

Protecting the Attorney-Client Privilege and Work Product Doctrine in Internal Investigations

By Ralf Rodriguez



In-house counsel are rightly focused on the confidentiality of materials and communications from an internal investigation. To protect investigative materials and communications from disclosure, counsel must thoroughly understand how both the attorney-client privilege and the work product doctrine apply in this context. These privileges are limited, and counsel who do not know the limits risk an inadvertent waiver. This article provides an overview of the key points in-house counsel should bear in mind when conducting an internal investigation to establish and maintain its privileged status.

Investigative Purpose

At the outset of an internal investigation, in-house counsel should candidly assess whether its purpose is to provide the company with legal advice, or if it has a business purpose. In the former case, a court will usually treat the investigation as privileged. In the latter case, the materials will typically be discoverable. The distinction between an investigation conducted to provide legal advice to the company as opposed to an investigation completed “in the ordinary course of business” serves as the linchpin for determining whether the privilege applies. See *e.g.* *In re County of Erie*, 473 F.3d 413, 420 n. 7 (2d Cir. 2007).

Thus, at the outset of an investigation, in-house counsel should clearly document its scope and purpose. Identify the key legal issues for which the company is seeking legal advice, being mindful that this documentation could be reviewed in camera in the event of a governmental or third-party inquiry. Therefore, in-house counsel should clearly outline the legal advice being sought without revealing all the details.

Retention of Outside Counsel

Another factor the courts emphasize when analyzing assertions of privilege is whether the company retains outside counsel to provide legal advice and lead the investigation. Involvement of outside counsel helps establish that the investiga-

tion was initiated for the specific purpose of obtaining legal advice, that an attorney-client relationship attaches to the investigation, and that the company reasonably anticipated litigation. Each of these elements supports an assertion of privilege, and outside counsel’s notes and questions constitute the mental impressions and opinions of legal counsel, thereby qualifying for protection under the work product doctrine. See *e.g.*, *Hickman v. Taylor*, 329 U.S. 495 (1947).

It is important to understand, however, that involvement of outside counsel does not offer blanket protection. For example, any recordings or transcripts taken of an interview with any adverse party are subject to discovery pursuant to Fed. R. Civ. P. 26 (b)(3)(C). This rule allows a party to obtain another party’s previous statements, including “contemporaneous stenographic, mechanical, electrical, or other recording – or a transcription of it – that recites substantially verbatim the person’s oral statement.” *Id.* Another vulnerability to bear in mind is that even if outside counsel is retained to interview an employee who has made an allegation against the company, the attorney-client privilege may not apply to communications exchanged during that interview given the adversarial nature of the relationship. The work product doctrine, however, should still apply to prevent disclosure of outside counsel’s notes and observations.

Waiver

Privilege can be waived inadvertently in several ways. First, when preparing a privilege log identifying privileged materials obtained during the course of an internal investigation, be sure to include materials in the possession of outside counsel. Failure to do so could lead a court to determine the company waived the privilege with respect to those documents. Likewise, the privilege applying to any investigative communications or materials could be waived by having a witnesses testify about them. Similarly, if a company refers to information obtained as part of its internal investigation to support

its claims or defenses in a case, a court is likely to find a waiver of any privilege relating to such information. Finally, cases are legion finding the attorney-client privilege is waived when the confidential communication is disclosed to a third-party. As such, if in-house counsel must share privileged investigative information with a third party, it should be in the context of a documented need for legal advice. For example, the privilege is not typically waived if the third party is necessary or useful for effective communication and consultation between outside counsel and the company. See *e.g.*, *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (recognizing exemption to waiver rule when the third party, such as an accountant, is necessary or useful for the effective consultation between the attorney and the client).

Conducting an internal investigation can be a high-stakes and extremely sensitive endeavor. Companies understandably want internal investigations to remain just that: internal. Proceeding in line with the points presented above will help ensure that the attorney-client privilege and/or work product doctrine attaches to a company’s investigative materials and communications.

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