

Compliance Today – January 2019 Got privilege? Best practices to protect privileges during an internal investigation

by James Holloway

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Whenever a provider begins an internal investigation into a compliance concern—whether prompted by an employee complaint, a government inquiry, an audit, a media report, or other factors—the protection of legal privileges should be top of mind. Internal investigations typically involve candid and confidential discussions regarding a provider's failure to comply with regulatory requirements, standards of care, or policies. Sometimes there are internal discussions about the provider's awareness of past non-compliance and the failure to take corrective action. There are numerous cases in which a provider was hit with a large verdict or forced into making a large settlement payment, because the government or a private party was able to obtain highly incriminating internal documents that could have been validly withheld from disclosure if the provider had taken the necessary steps to establish and maintain recognized legal privileges. That is an unforced error that providers should strive to avoid.

Common legal privileges for an internal investigation

Two legal privileges are usually available to protect internal investigations. The attorney-client privilege protects written and oral communications that are intended to be confidential between a client and their lawyer, and the privilege applies if a significant purpose of the communication is obtaining or providing legal services. Communications between the provider and its legal counsel during the course of an internal investigation could potentially be protected by the attorney-client privilege. The work product privilege protects materials prepared by or at the direction of a lawyer, for litigation or in anticipation of litigation. In many cases, an internal investigation is conducted in anticipation of litigation, so the work product privilege may be available.

With any internal investigation, providers should have two related goals in mind. First, establish the privileges for internal communications and materials made during the investigation. Then protect those privileges by avoiding disclosures of information to outside parties that result in a waiver or loss of privileges.

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