



OPERATING WITH INTEGRITY

COMMITMENT COMPLIANCE CULTURE

Investigations, Subpoenas and Protecting Privilege

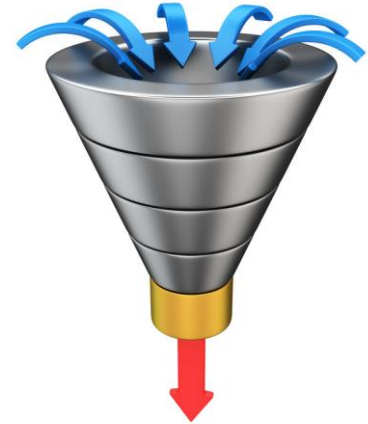
BBNC Compliance Conference

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Enforcement Actions

- Administrative
 - Least serious incidents
 - Strict Liability – least process
- Civil
 - More serious, non-criminal offenses
 - Regulatory investigator & Attorney General led
 - Could be strict liability or culpable mental state
- Criminal
 - Most serious offenses
 - Criminal Investigators & AUSA or State Prosecutor led
 - Culpable mental state required



Investigations and Penalties



- Investigation will be dictated by the circumstances.
 - Voluntary Disclosure
 - Informal request for additional information
 - Notice of Violation
 - Subpoena – civil or criminal
 - Interview – civil or criminal
- Penalties
 - Penalties/Fines
 - Jail
 - Exclusion/Debarment



What is a “Privilege”?

A privilege is a particular benefit or advantage enjoyed by a class of people.

Numerous Legal Privileges Exist:



Attorney-Client Privilege - A legal concept that prevents the disclosure of confidential communications between a client and the client’s attorney.

Work Product Privilege - Protects materials prepared in anticipation of litigation from discovery by, or disclosure to opposing counsel & litigants.



Why Are Privileges Important?

- Allows the sharing of sensitive and critical information without fear of disclosure.
- Control of information is vital in investigations and litigation.
 - If you can choose the what, when, and how of information disclosure, you can gain a significant advantage in investigating a matter or, ultimately, in litigation
 - Two way street – protects communications going from the attorney to the client and from the client to the attorney

Attorney-Client Privilege Elements

Four Basic Elements:

- Communication – oral or written
- Made between attorney and client
- In Confidence (no disclosure to third parties)
- **For the purpose of seeking, obtaining, or providing legal advice to the client (as opposed to business advice)**



1st Element: Communication



- Oral or written communications covered, but
- Only protects the contents of the communication itself
 - The facts communicated are not protected if those facts can be learned from some other source (can't launder problematic facts through your attorney)



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Element: Privileged Persons

Privileged Communications Can Extend to:

- The client
- The client's attorney
- Agents of either the client or the attorney
 - i.e. accountants, doctors or other specialists hired by attorney to perform analysis to aid the attorney in rendering a legal opinion to the client
- Communications between the attorney, client and the specialists are privileged.



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Element: Privileged Persons

Corporations

- Was the communication made within the “control group” of the corporation – i.e. a person having authority to obtain professional legal services
 - Employees in a position to control or take a substantial part in the determination of corporate action in response to legal advice –
 - Examples: CEO, CFO, division or department managers
- Best practice is to check with attorney before going outside control group





Element: In Confidence

Disclosing information to third parties outside the control group can destroy the privilege

- Generally, communications to 3rd parties not privileged-
- Unless the 3rd party is necessary for rendering the advice.
 - Physicians, accountants
 - Accident reconstruction experts
 - Other outside experts
- Allowing third parties in the room can be fraught with peril
 - safer practice to limit such communications



Element: For Purpose of Seeking or Obtaining Legal Assistance

Make your requests explicit!

- “I need to know the legal ramifications...”
- “Can you provide legal guidance on...”
- “What are our legal obligations under the contract...”
 - The drafting of arguably “legal” documents such as policies, procedures or other general documents by in-house counsel have sometimes been deemed “business” activities that are not privileged

Work Product Privilege



Three elements required:

- Documents and tangible things
- Prepared in anticipation of litigation or for trial
- By/For a party or that party's non-attorney representative

Limited to documents made in preparation for litigation

Prepared in Anticipation of Litigation or Trial

Is litigation imminent or being evaluated?

- Must be a tangible risk of litigation – broad general legal exposure does not count.
- Lawsuit does not yet need to be filed.
- Routine investigations don't qualify (accident reports, other investigations routinely conducted and in the ordinary course of business).



Preserving Privilege



- Waiver – Even if you satisfy all the elements, can still lose the privilege later on.
- Must be vigilant – Failure to assert the privilege or protect your communications can result in waiver.
- Only disclose privileged information to client or third-parties approved by attorney.
- Partial disclosures can lead to complete waivers in the eyes of a court.
- Stay away from “reply all”.
- When in doubt, pick up the phone.

Gathering Information and Conducting Investigations



Important to have a plan, personnel, and strategies in place in advance.

- General investigation policies can be useful
- For serious matters (allegations of widespread discrimination, allegations against senior management, offenses which may be reportable to government agency) an outside investigation by counsel may be best in order to protect information with privilege as much as possible

***IMPORTANT:** In most cases, do not commence investigation without first consulting counsel for direction.

THANK YOU



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