AUDITS CONDUCTED UNDER ATTORNEY CLIENT PRIVILEGE

How to Manage the "ACP" Framework During an Audit Engagement

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AGENDA

- Audits Conducted under Attorney Client Privilege (ACP)
- Break
- Cyber Audits and Litigation Risks
- Break
- Pay Equity Audits
- Q&A

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Audit Basics

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AUDIT BASICS

Mission

To enhance and protect organizational value by providing risk-based and objective assurance, advice, and insight.

- Mandatory guidance
- Definition of internal audit
- Code of Ethics
- Standards

The Institute of Internal Auditors North America

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AUDIT BASICS

The Institute of Internal Auditors North America

Core Principles

Demonstrates integrity.

Demonstrates competence and due professional care.

Is objective and free from undue influence (independent).

Aligns with the strategies, objectives, and risks of the organization.

Is appropriately positioned and adequately resourced.

Demonstrates quality and continuous improvement.

Communicates effectively.

Provides risk-based assurance.

Is insightful, proactive, and future-focused.

Promotes organizational improvement.

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AUDIT BASICS

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Standards

1100 – Independence and Objectivity

The internal audit activity must be independent, and internal auditors must be objective in performing their work.

1300 – Quality Assurance and Improvement Program

The chief audit executive must develop and maintain a quality assurance and improvement program that covers all aspects of the internal audit activity.

1312 – External Assessments

External assessments must be conducted at least once every five years by a qualified, independent assessor or assessment team from outside the organization.

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AUDIT BASICS

The Institute of Internal Auditors North America

Standards

1100 – Independence and Objectivity
1300 – Quality Assurance and Improvement Program
1312 – External Assessments

Practical Tip: Consider how these standards and obligations can affect ACP work or work product.

- When deciding on an ACP project can Counsel's oversight impact Audit's independence?
- How are your audit team's Quality Assurance Reviews(QAR) conducted and are ACP documents handled?

Practical Tip: When relying on audit for monitoring and testing of legal or compliance processes engage audit to identify / discuss ACP determination which is different than auditing processes in sensitive legal-oriented areas as part of the normal course of risk assessment for the organization.

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Attorney Client Privilege (ACP) Basics

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ATTORNEY CLIENT PRIVILEGE BASICS

OBJECTIVE

- Scope: Performing an audit engagement or audit work at the direction of counsel for purposes of giving legal advice
- Protects against disclosure of communications and documents regarding confidential information while providing legal advisement
- Applicable to audit work when an attorney performs the review and provides oversight of the audit work that involve legal issues

DISCUSSION EXCLUSIONS

- Upjohn [#IAALBIANYL]
- Attorney reporting obligations
- Cross border privilege rules
- External audit requests for information

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ATTORNEY CLIENT PRIVILEGE BASICS

Basics:

- ACP protects
  - Confidential communications (Attorney Client Communications – "ACC")
  - Attorney Work Product (Litigation)
- Ethical rules (WA)
  - RPC 1.6: Confidentiality of Information. (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
  - RPC 1.13: Organization as Client. (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
  - RPC 2.1: Advisor. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

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ATTORNEY CLIENT PRIVILEGE BASICS

Basics:

- ACC can protect
  - Confidential communications
  - between lawyer and client
  - with the intent that it be kept confidential
  - for the primary purpose of obtaining or rendering legal advice
- ACP isn't automatic – and there are challenges
- Privilege is very narrowly construed – and the burden is on the party seeking to assert the privilege to show ACP requirements have been met
- *Privilege protects communications, not the underlying facts*

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ATTORNEY CLIENT PRIVILEGE BASICS

Basics:

- What are the means of communication that can be protected?
  - Oral
  - Written
  - Email
  - IM
  - Text
  - Notes
  - Presentations
  - Workpapers - e.g. spreadsheets

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Challenges:

- Comingling business (risk) advice with legal advice
- Optics: scrutiny of in house assertions (v. outside counsel)
- Optics: taking active steps to "direct" the audit activities
- Navigating role as Counsel rendering legal advice and other legal roles (e.g. Compliance Officer, Corporate Secretary, etc.)
- Limiting information to those "need-to-know" stakeholders
- Protecting documents
- Avoiding waivers

Practical Tip: Always be clear about asserting the request or issuing of legal advice

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Challenges - waivers:

- The confidential communication is shared with a third party
  - Waiver means the communication is no longer protected from disclosure
  - Waiver can be intentional or inadvertent
  - The attorney-client privilege belongs to the client (Company) and only Company executives or attorneys can intentionally waive the privilege
  - Waiver can extend to not only a specific communication, but to all communications regarding issues or subject areas discussed in the communication

How does this apply to an ACP audit?

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ATTORNEY CLIENT PRIVILEGE BASICS

Challenges - waivers:

- Issuing ACP after a review/assessment commences – investigation example
  - Premera Blue Cross Customer Data Security Breach Litigation, Case No. 3:15-md-2633-SI, 2017 U.S. Dist. LEXIS 178762 (D. Or. Oct. 27, 2017)

    Premera claimed privilege and work product protection for its data breach investigation. The court rejected both claims. Among many other things, the court assessed Premera's work product claim for documents created by its consultant Mandiant. Premera had hired Mandiant to review its claims data management system in October 2014. On January 29, 2015, Mandiant discovered malware on the system. Premera quickly hired an outside lawyer, and on February 21, 2015, "Premera and Mandiant entered into an amended statement of work that shifted supervision of Mandiant's [later] work to outside counsel."

AUDITS CONDUCTED UNDER ATTORNEY CLIENT PRIVILEGE

Directing Audit Engagements with Protocols

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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

THE "WHY"

- Compliance determinations needing legal advisement – privileged communications
- Distinguish the audit objective from:
  - Investigative purpose
  - Risk assessment activity
- Seeking: Audit of information or processes for purposes of rendering legal advice

THE "HOW"

- Attorney direction and oversight
- Communication & documentation protocols
- Training
- Practical guidelines: **know the limits, identify and address risks**

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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

Tactical questions:

- Who is performing the audit work? Internal audit or is this a co-source audit?
- Who is supervising the audit work? In house counsel or outside counsel?
- As in house counsel, do you have time to "direct" the audit work or does this require outside counsel oversight? [ethics reminder]
- Do your audit teams – whether internal audit or external firm – understand ACP standards?

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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

1. Document audit/risk assessment ACP protocols (recommended):

- Clearly explain the purpose of any guidelines as it pertains to protecting attorney client and work product privileges

  These guidelines outline the process for designating and protecting the confidentiality of internal audits and risk assessments performed in anticipation of litigation under the attorney work product doctrine and/or for the purpose of providing legal advice under the attorney client privilege.

  The attorney client privilege protects and encourages confidentiality when a client seeks, or an attorney provides, legal advice in a confidential manner. These guidelines explain how to ensure that the privilege applies and that communications reflect that intent.

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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

Documented protocols, continued:

- Include attorney oversight directions
  1. Establish who is directing the work and acting as the single point of contact for Legal
  2. Issue a memo to document the audit engagement, as in house counsel overseeing the work
  3. Identify additional attorney legal SMEs given scope
  4. Fundamental responsibilities: direct the work, control the communications, uphold ACP protections, render legal advice

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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

Documented protocols, continued:

- Audit engagement notification and planning directions to audit staff
  1. Notification memo
  2. Initial planning meeting and ACP guideline overview
- Communications protocols
  1. General directions – limiting communications and upholding confidentiality
  2. Email guidance – general headers and ACP language
  3. Requests for information – guidance and oversight of "exchanges"

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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

Documented protocols, continued:

- Interviews
  1. The purpose of the interview is to collect information as part of an audit requested by Legal counsel
  2. The interview is protected under the attorney-client privilege, and
  3. The privilege is held by the Company, not the interviewee
  4. The interviewer should keep the substance of the interview confidential.
  5. Handout materials should be marked "ACP" and collected by the interviewer at the end of the interview if shared to facilitate discussion, etc.

Does Legal counsel need to be present at interviews?

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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

Documented protocols, continued:

- Documentation and storage instructions
  1. Interview materials
  2. Records (work papers, testing samples)
  3. Audit work paper storage:
     - Internal audit repository
     - Secure shared/collaboration site (Legal)
     - Outside counsel or co-source* network locations

Do co-source (third party) auditors receive company-issued equipment?

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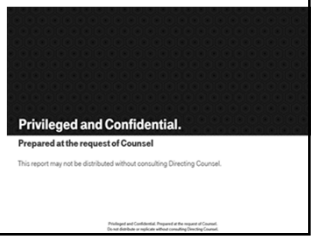
DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

Documented protocols, continued:

- Written report writing / process guidelines
  1. Document mechanics
     - "ACP" designation
     - Slide footer and cover page
  2. Draft reviews (soft copy)
  3. Revisions and action owner communications
  4. Final report and distribution

Can the audit engagement team issue the final report?



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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

Documented protocols, continued:

- Audit Committee communications and "package" – consider -
  - The Audit Committee's need to know given their oversight requirements and charter
  - Whether an attorney can provide a read out of the report or issues requiring legal advice
  - Coordinating with the audit function

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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

2. ACP overview and training:

- Provide the necessary training or explaining to audit engagement teams on how to preserve the privilege and Counsel's role
  - Standard ACP notifications given at meetings (e.g. performing audit at the direction of Counsel, information discussed is confidential and not to be shared or distributed, contacting Counsel with questions or requests, etc.)
  - Communication practices: avoiding pitfalls like requests for information or process inquiries in long email exchanges under ACP

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DIRECTING AUDIT ENGAGEMENTS - PROTOCOLS

3. For audit co-source engagements:

- Include the ACP directive in MSA/SOW terms:
  - Auditing at the direction of counsel for purposes of giving advice
  - Communication protocols: workpapers, report, communications
- Counsel inclusion in "Kick-off" and status meetings
- Continue to clarify roles and "Directing Counsel's" responsibility to provide oversight by directing work, reviewing drafts, etc.

AUDITS CONDUCTED UNDER ATTORNEY CLIENT PRIVILEGE

Practical Guidance

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PRACTICAL GUIDANCE

- Deciding whether to conduct an Audit under ACP is a *risk-based call*
- Litigation matters and "work-product" might incur heightened burden and risk
- Controlling the communications stream for large engagements is challenging – ensure you are closely reviewing communication practices and exchanges
- Meet with the audit engagement team to provide oversight and direct work
- Issue initial "ACP" memo and provide periodic reminders to audit staff/team

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PRACTICAL GUIDANCE

- Develop "ACP" audit memo headers – in **red** – for use during report distribution or audit engagement related communications
- Don't forget to remind people not to share in a shared file folder/SharePoint or shared application location
- Consider the technical aspects of ACP audit documentation storage and any IT governance processes needed to protect documents (QAR process, IT change management or backup processing, etc.)
- Meet with Audit prior to their Audit Planning to identify engagements that may fall within ACP [e.g. assess litigation risks for existing matters]

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BREAK #1

AUDITS CONDUCTED UNDER ATTORNEY CLIENT PRIVILEGE

Cyber Audits and Litigation

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CYBER MATURITY ASSESSMENT: BASICS

What is a CMA?

An Assessment of organization's ability to protect information assets and its preparedness against cyber threats.

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CYBER MATURITY ASSESSMENT: BASICS

What Do CMAs involve?

(1) A standard:

- National Institute of Standards and Technology (NIST)
- Industry Best Practices
- Proprietary Frameworks like KPMG and RSA

(2) A review of the organization's people, policies and systems

(3) A score – how well does the organization live up to the standards?

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Table 1: Function and Category Unique Identifiers

Function Unique Identifier	Function	Category Unique Identifier	Category
ID	Identify	ID.AM	Asset Management
		ID.BE	Business Environment
		ID.GV	Governance
		ID.RA	Risk Assessment
		ID.RM	Risk Management Strategy
		ID.SC	Supply Chain Risk Management
PR	Protect	PR.AC	Identity Management and Access Control
		PR.AT	Awareness and Training
		PR.DS	Data Security
		PR.IP	Information Protection Processes and Procedures
		PR.MA	Maintenance
		PR.PT	Protective Technology
DE	Detect	DE.AE	Anomalies and Events
		DE.CM	Security Continuous Monitoring
		DE.DP	Detection Processes
RS	Respond	RS.RP	Response Planning
		RS.CO	Communications
		RS.AN	Analysis
		RS.MI	Mitigation
		RS.IM	Improvements
RC	Recover	RC.RP	Recovery Planning
		RC.IM	Improvements
		RC.CO	Communications

- Source: NIST Cybersecurity Framework (April 16, 2018)

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Leadership and Governance
Board demonstration due diligence, ownership and effective management of risk

Human Factors
The level and integration of a security culture that empowers and helps to ensure the right people, skills, culture and knowledge

Information Risk Management
The approach is designed to achieve effective risk management of information throughout the organisation and its delivery and supply partners

Business Continuity and Crisis Management
Preparations for a security event and ability to prevent or reduce the impact through successful crisis and stakeholder management

Operation and Technology
The level of control measures implemented to address identified risks and reduce the impact of compromise

Legal and Compliance
Regulatory and international certification standards as relevant

- Source: KPMG Cyber Maturity Assessment Model

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CYBER MATURITY ASSESSMENT: BASICS

Why conduct a CMA?

PROACTICE:

- To ensure compliance with regulations and statutes (HIPAA, CPNI)
- Meet the needs of a growing company

REACTIVE:

- Vendor Assessments
- Consent Decree
- Post-Incident Review

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TO ACP OR NOT TO ACP?

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"IT'S CALLED DISCLOSURE!"

How might a CMA become public?

- Civil lawsuits (discovery)
- Regulatory Investigations (FCC, FTC, AGs)
- Deal Disclosures (Due Diligence)

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CONGRESSIONAL HEARINGS

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THE GOOD, THE BAD, AND THE UGLY

- Facts cannot be ACP-wrapped, so what's the big deal?
- CMAs contain characterizations of facts.
- CMAs are designed to push improvement → CMAs contains "bad" and "ugly" characterizations.
- Periodic CMAs track (lack of) progress

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Table 7. Example Current Maturity Rating

Capability Criteria	Evidence	Maturity Rating
Process and Analytics	• Workforce planning processes at both the HQ and at Sub-organization level • HQ issued a data call to sub-organizations on cybersecurity workforce before making a strategic • Supply and Demand Data exist and is used, but the process is arduous and there is some questions about its accuracy due to lag time	
Integrated Governance	• Workforce planners sit in the Human Capital offices at HQ and sub-organizational level • During a significant re-org, leadership put out guidance on how to manage and realign the cybersecurity workforce so that it would experience as little disruption as possible • HQ issued a data call to sub-organizations on cybersecurity workforce before making a strategic	
Skilled Practitioners and Enabling Technology	• Workforce planners sit in the Human Capital offices at HQ and sub-organizational level • Workforce planners receive training on some supply and demand analysis • There are no established communication channels between workforce planners; sharing information is not a common practice • Systems exist, but the process is cumbersome because WF planners have to weed through several systems and databases • WF planners manually update their data	

SOURCE: Dept of Homeland Security, *Cybersecurity Capability Maturity Model White Paper* (Aug 4, 2014)

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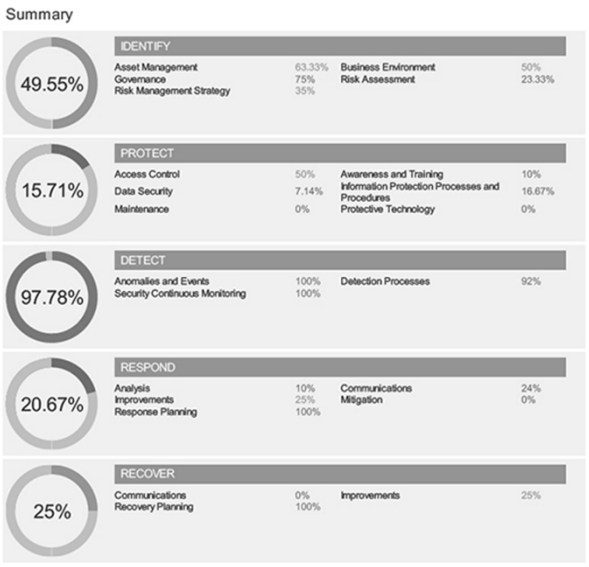

Source: Willis Towers Watson, Cyber Risk Profile Diagnostic Tool

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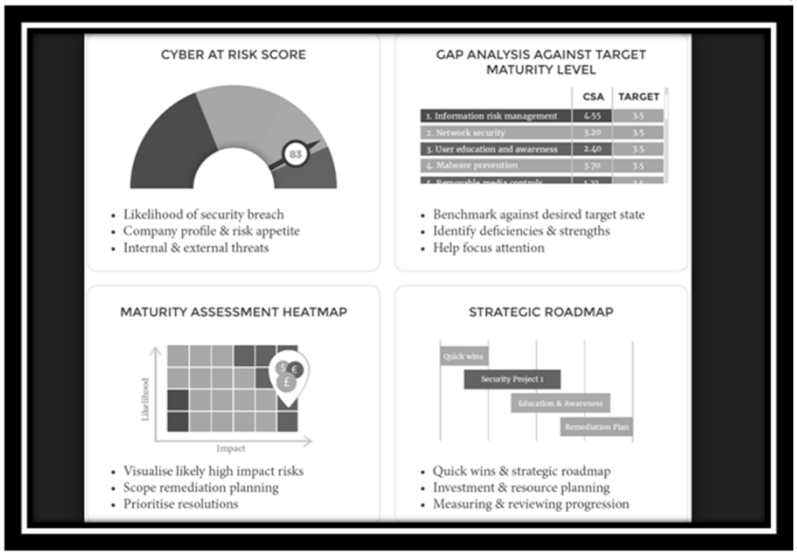

Source: Clarium CMA Framework

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"IT'S A CUT-AND-DRY CASE OF ATTORNEY CLIENT PRIVILEGE!"*

HOW TO WRAP A CMA IN ACP

1. At the direction of counsel
   - Document the engagement
   - Scope the project
   - Control the communications

2. For the purposes of rendering legal advice
   - Advise!
   - Example: Tie specific CMA goals to regulatory compliance

*It's never a cut-and-dry case of Attorney Client Privilege

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TYING CMA TO LEGAL ADVICE

- GLBA Standards for safeguarding customer information (16 CFR § 314.3).
- Information security program. You shall develop, implement, and maintain a comprehensive information security program that is written in one or more readily accessible parts and contains administrative, technical, and physical safeguards that are appropriate to your size and complexity, the nature and scope of your activities, and the sensitivity of any customer information at issue. Such safeguards shall include the elements set forth in § 314.4 and shall be reasonably designed to achieve the objectives of this part, as set forth in paragraph (b) of this section.

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TYING CMA TO LEGAL ADVICE

- HIPAA Administrative safeguards 45 CFR 164.308 –
- **(i)*Standard: Security management process.*** Implement policies and procedures to prevent, detect, contain, and correct security violations.
- (ii)Implementation specifications:
  - (A)Risk analysis (Required). Conduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information held by the covered entity or business associate.
  - (B)Risk management (Required). Implement security measures sufficient to reduce risks and vulnerabilities to a reasonable and appropriate level to comply with § 164.306(a).
  - (C)Sanction policy (Required). Apply appropriate sanctions against workforce members who fail to comply with the security policies and procedures of the covered entity or business associate.
  - (D)Information system activity review (Required). Implement procedures to regularly review records of information system activity, such as audit logs, access reports, and security incident tracking reports.

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TYING CMA TO LEGAL ADVISE

- 47 USC § 222(a) – Federal Customer Proprietary Network Information law
- 23 NYCRR 500.02(b)(1) -- New York Department of Financial Services – Cybersecurity Requirements for Financial Services Companies
- 201 CMR 17.03(2) (b) -- Massachusetts "Standards for the Protection of Personal Information of Residents of the Commonwealth
- State breach notification laws
- Consent Decree requirements

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"IT'S CALLED WAIVER!"

HOW TO LOSE ACP PROTECTION

- Failing to have counsel direct the assessment
- Comingling business (risk) advice with legal advice
- Failing to provide legal advice
- Oversharing the CMA
- Incorporating CMA into non-privileged documents
- "Applying" ACP after the fact

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TO ACP OR NOT TO ACP?

- Deciding whether to conduct an Audit under ACP is a *risk-based call*
- Is the organization facing current litigation or regulatory inquiries
- Was there a recent cybersecurity even that is likely to give rise to litigation or regulatory investigation
- Does the organization have the time, money, and resources to actually run the CMA under ACP

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CMAS AS WORK PRODUCT: SPECIAL CONSIDERATIONS

- The Work Product privileged is different from the Attorney-Client Communication Privilege
- Applies when documents are prepared by non-attorneys "because of" or in "preparation for" actual or threatened litigation.
- Courts weigh factors: timing of retention, timing of litigation holds, and, of course, direction of counsel (i.e., no potted plants)

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CMAS AS WORK PRODUCT: SPECIAL CONSIDERATIONS

- The Work Product privileged is not absolute
- Like the ACC privilege, WP may be waived.
- Unlike the ACC ,"work product" docs may still be discovered if "they are otherwise discoverable under Rule 26(b)(1)" and if "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(i)-(ii).

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CMAS AS WORK PRODUCT: SPECIAL CONSIDERATIONS

- An Organization might conduct a CMA in response to a significant security incident.
- CMAs in these circumstances may often follow on the heels of an incident-specific investigations
- Danger that unprotected CMA could waive ACP for prior investigations

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CASE STUDIES

- ***In re Experian Data Breach Litig.*, Civ. No. 15-01592, 2017 U.S. Dist. LEXIS 162891 (May 17, 2017) (Protecting Post-Incident Investigative report as Work Product)**
- ***Genesco, Inc. v. Visa U.S.A., Inc.*, F.R.D. 559 (M.D. Tenn. 2014) (Protecting Post-Incident Investigative report as Work Product)**
- **In re Anthem, Inc. Data Breach Litig., 236 F. Supp. 3d 150 (D.C. 2017) (Plaintiffs sought work papers and final report of Government audit of Anthem following data breach; some work papers protected but not all and not final report)**

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BREAK #2

AUDITS CONDUCTED UNDER ATTORNEY CLIENT PRIVILEGE

Pay Equity Audits

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PAY EQUITY AUDITS: THE BASICS

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SEARCH FOR STATISTICALLY SIGNIFICANT DEVIATIONS

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NEXT LEVEL REVIEW

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THE RESULTS

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THE REPORT

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NEXT STEPS

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GOALS OF A PAY EQUITY AUDIT

- Determine whether pay inequity exists that cannot be explained by neutral, bona fide factors;
- Assess litigation risk – from individuals or classes
- Determine whether an employer's current policies are creating, or contributing to these inequities;
- Take effective counter-measures

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*60 MINUTES, **"EVEN A "BEST PLACE TO WORK" CAN HAVE GENDER PAY DISPARITY"** CBS, VIA YOUTUBE

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MOST CRITICAL CONSIDERATION

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SECOND MOST CRITICAL CONSIDERATION

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WHERE

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WHO

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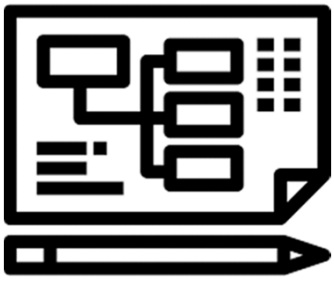
HOW



- INVOKE PRIVILEGE
- SCOPE LETTER
- DOCUMENTATION AND COMMUNICATION PROTOCOLS
- SCOPE MONITORING

Q&A

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SPEAKER INFO

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