

Protecting Privilege In FCA Cases From Start To Finish

By Daniel Chudd and Rachael Plymale

Law360, New York (May 24, 2017, 11:59 AM EDT) -- The False Claims Act has been a hot area of litigation for years, and current statistics signal that this trend will not end any time soon. With lucrative rewards for whistleblowers and the possibility of treble damages and steep penalties, companies cannot risk failing to thoroughly investigate False Claims Act allegations. In doing so, however, companies should be wary of unintentionally waiving or failing to establish privilege. This article will address six of the most common privilege pitfalls companies should be aware of in addressing False Claims Act cases.



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Choice of Investigators

After learning of a whistleblower complaint, companies must quickly analyze the allegations to determine the appropriate scope of the investigation and the best party to conduct the investigation. Factors to consider include the seriousness and credibility of the allegations based on the background of the whistleblower, the detail and plausibility of the allegations, and the potential liability if confirmed. The most serious of claims should be handled by outside counsel, while less serious complaints might be best handled by in-house counsel or, in some instances, even by human resources. The privilege ramifications of the choice of investigator, however, must be carefully considered to ensure that the company establishes and maintains privileged status for the investigation.



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For privilege to apply to an internal investigation, it must be sought for purposes of obtaining legal advice. Although obtaining legal advice need not be the sole goal of the investigation, it must be a “significant purpose” of the investigation. In *re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014). Whether the purpose of an investigation is for “legal advice” may be questioned when the investigation is conducted by nonattorneys such as by human resources or ethics/compliance functions. For example, in *Koumoulis v. Independent Financial Marketing Group*, 295 F.R.D. 28 (E.D.N.Y. Nov. 1, 2013), *aff’d in part*, 29 F.Supp.3d 142 (E.D.N.Y. Jan. 21, 2014), the court found that communications between outside counsel and human resources personnel were not privileged because “their predominant purpose was to provide human resources and thus business advice, not legal advice.”

To protect privilege in investigations conducted even in part by nonattorneys, or by attorneys with dual legal and business roles, companies should ensure that any investigation is done clearly at the direction of

counsel. The investigation should begin with a memo from counsel requesting an investigation to obtain legal advice and discussing any potential threat of litigation. All work should be managed and overseen by counsel. And privilege markings and Upjohn warnings (discussed below) should be used appropriately. Failure to follow these steps may result in the loss of privilege protections. In the most serious of investigations, having the investigation conducted entirely by outside counsel ensures that there is no question as to the purpose of the investigation and the privilege protections are most secure.

Privilege in Interviews

In *Upjohn Co. v. United States*, the U.S. Supreme Court established that communications between counsel and nonmanagement employees are privileged and that that privilege belongs to the company. 449 U.S. 383 (1981). Thus, witness interviews are typically protected so long as the interview is necessary for the representation, relevant to the employee's duties, and confidential. If these conditions are met, the privilege is established, and it is the company management's decision whether to waive that privilege.

Establishing the company-owned privilege described in *Upjohn* requires provision of an "Upjohn warning" to interviewees prior to the interview. The warning should communicate that (1) counsel represents the company, not the employee as an individual; (2) that any findings will be reported to the company; (3) that the contents of the interview are privileged and that privilege belongs to the company, which may decide to waive the privilege at any time and disclose the contents of the interview to a third party, including authorities; and (4) that the interview is confidential and should not be disclosed to others. Upjohn warning should be documented in any interview notes or memorandum to avoid later challenges by whistleblowers seeking privileged documents. Importantly, Upjohn should also be used by non-attorneys conducting interviews at the direction of counsel in order to protect privilege. See *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014).

Expert Consultants

False Claims Act investigations often involve complex allegations of improper payments and accounting discrepancies that require the use of nonattorney experts for analysis of financial information and processing of large scale document collections. Basic steps should be taken to protect the privilege with respect to the work of these experts and other consultants. For example, the retention and management of expert consultants should be handled by counsel. In retaining the experts, counsel should use detailed engagement letters that outline the purposes of engagement and the experts' role in assisting counsel with providing legal advice to the client. Any stated purpose in the engagement letter that might be interpreted as a "business purpose" should be avoided.

In addition, in managing an expert's work, care should be taken to ensure that all communications and work product are appropriately marked as prepared at the direction of counsel and privileged. Likewise, if the expert is involved in interviewing any employees, the interviews should be conducted at the direction of counsel and with counsel present if possible.

Audits

In investigating allegations of wrongdoing, companies often also undertake operations audits. Although such audits are often undertaken as a result of the investigation, the audits often do not focus on the specific facts of the investigation and instead seek to find broader patterns or concerns. This type of audit is more likely to be deemed privileged than a routine business audit; however, additional steps still should be taken to ensure the privilege is preserved.

If the audit is conducted internally, it should begin with a memo from counsel clearly setting out that the audit is being conducted for purposes of legal advice. Similarly, with outside auditors, counsel should clearly advise the auditors that their work is being done at the direction of counsel to assist in providing legal advice, and privilege markings should be routinely used. In addition, the confidentiality of the audit should be strictly maintained to ensure its results are treated in the same fashion as attorney-client privileged communications.

Government Disclosures

Companies may decide to disclose privileged information to government or regulatory authorities in order to gain cooperation credit or to aid in their defense. Some companies may also be required to make mandatory disclosures or respond to government subpoenas. Mandatory disclosures and subpoena responses do not require privilege waivers. Deliberate and voluntary disclosures, i.e., those made to obtain cooperation credit or present an affirmative defense, however, may result in broad privilege waivers.

For instance, in *United States v. Kmart Corp.*, 2014 WL 2218758 (S.D. Ill. May 29, 2014), Kmart made substantial document productions to the U.S. Department of Health and Human Services Office of the Investigator General in connection with an investigation into allegedly improper Medicare claims made by Kmart. Although Kmart signed a confidentiality agreement with the government prior to the production, the agreement did not address privilege. When Kmart later attempted to block discovery of certain categories of the materials that it had turned over to the OIG as being privileged or covered by attorney work product, the court disagreed. Despite Kmart's argument that its disclosure to the OIG was intended to be only a limited waiver of privilege, the court held that Kmart's waiver was broader. According to the court, companies cannot "pick and choose" to which adversary in the government it intends to waive privilege.

In light of this precedent, companies should carefully consider all voluntary disclosures to authorities and whether to disclose information over which it may later want to claim privilege or attorney work product protection. If privileged information is disclosed, clear confidentiality agreements should be used addressing the limited nature of the privilege. Companies should also be aware, however, that even when a confidentiality agreement addresses privilege issues, some courts may not respect the agreement and may find that the privilege has been waived. As such, the pros and cons of any disclosure of privileged materials should be carefully measured prior to being made.

Litigation and the "Advice of Counsel" Defense

Finally, privilege issues may arise in litigation, especially in the context of a company's attempt to defend itself based on its reliance on the advice of counsel. The "advice of counsel" defense can be a robust protection for defendants in False Claims Act cases. Raising the defense is not without its risks, however; asserting the defense waives attorney-client privilege for all communications regarding the misconduct, not just for those necessary to present the defense. *United States ex rel. Lutz v. Berkeley Heartlab Inc.*, 2017 BL 111755, D.S.C., No. 9:14-cv-230, April 5, 2017. Moreover, this waiver applies not only to attorney-client privilege, but also to work product, including to work product materials never communicated to the client, such as attorney notes from client interviews. Accordingly, a careful review of all privileged materials and the impact of their potential disclosure if privilege is waived should be undertaken prior to considering raising an "advice of counsel" defense.

Conclusion

Treading carefully in these six situations is vital for companies seeking to rely on privilege protections in False Claims Act cases. As in all areas of the law, preserving privilege protections can be paramount in the context of False Claims Act matters. Often, it is the privilege protection that will ensure full and frank disclosures and discussion and facilitate candid advice and the most effective representation.

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This article is part of a monthly column by Morrison & Foerster discussing issues related to False Claims Act litigation and enforcement. To read previous articles, [click here](#).

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