

In-House Ethics Advisory

November 16, 2021 *021*

In-House Privilege Issues in Criminal Investigations

Amy Richardson and Lauren Snyder

The federal and state governments recently have returned their attention to criminal investigations aimed at businesses. The following cases discuss in-house privilege issues in those situations.

In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means, 11 F.4th 1235 (11th Cir. 2021):

- This case addressed the application of in-house privilege after the government executed a search warrant.
- The government executed a search warrant at a company's offices and seized items from an in-house attorney. The company sought injunctive relief prohibiting the government's filter team (attorneys and staff not involved in the criminal investigation) from reviewing potentially privileged documents unless they or the court, after conducting its own review, ordered disclosure.
- The government put into place a filter protocol to review those documents, and following a hearing, the magistrate judge modified it. The modified protocol allowed the company to perform the initial privilege review and provide a privilege log to the government's filter team. The filter team was then permitted to review any items on the privilege log and challenge any of the privilege designations. If the parties were unable to reach a resolution about disputed items, the court or a special master would rule on the privilege dispute.
- The Eleventh Circuit upheld the filter protocol, because the company had the first opportunity to identify potentially privileged materials and before those items were provided to the investigative team, either the company or the court must approve.
- **Practical Tips:** If in-house counsel documents are seized by the government, make sure your company has the first opportunity to review them. If not, the protocol may be invalid.

In re Grand Jury, 13 F.4th 710 (9th Cir. 2021):

- This case examined whether the “primary purpose” for in-house privilege applied to documents responsive to a grand jury subpoena in a criminal investigation.
- The grand jury issued subpoenas related to a criminal investigation, in which the owner of a company is the target, and the district court held appellants (the company and the law firm that represented the target) in contempt for failure to comply. The district court found that certain dual-purpose (legal and business) communications were not privileged because the primary purpose was to obtain tax advice, not legal advice.
- Appellants argued that the broader “because of” test should apply rather than the “primary purpose” test. The “because of” test provides protection when it can be said that the document was created because of the anticipated litigation and would not have been created in similar form but for the prospect of it. The “primary purpose” test protects communications when their primary purpose is to give or receive legal advice.
- The court rejected the “because of” test and held that it made sense for that broader test to apply to work product, where the goal is to uphold the fairness of the adversarial process by shielding lawyers’ litigation strategies. Attorney-client communication is not necessarily tied to any adversarial process and the broader test could create a perverse incentive for a company to add lawyers to every business decision to try to insulate their communications in future litigation. Further, most Circuits have adopted the “primary purpose” test.
- **Practical Tips:** Recognize when your communications are privileged and when they are not by assessing the purpose. If the purpose is not to provide legal advice, the communications are not privileged. Separate communications involving legal advice from those involving business, tax, or other strategic advice to the extent possible.

* * * *

This advisory is not intended to convey legal advice. It is circulated to our clients and others as a convenience and is not intended to reflect or create an attorney-client relationship as to its subject matter.