

DOCUMENTS AND INFORMATION OVER WHICH DEFENDANTS MIGHT CLAIM PRIVILEGE

Legal Ethics and Best Practices

Speakers

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Introduction -1

⦿ Situation 1:

- Potential client: compliance officer
- Documents reviewed for privilege
- Clawbacks

⦿ Situation 2:

- Potential client: former in-house attorney
- Retaliation claims
- Disclosures to USAO, SEC, press

Introduction -2

- ⦿ Range of scenarios
 - Low-level vs. executive level employees
 - Quantum and quality of evidence
- ⦿ Apparently competing duties
 - To advocate
 - Regarding evidence
 - Defendant's potential privilege claims
- ⦿ Potentially severe consequences

Related principles of

Professional Responsibility

The Ethical Rules

- ⦿ **RPC 1.3 (Diligence)**
 - “Zealous” representation
- ⦿ **RPC 1.6 (Confidentiality of Information)**
 - The crime-fraud exception
- ⦿ **RPC 1.13 (Organization as Client)**
 - In-house counsel as relator
- ⦿ **RPC 3.4 (Fairness to Opposing Party and Counsel)**
 - Follow the law
- ⦿ **RPC 4.4 (Respect for Rights of Third Parties)**
 - Unwarranted “invasion” of defendant’s attorney-client privilege
- ⦿ **RPC 8.4 (Maintaining the Integrity of the Profession)**
 - Conduct prejudicial to the administration of justice

Avoiding Disqualification

- ⦿ Fact-intensive inquiry that considers:
 - Prejudice
 - Counsel's fault
 - Knowledge of privilege claim
 - Lesser available sanctions

Best Practices to Avoid Disqualification

- ⦿ Talk to your client
- ⦿ Create and document a procedure
- ⦿ If potentially privileged information has been provided by the relator-client:
 - Stop reading or otherwise absorbing the information
 - Do not destroy it (spoliation issues)
 - Seek court guidance if necessary
 - Involve filter counsel

Problems, process, and options from the

Perspective and experience of government counsel

Working with

Filter Counsel

How Filter Counsel Can Help

- ◉ When it is impractical or inadvisable to have the relator sort through his or her own material.



- Relator is too busy
- Relator is eager to turn over everything
- Nuanced privilege or work-product issues

How Filter Counsel Can Help

- Nuanced privilege or work-product issues

- When defendant is a corporation

- Related corporate entities
- Corporate agents = functional equivalent of employee
- Compliance department v. Legal department



How Filter Counsel Can Help

- ◉ Nuanced privilege or work-product issues
- Timeframes that raise work product
- Redactions



How Filter Counsel Can Help

- Travelling onsite to perform physical inspection of evidence



- Sometimes get a closer look into the defendant's internal processes and standards

How Filter Counsel Can Help

- ◉ Screen all types of evidence
 - Documents
 - Emails
 - Text messages
 - Voicemails
 - Conversations

Standards by Which Filter Counsel Operates

- Confidentiality

- Under seal
- No competing claims



Standards by Which Filter Counsel Operates

- ◉ Flexibility in strictness
 - If defendant would have a colorable claim to privilege or work-product
 - ◉ = Potentially Privileged
 - Case by case basis
 - Different firms and attorneys have different standards

Standards by Which Filter Counsel Operates

- ⦿ Different firms have different standards
 - Super strict
 - Anything sent to, from or cc'd to an attorney
 - Attorney = any "esquire" working for defendant
 - J.D. = "attorney working for defendant"

Standards by Which Filter Counsel Operates

- ⦿ Different firms have different standards
 - Not strict

- Boils down to how cautious you want to be

Standards by Which Filter Counsel Operates

- Privilege review standards should all be laid out in a Statement of Understanding

What is Filter Counsel NOT Doing?

- ⦿ Filter counsel is NOT making a privilege determination
- ⦿ Filter counsel is filtering out any material that contains a privilege that defendant might otherwise assert

Filter Counsel and Relator

- ⦿ Attorney-client relationship
 - Engagement letter
 - Providing legal advice only as to what documents are Potentially Privileged and what are Clean

Filter Counsel and Relator

- ⦿ Attorney-client relationship

- Direct line of communication

- Builds a relationship
- Inhouse or outside counsel, or compliance
- Other nuances



What if defendant challenges the process?

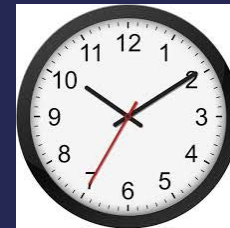
- Be thoughtful regarding communications with filter counsel
 - Communications between *qui tam* attorney and filter counsel may be subject to review
 - Important to have process laid out in SOU

Payment and Documenting the Relationship

- Issues and potential pitfalls regarding fees and costs for filter counsel

- Hourly billing

- Straightforward, easy and clean
- *Qui tam* firm recoups fees and costs in the end
- Potential hardship on smaller *qui tam* firms



Payment and Documenting the Relationship

- Issues and potential pitfalls regarding fees and costs for filter counsel

- Contingent fee



- Potential hardship on smaller inter-counsel firms
- Potential vulnerability if work is attacked
- Presumptively unfair
- Split-fee agreement

Payment and Documenting the Relationship

- ◉ Statement of Understanding
 - How does the *qui tam* firm want the documents handled?
 - Bates-stamping
 - File format
 - Privilege log
 - Where and how to release Clean documents
 - How to handle potentially privileged files

Payment and Documenting the Relationship

- ◉ Arranging the engagement
 - Usually recommended by *qui tam* attorneys
 - Fees typically paid by *qui tam* attorneys
 - Nothing prevents relator from paying filter counsel

Special topics in

Employment Claims

Employment Issues – Topics to Cover

- ⦿ Common retaliation claims arising in the context of qui tam filings
- ⦿ Frequent scenarios where potentially privileged information enters the picture in retaliation claims
- ⦿ Case law supporting a plaintiff's right to use privileged information to prove unlawful retaliation
- ⦿ Practical considerations for the use of privileged information

Common Employment Claims Arising in the Qui Tam Context

- FCA anti-retaliation claims
- Defense contractor whistleblower / OIG reprisal claims
- Sarbanes-Oxley anti-retaliation claims
- Dodd-Frank Act anti-retaliation claims
- Wrongful discharge tort claims
- State whistleblower laws

The Standard Analytical Framework for Retaliation Claims

- ◎ The plaintiff/relator must prove:
 - That she engaged in conduct that constitutes a protected disclosure under a particular anti-retaliation statute;
 - The she suffered some form of adverse personnel action; and
 - That there exists a causal nexus between the protected disclosure and adverse action.

Proving Protected Activity

- ⦿ A plaintiff must prove that she provided information about conduct that she reasonably believed evidences potential violations of law, regulation, or rules.
- ⦿ The reasonable belief standard has both objective and subjective components.
- ⦿ The particular laws, regulations, or rules will vary depending on the whistleblower retaliation statute at issue in the case.

How Might Privilege Enter the Picture in the Whistleblower Retaliation Context?

- ⦿ The whistleblower is an in-house attorney or ethics, compliance, or audit professional.
- ⦿ The whistleblower is a non-lawyer who is supervised by in-house legal professionals.
- ⦿ The whistleblower directs her protected conduct to the attention of the corporation's in-house lawyers.

Does “Privileged” Information Have a Role to Play in Proving Protected Activity?

- ⦿ Savvy employment counsel should answer this question with a qualified “yes,” but then proceed with extreme caution.
- ⦿ Employment counsel will likely draw on favorable SOX jurisprudence to analogize to other claims, like FCA(h).

The Bio-Rad Decision

- ⦿ A victory for plaintiff's counsel who seek to rely on privileged information to prove protected conduct.
- ⦿ The court drew upon Department of Labor precedent that has developed over the 16 year life of SOX.
- ⦿ Although Bio-Rad is not a circuit level decision, the analysis supplies plaintiffs with an important framework.

Practical Considerations

- ⦿ Qui tam and employment counsel should confer at the outset of their working relationship to discuss respective approaches to privilege screening and flag any privilege issues that is likely to arise in a given case.
- ⦿ Qui tam counsel should expect that employment counsel will be more willing to probe an expected or actual corporate assertion of privilege, especially where that information is directly relevant to the relator's core protected whistleblowing activity.

Practical Considerations

- ⦿ Ethical considerations are always paramount, as is minimizing unnecessary publication of privileged or confidential information if the plaintiff relies on that information to prove his or her protected conduct.
- ⦿ The proper handling of potentially privileged information often turns on the source of the materials in question – i.e., whether the plaintiff was permitted to access the materials in the first place.
- ⦿ Qui tam and employment counsel could consider “buckets of evidence approach,” but this sort of arrangement also might be impractical under the circumstances.

Questions

Thank you

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