

# **Practical Guidance for Maintaining Privilege Over an Internal Investigation**

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## **I. Introduction**

Imagine the following scenario:

Company X, with you as outside counsel, successfully navigates through a two-year DOJ and SEC investigation into potential Foreign Corrupt Practices Act (“FCPA”) violations in multiple countries, culminating in favorable resolutions with both agencies. The investigation involved voluminous document productions, more than fifty interviews of current and former employees, deep-dive forensic accounting work by a “Big Four” firm, multiple presentations to the DOJ and SEC, and a host of remedial measures to address the issues under investigation, including the termination of a number of Company X’s distributors, as well as employee terminations and discipline.

Barely after the ink dries on the settlement papers, Company X’s Board of Directors receives a shareholder demand letter alleging that the Board breached its fiduciary duties by failing to adequately oversee the company’s operations. Days later, the Board receives a letter from another shareholder demanding to inspect Company X’s books and records, and specifically requesting, among other things, “all documents relating to the FCPA investigation, including, but not limited to, interview memoranda, presentations to the Government, and reports or memoranda reflecting the findings of the investigation.”

As you review the shareholders’ demands, you begin to assess whether Company X can claim privilege or work-product protection over the myriad documents that the shareholders’ counsel have requested. A litany of questions runs through your head: Did you waive privilege by making witness proffers or other factual presentations to the DOJ and SEC? What about when you briefed the company’s outside auditors? Are your communications to the company about termination of distributors and employee discipline protected? Were any privileged materials inadvertently produced, and did you take adequate steps to ensure the return of any such materials?

The answers to these questions will likely turn on decisions that were made years ago, and whether the company was attentive to the privilege traps inherent in internal investigations. Below, we discuss a number of these traps, and offer practical guidance on how to avoid them throughout the stages of an internal investigation. As we explain, decisions made at critical junctures of an

investigation will determine whether Company X has adequately preserved applicable privileges and other protections.

## **II. The Beginning of an Investigation**

Preserving the privilege begins at the very outset of an investigation. Careful thought must be given to decisions regarding whom outside counsel represents, who will oversee the investigation, and whether and how to involve non-lawyers.

### **A. Be Clear on Who the Client Is and Who Is Overseeing the Investigation**

To maintain privilege over an investigation, it is essential that outside counsel establish with clarity whom they represent and to whom they are reporting. In many cases, the issue will be relatively straightforward because outside counsel will be representing a company, and the investigation will be overseen by in-house counsel. Board committee investigations add a layer of complexity. While communications between a board committee and its counsel are the classic type of attorney-client communications that would generally be privileged, the case for protection of communications between committee counsel and other stakeholders in an investigation, such as company counsel (in-house or outside) and management, is less clear.<sup>1</sup>

Complications can also arise when an investigation (whether the client is the company itself or a board committee) involves allegations of wrongdoing by officers or directors, or when in-house counsel may have been involved in the conduct under investigation. An investigation may not be credible if it is overseen by the individuals whose conduct is at issue in the investigation. Leaving credibility issues aside, there are also very real waiver risks in such situations. For example, as discussed further below, if counsel reports the findings of an investigation to members of management or board members who have engaged in conduct that could make them adverse to the company, a waiver

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<sup>1</sup> See, e.g., *Ryan v. Gifford*, Civil Action No. 2213-CC, 2007 WL 4259557, at \*3 n.2 (Del. Ch. Nov. 30, 2007) (assuming, but not deciding, that a company could properly assert privilege over communications between the company and counsel to a special committee of the company's board).

may result.<sup>2</sup> Additionally, particularly with respect to witness interviews, a lack of clarity over whether outside counsel represents both the company and individual directors and officers can have serious ethical and privilege implications.

To mitigate these risks, it may be desirable for outside counsel to be clear in their engagement letter about not only whom they represent, but also whom they *do not* represent. Additionally, outside counsel should be mindful that potential conflicts that are not apparent at the outset of an engagement may arise as facts are developed. For example, if, as an investigation progresses, it becomes apparent that the in-house counsel who is overseeing the investigation had substantive involvement in the events under investigation, outside counsel might consider recommending an alternative reporting line, or, if necessary, that oversight of the investigation be transferred to a board committee. These decisions are often complicated and highly sensitive, but outside counsel must satisfy itself from the outset that the engagement has been structured in a manner that most effectively safeguards the company's interests, including with respect to privilege.

B. Be Careful About Using Non-Lawyers to Conduct or Assist in an Investigation

Privilege traps can also arise when non-lawyers conduct or assist in an investigation. While non-lawyers, such as forensic accountants, often play a critical role in the fact-development process, careful thought must be given to how they are employed and how their work is overseen.

The use of a non-lawyer to lead an investigation carries with it the risk that the investigation will not be privileged. Recall that, for an investigation to be privileged, it must be shown that the investigation was conducted for the ultimate purpose of providing legal advice to the client. Because non-lawyers cannot provide legal advice, this predicate for the privilege may be lacking in an investigation led by a non-lawyer, even if counsel plays a role in advising on how to conduct the investigation.<sup>3</sup> Courts may well reject such an approach as a

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<sup>2</sup> See, e.g., *id.* at \*2-3. This issue can arise not only when counsel is reporting findings at the conclusion of an investigation, but also in circumstances where counsel is faced with requests from management to provide a briefing on the status of the investigation.

<sup>3</sup> See, e.g., *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121 (D.D.C. 2012) (holding that an investigation conducted by internal audit personnel was not covered by the attorney-client privilege and not protected by the work-product doctrine).

“gimmick” wherein counsel is not allowed to conduct the internal investigation but is retained “in a watered-down capacity to ‘consult’ on the investigation in order to cloak the investigation with privilege.”<sup>4</sup> As one court has put it, “when an attorney is absent from the information-gathering process, ‘the original communicator has no intention that the information be provided [to] a lawyer for the purposes of legal representation.’”<sup>5</sup>

If non-lawyers are employed to assist in an investigation, in order to maintain the privilege, it is critical that they act as agents for in-house or outside counsel, under the direction and control of such counsel, and for the purpose of assisting counsel in providing legal advice. The classic example of this is an accountant reviewing and analyzing a company’s books and records to assist in an investigation.<sup>6</sup> There are several practical steps that counsel can take to help preserve the privilege in such circumstances.

First, if third-party consultants will be retained, it is preferable that outside counsel retain them directly, and that the purpose and nature of the engagement be memorialized in a written agreement. For example:

This Statement of Work (“SOW”), effective as of [DATE], is made by [CONSULTANT] and [LAW FIRM] acting as agent for [CLIENT]. [CONSULTANT] understands and acknowledges that the services provided under this SOW are being requested by [LAW FIRM] on behalf of [CLIENT], and will be performed at the direction of [LAW FIRM] in order to assist [LAW FIRM] in providing confidential and privileged legal advice to [CLIENT].

The parties understand that it is [LAW FIRM] and [CLIENT’S] intention that the work performed by [CONSULTANT] under this SOW will be covered by the attorney-client

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<sup>4</sup> *Id.* at 129.

<sup>5</sup> *Id.* at 130 (quoting *Nesse v. Shaw Pittman*, 206 F.R.D. 325, 330 (D.D.C. 2002)).

<sup>6</sup> *See, e.g., United States v. Kovel*, 296 F.2d 918, 922 (2nd Cir. 1961) (privilege applies to communications to an accountant retained by an attorney to assist in providing legal advice to the client).

privilege, the attorney work-product doctrine, and all other applicable privileges and protections.

A separate SOW or engagement letter along these lines should be prepared for all third-party vendors, even if they regularly work for the client, including under a master services agreement.

Second, counsel should closely oversee and direct the work of consultants. To be sure, cost and efficiency considerations may dictate that communications between third-party consultants and company employees occur without counsel present. In this regard, it is not necessary for an attorney to “observ[e] and approv[e] every minute aspect of [the consultant’s] work.”<sup>7</sup> That said, in order to maintain privilege, such communications should nonetheless be made “at the direction of counsel, to gather information to aid counsel in providing legal services.”<sup>8</sup>

Third, consistent with these principles, if company employees are assisting in an investigation, they should be formally “deputized” by counsel, so that it is clear that they are working at counsel’s direction in order to assist counsel in providing legal advice. The following is an example of a “deputizing” communication:

Dear []:

In response to a recent compliance hotline report, the Company has asked the Law Department to provide advice regarding the application of U.S. law to certain business conduct in the Company’s operations in [COUNTRY X]. To provide this advice, the Law Department, with the assistance of outside counsel, will undertake a privileged and confidential investigation. I am writing to request your assistance in this matter in the preservation and collection of materials that may

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<sup>7</sup> See *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 72 (S.D.N.Y. 2010) (quoting *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 81 (S.D.N.Y. 2006)).

<sup>8</sup> *Id.* at 80.



be relevant to this investigation, for the purpose of providing legal advice to the Company in this matter. In assisting in this investigation, you will be acting under the direction of the Law Department and its outside counsel in providing legal services to the Company.

Any and all communications relating to this investigation are privileged and confidential, and neither those communications nor the fact of this investigation should be disclosed to anyone other than Company or outside counsel or others to whom Company counsel has authorized disclosure. Additionally, any materials or information collected in the course of this investigation should be treated as confidential, and should not be disclosed to anyone except at the express direction of Company or outside counsel.

C. Make Clear that the Purpose of the Investigation Is to Provide Legal Advice

If a company or a board committee intends to maintain privilege over an internal investigation, it should say so explicitly. This can be accomplished through various means—*i.e.*, in board minutes, through an email, orally if later memorialized in a file memo, or through a more formal, direct communication from management or the board authorizing counsel to undertake an investigation for the purpose of providing legal advice. If possible, in order to help substantiate a claim for protection under the work-product doctrine, the communication should identify actual or anticipated litigation or Government investigations arising from the conduct under investigation. The following is an example of a formal communication achieving this objective:

To: General Counsel

From: Chief Executive Officer

Re: Investigation of Matters in [COUNTRY X]

In response to a recent compliance hotline report and press reports, I am requesting the Law Department to provide advice regarding the application of U.S. law to certain business conduct in the Company's operations in [COUNTRY X]. To provide this advice, I am requesting that the Law Department, with the assistance of outside counsel, undertake a privileged and confidential investigation.

The events at issue have already given rise to a number of shareholder demand letters threatening litigation, and a request to inspect the Company's books and records. We are also aware of several law firms that have issued press releases indicating that they are investigating potential claims against the Company under U.S. securities laws. Additionally, we expect that the events that are the subject of the hotline and press reports will attract the attention of U.S. and foreign law enforcement authorities, including the Securities and Exchange Commission and the Department of Justice. The Company is seeking legal advice in connection with these matters, in anticipation of litigation, and the investigation is necessary so that you can provide this advice.

Any and all communications relating to this investigation and the requested legal advice are privileged and confidential, and neither those communications nor the fact of this investigation should be disclosed to anyone other than Company or outside counsel or others to whom Company counsel has authorized disclosure. Additionally, any materials or information collected in the course of this investigation should be treated as confidential, and should not be disclosed to anyone except at the express direction of Company or outside counsel.

This type of formal communication has the advantage of establishing and articulating the purpose of the investigation in a manner that is best protective of the privilege. Ideally, the purpose of the investigation should be clearly articulated early and often as the investigation proceeds—for example, when counsel seeks assistance from company personnel in preserving and collecting data, in *Upjohn*<sup>9</sup> warnings during witness interviews, in presenting findings to management or the board, and, if necessary, when interacting with enforcement authorities. In other words, it should be clear from the entire record of the investigation that outside counsel had been retained to conduct an investigation for the purpose of providing the company with legal advice. The existence of such a record will help a company to rebut an argument that no privilege attached to the investigation.<sup>10</sup>

D. Be Sensitive to the Complexities of Privilege Issues Outside the United States

If the subject matter of an internal investigation has the potential to draw the attention of foreign regulators or litigants, counsel cannot safely assume that United States law will govern subsequent adjudications of privilege issues. In a number of foreign jurisdictions, in-house counsel do not enjoy the same privilege and work-product protections as in the United States. For instance, in 2010, the European Court of Justice held in *Akzo Nobel Chemicals Ltd. v. European Commission* that, because in-house counsel are unable to exercise independence from the companies that employ them, their communications with the company are not privileged.<sup>11</sup> Thus, for investigations that may ultimately be the focus of litigation in the European Union, companies should evaluate the privilege risks that flow from having in-house lawyers lead such investigations. As a more general matter, in light of the differing legal standards that operate in foreign jurisdictions, counsel should take time at the outset of an investigation to research the relevant jurisdiction's privilege law when deciding which personnel will conduct which aspects of the investigation.

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<sup>9</sup> See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>10</sup> See, e.g., *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-CV-1276, Slip Op. at 5 (D.D.C. Mar. 6, 2014) (declining to find investigations privileged where they were “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice”).

<sup>11</sup> Case C-550/07P, *Akzo Nobel Chems. Ltd. & Ackros Chems. Ltd. v. Comm’n*, 2010 E.C.R. I-08301.

### **III. The Middle of an Investigation**

The fact-development stage of an investigation—conducting interviews, reviewing and producing documents, coordinating with other attorneys, and providing advice to the client—presents numerous risks to the privilege. We consider here some of the risks related to interviews, productions of documents, joint defense or common interest agreements, and the provision of advice on issues ancillary to an investigation.

#### **A. Carefully Consider the *Upjohn* Warning**

Conducting effective interviews is an essential element of a thorough investigation. Preserving the company's privilege, however, requires that attorneys give an adequate *Upjohn* warning before beginning the interview. If an attorney glosses over the warning or leaves out key aspects of it, he or she may jeopardize the privileged nature of the interview. In contrast, if an attorney takes an overly prosecutorial tone in delivering the warning, the attorney may chill the witness's willingness to cooperate fully, or even at all.

As a technical matter, the *Upjohn* warning should cover the following points:

- I am a lawyer for the company and do not represent you personally.
- The purpose of the interview is to learn about [the issue] in order to provide legal advice to the company.
- This conversation is privileged, but the privilege belongs to the company, not you. It is up to the company whether to waive the privilege, including with respect to the Government or other third parties.
- The conversation should be kept confidential in order to preserve the company's privilege.

Once those foundational points have been made clear, attorneys should inquire whether the witness has any questions. Before moving to the substantive focus of the interview, attorneys should receive a clear affirmation that the witness understands the warning and is willing to proceed with the interview.

If delivered effectively, the *Upjohn* warning will adequately advise the witness of the implications of the interview, without chilling the witness's willingness to cooperate. The following are some practical tips that can lead to cooperative, privileged interviews:

- Confer with the client in advance of interviews to understand whether particular witnesses present any unique sensitivities. In such circumstances, it may be helpful for in-house counsel or the employee's manager to have a brief discussion with the employee outside the presence of outside counsel in order to provide some context for the interview.
- Do not deliver the *Upjohn* warning in a rote, mechanized way; be friendly and casual. The witness should not feel like he or she is being read a *Miranda* warning.
- Emphasize the importance of the investigation to the company and the need for complete and accurate information. Express appreciation for the witness's assistance in helping the company to understand the relevant facts.
- If applicable, explain that the company is interviewing a number of individuals and is not singling out that particular employee.

Once counsel has delivered the *Upjohn* warning and obtained the witness's agreement to proceed, the content of the interview will be protected by the attorney-client privilege, so long as the attorney and the witness keep its content confidential. As an additional precaution, counsel should remind the witness at the conclusion of the interview not to discuss the substance of the interview with anyone else, except to the extent that the witness wishes to convey additional information or to ask follow-up questions. Such follow-up communications should be directed to an appropriate contact in the company's legal department or, depending on the circumstances, to outside counsel directly.

The risks of failing to give an adequate *Upjohn* warning can be severe. The 2009 case *United States v. Ruehle*<sup>12</sup> provides a stark example. *Ruehle* involved a DOJ and SEC investigation into alleged stock-option backdating at Broadcom Corporation. In the course of Broadcom's internal investigation, its

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<sup>12</sup> 583 F.3d 600 (9th Cir. 2009).

outside counsel interviewed William Ruehle, Broadcom's CFO. During the interview, Ruehle made numerous statements that he later sought to suppress as privileged in his criminal trial. Ruehle argued that because outside counsel had represented Ruehle and other individual officers in shareholder suits and had failed to advise him during the interview that his statements could be disclosed to third parties, his statements in the interview were privileged. The district court agreed. The court suppressed Ruehle's statements from the interview, concluded that outside counsel had breached their duty of loyalty to Ruehle, and referred the lawyers involved to the California State Bar for possible discipline.<sup>13</sup>

In reaching its decision, the district court concluded that there was no record that an adequate *Upjohn* warning had been provided, relying, among other things, on the fact that there was no reference to an *Upjohn* warning in the interviewing attorneys' notes.<sup>14</sup> The court went on to note that even if it credited one of the interviewing attorneys' testimony that he had given an *Upjohn* warning, the warning was inadequate because the attorneys failed to advise Ruehle that they were not acting as his counsel during the interview, or that "any statements he made to them could be shared with third parties, including the Government in a criminal investigation."<sup>15</sup> While the Ninth Circuit ultimately overturned the district court's privilege ruling on the ground that Ruehle knew his statements would be disclosed to the company's auditors—and thus were not confidential—this case illustrates the problems that can occur when there is a lack of clarity about whom outside counsel represents and when attorneys fail to provide adequate *Upjohn* warnings.<sup>16</sup>

#### B. Carefully Consider the Scope of Interviews Involving Former Employees

Counsel must be particularly sensitive to privilege considerations when conducting interviews of former employees. Federal courts generally have held that communications with former employees about events that occurred within the scope of their prior employment are subject to the attorney-client privilege.<sup>17</sup>

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<sup>13</sup> *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev'd sub nom. United States v. Ruehle*, 583 F.3d 600.

<sup>14</sup> *Nicholas*, 606 F. Supp. 2d at 1116.

<sup>15</sup> *Id.* at 1117.

<sup>16</sup> *See Ruehle*, 583 F.3d at 602.

<sup>17</sup> *See Upjohn Co. v. United States*, 449 U.S. 383, 403 (1981) (Burger, C.J., concurring) ("[A] communication is privileged at least when . . . an employee or former employee speaks at the direction of the management with an attorney regarding conduct or

Counsel conducting an investigation should thus use great care to focus the interview on matters that occurred during the former employee's tenure, as some district courts have held that interviews on topics subsequent to employment with the company are not privileged.<sup>18</sup>

Counsel also should consider the circumstances of the witness's departure from the company when assessing whether the witness is likely to be cooperative or to maintain the confidentiality of the interview. In the absence of a contractual provision (*e.g.*, in a severance agreement) obligating an employee to cooperate in an investigation and maintain confidentiality, a company may have no effective remedy against a former employee who fails to maintain confidentiality. Even with such contractual protections, their utility may be limited; the SEC, for example, has made clear that such contractual undertakings cannot be used to prevent someone from reporting information to the Commission under the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>19</sup> Thus, if a company has real concerns that the employee will not maintain confidentiality, it should think carefully about whether to proceed with the interview.

C. Draft Interview Summaries or Memoranda with an Eye to Preserving Privilege

Memorializing the content of the interview is essential to a credible investigation. When crafted well, interview summaries should avoid the need to revisit topics with witnesses and can serve as a resource to the rest of the investigative team. To ensure that the content of such summaries remains privileged, interviews should not be recorded or transcribed verbatim. A recorded or transcribed interview summary will be considered more easily discoverable than a written summary that contains an attorney's mental

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proposed conduct within the scope of employment"); *In re Allen*, 106 F.3d 582, 605 (4th Cir. 1997) ("Most lower courts have followed the Chief Justice's reasoning and granted the privilege to communications between a client's counsel and the client's former employees."). *But see id.* at 606 n.14 (citing federal cases denying the privilege as to communications with former employees and describing them generally as either "following state law" or having concluded that "the former employee had ceased being employed by the client *before* the relevant conduct occurred").

<sup>18</sup> See, *e.g.*, *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999).

<sup>19</sup> See 17 C.F.R. § 240.21F-17(a) (2012).

impressions.<sup>20</sup> The summary should state expressly that it does not constitute a transcript and that the content is not presented sequentially. Moreover, the written summary should state that it contains the thoughts, mental impressions, and conclusions of the attorney. The written summary also should confirm that the *Upjohn* warning was delivered, describe the content of the warning, and indicate that the witness understood and agreed to proceed with the interview. Sample introductory language to a typical written interview summary follows:

On [DATE], [names of counsel] met with and interviewed [WITNESS], [TITLE] of Company X (the “Company”), at [LOCATION]. This memorandum consists of information obtained in the course of the interview as well as the thoughts, impressions and conclusions of counsel. The memorandum is not and is not intended to be a verbatim transcript of the interview and in many instances is organized topically, rather than in the sequence in which the conversation took place. This memorandum has not been reviewed by [WITNESS] for accuracy or otherwise adopted by him as his statement.

At the outset, counsel explained that Company X is concerned about the possibility that certain laws may have been violated in connection with specific areas of Company X’s business and that [LAW FIRM] had been hired to look into the situation and to give the Company legal advice. Counsel told [WITNESS] that [LAW FIRM] is representing the Company in this matter, not him personally, but that his help is needed to collect and understand the facts so that the Company can receive accurate advice. Counsel also explained that the conversation was privileged, but it was up to the Company to decide whether it would like to disclose what was discussed to a third party or to the

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<sup>20</sup> See FED. R. CRIM. P. 26.2(a), (f)(2).



Government. Counsel told [WITNESS] not to talk to anyone else about this meeting or about what was discussed. He confirmed that he understood all of the above.

D. Use Clawback Provisions to Prevent Waiver from Inadvertent Production of Privileged Materials

Few experienced practitioners have avoided entirely the problem of an inadvertently disclosed privileged document. The scope, scale, and complexity of investigations today create a significant risk of inadvertent production of privileged material. To mitigate that risk, document production letters should include unequivocal language, preserving the client's ability to recover inadvertently disclosed documents. Sample language follows:

It is possible that, despite our diligent efforts, certain information protected by [our client's] attorney-client privilege or other applicable privileges may have been included in this production. Accordingly, we hereby reserve our right to seek the return of any privileged or protected materials that may have been inadvertently produced, and respectfully advise you that any inadvertent production should not be considered a waiver. We respectfully request that you inform us immediately if you become aware of any such materials in our production.

Of course, no language is a substitute for a painstaking privilege review of all documents in advance of production, but incorporating this language can ensure that any documents escaping such a review can be recovered without effectuating a privilege waiver.

E. Joint Defense Agreements Should Have Language that Protects Privileged Communications

Sharing of information among counsel for clients with a common interest can yield substantial efficiencies and may be helpful in developing an accurate and comprehensive understanding of the facts. Doing so, however, can imperil the privilege, as such collaboration will often involve the disclosure of

confidential information. Joint defense or common interest agreements address this concern by bringing confidential communications among outside counsel and their clients within the ambit of the attorney-client privilege and the work-product doctrine. Carefully drafting joint defense agreements will ensure that attorneys can conduct an efficient investigation with other outside counsel, while preserving the privilege and other applicable protections. Some tips on drafting these agreements follow:

- Meticulously define the scope of the common interest and thus the scope of the agreement.
- Indicate that the parties may, at their discretion, share information concerning the relevant matters without waiving any applicable privileges.
- Note that nothing in the agreement—nor the simple sharing of information pursuant to the agreement—shall constitute a waiver of any applicable privilege or protection.
- Include clawback language regarding inadvertent disclosures of privileged information.
- Provide for unilateral withdrawal from the agreement by any party for any reason, while noting that the agreement will continue to protect all shared information prior to withdrawal.

F. Be Wary of Providing Non-Legal Advice

In any internal investigation, outside counsel may be asked to advise on topics that are ancillary to the core legal issues under investigation. A prominent example is advice on issues relating to termination of commercial relationships or employee discipline. In light of recent case law, counsel should be aware that the provision of “business advice”—even in the context of a privileged investigation—may not itself be privileged. For example, in the 2014 case *Koumoulis v. Independent Financial Marketing Group, Inc.*, the plaintiffs sought to compel production of communications between the defendants and their outside counsel regarding the internal investigation of plaintiff’s discrimination

claims.<sup>21</sup> The defendants withheld the documents, asserting the attorney-client privilege and work-product protection. Although these documents seem like core privileged communications, the district court did not find clearly erroneous a magistrate's finding that "their predominant purpose was to provide human resources" advice; the district court accordingly held that no attorney-client privilege attached.<sup>22</sup> The district court explained that "almost all of the information contained in the [documents] relates to business advice provided by outside counsel to Defendants' human resources personnel or the factual record of Defendants' internal investigation."<sup>23</sup> For similar reasons, the court explained that work-product protection did not apply: While "it may be true that the possibility of litigation prompted Defendants to seek outside counsel's advice, the communications themselves demonstrate that rather than discussing litigation strategy or advice, [outside counsel] advised Defendants on how to conduct the internal investigation," as well as on how to address plaintiff's "ongoing work performance issues and internal complaints," which is "advice that would have been given regardless of a specific threat of litigation."<sup>24</sup>

This decision makes clear that there is a real disclosure risk in providing advice of a "business-related character" when assisting clients in conducting an internal investigation.<sup>25</sup> Any such communications not only should be labeled with privilege legends, but also should include more than "a stray sentence or comment within an e-mail chain referenc[ing] litigation strategy or advice."<sup>26</sup> Communications related to the structure and scope of an internal investigation must be continually tied back to the provision of legal advice and the prospect of future litigation.

#### **IV. The End of an Investigation**

The conclusion of an internal investigation—particularly one that will inform the Government's decision on whether to bring an enforcement action—will often involve some form of reporting that may implicate a variety of privilege considerations. We consider here the risks related to such reporting, the

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<sup>21</sup> *Koumoulis v. Indep. Fin. Mktg. Grp.*, No. 10-CV-0887, 2014 WL 223173 (E.D.N.Y. Jan. 21, 2014).

<sup>22</sup> *Id.* at \*3-5.

<sup>23</sup> *Id.* at \*2.

<sup>24</sup> *Id.* at \*6.

<sup>25</sup> *Id.* at \*4.

<sup>26</sup> *Id.*

issue of “selective waiver,” and the issues to consider in communicating with a company’s outside auditors about an internal investigation.

A. When Reporting Findings, Carefully Consider the Audience and Method of Reporting

The manner in which outside counsel elects to report the findings of the internal investigation has significant consequences for the privilege. For some investigations, attorneys will have little choice regarding the form of disclosure, as the investigation will inexorably lead to some public disclosure of findings (e.g., a major scandal of broad national or international interest). In contrast, other investigations are conducted with the expectation that the findings will remain closely held by the client. Between those two poles are internal investigations conducted in parallel with Government investigations, in which attorneys are expected to proffer factual information learned during the course of their investigation.

Reporting in the context of a Government investigation presents a unique form of risk, given the possibility of a broad subject-matter waiver of the privilege. To guard against this risk, counsel is typically well served both to limit the disclosure of investigative findings (whether delivered orally or in writing) to those audiences with a need to know, and to be clear that such communications are confidential (through, for example, appropriate use of legends calling for protection from disclosure under the Freedom of Information Act). Additionally, counsel should be mindful that subject-matter waiver occurs only when there is a voluntary disclosure of *privileged* information. This counsels in favor of limiting investigative reports or presentations—to the extent possible—to a detailed recitation of the investigative process and the relevant facts. If counsel is able to avoid preparing a written report and can instead prepare a presentation consisting of source documents, coupled with an oral presentation of relevant facts, the risk of a privilege waiver can be substantially mitigated.

As noted above, special attention must be given to the risk of waiver in circumstances where counsel is communicating findings to potentially adverse parties. For example, if outside counsel has been retained by a board committee and subsequently presents to the entire board, there is a risk of waiver to the extent the facts suggest the board members did not receive and consider the

presentation in their roles as fiduciaries of the company, but rather in their personal capacities as defendants (potential or actual) in litigation.<sup>27</sup>

A 2007 Delaware case, *Ryan v. Gifford*, illustrates the point. In *Ryan*, the Delaware Chancery Court found a subject-matter waiver where a special committee's findings were disclosed to the full board, including board members who were defendants in the underlying derivative suit and whose personal counsel attended the presentation.<sup>28</sup> The court concluded that since the committee's disclosure was made to the defendant board members in their individual capacities as defendants (and subjects of the special committee investigation) rather than in their fiduciary capacities as board members, the common interest doctrine did not apply.<sup>29</sup> While it should not be read for the proposition that counsel to a special committee always effectuates a privilege waiver by communicating its investigative findings to the full board, *Ryan* reinforces the notion that counsel must tread cautiously in this area.<sup>30</sup>

#### B. Even Oral Proffers Risk a Waiver

Oral proffers are frequently employed to provide Government enforcement authorities with factual information gathered in an internal investigation. Although this tactic can alleviate the risk of handing over a written document memorializing the results of a privileged investigation, there is still danger in making oral proffers.

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<sup>27</sup> See, e.g., *In re OM Sec. Litig.*, 226 F.R.D. 579, 593 (N.D. Ohio 2005) (finding a privilege waiver when counsel for the Audit Committee presented a report to the full board).

<sup>28</sup> *Ryan v. Gifford*, Civil Action No. 2213-CC, 2007 WL 4259557, at \*3 (Del. Ch. Nov. 30, 2007) (“The presentation of the report constitutes a waiver of privilege because the client, the Special Committee, disclosed its communications concerning the investigation and final report to third parties—the individual director defendants and Quinn Emmanuel—whose interests are not common with the client, precluding application of the common interest exception to protect the disclosed communications.”)

<sup>29</sup> *Id.*

<sup>30</sup> In a subsequent opinion denying a motion for an order certifying an interlocutory appeal, the court explained the potentially limited reach of its opinion: “The decision would not apply to a situation (unlike that presented in this case) in which board members are found to be acting in their fiduciary capacity, where their personal lawyers are not present, and where the board members do not use the privileged information to exculpate themselves.” *Ryan v. Gifford*, Civil Action No. 2213-CC, 2008 WL 43699, at \*5 (Del. Ch. Jan. 2, 2008).

This risk was made clear in *SEC v. Vitesse Semiconductor Corp.*, in which outside counsel for a non-party company's audit committee had delivered to the SEC oral summaries of multiple witness interviews, which concerned the conduct of the defendants in the SEC enforcement action.<sup>31</sup> When the defendants learned of notes from these witness interviews and moved to compel their production, the non-party company asserted privilege. To assess whether the proffer constituted a waiver of work-product protection, the district court conducted an *in camera* review of counsel's handwritten notes of the witness interviews and the notes of an SEC lawyer who had taken notes during the oral proffer.<sup>32</sup> The court found that "the oral summaries provided to the SEC were very detailed" and were "witness-specific"; at times, "the SEC's notes matched [company counsel's] notes almost verbatim."<sup>33</sup> Accordingly, the district court concluded that the company had waived work-product protection and ordered the company to turn over the notes because it had "effectively produced these notes to the SEC through its oral summaries."<sup>34</sup>

Companies, therefore, should exercise caution as they approach factual proffers based on witness interviews. In that regard, counsel should have a written understanding in place with the relevant governmental agency that the factual proffer is not intended to effect a waiver. Moreover, counsel should consider other means to avoid an inadvertent waiver, such as not providing verbatim recitations of witness interviews and attempting instead to proffer facts surrounding particular issues under investigation, drawing on the witness interviews and other sources to inform the proffer.

### C. Do Not Rely on "Selective Waiver"

Reporting only on the facts learned in an investigation may not provide a sufficiently comprehensive account to the Government to preclude an indictment or to achieve an otherwise favorable resolution. In these circumstances, a company may conclude that the benefits of full disclosure outweigh the costs of waiving the privilege. If the client makes this determination, outside counsel may still hope to effect only a "selective waiver," whereby privileged

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<sup>31</sup> No. 10 Civ. 9239, 2011 WL 2899082, at \*1-3 (S.D.N.Y. July 14, 2011).

<sup>32</sup> *Id.* at \*3.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; see also *Gruss v. Zwirn*, 09 Civ. 6441, 2013 WL 3481350 (S.D.N.Y. July 10, 2013) (finding a work-product waiver where counsel "deliberately, voluntarily, and selectively disclosed to the SEC" summaries of twenty-one witness interviews in a PowerPoint presentation).

information is disclosed to the Government yet remains protected from disclosure to third parties. Selective waiver, however, is disfavored in most federal courts of appeals and has been adopted only by the Eighth Circuit.<sup>35</sup>

If the company does intend to disclose privileged material to the Government, it should first attempt to obtain an agreement from the Government that it will keep the information confidential (a “McKesson letter”). Future plaintiffs, however, will not be parties to this agreement, and some courts have found that productions of privileged materials pursuant to confidentiality agreements with the Government nonetheless constitute a waiver.<sup>36</sup> Notwithstanding the risk, these agreements can still be worthwhile because they limit the chance that the Government will argue that a voluntary production constitutes a waiver; moreover, privately held companies do not face the same risks as publicly traded companies with respect to downstream litigation. Simply put, a confidentiality agreement is beneficial, but even with an ironclad agreement in place, companies should not expect that materials produced to the Government will be immune from subsequent disclosure in civil litigation.

#### D. Exercise Care in Communications with Outside Auditors

As a general matter, disclosure of privileged information to external auditors constitutes a subject-matter privilege waiver.<sup>37</sup> Auditors, however, typically recognize that demanding privileged information would put the company in an untenable position, and they are often receptive to a company’s waiver concerns. To the extent that auditors have continued to request more detailed information in the wake of high-profile accounting fraud cases,

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<sup>35</sup> Compare *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (adopting doctrine of selective waiver because “[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers”), with *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1127-28 (9th Cir. 2012) (rejecting selective waiver and collecting cases for the proposition that the doctrine had been “rejected by every other circuit to consider the issue since” the Eighth Circuit considered it in *Diversified Industries*).

<sup>36</sup> See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302-04 (6th Cir. 2002); *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1424-27, 1431 (3d Cir. 1991). But see *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at \*11 (Del. Ch. Nov. 13, 2002) (“I adopt a selective waiver rule for disclosures made to law enforcement agencies pursuant to a confidentiality agreement.”).

<sup>37</sup> See, e.g., *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).

companies need to be prepared to communicate with their auditors about internal investigations in a way that will not constitute a waiver of the privilege. Some tips follow:

- Consider briefing the auditors from the outset of the investigation. Have a candid conversation with them about the need for outside counsel to maintain privilege, while still providing them the information they require to perform their procedures. Enlist the help of the general counsel, the head of the internal audit department, or other appropriate in-house personnel to facilitate the dialogue between outside counsel and the independent auditors.
- Focus on process. Without revealing privileged legal advice, provide the auditor detailed information about the investigative process—the investigation’s structure, the personnel involved, the document preservation steps that were taken, the number of interviews conducted, the number of documents reviewed, the outside accountants and vendors employed, and any other relevant information. The stronger the investigative process and the more complete the description of the process, the more likely it is that the auditors will feel comfortable with the reliability of the investigation.
- If necessary, provide factual proffers to the auditors orally, rather than in a written, discoverable document.

Finally, while the disclosure of privileged information to auditors will likely waive the attorney-client privilege, work-product protection may remain intact because the auditor is not adverse to the client. For instance, in *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, Allegheny sought to compel discovery of two internal investigation reports (prepared by in-house and outside counsel), which Merrill Lynch had disclosed to its auditor.<sup>38</sup> Allegheny argued that the disclosure waived any applicable privilege.<sup>39</sup> The district court disagreed, stating that the “critical inquiry” is whether the auditors “should be conceived of as an adversary or a conduit to a potential adversary.”<sup>40</sup> The court held that “any

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<sup>38</sup> 229 F.R.D. 441 (S.D.N.Y. 2004).

<sup>39</sup> *Id.* at 444.

<sup>40</sup> *Id.* at 447.



tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine.<sup>41</sup> Although this view is not universally held,<sup>42</sup> if the client cannot avoid disclosure of privileged information to its auditors, counsel should zealously argue in subsequent civil litigation that work-product protection remains intact.

## **V. Conclusion**

The consequences of a privilege or work-product waiver can be significant. It is therefore critical that attorneys conducting privileged internal investigations remain continually focused not only on conducting a credible, comprehensive investigation, but also on doing so in a manner that ensures the integrity of the attorney-client privilege, attorney work-product protection, and other applicable privileges and protections. This article has explained that pitfalls with respect to waiver exist at every stage of an internal investigation. Nonetheless, with careful planning and vigilance, attorneys can guide their clients safely through an internal investigation, while minimizing these downstream risks.

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<sup>41</sup> *Id.* at 448.

<sup>42</sup> Compare *SEC v. Schroeder*, No. C07-03798, 2009 WL 1125579, at \*8-9 (N.D. Cal. Apr. 27, 2009) (following *Merrill Lynch* and finding work-product protection applied to documents that had been disclosed to a company's auditors), and *SEC v. Roberts*, 254 F.R.D. 371, 381-82 (N.D. Cal. 2008) (same), with *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 116 (S.D.N.Y. 2002) (holding that disclosure of the meeting minutes of a Special Litigation Committee to the company's auditors waives work-product protection because the disclosure "did not serve any litigation interest . . . or any other policy underlying the work product doctrine" and because the auditors' interests "were not necessarily united with those of" the company), and *United States v. Hatfield*, No. 06-CR-0550, 2010 WL 183522, at \*3-4 & n.4 (E.D.N.Y. Jan. 8, 2010) (noting that "most courts have concluded that disclosure to an independent auditor does not waive the work product immunity" but nonetheless following *Medinol*).