

Privilege Newsletter: Investigations - Cooperating With The Government Without Waiving Privilege

Publications

May 17, 2022

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In response to a government investigation, the company has conducted a comprehensive internal investigation, taking steps necessary to establish and maintain applicable privileges and protections. The company now wants to cooperate with the government by providing information learned during its investigation, but it wants to avoid waiving privilege in doing so. Even more, it wants to avoid broad subject matter waiver over the investigation. It is axiomatic that facts are not protected by either the attorney-client privilege or the work product doctrine. Instead, the substance of communications, and related notes and summaries, may be protected by both the attorney-client privilege and the work product doctrine. Distilling non-privileged facts from privileged communications to prepare a presentation for the government can be challenging. If the company discloses the substance of identifiable privileged communications, there is a risk of waiver.

A second rule of the road for communicating with the federal government, Federal Rule of Evidence 502(a), limits the risk that disclosure of some privileged information to the government will result in broad subject matter waiver. The traditional rule is that, where a party waives attorney-client privilege over a communication, the scope of waiver may extend to the entire subject matter of the communication. FRE 502(a), where applicable, overrides federal and state substantive law and significantly restricts courts from imposing subject matter waiver. FRE 502(a) provides that disclosures of privileged or protected information in a federal proceeding, or to a federal office or agency, will not result in subject matter waiver unless the waiver was intentional, and fairness requires consideration of undisclosed privileged information. The Committee Notes to FRE 502(a) explain that fairness requires further disclosures only in “unusual situations” where a party makes “a selective and misleading presentation of evidence to the disadvantage of the adversary.”

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