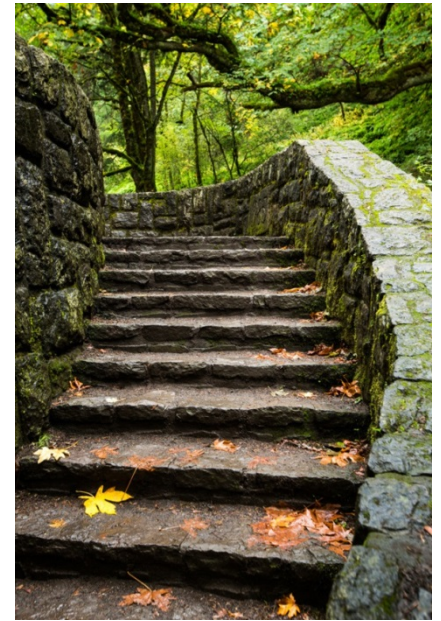


Ten Steps to Preserving Privilege in Investigations

Ten Steps to Preserving Privilege

1. Learn the privilege rules
2. Put a lawyer in the lead
3. Make a communications plan
4. Limit internal reporting
5. Cut off the grapevine
6. Separate legal and business advice
7. Label documents accurately
8. Don't record interviews
9. Give clear privilege warnings
10. Manage third party communications



Step 1: Learn the Privilege Rules



Understand why preserving privilege is important:

- Limiting legal exposure to the company
- Limiting legal exposure to employees
- Limiting harm to business interests
- Limiting reputational risks
- Limiting litigation and investigation costs
 - Containing the body of evidence
 - Limiting the size of the witness pool

Step 1: Learn the Privilege Rules



Evaluate when preserving privilege is important.

- Is civil litigation or a government investigation pending or threatened?
- Is it a routine or preliminary inquiry or a non-routine investigation?
- Are significant compliance issues involved?
- Could the investigation lead to future litigation or disclosures?
 - Are you sure?

Step 1: Learn the Privilege Rules



Understand what's protected and what isn't.

- **Attorney-Client Privilege**

- Communications must be between employees and the company's attorney in order to give or receive legal advice.
 - Information must involve matters within the scope of the employees' company duties.
 - Employees must be aware that the purpose is to facilitate legal advice to the company.
 - Communications must be designated confidential when made, and must remain confidential.
- The privilege does **not** protect disclosure of **underlying facts** or non-lawyer **management communications** about the investigation.
 - Merely copying a lawyer doesn't create privilege.

Step 1: Learn the Privilege Rules



Understand what's protected and what isn't.

- **Work Product**

- Applies to work product created by or at the direction of company attorneys.
- Includes only documents prepared “in anticipation of litigation.”
- Weaker than privilege: Can be overcome with a showing of “substantial hardship.”
- Greater protection for attorney opinions or mental impressions.

Step 1: Learn the Privilege Rules



Understand where the protections apply and where they might not.

- Consider applicable state laws
 - In some states, attorney-client privilege applies only to “control group” employees
 - In others, the privilege may apply to any employee if discussing the “subject matter” of legal advice to the company
 - Other states apply neither approach.
- Consider applicable foreign laws
 - Many countries don’t recognize “attorney-client” privilege *per se* (but some recognize general duties of confidentiality).

Step 1: Learn the Privilege Rules



Evaluate whose communications are protected and whose aren't.

- Employees outside the “control group”?
 - Maybe - depends on state law
- Former Employees?
 - Maybe - depends on adversity/presence of individual counsel for the former employee
 - Depends on state law.
- Consultants & Advisors?
 - Maybe, if consultant is essential to legal advice.
- Co-defendants? – Maybe, if there's a common interest.

Step 2: Put a Lawyer in the Lead



Decide who will lead the investigation:

- Preliminary Inquiry: Initial interviews and document review to assess whether a formal investigation is warranted.
 - Often led by HR, management, compliance officers, or other non-lawyers
 - Not privileged
- Formal Investigation: Should always be led by an attorney if privilege is important.
 - In-house vs. Outside Counsel: Privilege is stronger for outside counsel.
 - Independence/fewer conflicts
 - No mixing of business/legal advice
 - Recognized under (more) foreign laws

Step 3: Make a Communications Plan (and stick to it!!!)



- Be clear about who will oversee the investigation and report only to them.
- Limit the size of the investigation team.
 - Lawyers, paralegals & their assistants
 - Information technology/records management
 - Accountants, HR and other experts needed for lawyer to give good legal advice.
 - Avoid using anyone with potential conflicts.
- Take care when non-lawyers are on the team.
 - Team members should report and take direction only through the lead attorney.
 - Attorneys should retain any outside experts.
 - Team members should segregate investigation materials from their other work.
 - Attorneys should lead interviews when possible.

Step 4: Limit Internal Reporting



- Limit communications to company contacts with a “need to know”.
- In “control group” states, avoid disclosure to anyone outside upper management.
- Be aware that reporting to company leaders can waive privilege if they are investigation targets.
- Warn recipients against redistribution.

Step 5: Cut Off the Grapevine



Widespread company communications likely won't be regarded as privileged.

- Warn control group employees against discussing the investigation without counsel present.
- Instruct witnesses and document custodians on the need for confidentiality.
- When gossip is already rampant, consider sending a notice to all employees:
 - Instruct them not to talk about the matter under investigation; and
 - Tell them to direct any inquiries or comments to the lead investigator.
 - Know that some employees will ignore your instructions.

Step 6: Separate Legal & Business Advice



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

- Some courts require a “clear showing” of legal vs. business purpose.
- Think before you email!
 - 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.

Step 7: Label Documents Accurately



- Investigation reports and memos should:
 - state that the purpose of the investigation is to gather information to provide legal advice
 - identify any actual or anticipated litigation or government investigations creating work product protection
- Don't "over" or "under" label.
 - Labeling everything "privileged" makes all privilege designations suspect.
 - Using the "work product" designation could trigger document preservation and litigation hold notification requirements.

Step 8: Don't Record Interviews



- Recorded interviews may not be protected.
 - Instead, bring a note-taker who can testify to what the witness said, if necessary.
- Interview summaries should not be transcripts.
- Use care in asking witnesses to sign interview statements.
 - Some courts require signed statements to be produced to witnesses.
- Include attorney impressions and opinion in any written interview reports.
- Anticipate disclosure.
 - Write reports knowing they could end up in court.
- Do not use privileged materials to refresh a witness's recollection.

Step 9: Give Clear Privilege Warnings



Every interview with a witness under privilege should begin with an “*Upjohn*” warning, stating that:

- You are (or are reporting to) a lawyer who is representing the company.
- The witness has been asked to participate so that company counsel can gather facts to provide legal advice to the company.
- 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.
- The privilege belongs to the company, so the company has the right to waive it and disclose the witness’s statements without notifying the witness.
- The witness must not disclose the questions asked or answers given during the interview.

Step 10: Manage Third Party Communications



Use caution when disclosing investigation summaries or memos to third parties.

- Government and Government Agencies:
 - Such disclosures could waive privilege as to the entire investigation.
 - Such disclosures could waive privilege as to other agencies and private parties.
 - Disclose only underlying facts.
- Auditors:
 - Such disclosures usually waive privilege.
- Insurance Companies:
 - Communications with insurers may be protected under the common interest doctrine.

Presenters



Dulce Foster
Fredrikson & Byron, P.A.
612.492.7110
dfoster@fredlaw.com



Lousene Hoppe
Fredrikson & Byron, P.A.
612.492.7402
lhoppe@fredlaw.com



David Glaser
Fredrikson & Byron, P.A.
612.492.7143
dglaser@fredlaw.com