

# Conducting Privileged

## Internal Investigations

BY TODD PRESNELL

In-house attorneys receiving a whistleblower complaint, government inquiry or other alert must decide whether and how to conduct an internal investigation. They may retain outside counsel to conduct the investigation, for privilege or other purposes, or they may keep the investigation in-house. If they choose the latter, they must manage many complex issues to ensure that the investigation and its results remain protected from discovery in subsequent litigation. Below, we examine these issues and offer some tips for increasing the chances that the investigation will be privileged.

To navigate these waters, it is helpful to return to the foundational elements of privilege. Simply put, the corporate attorney-client privilege applies to confidential communications between employees and counsel, whether outside or in-house, made for the purposes of rendering or implementing legal advice.

The confidential component contains two critical elements. First, the communication must be confidential when made. Practically, this means among other things that the corporate lawyer should not include unnecessary recipients on email communications nor hold verbal conversations with employees in the presence of third parties — or even in the presence of other employees who do not need to know the substance of the conversation.

Second, communications also must be made with the intent that they remain confidential. So the confidential one-on-one email may lose its confidentiality, and thus the privilege, if the recipient forwards it to third parties or unnecessary internal employees.

The legal advice component is even more troublesome for in-house lawyers. While many courts presume a legal advice purpose when an employee communicates with outside counsel, that same presumption evaporates when the employee communicates with in-house attorneys. Courts

make this distinction because they recognize that many in-house lawyers communicate about business-related, as well as legal, issues; therefore, they will not assume that a communication involves legal issues simply because an in-house lawyer is present.

Many courts effectively apply this heightened legal advice standard to in-house lawyer communications. When a party challenges an in-house lawyer's privilege assertion, courts want to see the in-house lawyer's sworn declaration explaining why the communication pertained to legal, rather than business, advice.

Even if the in-house lawyer meticulously meets the privilege's three foundational elements, jurisdictional choice-of-law issues could derail the assertion of privilege. Many jurisdictions follow the subject matter test, which applies the privilege to counsel's discussions with any employee so long as the discussion pertains to issues within the scope of that person's employment. Other jurisdictions follow the control group test, which generally holds that the privilege covers counsel's communications with an employee if the employee is in a position to take action based on the lawyer's advice. The scope of the control group test is narrower, meaning that the privilege will not shelter corporate counsel's communications with lower-level employees.

Federal courts employ the common law/subject matter test in federal-question cases. They utilize state privilege law in diversity cases. Some states follow the narrow control group test, others follow the subject matter test, while other states remain undecided.

The take-away for in-house lawyers is that one may not know at the time of the communication whether the narrow control group test or the broader subject matter test will apply.

It is with these privilege uncertainties that in-house lawyers undertake an internal investigation. The legal advice presumption afforded outside counsel may persuade the in-house lawyer to retain a law firm to conduct the investigation. But not every whistleblower complaint, government subpoena, or other internal issue necessitates the retention of outside investigation counsel. When a company determines to keep the investigation in-house, its legal department must ensure that it conducts the investigation in a privileged manner.

The primary concern for a company conducting its own investigation is that a court will determine that it undertook the investigation for business reasons rather than for securing legal advice. Indeed, some government regulations require companies to conduct internal investigations when certain complaints arise, and many companies maintain internal operating policies that similarly require an automatic investigation when an adverse event occurs. These investigation requirements sound quite business oriented, and they may lead a court to reject any argument that the company conducted the investigation for legal advice reasons.

In-house lawyers, however, rarely have time to add a comprehensive internal investigation to their schedules. They may, if it's properly handled, delegate to others, including non-lawyers, and still maintain the privilege. The key is for the in-house lawyer to formally delegate the investigation to the designee. In the delegation memorandum, the in-house lawyer should expressly state that the investigation is confidential, subject to the privilege and conducted so that the lawyer can provide the company with legal advice. With these instructions, the designee may conduct the investigation, including employee interviews and document review, and then prepare a written or oral report.

The designee should follow the same interview instructions described above and, importantly, return any investigation results to the in-house legal department. (Delivering investigation results to business units may influence a court to find that the investigation was for business, non-legal purposes.)

The D.C. Circuit Court of Appeals 2014 decision in *Kellogg, Brown & Root, Inc.*, for example, supports this approach. A KBR employee brought a False Claims Act case alleging that the company submitted fraudulent payment claims to the Department of Defense. KBR's Code of Business Conduct required the company to investigate, and KBR's in-house counsel led an investigation that included non-lawyers conducting employee interviews. Even though a KBR business policy required the investigation, and non-lawyers conducted most of it, the court found the resulting report privileged because



In-house counsel must therefore take careful steps to circumvent a court's proclivity for finding business-generated investigations. Initially, in-house counsel may conduct the internal investigation themselves or delegate to others. If the in-house lawyer conducts the investigation, then she should designate her employee communications as "privileged and confidential," provide written instructions to interviewees that they should not disclose their communications without authorization, provide Upjohn warnings where necessary, and deliver any investigation results to the company's decision makers.

KBR's legal department initiated and managed it.

In *Johnson v. Ford Motor Company*, a West Virginia federal court similarly protected as privileged Ford's internal investigation into "sudden-acceleration" claims. Following at least one lawsuit and a story in the Wall Street Journal, Ford's Office of General Counsel initiated an investigation, but delegated the entire investigation to the company's Automotive Safety Office, a non-legal department.

To support the privilege assertion, a Ford in-house lawyer (who met the heightened standard explained above) submitted an affidavit detailing

that the OGC directed the safety officer to assist the legal department in the review and analysis, that the investigation results “were used solely by Ford’s attorneys in rendering legal advice to Ford,” and the results were not “disseminated beyond those Ford employees and consultants working directly with Ford’s counsel.”

The court found the investigation report privileged because Ford satisfied its burden to show that its lawyers requested and directed the investigation, the investigation was for legal advice purposes, and that it kept the resulting documents confidential by limiting dissemination on a need-to-know basis.

In a third case the Texas Court of Appeals, in *Fairway Methanol LLC and Celanese Ltd*, January 2017, upheld the privilege over a company’s post-accident investigation even though the company admittedly wanted the investigation so that the legal department could offer “business advice” regarding potentially at-fault employees. The court upheld the investigation as privileged because the company’s in-house lawyer filed an affidavit declaring that the legal department requested the investigation for the primary purpose of defending litigation, the investigation team acted on the legal department’s instructions, the team marked all communications as “privileged and confidential,” and the team communicated its findings solely to the legal department.

These three opinions support the boomerang approach to in-house, lawyer-led investigations. Even where an in-house lawyer delegates an investigation to non-lawyers, she has a greater chance of winning the privilege battle if she initiates the investigation by declaring it is for legal advice purposes, educates the investigative team on communicating confidentially, and the team returns the results solely to the in-house lawyer.

Two agent-related issues deserve separate consideration. The first is whether the attorney-client privilege applies to former employees. In other words, can an in-house lawyer or her designee conduct investigation interviews with former employees in a privileged setting? This issue is unsettled.

In the 1981 case, *Upjohn Co. v. United States*, the Supreme Court left open whether the privilege safeguards corporate counsel’s communications with former employees. Few circuit courts of appeals have addressed the issue, but the Fourth and Ninth Circuits held that the privilege covers those communications. To the contrary, the Washington Supreme Court in the 2016 decision in *Newman v. Highland School District* ruled that the privilege

## Practice Tips

Although courts employ varying standards, the following practice tips should increase the chances that the in-house lawyer’s investigation will be privileged.

- Conduct the investigation knowing that most courts will not presume that an in-house lawyer’s communications with employees are for legal advice purposes.
- Label employee communications as “privileged and confidential.”
- Instruct interviewees that the conversation is confidential and privileged, and that they should not disseminate emails or otherwise discuss the conversation with others.
- If delegating the investigation to non-lawyers, prepare an initiating memorandum that emphasizes the investigation is confidential and for legal advice purposes.
- Instruct and train non-lawyer investigators on how to conduct confidential, privileged interviews.
- Ensure that non-lawyer investigators return any work product or results only to the in-house lawyer, and not a business unit.
- Know if your jurisdiction applies the privilege to former employees; and if it does, determine whether and how to conduct the interview.

does not apply to former employees. Other jurisdictions have not addressed this issue.

A second consideration is whether the privilege protects communications between in-house lawyers or their designees who interview consultants or third-party contractors during an investigation. Although not addressed in every jurisdiction, the privilege should cover these communications under the functional-equivalent doctrine, which holds that the privilege applies to third-party communications if the third party was acting as the functional equivalent of an employee. ■



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