

THE ROLE OF COUNSEL IN COMPLIANCE INVESTIGATIONS

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COMPLIANCE INVESTIGATIONS

Internal Policies & Procedures

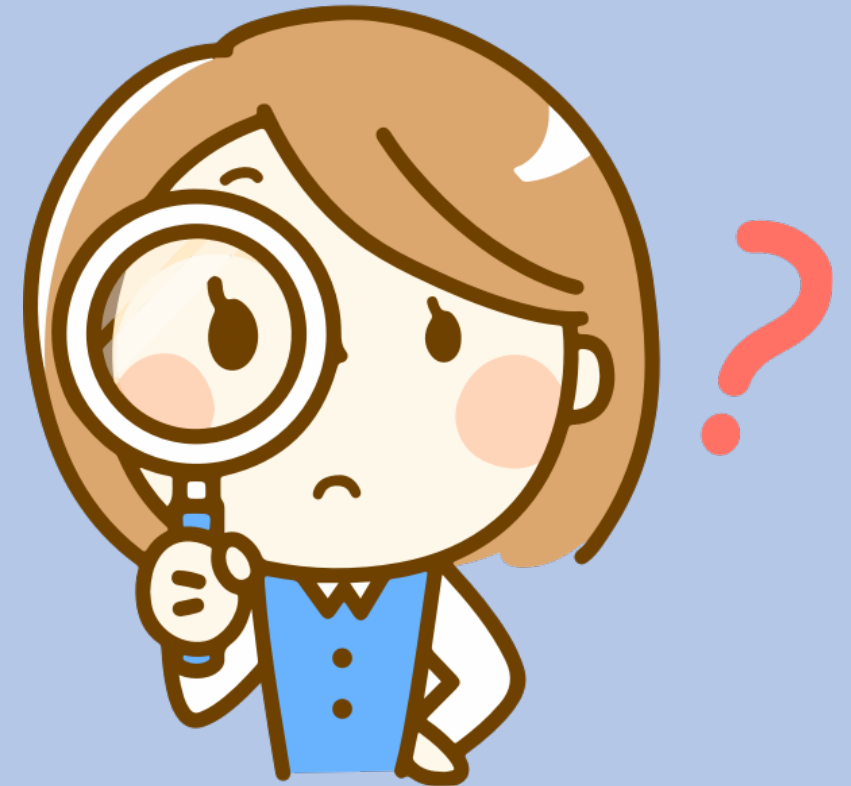
Attorney-Client Privilege

Attorney Work Product

OIG Guidance

Compliance Policy re: Investigations

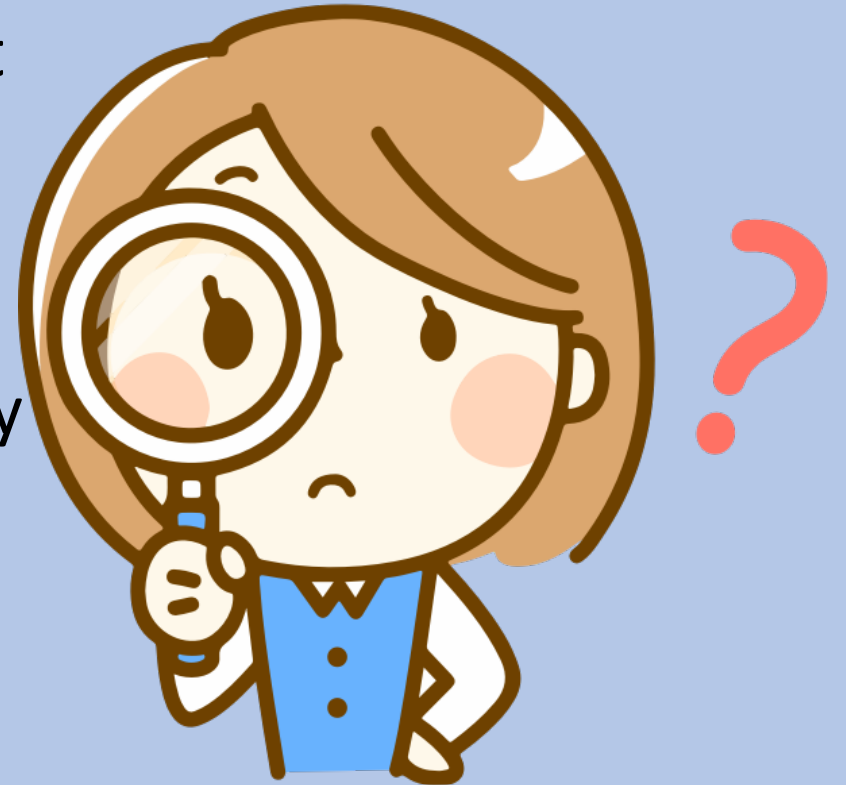
- Do you have one?
- What is the process?
 - What is the role of the CCO?
 - Initial substantiation?
 - Conducting interviews?
 - When does attorney get involved?
 - After initial substantiation?
 - After interviews?
 - How does attorney get involved?
 - Direct CCO?
 - Conduct investigation?



Compliance Policy re: Investigations

➤ Example of process:

1. CCO substantiates the allegation & that there is enough information to conduct an investigation
2. If the allegation involves and potentially implicates a federal, state or local law, rule or regulation -> counsel is contacted
3. Counsel directs or conducts the investigation



Attorney-Client Privilege

- When does it attach?
 - ✓ When CCO requests legal advice
 - ✓ Doesn't apply to business advice
 - ✓ Merely copying attorney on emails will not suffice
 - ✓ Should be in writing
 - ✓ Will not attach once investigation is over
 - ✓ Will not attach if purpose is to commit a crime or cover up a crime



Attorney-Client Privilege

- Designed to protect communications between an attorney and client
- Protects communications going from the client and visa-versa
- Designed to allow full disclosure and communication between attorneys and clients
- Controlled by the client – but clients responsible for keeping it safe



Attorney-Client Privilege

- What does it cover?
 - ✓ Written communication
 - ✓ Oral communication
 - ✓ Electronic communication



Made between client and attorney in confidence
For the purpose of seeking legal advice

Attorney-Client Privilege

Allegation: “The DOJ Plaintiffs’ recent motion to sanction Google and compel disclosure alleges that in a program called “Communicate with Care,” Google trains its employees to create the illusion of attorney-client privilege by instructing employees to include an attorney, a privilege label, and a generic request for legal advice in ordinary course business communications, even where legal advice is not actually needed. According to the DOJ Plaintiffs, the in-house counsel copied on these emails often do not respond to these “artificial” requests for legal advice. The DOJ Plaintiffs claim that the program’s purpose is to shield sensitive business communications from discovery by abusing the attorney-client privilege, and that Google specifically engaged in this process to improperly withhold communications and agreements directly relevant to the instant action.”

<https://www.natlawreview.com/article/sound-silent-attorneys-doj-alleges-google-fakes-attorney-client-privilege-ccing>

Attorney-Client Privilege

- ✓ Privilege only protects the contents of the communication itself
- ✓ Facts communicated to attorney are not protected *if* those facts can be learned from some other source
- ✓ Does not protect existence of attorney-client relationship, fee arrangements, or factual circumstances surrounding the communication (date, time, place, etc.)
- ✓ If a communication is made with the intention to be conveyed to third parties – no privilege

Attorney-Client Privilege

- ✓ Consultants:
 - ✓ Work of consultants may not be privileged
 - ✓ Is Consultant's presence necessary to allow the lawyer to provide legal advice?



Work Product Doctrine

- What does it cover?
 - ✓ Documents and tangible items
 - ✓ Attorney notes, memos
 - ✓ Prepared by or at the direction of counsel
 - ✓ In anticipation of litigation or trial

- ✓ If a CCO is an attorney but is not acting in that capacity, there is no privilege



Work Product Doctrine

- Protects thoughts and impressions of the attorney prepared in anticipation of litigation from disclosure



Waivers

- Inadvertent
 - Could be waiver as to some or all
- Deliberate – cooperation?
- Advice of counsel defense
- Work product doctrine may be overcome if it can be shown that the party has a substantial need and would suffer undue hardship



Waivers

- Prior Government pressure to waive privileges to earn cooperation credit
- 1999 Holder Memo
- 2003 Thomson Memo
- 2004 Sentencing Guidelines Amendment



Waivers



2008 Filip Memo

- ✓ Cooperation credit now expressly focuses not on waiver of privilege, but on the disclosure of facts known to the corporation about conduct under review
- ✓ Directs prosecutors not to seek disclosure of core (nonfactual) attorney-client communications, although a company may choose to do so

Corporate Attorney Client Privilege

- Who is the client?
- Work product doctrine may be overcome if it can be shown that the party has a substantial need and would suffer undue hardship



Corporate Attorney Client Privilege

Upjohn Co. v. U.S.:

- ❖ Communications with lower level employees of a company could be privileged when:
 - ❖ They are treated as confidential;
 - ❖ They are communicated to counsel at the direction of superiors for the purpose of obtaining legal advice; and
 - ❖ The communications are related to the duties of the employee



Upjohn Warning

Where corporate employees communicate with corporate counsel at the direction of superiors in order to secure legal advice from counsel, and where employees are aware that they are being questioned so that the corporation could obtain legal advice, such communications are protected by attorney–client privilege.

Upjohn Co. v. United States, 449 U.S. 383, 392 (1981).



Investigations

- Policies and procedures
- Create investigative plan
 - Outside counsel may be used?
 - Litigation hold
 - Include IT and auto-deletes
 - Interviews
 - 2 people, 1 focused on taking notes
 - Reports?
 - Government reporting /Government CID/Subpoena
 - Bate Stamp/ keep copies of all sent



AN INTEGRATED APPROACH TO CORPORATE COMPLIANCE

A Resource For Health Care Organization Boards of Directors



III. An Integrated Response to Corporate Compliance

Given its focus on the General Counsel, the ABA Task Force Report did not address specifically the role of the Chief Compliance Officer in promoting the compliance oversight function of the Board. In some respects, the position of a Chief Compliance Officer is unique within a corporate organization. No other person has primary functional responsibility for the day-to-day operations of the compliance and ethics program. The breadth of the responsibilities and roles of a Chief Compliance Officer will vary, but may include:

1) developing and implementing policies, procedures, and practices; 2) overseeing and monitoring the implementation of the program; 3) updating and revising the program, as appropriate; 4) developing, coordinating, and participating in a multi-faceted training and education program; 5) coordinating internal audits; 6) reviewing, responding to, and investigating reports of non-compliance; 7) serving as a resource across the organization on substantive compliance questions and issues; and 8) reporting directly to the Board of Directors, CEO, and president on compliance matters. In that process, the Chief Compliance Officer is expected to have a broad knowledge of the organization and operational matters and an awareness of applicable laws and regulations. Similarly, few individuals in the organization have the breadth of interaction with individuals at all levels of the organization: board, management, employees, and third parties, including federal and state government representatives.

The Chief Compliance Officer of a health care organization may also bring a depth of experience to the position. Even before the recent corporate scandals, the health care industry experienced a decade of scrutiny by regulators and law enforcement agencies. Health care providers operate in a heavily-regulated environment with rules that may carry significant penalties for non-compliance. The government has committed substantial resources to identifying and sanctioning the individuals and entities that defraud and abuse federal and state health care programs. The net result is that the health care industry has advanced further than many other business sectors in establishing compliance and ethics programs and “best practice” standards. This in turn suggests that the roles of the General Counsel and the Chief Compliance Officer in supporting the Board’s compliance oversight function may be more complex in the health care industry than in other industry sectors.

Any Questions/Thoughts/Comments
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