



*Privilege Considerations in  
Internal Investigations:*

*Kristin Graham Koehler*

## Speaker Biographies

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### Kristin Graham Koehler

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Kristin Graham Koehler has handled numerous United States Department of Justice (DOJ) criminal and civil investigations involving healthcare fraud, antitrust, securities fraud, and violations of the Foreign Corrupt Practices Act (FCPA). She has significant experience representing clients in qui tam matters, State AG investigations, and congressional investigations, and has negotiated numerous Corporate Integrity Agreements with the HHS Office of Inspector General.

# Attorney-Client Privilege

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- In general, the attorney-client privilege protects confidential communications made for the purpose of securing legal advice
- In order to protect privileged communications during an investigation, counsel should:
  - clearly identify who counsel represents
  - avoid conflicts of interest
  - designate privileged material as such
  - limit dissemination of privileged material on a need-to-know basis



# Work Product Doctrine

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- Work product doctrine protects documents and other tangible things prepared by counsel, or by persons working at the direction of counsel, in anticipation of litigation
- Is an internal investigation “in anticipation of litigation”?
  - Yes, if active government inquiry has commenced
  - Maybe, if solely an internal review
    - If take position in the internal investigation that litigation is reasonable anticipated, note related need for appropriate document preservation measures



# Joint Defense Privilege

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- Joint defense privilege essentially extends the attorney-client privilege and work product doctrine to confidential communications designed to advance the representation of parties sharing common interests
- Frequently used between company and employees in investigations
- Counsel should consider memorializing the agreement in writing, which is required by some courts; clearly identifying the parties and defining the “common interest”
- Agreement should make clear that communications are confidential and disclosure of confidential information among members of agreement does not constitute waiver of attorney-client privilege or work product doctrine

# Joint Defense Privilege

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- Agreement should prevent disclosure of confidential information by any member of group to third party unless member that provided the information agrees
  - Agreement should make clear that confidentiality requirement remains in force for members who withdraw from group
  - Joint defense agreements usually permit members to withdraw only upon express notification to other members of group
- Agreement should make clear that joint defense agreement does not give rise to attorney-client relationships between party to agreement and counsel for another party
- Agreement also should state that parties understand and agree that sharing of privileged information will not be basis for disqualification of counsel or claim of conflict in event that one or more parties withdraws from joint defense or otherwise becomes adverse

# Witness Interviews – Practical Privilege Considerations

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- Consider whether internal or external counsel should be present
- Explain the nature of investigation and purpose of the interview at the outset
- Set the tone: collaborative and courteous, not adversarial
- Give admonitions
  - *Upjohn* warning – oral or written?
  - Preserve potentially relevant documents
  - Contact with third parties/government
  - Confidentiality reminder at end

# Interview Memorandum

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- To prepare or not to prepare?
- If written: Memo or Bullet Points?
- Necessary Intro Paragraphs:
  - This memorandum reflects information obtained during interviews conducted on [X date] by [Counsel].
  - Prior to each interview we described the purpose of the interview. We stated that we represented the Company and were not the witness' attorney. We explained that the interview was to gather factual information that we would use in providing legal advice to the Company. We stated that the conversation was protected by the Company's attorney-client privilege and that the Company could decide, at its discretion, whether to disclose the conversation. We asked each witness to keep our conversations confidential, and each agreed to do so.
  - The purpose of this memorandum is to record factual information necessary to provide legal advice to the Company. This memorandum does not contain a verbatim, or substantially verbatim, transcript of the interview. Rather the memorandum sets forth our thoughts, impressions, conclusions, and opinions in connection with the pending matters involving the Company. In particular, this memorandum reflects our judgment as to the relevance of certain information and the interpretation of factual disputes. This memorandum incorporates privileged and confidential information and is protected by the attorney-client and work product privileges.



## Other Privilege Issues

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- Disclosure to Auditors
- Different Privilege Laws/Standards In Other Countries

## Use of Experts or Consultants

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- Generally, retained by company and law firm, with bills to be paid directly by the company
- Engagement letter should be clear that engagement is designed to help counsel provide legal advice and is undertaken in anticipation of litigation

# Report of Investigation

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- Decision concerning how to report results of internal investigation will depend upon client's goal in conducting investigation
- Counsel may choose to report informally to company's general counsel or officers
- In other cases, written report may be necessary to formally report to the board, to voluntarily disclose to the government, or to influence the decisions made by prosecutors or a sentencing court
- In drafting a written report, counsel should minimize the potential waiver of privileges and the likelihood of use of the report against the company in future enforcement actions or civil litigation
- Dissemination of the report should be limited and only to those in a position to take action in order to maintain the privilege

# Waiver

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- Any agreement with the government to waive privilege should be in writing and should contain three key components:
  - **Scope of the Waiver** – The agreement should define the types of work product and communications waived, as well as the subject matter of the waiver
  - **Waiver Limitations** – The agreement should delineate any types of work product and communications for which privilege is not waived
  - **Limitations on Use** – The agreement should specify how the government will use the privileged information. For example, the government may agree not to use the information in any subsequent criminal or civil case against the company
- Counsel should understand that, in waiving its privilege in a government investigation as to a given subject matter, the company is in all likelihood also waiving its privilege against all parties with respect to that same subject matter
  - Most jurisdictions follow the Second Circuit rule, which does not permit selective waiver. See *In re Steinhardt Partners LP*, 9 F.3d 230, 236 (2d Cir. 1993)

## The “Yates Memo” – September 10, 2015

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- In September 2015, Deputy Atty. Gen. Sally Yates announced new policy guidance, emphasizing DOJ priority to identify culpable individuals in corporate investigations. Expands on already-existing DOJ practices
- Requires DOJ to “fully leverage its resources to identify culpable individuals at all levels in corporate cases”
  - DOJ attorneys must do more to pursue individuals in corporate enforcement actions. Approval by Assistant AG or US Attorney required if no action
  - States a preference for resolving individual cases before corporate ones. Before corporate settlement, DOJ attorney must have a “clear plan” to resolve individual cases and memorialize any declinations
  - Whether to bring a civil suit should be based on considerations beyond an individual’s ability to pay
- Requires a self-reporting company seeking cooperation credit to make a full disclosure to the DOJ, including the identities of all culpable individuals
  - No cooperation credit awarded if information on individuals not provided. Yates described the new approach to corporate cooperation as “all or nothing,” analogizing a company that fails to identify responsible individuals to a drug trafficker who is unwilling to testify against a cartel boss

# Potential Impact: Privilege

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- Remains unclear exactly how the DOJ will address assertions of privilege in the assessment of total cooperation
- Memo states companies must only provide non-privileged information, but most information acquired during an internal investigation is, or should be, privileged
  - In actuality, requirement to provide all relevant information may require a full or partial waiver of privilege
  - This is particularly relevant for any decisions not to share interview memos reflecting statements of individuals who may be potential targets for prosecution
  - Companies may be put in the untenable position in which maintaining privilege and receiving cooperation credit are mutually exclusive aims
- Potential impact on:
  - Scope of internal investigations: potential waiver of privilege could limit scope
  - Employee cooperation: employees may be reluctant to speak to counsel if they believe companies are looking for and will disclose wrongdoing on their part
  - Defense counsel for employees: may be necessary before employees will cooperate with an internal investigation; may only be able to acquire information under a JDA
  - Upjohn: may require more fulsome warning

# Potential Impact: Privilege

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- DOJ has offered some additional guidance on this question since publication of the Yates Memo:
  - Asst. Attorney General Leslie Caldwell remarks in September 2015:
    - “I...want to make clear that the new guidance does not change existing department policy regarding the attorney-client privilege or work product protection. Prosecutors will not request a corporate waiver of these privileges in connection with a corporation’s cooperation”
  - Deputy Attorney General Yates remarks in November 2015:
    - To receive cooperation credit, companies must provide “all non-privileged information”; however, Yates also stated that companies must “report to the government all relevant facts.” Claimed new guidance does not roll back existing DOJ policy
    - “Let’s be clear about what exactly the attorney-client privilege means. As we all know, legal advice is privileged. Facts are not. If a law firm interviews a corporate employee during an investigation, the notes and memos generated...may be protected, at least in part...But to earn cooperation credit, the corporation does need to produce all relevant facts—including the facts learned through those interviews”
    - Regarding the potentially chilling effect on employees’ willingness to talk, Yates noted that DOJ is “not asking companies to pin a scarlet letter on their employees.” Acknowledged some employees may be nervous, “[b]ut to the extent that there’s a tension between the interests of the company and the interests of individuals in an internal investigation, that dynamic is nothing new”