

Government Investigations: Considering Privilege Issues and More

Health Law Webinar

September 9, 2026

Fredrikson

Make it Better with Butter
10 a.m.

10:30 a.m.
4-H Demonstrations

11:30 a.m.
Hand Milking

12:00 p.m.
Milking Demonstration

Talk to the Animals
12:20 p.m.

1:30 p.m.
Hand Milking

Milking Demonstration
2 p.m.

Celebrity Milking Contest
2:30 p.m.

4:00 p.m.
Milking Demonstration

4:00 p.m.
More Cheese Please Daily Contest

4-H Demonstrations
4:30 p.m.

Milking Demonstration
6 p.m.

4-H Demonstrations
6:30 p.m.

A Quick Primer on the Two Key Privileges

Attorney-Client Privilege

- Communications between lawyer and client.
- Intended to be confidential.
- Made for the purpose of seeking or giving legal advice.
- Oral and written communications: mail, email, phone calls, meetings, attorney documents and notes.
- *Mixing business and legal advice is the biggest risk for in-house lawyers.*

Work Product Doctrine

- Materials prepared or assembled at direction of counsel.
- Must be in anticipation of potential litigation.
- Overcome if there is "substantial hardship".
- Opinion/mental impressions receive higher protection.
- *Can have AC but NOT WP for consultant work if not anticipating litigation.*

Don't Forget Other Possible Protections!

- Peer Review: A protection not a privilege.
- Common Interest/Joint Defense.
- Patient Confidentiality (Particularly for Part 2!)



A Quick Primer on Responding to Government Agents

The Agents Are NOT Your Friends

- Agents want you to talk. They use fear and confidence.
- **Your biggest weapon: silence.**
- Don't try to convince the agent "it's all a misunderstanding."
- Medicare rules are complicated. You may have violated one without knowing it.
- *To many investigators, there is no such thing as an "innocent mistake."*

Know Your Rights

- Agents can't require anyone to attend an interview (The licensing board exception!!)
- Agents can't obtain documents without a warrant or subpoena.
- Agents can't obtain privileged information.
- Agents can't prevent you from talking about the interaction.

Know Your Obligations

- Cannot prevent employees from talking.
- If you talk, you must tell the truth.
- Never destroy or hide documents.
- **If they have a warrant, let them in. Do not talk to them. Get I.D. and call a lawyer.**

Receiving a Civil Investigative Demand

The initial response and the first critical decisions about privilege.

What Is a Civil Investigative Demand (CID)?

A pre-complaint discovery tool used by the Department of Justice in False Claims Act investigations.

- A CID authorizes the government to demand:
 - 1. Documents:** Production of relevant documents, records, and electronically stored information.
 - 2. Interrogatory Answers:** Written responses to questions under oath.
 - 3. Oral Testimony:** Examination of witnesses under oath, similar to a deposition.

Subpoenas

A grand jury subpoena may include language such as: "The United States Attorney requests that you do not disclose the existence of this subpoena. Any such disclosure would impede the investigation being conducted and thereby interfere with the enforcement of the law." That is grossly misleading!!

The Initial Response to a CID

- **Insurance:** Check for coverage.
- **Contact the Prosecutor:** Counsel experienced with government interaction should reach out to define scope and priorities.
- **Litigation Hold:** Start working on a litigation hold right away and update, update, update.
- **Investigation:** Conduct initial interviews.

Privilege Considerations at the Outset

- Put a Lawyer in the Lead.
 - Key issue: whether the communication was in furtherance of obtaining legal advice. The lawyer must be in charge.
- Make a Communication Plan.
 - Determine who needs to know what, and when. Control the flow of information.
- Limit Internal Reporting.
 - Share information only with those who need it. Broad dissemination risks waiver.
- Cut Off the Grapevine.
 - Warn control group employees against discussing the matter without counsel present.
- Separate Legal and Business Advice.
 - In-house attorneys should send separate emails for business and legal analyses.

Tiger Traps: the Happy Hoppe

- You label a document as "work product."
- That means you think there is a risk of litigation.
- **Have you just created a duty of document preservation??**

Investigations are often considered "in anticipation of litigation," so labeling something as "work product" likely will not create a duty that doesn't already exist.

The Big Question: Do You Care About Privilege?

The easy answer is yes, but what about the 60-day rule?

Privilege Matters

- Kickback allegations.
- Quality of care issues.
- Medical necessity disputes.
- Medical malpractice claims.
- Any issue involving judgment calls.

Privilege May Not Matter, Or May Hurt!

- Refund/overpayment issues.
- Privilege may hinder your ability to share findings.

The 60-Day Rule: Previously ~6 months to determine overpayment; now 180 days. Now the Government asserts the refund is due at the earlier of 180 days after you should suspect it or your determination you owe money.

Initiating a Litigation Hold

A CID or government investigation clearly triggers preservation obligations.

The Litigation Hold: When and Why

- The duty to preserve evidence arises when litigation is reasonably anticipated.
 - A CID, government subpoena, or credible whistleblower complaint clearly triggers this duty. Failure to preserve can result in spoliation sanctions.
- Scope of the Hold.
 - Identify all relevant custodians.
 - Preserve all forms of electronically stored information (ESI).
 - Suspend auto-deletion policies for relevant data.
 - Consider all forms of relevant data: email, texts, voicemails, shared drives, information stored on individual hard drives.
 - Document the hold process thoroughly.

Connection to the Happy Hoppe

Remember: labeling a document as "work product" signals you anticipate litigation. This may create a preservation duty that predates the formal litigation hold.

Privilege in the Hold Notice

The hold notice itself may or may not be privileged. Keep legal in the lead on drafting and distribution. Balance transparency with privilege protection.

Conducting Interviews

Internal interviews are the backbone of any investigation – and a minefield for privilege.

Who Should Conduct Internal Interviews?

- Attorney / compliance officer / other?
 - Consider multiple factors when deciding who takes the lead.

Honesty

Who will people be most honest with?
Do people talk more when comfortable
or afraid?

Expertise

Who will "ask the next question"? Who
knows the substantive law well enough
to follow up?

Staffing

There should be two people; at least
one might be a witness. Can there be
too many?

Cost vs. Privilege

Balance the cost of attorney
involvement against the value of
preserving privilege.

Learning About the Issue – Employee Interviews

- Make sure the employee understands your role.
 - Provide an Upjohn-style warning so the employee knows who you represent.
- Ask lots of questions.
 - Dig in as much as possible – you need to know where to look and who to talk to next.
- The stopped clock axiom.
 - Even a stopped clock is right twice a day – take every concern seriously.
- Take things under advisement.
 - You don't have to dismiss concerns in the moment, even if you think they are wrong.
- Be careful with promises of confidentiality.
 - You may need to talk to others; explain you won't reveal sources unless relevant and necessary.

Employee Certifications

An annual certification can pay huge dividends. It prevents people from revisionist reporting.

Separation Agreements

Employees can't promise not to report to the government. We don't want to look like we're inhibiting government reports. An employee can promise not to keep the relator's share.

The Upjohn Warning

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

Every interview with a witness under privilege should begin with these statements:

1. You are (or are reporting to) a lawyer who is representing the company.
2. The witness has been asked to participate so that company counsel can gather facts to provide legal advice to the company.
3. The witness's statements are protected by attorney-client privilege, meaning he or she can't be forced to disclose what was said unless privilege is waived.
4. The privilege belongs to the company — the company has the right to waive it and disclose the witness's statements without notifying the witness.
5. The witness must not disclose the questions asked or answers given during the interview.

Protecting Privilege in Interviews

- Make sure everyone knows legal is involved.
 - The extent of the Upjohn warning detail depends on how often the interviewee participates in these types of interviews.
- Request for confidentiality.
 - Co-workers: Use common sense – explain that discussing the matter could harm the investigation.
 - Family: Request they not share details of the interview.
 - Government: Make sure employees know they CAN but NEEDN'T talk to the government.
- What if the employee wants to bring counsel?
 - The employee has the right to bring counsel. This should not impact privilege or confidentiality. If appropriate, consider an informal joint defense arrangement.

Protecting Privilege in Interviews – Should You Record the Interview?

- Possible impact on the interviewee – inhibits candor.
- May make the interview discoverable.
- Even a signed statement is at higher risk of discovery.
- Audio records or signed written statements are much more likely to be discovered.

What is Privileged?

Facts are NOT protected – only analysis and opinions.

- **Key Practical Impacts**

- Source documents are never protected.
- Memos with facts and impressions may be partially discoverable. The more impression, the more protected.
- **The closer an interview summary is to a transcript, the more likely it is discoverable.**
- Audio records or signed written statements are much more likely to be discovered.

Interview Tips

- **Make People Comfortable:** A comfortable reporter is a more honest reporter. Consider geography. Be authentic.
- **Let Them Talk:** Choose your questions thoughtfully. Enjoy the silence – the oldest trick in the book works because people fill silence with information.
- **Educate Your Witness:** One goal of interviews is education. Use documents to refresh recollection, but beware: anything you show may be discoverable.
- **Hiring Consultants:** Attorney-client or work product? Discuss the consultant's role: is s/he an advocate or a cop? Get references – there are horror stories.
- **Writing Summaries:** Flashy or quotidian? Who gets copies? The closer to a transcript, the more likely discoverable. Keep summaries analytical, not verbatim.

Interview Tips – Who Are the Privileged Parties?

- **Employees:** Yes (outside "control group" depends on state law).
- **Former Employees:** Maybe (depends on adversity/state law).
- **Consultants & Advisors:** Probably, if essential to legal advice.
- **Auditors:** Generally, no.
- **Government Agents:** Almost never (no common interest; selective waiver argument).

Document Production

The document collection, review, and production process is where privilege issues become more complex.

Document Collection and Review

- Negotiate and Prioritize Categories of Documents for Production.
 - Most requests are overbroad.
 - Work with the AUSA to identify critical issues.
- Gathering Responsive Documents.
 - Start the process during interviews.
 - Work with IT to identify and preserve relevant data sources.
 - Coordinate with business units to locate paper and electronic records.
 - Implement e-discovery workflows for systematic collection.
 - Ensure chain of custody documentation throughout.
- The Role of E-Discovery.
 - Technology-assisted review (TAR) can accelerate the process.
 - Keyword searches and date filters narrow the review set.
 - Defensible process documentation is essential.

The Privilege Review

The Biggest Risk for In-House Lawyers.

Mixing business and legal advice is the biggest risk to privilege for in-house lawyers.

- Some courts require a "clear showing" that in-house lawyer communications were for a legal vs. business purpose.
- Some courts focus on "predominance"; others will segregate business and legal portions.
- In-house attorneys should send separate emails for business and legal analyses, even on the same subject.
- Board minutes should note when discussions are held with company counsel under privilege.
- All investigation team members should mark emails, notes, and memos with "privileged" or "work product" designations as appropriate.

The Privilege Log

- **What Must Be Logged:** Each document withheld on privilege grounds must be identified with sufficient specificity: author, recipients, date, subject matter, and basis for privilege.
- **Specificity Requirements:** Vague descriptions like "legal advice" are insufficient. Courts increasingly require detailed descriptions that allow meaningful challenge.
- **Strategic Considerations:** Consider whether a categorical log is appropriate. Negotiate with the government early about log format and timing.

Inadvertent Disclosure and Clawback

FRE 502 and Clawback Protections.

Privilege Waivers.

- Types:
 - Inadvertent: accidental disclosure.
 - Express: intentional disclosure.
 - Implied: conduct inconsistent with privilege.
- Scope:
 - Full, partial, or selective.
 - 8th Circuit supports selective waiver (Diversified Industries, 572 F.2d 596).
 - Others not so much (In re Pac. Pictures Corp., 679 F.3d 1121, 9th Cir. 2012).

Clawback Agreements.

- Negotiate FRE 502(d) orders and clawback agreements early. These provide a safety net for inadvertent disclosures during the production process without waiving the privilege.

Oral Testimony in a CID Examination

Preparing for and navigating privilege assertions during government testimony.

Preparing for CID Oral Testimony

- Understanding the Scope.
 - Review the CID's specifications for testimony topics carefully.
 - Assess which topics may implicate privileged communications.
 - Prepare a privilege strategy before the examination.
- Preparing the Witness.
 - Conduct thorough prep sessions covering likely question areas.
 - Train the witness to distinguish facts (not protected) from analysis (protected).
 - Practice pausing before answering to allow counsel to object.
- Role of Counsel During Testimony – the Nearly Potted Plant.
 - Present to assert privilege and protect the witness's rights.
 - Object to questions seeking privileged communications or opinion work product.
 - Request breaks when needed to confer with the witness.



Advocating with the Government to Dismiss or Decline Intervention

Presenting your case to the government during the investigation and seal period.

The Dismissal or Declination Decision

When the government declines to intervene in an FCA case, the relator may proceed alone – but the odds shift significantly in the defendant's favor.

The Importance of Advocacy During the Seal Period.

- Request meetings with the assigned DOJ attorney to present your case.
- Provide exculpatory evidence and context for the allegations.
- Address compliance program strengths and remedial measures taken.
- Demonstrate good faith and willingness to cooperate.

Key Considerations

- Timing matters – advocate early and consistently during the seal period.
- Tone matters – be cooperative, not adversarial.
- Know that the government may extend the seal period to investigate further.
- The government's decision is not a finding of innocence – manage expectations.

Unsealing of a Qui Tam Complaint

What happens when the seal is lifted and a complaint becomes public.

The Qui Tam Process and Unsealing

The False Claims Act's qui tam provision allows private citizens (relators) to file suit on behalf of the government against those who have defrauded the government.

- The Seal Period.
 - Complaint filed under seal for at least 60 days.
 - Government investigates and decides whether to intervene.
 - Seal may be extended multiple times.
 - Defendant may not know about the case during the seal period.

Post-Unsealing Privilege Concerns

Protecting Investigation Work Product

All materials created during the internal investigation remain privileged. Ensure proper logging and assertion of work product claims. Opinion work product (mental impressions, conclusions, legal theories) receives the highest level of protection.

Reevaluate the Litigation Hold

Qui tam complaints are often much broader than the topics listed in a CID—both the temporal scope and substantive scope. Conduct a paragraph-by-paragraph review of the Complaint

Impact of Public Disclosure

The complaint's allegations become public record. Prior privileged communications about the same topics remain privileged but be cautious about public statements that could be construed as waiver. Consider whether privileged information appears to be included in the complaint.

Strategic Considerations

Evaluate whether voluntary disclosure of certain privileged materials would strengthen your position. Remember: selective waiver isn't conducive to building trust, but strategic transparency can be powerful.

Dealing with PR

- Is a PR Consultant Valuable?
 - Lawyers are good at crafting messages.
 - Connections can be worthwhile.
 - Reporters and judges are pretty different.
- Are Communications Regarding PR Privileged?
 - There is less clarity than one might expect.
 - Safest to assume that communication might be discoverable.
 - Don't write anything you don't want read.

Presenters



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