

PRESERVING THE ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT PROTECTION IN INTERNAL AND GOVERNMENT INVESTIGATIONS

Eric Gorman
Partner
Skadden, Arps, Slate, Meagher & Flom LLP

Skadden

Lawrence Oliver, II
Chief Counsel, Investigations
The Boeing Company



September 26, 2016

SCCE Compliance & Ethics Institute



- I. Background: Investigation trends and general considerations affecting privilege and work product in investigations.
- II. Internal Investigations: Asserting and preserving the attorney-client privilege and attorney work product protection in the internal investigation context.
- III. Government Investigations: What to do when the government comes knocking – additional factors to consider regarding privilege and work product protection in government investigations.
- IV. Collateral implications: Treatment of the privilege and work product protection in collateral litigation that relates to the subject of an investigation, and other scenarios.

I. Background: Investigation trends and general considerations affecting privilege and work product in investigations.

Background: Types of Investigations

- Investigations can range in size from small reviews involving a discrete set of facts and a small number of witnesses, to global investigations taking years and involving hundreds of witnesses and multiple governments/agencies.
 - Companies should calibrate the scope and intensiveness of investigations according to the nature and seriousness of the alleged conduct at issue.
- Internal vs. joint/cooperative investigations
 - Internal – no intention to share or rely on the results of the investigation outside of the investigating organization.
 - » Internal investigations are typically directed by the board and/or a committee of the board, by the company/management, and sometimes both.
 - » Some internal investigations are handled strictly by in-house counsel or compliance professionals. Others are conducted by outside counsel, with assistance from in-house professionals.
 - » If an investigation concerns a regulated subject matter (e.g., Dodd-Frank/SEC), what begins as a purely internal investigation could change into a government enforcement matter.
 - Joint or cooperative investigations, conducted in conjunction with government authorities.

Background: Investigation Trends Among Corporations



According to recent surveys:

- In 2015, among companies with revenues of \$1 billion or more, 51% had at least one regulatory proceeding pending against them.
- In 2015, among all surveyed companies, 44% had had at least one internal investigation requiring the assistance of outside counsel during the previous 12 months.
 - Between 2008 and 2014, the number of companies conducting at least one internal investigation requiring the assistance of outside counsel fluctuated between 30-55%.
 - In 2014, 25% of respondent companies undertook 3+ internal investigations requiring the assistance of outside counsel.
- Industries with the largest proportion of internal investigations involving external counsel (2014):
 - Healthcare (19% conducting 6+ investigations)
 - Technology/Communications (17% conducting 6+ investigations)
 - Total Sample (9% conducting 6+ investigations)

2014 & 2015 Litigation Trends Annual Survey
Norton Rose Fulbright

Background: Investigation Trends Among Corporations



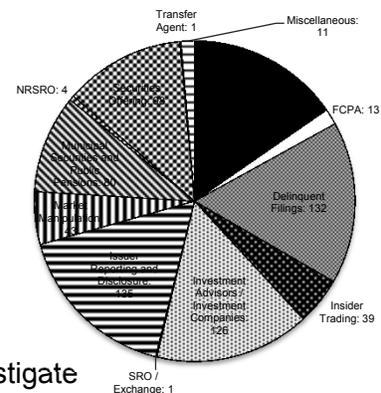
- Investigations can arise in many different ways, and through many different channels. For example:
 - Internal complaint (e.g., oral or written allegation made to a supervisor; call to company ethics/compliance hotline)
 - Internal audit or corporate controller identifies an issue
 - Anonymous letter/complaint
 - Proactive review by the company – e.g., to determine whether an issue that has arisen among competitors also is an issue for the company investigating itself
 - Government inquiries/requests
 - » Informal (phone call or other communication from regulator/prosecutor)
 - » Subpoena
 - » Search warrant

Background: Investigation Trends Among Corporations

- Investigations by corporations are often undertaken with possible government action in mind – for example, in advance of, or in anticipation of, government action. Enforcement activity by the U.S. government – whether ongoing or prospective, and whether criminal or regulatory (or both) – often prompts corporations to conduct their own investigations, and helps determine the scope and timing of such investigations. For example:
 - The Department of Justice’s Fraud Section is actively pursuing cases through three litigation units –
 - » Foreign Corrupt Practices Act (FCPA) Unit (reported results for 2013-15: 16 corporate resolutions; 34 individual charges or pleas; and corporate penalties of \$1.71 billion)
 - » Health Care Fraud Unit (reported results for 2015: charges brought against 243 individuals, including 46 medical professionals)
 - » Securities & Financial Fraud (SFF) Unit (reported results for 2013-15: 19 corporate resolutions; 226 individuals convicted; \$5.087 billion in corporate penalties)
 - Collectively, in 2015, the DOJ has obtained convictions of 225 individuals; resolutions and pleas with 11 corporations; and corporate fines, restitution, and penalties of \$3,942,200,000

Background: 2015 SEC Enforcement Action Statistics

- The Securities and Exchange Commission’s Division of Enforcement also has been active:
 - In 2015, 807 total SEC actions: Broker-Dealer, Delinquent Filings, Investment Advisor, and Issuer Reporting and Disclosures each comprise over 15% of SEC enforcement actions.
 - The SEC’s bounty program incentivizes whistleblowers.
- Many other examples in other regulated areas
- In addition, private complainants can prompt a company to investigate



- *E.g.*, whistleblowers alleging violations of various laws; False Claims Act cases (*qui tam* actions)
 - » In 2015, the DOJ obtained more than \$3.5 billion in settlements and judgments from civil cases involving alleged fraud and false claims against the government (including \$1.9 billion from the healthcare sector, and \$1.1 billion for payments under government contracts, such as military contracts and contracts for government “programs at home.”)
 - » From January 2009 to the end of the FY2015, the DOJ obtained \$26.4 billion in such settlements and judgments.
 - » Whistleblower awards under the FCA during FY2015 totaled \$597 million.

Background: Legal Issues and Risks at Stake During Investigations, and Investigation Objectives – Context for the Privilege and Work Product



- The nature and context of an investigation generally affect whether and how the privilege and work product protection arise and how they are maintained.
- Focus of investigation:
 - Possible criminal conduct? Regulatory violation? Civil liability? A transaction (e.g., due diligence)?
- Nature of investigation:
 - Typically driven by type of conduct being investigated – e.g., potential criminal violations are likely to be approached differently than a simple HR decision – and by the objective(s) of the investigation.
 - » Type of conduct at issue can affect factors such as how early and to what extent counsel are involved; the number of separate represented parties, and whether their interests align; the need for possible self-reporting and/or cooperation with the government, etc.
 - » If corporation is a federal contractor, beware that if “credible evidence” of fraud or other wrongdoing is uncovered in connection with a federal contract, mandatory disclosure obligations are triggered under FAR 52.203-13.
- Investigation objectives may include:
 - Learning and understanding underlying facts and circumstances
 - Explaining relevant facts and circumstances to pertinent decision-maker(s), inside and/or outside the company, and facilitating a decision or action by such decision-makers
 - » Relevant decision-makers could include corporate directors/executives, authorities with charging discretion, etc.
 - Resolving potential concerns and/or legal claims by others against the company
 - » Government authorities; private claimants; internal constituencies/stakeholders

Background: Legal Issues and Risks at Stake During Investigations, and Investigation Objectives – Context for the Privilege and Work Product



- Objectives of company undertaking investigation where government is involved, or may become involved:
 - Resolution of potential claims by the government
 - » Determine whether to self-report
 - » Maximize confidence of the government in the quality and reliability of the internal investigation
 - > Obtain cooperation credit; minimize likelihood of aggressive government action that supplants or disregards the internal investigation
 - » Resolve claims on best terms possible: e.g., NPA, DPA, no-action letter; cooperation agreement; minimize penalties/monetary settlement
 - Resolution of possible civil litigation (if already filed); reduction of likelihood of such litigation (if not yet filed)
 - Strengthen internal processes/controls
- When to engage outside counsel
 - Factors to consider
 - » Nature of conduct at issue; types of possible exposure (criminal, regulatory, civil)
 - » Capacity of in-house counsel and compliance team
 - » Experience of outside counsel; independence of outside counsel

II. Internal Investigations: Asserting and preserving the attorney-client privilege and attorney work product protection in the internal investigation context.

Internal Investigations: Preserving the Attorney-Client Privilege or Work Product Protection

- To preserve the privilege or work product protection:
 - There must be a communication or thing that is privileged or protected by the work product doctrine;
 - The privilege or protection can't have been waived; and
 - The holder of the privilege or protection must act to maintain the privilege or protection.
- Important to understand what the attorney-client privilege and the attorney work product protection are, and how they operate.

Internal Investigations: Preserving the Attorney-Client Privilege or Work Product Protection

Attorney-Client Privilege	Attorney Work Product Protection
The attorney-client privilege protects from disclosure <i>confidential communications</i> between a <i>client</i> and his or her <i>attorney</i> in connection with the <i>providing of legal advice</i> .	The attorney work product doctrine covers <i>documents and tangible things</i> " <i>prepared in anticipation of litigation or for trial</i> " if such items were <i>prepared "by or for the party or its representative</i> (including an attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A).

Attorney-client privilege and attorney work product are similar, in that they protect certain information communicated with or created by attorneys, but there are key differences.

- Some differences are addressed below; practically speaking, in the investigation context, the differences relate to the types of information covered, how strong the protection is, and how broadly the information can be shared without waiving the protection.

Internal Investigations: The Attorney-Client Privilege

- Definition: The attorney-client privilege protects from disclosure confidential communications between a client and his or her attorney in connection with the providing of legal advice.
 - The attorney-client privilege protects communications or documents that constitute or describe legal advice, or that request or provide information (such as factual background) necessary to render legal advice.
 - In general, the attorney-client privilege does *not* protect:
 - » Facts discovered/disclosed to counsel
 - » The fact of the representation
 - » Communications not in furtherance of providing legal advice

Internal Investigations: The Attorney-Client Privilege



- Attorney-Client Privilege – Factors to Consider:
 - Who is the Attorney?
 - » Inside and outside counsel
 - » Includes people working for or at the direction of the attorney (e.g., forensic accountants)
 - » General principle: non-legal work performed by agents or consultants of attorneys can be protected, provided the non-legal work is performed at the direction of an attorney and is for the purpose of informing the attorney’s legal advice.
 - Who is the Client?
 - » Be clear from the beginning of any engagement: who is, and who is not, the client
 - » In investigations, the client could be the company, the board, an audit committee, or a special investigation or special litigation committee of the board
 - » Can individual employees be represented by company counsel, or do they need separate counsel (or no counsel at all)?
 - > Potential conflicts of interest
 - > Possible impact on perceived cooperation/cooperation credit
 - » Who is not the client:
 - > Anyone not connected with the Company
 - » *Upjohn* warnings and their importance

Internal Investigations: The Attorney-Client Privilege



- General Principles:
 - For an internal investigation to be protected by the attorney-client privilege, the investigating company must:
 - » Clearly structure the investigation as one seeking legal advice,
 - » Ensure that attorneys themselves conduct (or at a minimum supervise) the inquiries, and
 - » Make clear to employees who communicate/provide information relevant to the investigation that the information they provide will be transmitted to attorneys for the purpose of obtaining legal advice.

United States v. ISS Marine Servs., Inc., 905 F. Supp. 2d 121 (D.D.C. 2012).
 - In general, communications in internal investigations involving in-house compliance departments can be protected by the attorney-client privilege if a “primary” or “significant” purpose of the internal compliance investigation is to obtain legal advice (and provided the other conditions for the privilege are satisfied). See *In re Kellogg, Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014).

Internal Investigations: The Attorney-Client Privilege



- Exceptions and limits to the attorney-client privilege:
 - Crime/fraud exception: “A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.” *Clark v. United States*, 289 U.S. 1, 15 (1933).
 - Foreign jurisdictions:
 - » Some non-U.S. jurisdictions do not recognize a privilege for communications between in-house counsel and others at the company. (*E.g.*, Czech Republic, Latvia, and Russia.). In other non-U.S. jurisdictions, in-house counsel generally are not members of the local bar; thus, privilege laws typically do not apply to in-house counsel there. (*E.g.*, France, Italy, and Luxemburg.)
 - » China does not have an equivalent to the work product protection or attorney-client privilege.
 - » Other countries, such as Canada and the United Kingdom, conduct analyses similar to the U.S. to determine whether the privilege covers specific communications with an in-house attorney.

Internal Investigations: The Attorney-Client Privilege



- How (Not) to Waive the Attorney-Client Privilege – Waiver Takes Many Forms
 - A client may waive the privilege by disclosing the privileged communication(s).
 - Disclosure, and the resulting waiver, may be –
 - » Intentional: client affirmatively decides to waive the privilege and disclose the protected communication (discussed further below).
 - » Inadvertent: waiver occurs unintentionally (discussed further below), because either client or someone else mistakenly discloses the protected communication.
 - > Imputed waiver: although the client holds the privilege, a disclosure of a privileged communication by someone else may be imputed to the client, resulting in a waiver.
 - > *E.g.*, employee of corporation (which owns the privilege) discloses privileged information, possibly resulting in waiver.
 - » Implied: occurs where a privilege holder “asserts a claim that in fairness requires examination of protected communications.” *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).
 - > For example, in the investigation context, this could occur by relying, in subsequent litigation, on the conclusions reached in an investigation; that could result in a waiver of the privilege over underlying investigation materials.

Internal Investigations: Work Product Protection



- Definition: The work product doctrine allows a party to withhold from discovery documents and tangible things “prepared in anticipation of litigation or for trial” if such items were prepared “by or for the party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” Fed. R. Civ. P. 26(b)(3)(A).
 - Courts have found litigation to be anticipated where some possibility of litigation exists. It is not necessary that a specific claim be threatened or filed, nor does the preparer of the protected materials need to have a particular claim or defense in mind.
 - Materials prepared in anticipation of a government investigation or enforcement action can qualify as work product.
 - However, documents created in the ordinary course of business are not protected. Work product does not include documents that would have been created in a largely similar form absent litigation.

Internal Investigations: Work Product Protection



Fact vs. Opinion Work Product

- Fact work product is tangible material, factual in nature, that is prepared or collected in connection with an anticipated litigation.
 - Examples of fact work product could include handwritten notes, electronic recordings, diagrams and sketches, financial analyses, and photographs.
 - Fact work product receives a lower level of protection than opinion work product.
- Opinion work product includes documents or materials that reflect the mental impressions or opinions of the client’s lawyer or agent.
 - Examples of opinion work product include draft documents, a lawyer’s comments on draft presentations or talking points, internal electronic communications relaying a company’s legal response or strategy, etc.
 - Opinion work product is highly protected from disclosure under the Federal Rules of Civil Procedure.

.How (Not) to Waive the Work Product Protection

- As with the attorney-client privilege, a party may waive the work product protection through disclosure. Disclosure may be intentional or inadvertent.
- Different levels of protection for fact work product vs. opinion work product:
 - Courts may order disclosure of fact work product if:
 - » (i) it is otherwise within the scope of civil discovery, and
 - » (ii) the party shows a substantial need for the materials and that it cannot, without undue hardship, obtain their substantial equivalent by other means. Fed. R. Civ. P. 26 (b)(3)(A).
 - However, opinion work product is highly protected from disclosure in the federal courts.
 - » The test for waiving opinion attorney work product protection is more stringent than the test for waiving the attorney-client privilege.
 - » Scope: Unlike the attorney-client privilege, where subject-matter waiver is a risk, waiver of the opinion work product protection over a document generally only waives the protection for that document, not other related or underlying documents. *See, e.g., In re United Mine Workers*, 159 F.R.D. 307, 312 (D.D.C. 1994).

III. Government Investigations: What to do when the government comes knocking – additional factors to consider regarding the privilege and work product protection in government investigations.

Government Investigations: Cooperating with the government without waiving the privilege or work product protection – ways to assert and preserve privilege/work product.



- General Considerations: criminal vs. regulatory vs. civil exposure
 - Possible exposure of corporation
 - » Cooperation credit/self-reporting
 - » Principles of Federal Prosecution of Business Organizations (Filip Factors)
 - Possible exposure of individuals
 - » Individuals as target, subject, witness
- DOJ Policies & SEC Guidelines: cooperation does not require waiver.
 - DOJ Policies:
 - » Waiving privilege is not a prerequisite to cooperation.
 - » Disclosure of attorney work product may not be requested by the government, and is not required as a condition for cooperation credit or eligibility.
 - SEC Policies:
 - » SEC staff must respect legitimate assertions of the privilege and work product protection.
 - » As a matter of public policy, the SEC encourages individuals and corporations to consult counsel about the requirements and potential violations of the securities laws.
 - » SEC staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director or Deputy Director.

Government Investigations: Cooperating with the government without waiving the privilege or work product protection – ways to assert and preserve privilege/work product.



- Additional Factors to Consider When Assessing Privilege in the Context of a Government Investigation
 - Yates Memorandum
 - » September 9, 2015 Memorandum from DAG Sally Yates, requiring focus on individual prosecutions and providing six factors to be used to assess cooperation during government investigations.
 - » To obtain cooperation credit, company must disclose all relevant facts regarding individuals responsible for misconduct.
 - » When such facts are significantly intertwined with privileged communications, certain disclosures could be difficult, or possibly risk a waiver of privilege.
 - FCPA Pilot Program
 - » Announced on April 5, 2016 by the DOJ to encourage voluntary self-disclosure, cooperation, and remediation of corporate FCPA violations.
 - » Parsing privileged materials vs. underlying facts for cooperation and transparency; although DOJ states that nothing in the Pilot Program alters the Department's policy that full cooperation credit is not dependent upon waiver of the attorney-client privilege or work product protection, the conditions of the Pilot Program conceivably could require disclosure of information obtained pursuant to privileged conversations, and cooperating to the extent required by the Pilot Program conceivably could, in certain situations, be in tension with strictly preserving the privilege.

Government Investigations: Cooperating with the government without waiving the privilege or work product protection – ways to assert and preserve privilege/work product.



- Use of privileged materials in a government investigation.
 - Continue to give *Upjohn* warnings and ensure company personnel are appropriately advised prior to government interviews.
 - Attorneys should carefully review and consider all documents requested by the government and whether a privilege applies to such materials.
 - Assert privilege when necessary in government productions and interviews.
 - Confidentiality agreements with the government: such agreements generally do not cover privilege, but rather are agreements by the government to maintain the confidentiality of the information the company provides to the government.
 - Fed. R. Evid. 502(d) vs. (e)

Government Investigations: Cooperating with the government without waiving the privilege or work product protection – ways to assert and preserve privilege/work product.



- Inadvertent Waivers
 - Documents that are inadvertently produced in a federal proceeding or to a federal officer or agency, but are not “clawed back” once the production is discovered, may no longer be privileged.
 - Federal Rule of Evidence 502(b): Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, a disclosure does not operate as a waiver in a federal or state proceeding if:
 - » the disclosure is inadvertent;
 - » the holder of the privilege or protection took reasonable steps to prevent disclosure; and
 - » the holder promptly took reasonable steps to rectify the error.
 - Clawback agreements
 - » Important to have in place prior to providing documents to federal agencies or opposing parties. Such agreements are considered a “reasonable step” to protect against disclosure of privileged materials.
 - » Such agreements require prompt notice to the recipient of the inadvertently-produced document that the document is privileged (typically as soon as practicable production is discovered), and a request to return the document.

Government Investigations: Cooperating with the government without waiving the privilege or work product protection – ways to assert and preserve privilege/work product.



• Government Interviews

- In witness preparation, sensitize witnesses to what they have independent knowledge of vs. what they may have learned from the company's lawyer.
- Materials utilized during preparation: showing a witness privileged material may constitute waiver of the privilege (and could risk more general subject matter waiver), especially if the witness relies on the privileged material in his/her testimony.
- Notes taken during the interviews by counsel are generally deemed work product, and may also be privileged (subject to other conditions for the protections being satisfied).
 - » But: such notes/interview memoranda cannot be a simple transcript of interviews; it is the mental impressions of counsel that qualify interview memoranda as opinion work product.

• Reliance on privileged materials in government communications.

- Avoiding waiver
- Other considerations

Government Investigations: Cooperating with the government without waiving the privilege or work product protection – ways to assert and preserve privilege/work product.



• Sharing privileged materials with other parties: possible scenarios

- *E.g.*, between the board and management; with individual employees; with other parties

• Common Interest Doctrine – Basics

- Definition: the privilege generally allows “persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers.” Restatement (Third) of the Law Governing Lawyers § 76 cmt. b; *see also, e.g., United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).
 - » The general rule with regard to materials protected by the common interest doctrine or a joint defense agreement is that one party to the agreement cannot unilaterally waive the protection. *See, e.g., United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012) (“the case law is clear that one party to a [joint defense agreement] cannot unilaterally waive the privilege for other holders.”).
 - » However, communications protected by common interest arrangements are not privileged as between the parties, and thus can be used in a subsequent adverse proceeding between the parties. *See, e.g., In re Mirant Corp.*, 326 B.R. 646, 649 (Bankr. N.D. Tex. 2005).
- Assessing the commonality of interest:
 - » Most federal courts hold that there does not need to be pending litigation to find a “common interest,” but a common interest must be legal and not purely commercial.
 - » Once protected information is shared with a third party not included in the common interest, the protection is waived. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995).
- Scope of the common interest doctrine varies by jurisdiction.
- Common Interest / Joint Defense Agreements
 - » Advisability of such agreements; oral vs. written; implications of JDAs in light of the Yates Memorandum (*e.g.*, limitations on company's ability to provide information to the government that was obtained under the JDA).

Government Investigations: Cooperating with the government without waiving the privilege or work product protection – ways to assert and preserve privilege/work product.



- Decisions to Waive Privilege: Although the government generally is not permitted to demand that corporations waive privilege, there are situations where a corporation might voluntarily decide to waive the privilege.
 - For example, corporations may elect to assert an advice of counsel defense: pointing to advice received from counsel as evidence to negate *mens rea*, or specific intent, necessary to establish liability.
 - » When weighing an advice of counsel defense, courts will often deem a corporation's privileges waived with respect to the advice received.
 - » Best to precisely specify, and if possible obtain government's agreement to, the scope of an intentional waiver like this (*e.g.*, date range, people, and subject(s) covered), to help protect the privilege for anything outside the scope of the intended waiver.

Government Investigations: Cooperating with the government without waiving the privilege or work product protection – ways to assert and preserve privilege/work product.



- Effects of Waiver (factors to consider prior to waiving privilege)
 - Companies cannot use privileged information as both a sword and shield — affirmatively relying on the results of internal investigations in litigation could necessitate disclosure of those materials.
 - The scope of a waiver depends on (1) intentionality, (2) subject matter, and (3) fairness.
 - » Intentionality requires evidence of a voluntary disclosure. See Fed. R. Evid. 502(a) Advisory Committee's notes.
 - » Same subject matter requires evidence that the undisclosed communications were created as part of and in furtherance of the initial investigation.
 - » Fairness requires evidence that a broad/narrow scope will not provide an undue advantage to either side.
 - Inadvertent waivers: better argument to limit scope of waiver to the information actually disclosed.

Government Investigations: Cooperating with the government without waiving the privilege or work product protection – ways to assert and preserve privilege/work product.

- Selective Waiver Doctrine
 - Selective waiver would permit a corporation to disclose privileged communications or documents in a government investigation without waiving privilege, as to the same subject matter, in subsequent civil litigation or other investigations.
 - Selective waiver of the attorney-client privilege has been rejected by every federal circuit that has examined it (1st, 2d, 3d, 4th, 6th, 7th, 9th, 10th, and Fed.), except the 8th Circuit.
 - » The Fourth Circuit has nevertheless protected a company's opinion work product against a subpoena issued by a former employee under criminal indictment, notwithstanding the company's prior voluntary disclosure of a relevant position paper to the United States Attorney. See *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988).

IV. Collateral Implications: treatment of the privilege and work product protection in collateral litigation that relates to the subject of an investigation, and other scenarios.

Collateral Implications – General Principles



- Part[ies] cannot selectively divulge privileged information. *Chinnici v. Central DuPage Hosp. Ass'n*, 136 F.R.D. 464, 465 (N.D. Ill. 1991).
- Once privileged materials have been disclosed to a third party, the privilege has been waived for all materials relating to that subject matter. *Id.*
- What constitutes the same “subject matter” is highly fact-specific. Courts tend to balance the disclosure’s circumstances and the relative prejudices to the parties of permitting or denying future disclosures. *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1430 (Fed. Cir. 2005).
- However, the Second Circuit left the door open for the potential enforcement of confidentiality agreements between a company and the government. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993).

Collateral Implications – Civil Litigation



- Derivative Litigation
 - The *Garner* doctrine permits a company’s shareholders, who are suing on behalf of the corporation, to bypass company attorney-client privilege upon a showing of good cause. *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970).
 - While the *Garner* doctrine arose in the context of a shareholder derivative action, its principles have been applied where there is a fiduciary relationship owed by the party asserting the privilege to the party seeking to abrogate it — including shareholder class actions. *Deutsch v. Cogan*, 580 A.2d 100, 108 (Del. Ch. 1990); *see also Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 84 (N.D.N.Y. 2003) (collecting cases).
 - To the extent an SLC has conducted an internal investigation to assess the merits of the derivative claims, for example, there could be arguments in certain scenarios for the derivative plaintiffs to gain access to the investigation materials.

Collateral Implications – Civil Litigation



- Transaction Litigation:
 - Though not all courts agree, the *Garner* doctrine, which allows derivative parties to bypass attorney-client privilege upon a showing of good cause, may apply to other, non-derivative lawsuits, also launched by shareholders — such as securities class actions.
- Consumer Litigation:
 - Plaintiffs in consumer cases filed in connection with a government investigation, which in turn relates to an internal corporate investigation, could try to obtain documents relating to the corporation's investigation.
 - » Documents and reports disclosed by the corporation to the government generally will not be protected from subsequent disclosure.
 - » However, documents prepared by counsel conducting the corporation's investigation should remain subject to the attorney-client privilege and work product protection if the requirements of those protections are met and the corporation does not attempt to rely on the conclusions of the investigation in its litigation defense.

Collateral Implications – Individual Government Prosecutions



- Current and former executives should not be able to abrogate a corporation's privilege without the corporation's permission. *In re Grand Jury Proceedings*, 219 F.3d 175, 185 (2d Cir. 2000). Executives can, however, use privileged communications or work product that otherwise has been waived in any manner by the corporation.
 - See, e.g., *United States v. Sigelman*, No. 14-cr-00263, Dkt. 104, (D.N.J. Oct. 20, 2014) (quashing individual defendant's subpoena requesting all investigation files related to individual's indictment as overly broad, but acknowledging that DOJ was required to turn over any materials it received from the company for which disclosure was required under Fed. R. Crim. P. 16, *Brady*, *Giglio*, or the Jencks Act, collectively requiring the disclosure of any exculpatory evidence, all prior statements of a defendant, and all prior statements by any other witness used at trial by the government).
 - There is no equivalent to the *Garner* doctrine in this scenario.
 - There is some possibility that courts would consider breaching the privilege, which is a creature of common law, if the assertion of privilege were to undercut a criminal defendant's Constitutional (e.g., Sixth Amendment) rights. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *United States v. Rainone*, 32 F.3d 1203, 1206 (7th Cir. 1994) ("Even the attorney-client privilege, therefore, hallowed as it is, yet not found in the Constitution, might have to yield in a particular case if the right of confrontation, whether in its aspect as the right of cross-examination or in some other aspect, would be violated by enforcing the privilege. So at least dicta in two cases intimate.").
- Conversely, executives cannot assert privileges that the corporation has waived, unless the communications fit within *Upjohn's* allowance for legal representation in an executive's individual capacity.
 - Giving effective *Upjohn* warnings when interviewing executives should prevent this from occurring.

Collateral Implications – Collateral Actions By Other Enforcement Bodies (SEC, DOJ, other regulatory bodies)



- If attorney-client privileged materials are voluntarily disclosed to one government body during an investigation (or placed in controversy), privilege is likely waived for all materials disclosed. *In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012).
- However, undisclosed communications should not become discoverable unless they:
 - Concern the same subject matter as the waived communications, and
 - Ought, in fairness, to be produced. See Fed. R. Evid. 502(a).
 - » See also *U.S. v. Stewart*, No. 15-cr-00287, Dkt. 141, (S.D.N.Y. July 22, 2016) (holding corporation's disclosure to FINRA of privileged conversations between in-house attorney and corporation's employee waived privilege as to the disclosed conversations, but did not result in subject matter waiver because disclosure was outside judicial context, not during an investigation, and nothing in the record indicated that the disclosure to FINRA was used affirmatively to prejudice either of the parties in the criminal proceeding).
 - » In *Stewart*, the investigating attorney was called to testify at trial about what she was told in the course of her investigation by the company employee (the defendant).
- A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding. Fed. R. Evid. 502(d). However, an agreement between parties regarding disclosure of privileged or protected materials is binding only on the parties to the agreement, unless it is incorporated into a court order. Fed. R. Evid. 502(e).

Collateral Implications – Other Scenarios



- Mergers and Acquisitions:
 - Material risks/potential liabilities that are under investigation may become a focus of due diligence in a transaction (e.g., potential FCPA violations that are under review)
 - In the transaction context, courts often apply the common interest doctrine.
 - » Sharing privileged communications with another party prior to signing a merger or acquisition agreement waives the privilege as the other side is considered an adversarial at this time.
 - » After a merger or acquisition agreement is signed, however, privileged communications remain privileged under the common interest doctrine (subject to principles of waiver).
 - » After a merger, acquisition, or other change of control, the right to assert the attorney-client privilege passes to the party assuming control of the company.
 - Due diligence
 - » Some courts have expanded the common interest doctrine to protect exchanges between potential transaction parties regarding pending litigation that one of them faces, including disclosures during the due diligence process (e.g., D.N.J., D. Neb., N.D. Cal.).
 - » However, other courts hold that the sharing of privileged communications prior to signing a merger or acquisition agreement is a waiver of the underlying privilege (e.g., N.D. Ill., N.D. Ohio, S.D.N.Y.).
 - Thus, carefully weigh risks of disclosing results of investigation to potential merger partner, prior to the signing of a definitive merger agreement.

Collateral Implications – Other Scenarios

- Corporate Audits: Sharing privileged documents with an external auditor generally waives the attorney-client privilege, but not necessarily the work product protection.
 - Privilege: See *In re John Doe Corp.*, 675 F.2d 482, 488 (2d Cir. 1982) (conversation during company's annual audit between corporate general counsel and accountant regarding suspicious payment waived privilege); *First Federal Sav. Bank of Hegewisch v. U.S.*, 55 Fed. Cl. 263, 269 (2003) (documents provided to accountant for audited financial statement not privileged).
 - Work Product: Sharing work product with an auditor does not necessarily waive the protection; courts sometimes recognize a commonality of interest between the corporation and its auditor.
 - » More recent cases uphold work product protection notwithstanding a decision to share attorney materials/findings with auditor (N.D. Ill., S.D.N.Y., D.S.C.)
 - » Courts consider whether the sharing of work product increases the opportunity for adversaries to view the work product, an auditor's role as a public watchdog, as well as whether there is a common interest between the parties.
 - Weigh risks of disclosure vs. non-disclosure to accountant or auditor.
 - » Note: providing privileged information to an accountant retained by a company's attorney to assist that attorney in conducting investigation and/or rendering legal advice to the company will not waive the privilege (subject to other conditions of privilege/work product being met); this is different from sharing privileged or work product materials with outside auditor.

QUESTIONS