIALITY THROUGH ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK-PRODUCT DOCTRINE

Failure to maintain privilege may leave company's most sensitive information exposed to regulators, litigation opponents and competitors

Two layers of analysis

- 1) Historical materials
- 2) Materials connected to the investigation

Privilege as a double-edged sword

Fosters candor and protects documents but prevents using documents later on.

Think ahead:

Is privilege over the investigation itself necessary?

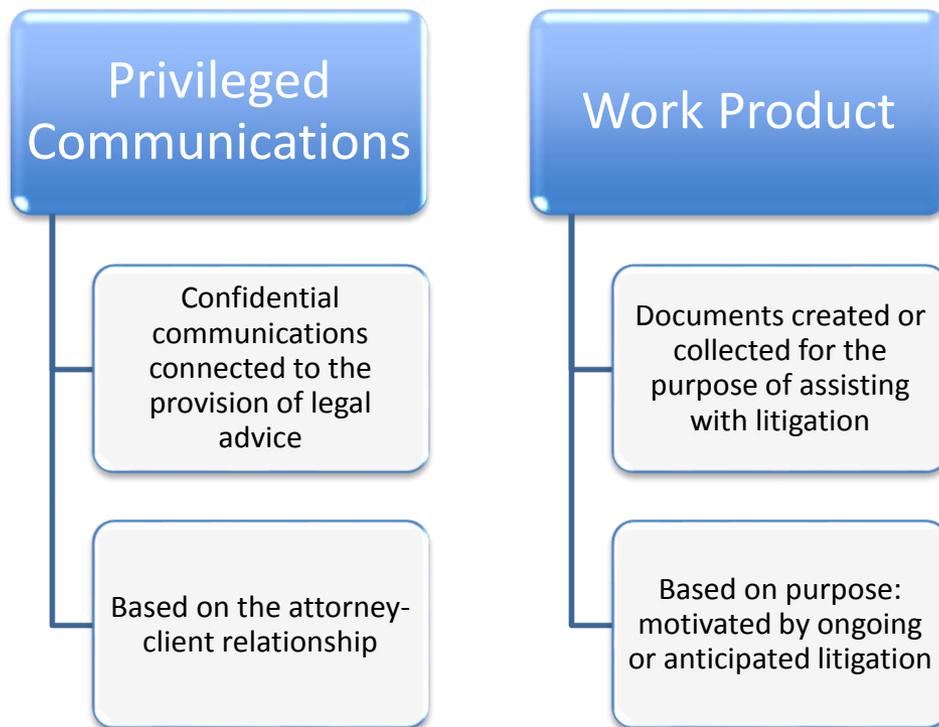
Will privilege limit the defense later, like affirmative defenses?

When waiver is at play: What other documents will be waived?

How will a government agency treat waiver?

Who “Owns” the Privilege? See Upjohn!

At least two basic privileges:

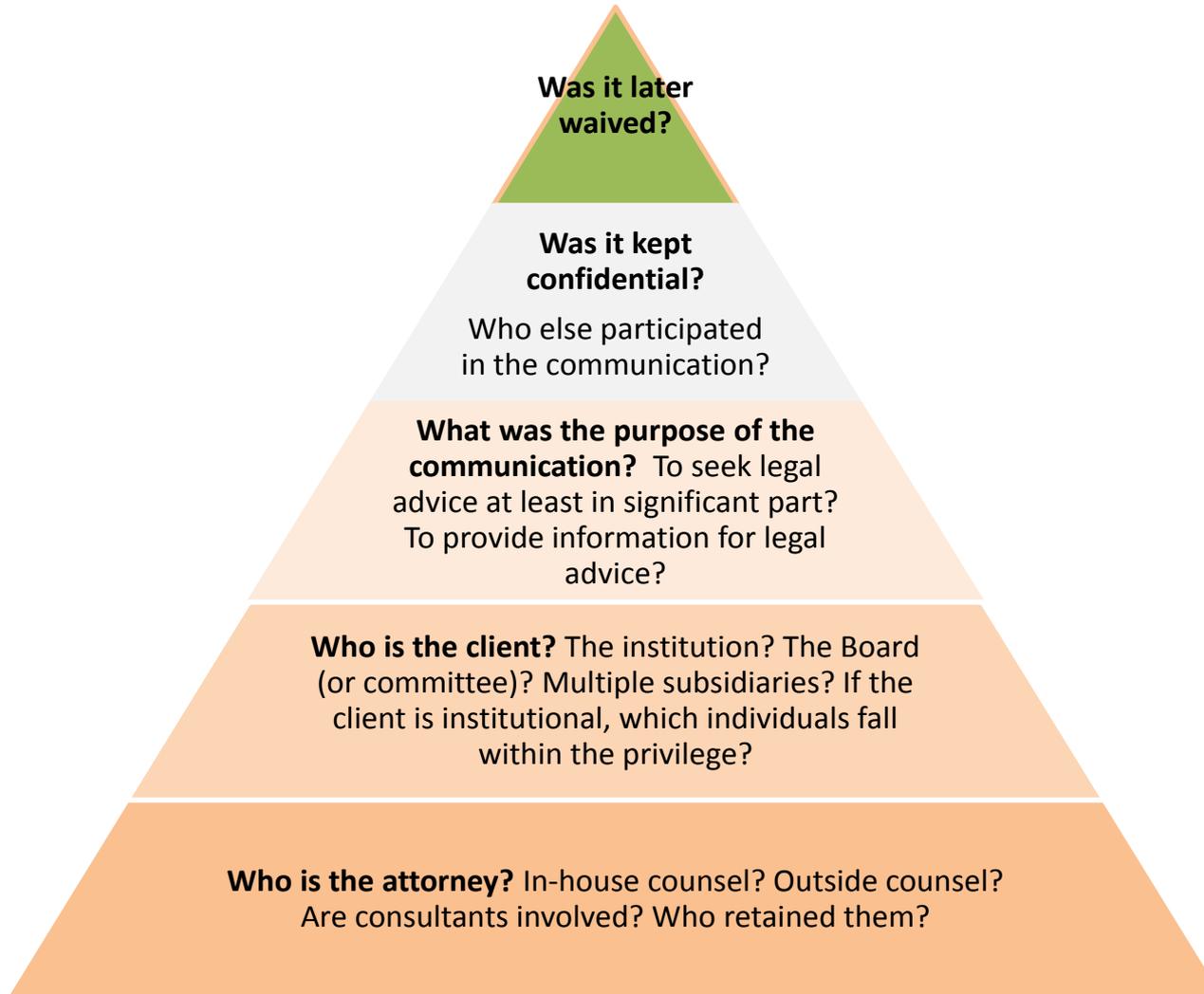


ATTORNEY-CLIENT PRIVILEGE

US law applies protection of attorney-client privilege to employee communications with counsel if:

- Communication was made for the purpose of securing legal advice;
- Employee making the communication did so at the direction of his/her corporate superior;
- The superior made the request so that the corporation could secure legal advice;
- The subject matter of the communication is within the scope of the employee's corporate duties; and,
- The communication is not disseminated beyond those persons who, due to corporate structure, need to know the contents.

Practical tip: Engagement letter with outside counsel conducting the investigation should document the scope; management/board should direct employees to cooperate with counsel



Materials created or collected for, or in anticipation of, litigation

- Documents embodying or reflecting the opinion of attorneys, like witness interview memos, white papers
- Analysis created for litigation or in anticipation of it
- Historical documents collected at counsel's direction
- Historical facts pulled together at the request of counsel

Scope questions

- Did litigation or the anticipation of it motivate the internal investigation? Is there a grand jury proceeding or a government investigation underway?
- Did the client or client representative prepare the materials?
- Must the materials be produced regardless because the adverse party cannot obtain a substantial equivalent to the underlying facts or documents without "undue hardship"?

Privilege Considerations: Best Practices for In-House Lawyers

Insert yourselves early on into investigations or be the one to instigate them. Direct the fact-gathering; stay involved. Document the primary motivation for the investigation and keep the investigation separate from others required by law, policy, or business practices.

Involve outside counsel for complex, sensitive investigations, especially where independence is paramount to the investigation's credibility. Involve them in fact-gathering. Tie the fact-gathering to the legal advice they were retained to provide.

Be careful about what you communicate over email or in documents (in case the privileged is waived). Also, choose recipients carefully. Be clear on the role of consultants. Structure outside agent relationships to maintain the privilege.

Educate in-house management about privilege protections and ways they can help maintain privilege, including being explicit about requests for advice. Encourage them to vet with counsel any public statements or statements to third parties, about legal matters.

Use appropriate notations like “protected by the attorney-client privilege” but also insert indicia of privilege into materials such as memorializing that legal advice is being sought for a draft. On the flip side, do not overuse or misuse the designations.

Separate business from legal advice. Memorialize them in separate documents if possible. Keep privileged documents in separate locations.

Know the privilege law in the jurisdiction that governs. Stay current on privilege trends. Seek specific advice on privilege as it applies to your particular investigation, early. Seek counsel on the pitfalls, in advance.

Keep a detailed track record of when and how documents were collected and prepared for litigation. Document when in-house counsel was present or involved. Provide outside counsel the information it needs to appropriately assert protections.

ATTORNEY-CLIENT PRIVILEGE

Not all jurisdictions will recognize attorney-client or work product privilege or apply it to internal investigations

U.S. and UK recognize the attorney-client and work product privileges if investigation is conducted by in-house or outside counsel in anticipation of litigation or regulatory investigations

EU directive applies privilege for communications of outside counsel but **not** in-house counsel

Japan recognizes confidentiality but not privilege. Written report provided to Board during a regular Board meeting would be available to company's shareholders

Practical tip: Counsel should familiarize oneself with laws of applicable jurisdictions in the beginning of the investigation

DATA PRIVACY ISSUES IN COLLECTING AND PRESERVING DOCUMENTS

- DATA LOCATION MATTERS -- Privacy and Data protection laws will vary and may limit what can be obtained
- Interception and review of electronic or telephonic communications may require employee's consent or notification, or may be prohibited and/or subject to civil or criminal penalties
- Investigator should ensure knowledge of laws that apply in each jurisdiction in which investigation will be conducted
- EU Directive 95 has broad reach but Member states may have additional restrictions
- Swiss and French laws could trigger criminal sanctions if data privacy laws are violated by the investigator

DATA PRIVACY ISSUES

- Various U.S. & foreign authorities may have differing expectations as to data privacy issues
- Protecting individual employees' privacy may be viewed as non-cooperative or obstructionist by authorities
- Legal landscape is changing – See *Microsoft Corp. v. U.S.* (2d Cir. 2016) holding that U.S. service provider may not be compelled to produce data stored on foreign server in response to warrant under Stored Communications Act but that U.S. should use Mutual Legal Assistance Treaty (“MLAT”) process
- Foreign laws may require notification and consent from customers before their data may be produced or transferred to the U.S.

DATA PRIVACY ISSUES

- Global companies should proactively consider internal agreements with foreign affiliates to allow for transmission & sharing of data
- Uncertainty of how Cloud data will be treated in the future

Practical tip: Investigating counsel should consider whether the data can and should be brought to the U.S. for review or whether it should be reviewed on-site

CORRECTIVE AND REMEDIAL MEASURES

- Depending on issues underlying the investigation, consider benefit of making recommendations for adoption of remedial measures and other corrective steps (*i.e.* employee terminations and demotions)
- Counsel should consider whether advisable to provide a written set of recommendations if company has confirmed that it will not be adopting the recommendations or may disagree
- Recommendations that are made should be reasonable and appropriate to the client, consistent with applicable law and regulations, and client's financial circumstances

SETTLEMENT NEGOTIATIONS AND LITIGATION

- Balancing company's interests with interests of the individual officers and employees
- Issues relating to company settlement when officers/employees continue to litigate with the government -- company as a witness in such litigation
- Company indemnification for penalties and disgorgement by officer or employees