Attorney-Client Privilege for the Compliance Officer:
Who has it? When do you have it? How do you keep it?

April 22, 2014

Panelists

Marsha Gerber (Moderator)
Partner
Norton Rose Fulbright
(713) 651-5296
Marsha.gerber@nortonrosefulbright.com

Steven Smart
Associate General Counsel
Israel Chemical, Ltd.
Advocacy Chairperson
ACC Compliance & Ethics Committee
(314) 983-7812
Steven.smart@ici-group.com

Michael Kallens
Associate General Counsel
Booz Allen Hamilton Inc.
(703) 377-6222
Kallens_michael@bah.com
Recommendations for preserving attorney client privilege and attorney work product protection in the context of the company's compliance program administration and implementation

- Adequately consider and define separate legal and compliance roles for the compliance officer and compliance group, even if the same individuals perform multiple roles
  - Chief Compliance Officer vs. General Counsel
  - Compliance Attorney vs. Program Manager
- Legal roles – focus on providing advice regarding compliance issues, and conducting investigations; may include seeking legal advice as the compliance officer
- Compliance role – focus on compliance program design, management and implementation
- Compliance officers and personnel need not necessarily be attorneys for privilege to apply to specific activities and communications, nor do they necessarily need to be part of the legal department
- That is, depending on the circumstances, compliance officers and compliance personnel can either
  - Act under the instruction, direction, and supervision of attorneys, or
  - Act as clients and instruct/seek legal advice from attorneys
- Consider and determine at the outset which role the compliance officer has in a given situation, and use written letters of instruction to clarify and document it
- If the same person is both GC and CCO, instead of letters of instruction, explicitly state in communications when acting as GC or providing legal advice
- If the CCO reports to the GC, instructions may be given less formally, but should be documented in writing
- Actively communicate the expectation of confidentiality regarding those documents to which privilege should attach, and limit their circulation
- Do not label every communication “privileged and confidential”; be selective
Example 1:
The CCO wishes to conduct a comprehensive company-wide assessment of regulatory risk. The GC provides him/her with a letter of instruction asking the CCO and the compliance staff to investigate and prepare a written report addressed to the GC on regulatory risk. The work is to be performed under the general supervision of the GC.

Example 2:
The CCO wishes to conduct a comprehensive company-wide assessment of regulatory risk. The CCO provides the GC with an instruction letter asking the GC and legal staff to investigate and prepare a written report to the CCO on regulatory risk. The CCO is acting as client in this situation.

Example 3:
During a compliance training session conducted by a non-attorney compliance officer, an employee raises concern about a possible compliance failure. The compliance officer brings the issue to the attention of the GC. The GC instructs the compliance manager to investigate the matter under his supervision, using a written letter of instruction.

Example 4:
During a compliance training session conducted by a non-attorney compliance officer, an employee raises concern about a possible compliance failure. The compliance officer instructs the GC to investigate the matter and report back to the CCO, using a written letter of instruction. Alternatively, the GC investigates the matter and reports directly to the CEO, the Board, or to a management committee that includes the CCO.