

ALSTON & BIRD



Attorney-Client Privilege in Internal Investigations

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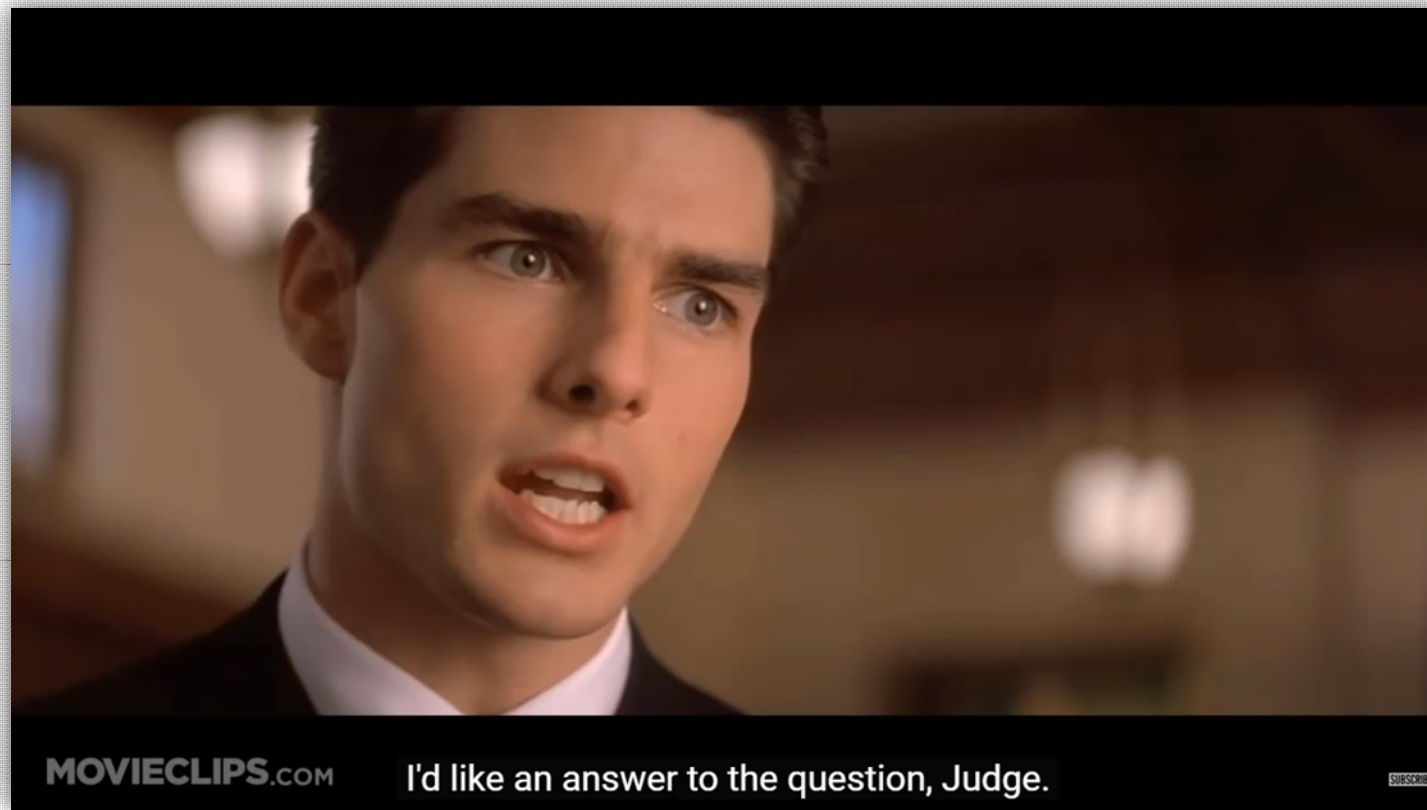
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“I WANT THE TRUTH!”
–Lt. Daniel Kaffee (*A Few Good Men*)





INTERNAL INVESTIGATIONS



One Big Question

WHAT HAPPENED?

Lots of Little Questions

Who?

What?

When?

Where?

Why?

How?

Like putting a jigsaw puzzle together
with pieces from other puzzles mixed in and some missing altogether



Benefits (When Done Right)

- Identify conduct at issue
- Identify who was involved
- Help company assess legality / propriety of conduct
- Help company make informed and proactive decision about corrective action, if necessary
- Allow company to determine if self-disclosure is required (and, even if not required, whether it would be wise)
- Allow company to better assess other risks (legal, regulatory, reputational)



Risks (When Done Wrong)

- Put company in worse position compared to no investigation
- Cause destruction of—or failure to preserve—relevant evidence
- Alter fact witnesses' memories or improperly educate them
- Create inaccurate or misleading record of events that portrays company (or a subject) in negative light
- Impair attorney-client privilege and work product protection
 - Might have to produce otherwise protectible materials (to government or opposing parties in litigation)



ATTORNEY-CLIENT PRIVILEGE



Common Strategy

Lawyers conduct investigation
“under privilege”



Common Perception





Reality



Question: Will the Wolf get your investigation report?

Answer: It depends.



Elements

- (1) Attorney-client relationship at the time of the communication*
- (2) Communication made in confidence
- (3) Communication relates to matter about which lawyer is consulted
- (4) Communication made in course of giving / seeking legal advice
- (5) Client hasn't waived privilege

* In business org context, includes communications with employees of client at direction of superiors to obtain legal advice from the company's counsel. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).



Purpose

- To protect confidential communications between clients and attorneys made for the purpose of obtaining (or furnishing) legal advice
- Promotes “full and frank” attorney-client relationship
- Encourages clients to seek legal advice without fear that information they share will be used against them later
- Enables attorneys to get more complete picture of facts to facilitate legal advice



A Few Basic Truths

- Not every lawyer-led internal investigation is privileged
- Not every communication between attorney and client is privileged
- Simply copying a lawyer on an email doesn't make it privileged
- Underlying facts are not privileged
- Whether privilege applies is fact-intensive (and jurisdiction-sensitive)



A Few Basic Questions

- Is the lawyer serving as a lawyer or only as an investigator?
- Is the primary (or significant) purpose of the investigation to facilitate legal advice?
- Which particular communications are covered?
- To whom will the findings be communicated?
- And in what form?



WORK PRODUCT DOCTRINE



Scope

- Protects materials that a lawyer prepares “in anticipation of litigation”
- “In anticipation of litigation” means (in NC) that a reasonable person would expect a possibility of litigation
- Also covers materials prepared by non-lawyers:
 - Paralegals and support staff
 - Consultants, investigators, and experts that attorney engages
 - Client representatives
- Protection is stronger if work is at lawyer’s direction



Limited Protection

- Not all of a lawyer’s work is protected as “work product”
- Is the investigation in anticipation of litigation?
- Materials covered by work-product protection may be discoverable if:
 - There’s a showing of substantial need; and
 - Access to information can’t be achieved without undue hardship (*e.g.*, interview of deceased witness)
- Generally, attorney’s mental impressions, conclusions, opinions, and legal theories are protected—only facts will be disclosed
- Like attorney-client privilege, can be waived



BUCKLEY LLP V. SERIES 1 OF OXFORD INS. CO.



An Uncertain Privilege

“[I]f the purpose of the attorney-client privilege is to be served, the attorney and client **must be able to predict with some degree of certainty whether particular discussions will be protected.** An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

– *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)



Background

- Recent decision from Supreme Court of North Carolina
- Appeal from Business Court
- Involves whether attorney-client communications in furtherance of an investigation relate to rendition of legal services
- Association of Corporate Counsel and U.S. Chamber of Commerce filed amicus brief



Facts

- Law firm Buckley LLP hired Latham & Watkins to investigate sexual misconduct allegations against founding partner
- Partner resigned
- Buckley sued Oxford seeking determination that coverage was available under key-person policy
- Oxford sought communications between Buckley and Latham to determine whether partner's exit was voluntary
- Buckley withheld documents on privilege and work-product grounds
- Oxford moved to compel



NC Business Court Granted Motion to Compel

- Court concluded that many communications were not privileged because “primary purpose” was not “to seek or provide legal advice”
- Materials created in ordinary course of business under company policy available for discovery
- Hiring a prominent outside law firm to investigate does not change that
- Many of Buckley–Latham communications were solely or primarily in furtherance of investigation (required by firm policy)
- Court’s view was that they were unrelated to legal services
- Not in anticipation of litigation arising from misconduct



NC Supreme Court Affirmed

“In today’s business world, investigations of alleged violations of company policy, including policies prohibiting sexual harassment or discrimination, are ordinary business activities and, accordingly, the communications made in such investigations are not necessarily ‘made in the course of giving or seeking legal advice for a proper purpose.’”

– *Buckley, LLP v. Series 1 of Oxford Ins. Co.*, 382 N.C. 55, 56 (2022)



Key Lessons

- Privilege may not shield all communications with outside law firm engaged to conduct internal investigation **required by company policy**
- Communications primarily in furtherance of investigation may not be considered for purpose of “giving or seeking legal advice” absent **clear connection to specific legal services**
- When company hires outside law firm to conduct investigation required by company policy, work-product doctrine may not shield work deemed to be “ordinary business activities” rather than in anticipation of litigation



ATTORNEY-CLIENT PRIVILEGE IN INTERNAL INVESTIGATIONS



Consider Privilege at All Stages

- Engagement Letter
- Planning
- Gathering documents/data
- Employee interviews
- Reporting results
- Disclosures to government
- Incident response



Improve Chances that Privilege Will Be Respected

- Be deliberate from beginning
- Be clear about connection to legal advice/litigation
- Document the basis for asserting privilege/WP
- Limit involvement, access, and distribution of report/materials
- Ensure clear labeling of anything intended to be protected
- But remember:
 - Marking something “privileged” doesn’t necessarily make it so
 - Copying attorneys doesn’t cloak non-privileged emails with privilege
- If there’s going to be a waiver, it should be planned



Fact Investigations Facilitate...

- Attorney analysis of potential legal risks and counseling about those risks
- Attorney analysis of potential legal claims against third parties (or even employees)
- Attorney preparation for potential litigation that might arise from underlying issues
- Attorney counseling regarding legal aspects of future action, like remediation or improving compliance program



Questions?



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Thank You