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I. Background – Investigation trends and general considerations affecting privilege and work product.

Background: Types of Investigations; Trends

- Corporate investigations are often undertaken with possible government action in mind — *i.e.*, in advance/anticipation of, government action.
- Investigations may be internal or conducted jointly with government authorities.
- Recent Statistics
  - The Fraud Section of the Department of Justice pursues cases through three litigation units:
    - Foreign Corrupt Practices Act Unit: in 2016, 17 individuals charged or pleaded guilty; 13 corporate resolutions; $1.36 billion in corporate U.S. criminal fines and forfeiture; $7.3 billion in total resolutions
    - Health Care Fraud Unit: in 2016, charges brought against 233 individuals, with 152 individual convictions; $512 million in total resolutions
    - Securities & Financial Fraud Unit: in 2016, 52 individuals charged; 34 individuals convicted; 1 corporate resolution resulting in $1.6 million criminal penalty
  - The SEC Division of Enforcement similarly regulates corporate activity.
    - In 2016 alone, the SEC filed 868 enforcement actions, a new high.
    - The agency also set a new high in pursuing 21 FCPA-related enforcement actions.
    - These enforcement actions yielded more than $4 billion in disgorgement and penalties.
  - In addition, private complainants can prompt a company to investigate, *e.g.*, whistleblowers alleging legal violations or False Claims Act cases (*qui tam* actions).
Background: Enforcement Trends

- Express focus by the Department of Justice in recent years on individual misconduct and possible individual prosecutions
- Yates Memorandum: former DAG Sally Yates issued a memo on September 9, 2015 articulating the DOJ’s priorities in this regard and instructing cooperating companies to report on potential misconduct by individual employees and executives
  - The memorandum was described as simply reflecting existing DOJ enforcement priorities, not setting a new agenda
- Under the Trump administration, the DOJ has expressly stated that it will continue to focus on individual prosecutions
  - Attorney General Jeff Sessions gave a speech in April of this year before the Ethics and Compliance Initiative, stating that “[t]he Department of Justice will continue to emphasize the importance of holding individuals accountable for corporate misconduct.”
  - The AG added, “[i]t is not merely companies, but specific individuals, who break the law. We will work closely with our law enforcement partners, both here and abroad, to bring these persons to justice.”

Background: Investigation Objectives

- 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
  - Resolving potential concerns and/or legal claims by others against the company
- Focus of investigation:
  - Possible criminal conduct? Regulatory violation? Civil liability? A transaction (e.g., due diligence)?
- The objectives and focus of an investigation generally affect whether and how the privilege and work product protection arise and how they are maintained.
Internal Investigations: Asserting and preserving the attorney-client privilege and attorney work product protection.

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.

- 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

When does the attorney-client privilege apply:
  - Confidential communications between a CLIENT:
    - In corporate investigations, this could be, e.g., the company, the board, an audit committee, or a special investigation or special litigation committee of the board.
    - Recognize who is not the client: (i) individual employees (whether or not they have separate counsel); (ii) anyone not connected with the Company.
    - Upjohn warnings and their importance.
  - And its ATTORNEY:
    - Legal counsel, and in general people working at counsel’s direction
  - For the purpose of obtaining LEGAL ADVICE.
    - Non-legal communications are not covered by the privilege.

• The attorney-client privilege applies to communications that satisfy these criteria, unless an exception applies or until the privilege is waived.

Internal Investigations: The Attorney-Client Privilege – Exceptions and Limits

In general, the attorney-client privilege does not protect:
  - Facts discovered/disclosed to counsel: facts are not privileged.
    • Interpretations and analysis of facts by counsel can be protected, however.
    - The fact of the representation – i.e., that the client is represented by the attorney.

Other 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: Certain foreign jurisdictions do not recognize the attorney-client privilege or the work product protection at all. In certain other foreign jurisdictions these privileges do not apply to in-house counsel. When conducting investigation work abroad, it is important to consider to whom and how the attorney-client privilege and work product protection will apply.
Internal Investigations: The Attorney-Client Privilege

Waiver and How to Protect Against It.

- 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.
  - **Inadvertent**: waiver occurs unintentionally, because the client or someone else mistakenly discloses a protected communication.
  - **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 waiver of the privilege over underlying investigation materials.

Advice-of-counsel defense generally waives the privilege over the legal advice on which the privilege holder claims to have relied.

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 an 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 have 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 or a threat of litigation.
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 and materials that reflect the mental impressions and/or opinions of the client’s lawyer or the lawyer’s 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.

Waiver and How to Protect Against It.

- As with the attorney-client privilege, a party may waive the work product doctrine 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 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).
Government Investigations: What to do when the Feds come knocking – additional factors to consider regarding the privilege and work product protection in government investigations.

III.

• SEC Guidelines & DOJ Policies: cooperation does not require privilege or work product 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.
    » However, cooperating companies must share facts discovered in an investigation.
  - 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.
    » Like the DOJ, the SEC requires cooperating parties to share facts learned in an investigation.
Government Investigations: Protecting Privilege and Work Product During Government Cooperation

- Additional Factors to Consider Prior to and During Government Cooperation
  - Government programs incentivize disclosure:
    » Yates Memorandum: September 9, 2015 Memorandum directing the DOJ to focus on individual prosecutions during government investigations. Cooperating companies are required to share information about individuals and their potential misconduct.
    » FCPA Pilot Program: April 5, 2016 DOJ program to encourage voluntary self-disclosure, cooperation and remediation for corporate FCPA violations. In FY2016, the DOJ extended 5 Pilot Program declinations, in which companies disgorged a total of $15 million in allegedly illicit profits.
    » When seeking cooperation credit from the government, companies should assess whether any disclosures involve privileged materials, and if so, whether they are willing to waive that privilege.
  - Inadvertent Disclosures and Clawback Agreements
    » Documents that are inadvertently produced, but are not "clawed back" once the production is discovered, may no longer be privileged. (Fed. R. Evid. 502(b).)
    » Clawback agreements are considered a “reasonable step” to protect against disclosure of privileged materials, and are typically an effective measure for protecting a company in the case of an inadvertent disclosure.

Minimizing Risks of Waiver
- Where possible, structure disclosures to the government around facts, which are not privileged or protected work product, and avoid sharing privileged communications or attorney work product
- Producing Materials Pursuant to Government Requests and Subpoenas:
  » Attorneys should carefully review all documents before production for privilege or work product.
  » Assert privilege when necessary in government productions and interviews.
  » Consider a Confidentiality Agreement: such agreements generally do not cover privilege, but address the confidentiality of disclosed materials and may include clawback provisions.
- Government Interviews:
  » Continue to give Upjohn warnings.
  » In witness preparation, sensitize witnesses to what they have independent knowledge of vs. what they may have learned from another employee (or the investigating lawyer).
    • Investigating lawyers must be careful not to taint witnesses with previously-unknown facts, or disclose legal theories and strategies.
  » Review materials for privilege prior to using them in witness preparation. (Such use could result in waiver, especially if the witness relies on privileged material in his/her testimony.)
  » Counsel’s notes from witness preparation and interviews are generally protected work product.
Extending the Privilege: the Common Interest Doctrine – Basics

- The common interest doctrine generally acts to protect the sharing of privileged communications or work product materials between parties with a common legal interest.
- The selective waiver doctrine may be invoked to support sharing privileged investigation materials between, e.g., an audit committee and company management or between counsel for individual witnesses.
- 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. Schaeffler v. U.S., 806 F.3d 34, 41-43 (2d Cir. 2015) (communications regarding tax opinions made in the course of common enterprise between companies protected under common interest); United States v. A.T.&T. Co., 642 F.2d 1285 (D.C.Cir.1980) (shared information regarding parallel lawsuits protected).
  » Once privileged information is disclosed to a third-party that does not share the common interest, the protection is generally waived. See, e.g., United States v. United Techs. Corp., 979 F. Supp. 108, 111 (D. Conn. 1997).
- There is limited precedent holding that asserting the common interest doctrine may protect the sharing of privileged or protected information between a cooperating company and the government during an investigation. The weight of authority, however, holds that sharing previously-protected materials with the government waives the applicable protection.

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 waiver depends on (1) intentionality, (2) subject matter, and (3) fairness.
  » Intentionality: was the disclosure voluntary? See Fed. R. Evid. 502(a) Advisory Committee’s notes.
  » Same subject matter: do the undisclosed communications/materials relate to the same topic(s) as the communications/materials that were shared with the government? If the undisclosed communications/materials were created as part of and in furtherance of the same investigation that yielded the communications/materials that were shared with the government, that could favor a finding that the subject matter is the same.
  » Fairness: the scope of waiver, however construed (either broadly or narrowly), should not provide an undue advantage to either side.
- Inadvertent waivers: Claw back documents as soon as inadvertent disclosure is realized. If it is too late, argue to limit scope of waiver to the information actually disclosed.
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 the *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.

It is best to precisely specify, and if possible obtain government’s agreement to, the scope of an intended waiver (e.g., date range, people, and subject(s) covered), to protect the privilege for anything outside the scope of the intended waiver.

Selective Waiver Doctrine

- Selective waiver permits an investigating 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.
- This doctrine arose in the Eighth Circuit, but has since been rejected by most other circuits that have explicitly addressed the issue. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978).
- There is some room to argue for selective waiver in the Second Circuit, which held that waiver determinations require a fact-specific analysis that considers any confidentiality agreement or common interest. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993).
  - Under *Steinhardt Partners*, the party attempting a selective waiver should have a confidentiality agreement in place prior to any disclosure, and/or should assert a common interest with the government in making that disclosure.
- The Fifth and Eleventh Circuits have not definitely ruled out the selective waiver doctrine, but lower courts in each have rejected it. The Seventh Circuit has conflicting opinions regarding the availability of the doctrine, but it has not applied the doctrine either time it was discussed.
  - The Northern District of Illinois, however, has employed the doctrine from time to time. The same is true of the Southern District of New York.
Collateral Implications: treatment of the privilege and work product protection in collateral litigation.

IV. Collateral Implications – General Principles

• Notwithstanding Steinhardt Partners and select district court opinions, the general rule is that parties cannot selectively divulge privileged information. Chinnici v. Central DuPage Hosp. Ass’n, 136 F.R.D. 464, 465 (N.D. Ill. 1991). As such, many courts hold that information shared with the government loses any privilege or other protection.

  • Once privileged materials are disclosed to a third party, the privilege is 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).

  • Protecting investigation materials can become a critically important point in dispute in litigation.
Collateral Implications – Recent Litigation

- **Doe v. Baylor University**, 16-cv-173 (W.D. Tex. Aug. 11, 2017) (Dkt. 168): A federal judge ordered Baylor University to turn over parts of an internal investigation conducted by outside counsel on behalf of the university.
  - In September 2015, the Baylor University Board of Regents hired outside counsel to investigate Baylor’s responses to certain issues under Title IX, and in May 2016, Baylor University released two documents summarizing the investigation: (1) “Findings of Fact,” a thirteen-page summary of outside counsel’s investigation and its conclusions; and (2) “Report of External and Independent Review, Recommendations,” a ten-page list of outside counsel’s recommendations. (Id. at 1-2.)
  - In June 2016, plaintiffs (former students at Baylor) filed a lawsuit alleging state and federal claims (including under Title IX) related to heightened risks of sexual assault on campus. Plaintiffs in this litigation sought all materials provided to and produced by outside counsel in connection with its Title IX investigation. Baylor objected, arguing that such documents were protected by the attorney-client privilege and work product protection. (Id. at 2.)
  - Because outside counsel was engaged to provide the Board legal advice, the court ruled that communications with counsel regarding the investigation were protected by the attorney-client privilege. Plaintiffs argued that despite this protection, Baylor waived the privilege through its third-party disclosures. (Id. at 5-7.)
  - The court agreed with plaintiffs. Because Baylor’s intentional disclosures to third parties “provide[d] substantial detail about both what Baylor and its employees told [outside counsel] and what advice Baylor received in return,” the court held that Baylor waived the attorney-client privilege as to communications between Baylor and counsel during its investigation. (Id. at 9-10.)
  - Because outside counsel was engaged in anticipation of potential Title IX litigation, the work product protection also applied to certain materials, and because “[w]aiver is more narrow in the context of the work-product doctrine,” the court ruled that Baylor did not waive the work product protection over any materials not actually disclosed to an adversary. (Id. at 16-17.)
  - Thus, interview memoranda, notes, emails, presentations, and other documents that were prepared as part of outside counsel’s investigation, and that were not released, remained protected. Additionally, Baylor was not required to answer questions regarding its counsel’s mental impressions.

Collateral Implications – Civil Litigation

- **Consumer Litigation:**
  - Plaintiffs in consumer cases filed in connection with a government investigation, which in turn relates to issues that are the subject of 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 shielded under the attorney-client privilege and attorney work product protection if the requirements of those protections are met, the documents are not disclosed to the government, and the corporation does not attempt to rely on the conclusions of the investigation in its litigation defense.
Collateral Implications – Civil Litigation

Derivative Litigation

- The Garner doctrine permits a company's shareholders, if they sue in a derivative capacity (i.e., on behalf of the corporation), to bypass company attorney-client privilege upon a showing of good cause. Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970) (granting shareholders access to privileged material from internal investigation).
  - To the extent an SLC has conducted an internal investigation to assess the merits of derivative claims, for example, there is a risk in certain scenarios that derivative plaintiffs could gain access to investigation materials.
  - While the Garner doctrine arose in the context of a shareholder derivative action, its principles have also been applied where a fiduciary duty is allegedly owed by the party asserting the privilege to the party seeking to abrogate it — including, in at least one case, a shareholder class action. Henry v. Champlain Enterprises, Inc., 212 F.R.D. 73, 84 (N.D.N.Y. 2003).

Collateral Implications – Individual Government Prosecutions

Prosecution of Individual Wrongdoers:

- 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 or work product materials that otherwise have 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).
  - 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).
- 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). That is likely to be the case even as to other government agencies.

- However, undisclosed communications should not become discoverable unless they:
  - Concern the same subject matter as the waived communications, and
  - Ought, in fairness under the circumstances, to be produced. See Fed. R. Evid. 502.

Collateral Implications – Other Scenarios

- Mergers and Acquisitions:
  - Here, courts often apply the common interest doctrine.
    - Sharing privileged communications with another party prior to signing a merger or acquisition agreement generally waives the privilege as the other side is considered an adversary at that time.
    - After a merger or acquisition agreement is signed, however, privileged communications arguably remain privileged under the common interest doctrine (subject to principles of waiver).
    - After a merger, acquisition, or other change of control (generally in a stock transaction), the right to assert the attorney-client privilege passes to the party assuming control of the company.
      » Asset purchases may not transfer ownership of the privilege as clearly, however.
  - 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.).
Collateral Implications – Other Scenarios

- Corporate Audits:
  - Sharing privileged documents with an external auditor typically waives the attorney-client privilege.
  - It is less clear whether the work product protection is waived when shared with an auditor.
    > Courts consider whether the shared work product increases the opportunity for adversaries to view the work product, an auditor’s role as a public watchdog, and whether there is a common interest between the parties.
    > More recent cases uphold work product protection notwithstanding decision to share materials with auditor (N.D. Ill., S.D.N.Y., D. S.C.)
  - 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).

QUESTIONS