

## Ethics Update

March 18, 2022

Below are two cautionary tales connected to privilege: the first involving disclosure of an internal investigation's findings, and the second involving communications with a third-party consultant.

Opinion, *United States v. Coburn*, Civ. No. 2:19-cr-00120-KM (D.N.J. Feb. 1, 2022):

- The defendants—accused of violating the Foreign Corrupt Practices Act while employed as Cognizant's Chief Legal Officer and President—argued that Cognizant had waived privilege over its internal investigation after Cognizant disclosed a summary of the investigation to DOJ.
- While under threat of prosecution, Cognizant disclosed to DOJ detailed accounts of interviews of employees, including the defendants. The court found that by handing these materials to a potential adversary, Cognizant destroyed any confidentiality the materials may have had, undermining both attorney-client and work product privileges.
- Concerning the breadth of the waiver, the court held that:
  - (1) to the extent summaries of interviews were conveyed to DOJ, the privilege was waived as to all memoranda, notes, summaries, or other records of the interviews;
  - (2) to the extent summaries conveyed contents of documents or communications, those underlying documents or communications were within the scope of waiver; and
  - (3) waiver extends to documents and communications that formed any basis of the presentation to DOJ.
- **Practical Tips:** Do not disclose a summary or findings of the company's internal investigation to a government entity to avoid prosecution. If you do, you risk waiving any privilege over the investigation's materials, including underlying documents that were reviewed as part of the investigation.

Special Master's First Interim Report and Order, *Google*, 20-CA-252802 (N.L.R.B. Nov. 26, 2021):

- Google allegedly interfered with employees' protected concerted and union activities by coercively interrogating and terminating employees, among other misconduct.
- The NLRB conducted an in-camera review of documents responsive to a subpoena request for communications relating to Google's hiring of third-party IRI Consultants and Project Vivian, Google's codename for its attempt to understand union organizing campaigns.

- NLRB found communications and materials created by or with IRI Consultants were not privileged because they involved the development of campaign materials regarding antiunion messaging, not providing legal advice. The fact that they were funneled through outside counsel and labeled as privileged did not make them privileged. Nor did the paragraph in Google's contract with IRI stating it was Google's intent that their communications be privileged.
- NLRB also rejected Google's argument that IRI Consultants were experts retained by a lawyer to conduct studies and analyses required to give legal advice because Google did not identify any legal advice one can reasonably conclude would necessitate first obtaining antiunion messaging and training from IRI, and the document recommending Google engage IRI made no mention of legal advice.
- Practical Tips: Before you hire a third-party consultant, consider whether they are assisting with the provision of legal advice and incorporate that purpose into the consultant's retention agreement. If they are not, then the privilege may not apply, even if you label communications as privileged.

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