Bloomberg Law

Corporate Law & Accountability Report™

CORPORATE INVESTIGATIONS

Protecting the Privilege in Corporate Investigations When It Counts—From the Beginning



BY AMY CONWAY-HATCHER, KYLE CLARK, AND ANDREW GEORGE

When things go wrong and the fire alarm sounds, the natural reaction is to move quickly to find out what happened and to root out problems to limit potential damage to the company. While this sense of urgency is important and can be extraordinarily helpful to show the company acted promptly and responsibly, it is equally important to pause and decide on a focused strategy with clear objectives and a documented action plan. That plan should include a thoughtful approach to maximize the organization's ability to assert and preserve important legal protections so that confidential and privileged information does not become discoverable by third parties like the government or other civil litigants, such as shareholders, insurers or disgruntled employees.

Amy Conway-Hatcher, Kyle Clark, and Andrew George are Baker Botts litigation lawyers in the firm's Washington, D.C., office. Ms. Conway-Hatcher is a partner and can be reached at 202.639.1306 or amy.conway-hatcher@bakerbotts.com. Mr. Clark is a partner and can be reached at 202.639.1320 or kyle.clark@bakerbotts.com. Mr. George is a senior associate and can be reached at 202.639.7764 or andrew.george@bakerbotts.com. *The authors wish to thank Noah Mink and Katherine S. Dutcher for their assistance in researching these subject matters and preparing this article for publication.*

In the context of corporate investigations, maintaining the attorney-client privilege and other legal protections continues to be one of company counsel's greatest challenges. Recent cases and settlements show how aggressive the government and other litigants can be in pursuing waiver claims to gain a better strategic footing in litigation. Gaining access to this type of information, particularly when it comes from a corporation's internal investigation of potential wrongdoing by its employees, can provide a critical roadmap to the other side and it can have significant, complex, and expensive ramifications for companies later.

The takeaway is that practitioners need to be more proactive and strategic in their approach to safeguarding legal protections—from the very beginning. The

 ISSN 2330-6300

risks are too great and, as some companies have found out the hard way, if these protections are waived, there is no going back.

Back to Basics: Attorney-Client Privilege and Attorney Work Product Protection Defined

The attorney-client privilege is one of the oldest recognized privileges for protecting confidential communications between attorneys and their clients. The privilege encourages ''full and frank communication between attorneys and their clients'' and ''recognizes that sound legal advice . . . depends upon the lawyer being fully informed by the client.'' [*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).] In *Upjohn*, the U.S. Supreme Court acknowledged that the attorney-client privilege applies to companies and that communications between company employees and the company's counsel are protected where counsel is gathering information needed to provide legal advice to the company. While the privilege protects the communications, however, it does not extend to the underlying facts or evidence being discussed. The privilege is held by the client alone and only the client may claim or waive it.

By contrast, the attorney work product doctrine protects the mental processes, thoughts, and opinions of counsel that are developed in anticipation of litigation. Originally recognized by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), this rule is codified in Rule 16(b)(2) of the Federal Rules of Criminal Procedure and Rule 26(b)(3) of the Federal Rules of Civil Procedure. The rule excludes from protection materials prepared in the ordinary course of business or unrelated to litigation. [*See* Fed. R. Crim. P 16 advisory committee's note (1970).] Most federal courts determine whether material is protected by evaluating whether the document or other material ''can fairly be said to have been prepared or obtained because of the prospect of litigation,'' regardless of whether an attorney personally created the document. [*United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010). The Fifth Circuit looks to the ''primary motivating purpose'' of the document, rather than applying the ''because of'' standard. *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982).] Not surprisingly, the applicability of this doctrine to materials prepared during an investigation will depend greatly on the investigation's purpose and the extent to which counsel can show it was prepared ''in anticipation of litigation'' as opposed to the ordinary course of business. ''Ownership'' of work product protection is more complicated; some jurisdictions grant counsel an ownership interest, but most again leave it to the client. [*See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 90 (''When lawyer and client have conflicting wishes or interests with respect to work-product material, the lawyer must follow the instruction of the client . . . .'').]

To be able to assert and maintain each of these important legal protections, the privilege owner must demonstrate that the communication or information fits within the definition of the respective protection and was kept confidential. While this sounds simple, the lines can quickly become blurred and the position difficult to prove, particularly in a fast-paced investigation that involves multiple jurisdictions, and large teams of attorney and non-attorney advisors.

Seven Strategies for Safeguarding the Privilege and Avoiding Waiver

1. *Know the Rules in Your Jurisdiction and Remember, Not All Jurisdictions are the Same*

The rules and applicable laws may vary from state to state, among the federal courts and among different nations. Practitioners need to understand the applicable laws in the relevant jurisdictions. Typically, to maintain attorney-client privilege, investigations must be directed and supervised by counsel with the aim of providing legal advice to the client. For the work product doctrine to apply, the party usually must be able to show that documents and other tangible materials were prepared ''in anticipation of litigation'' rather than in the ordinary course of business. Beyond this, all bets are off, depending on what jurisdiction one is in and the applicable facts and circumstances of the engagement. For example, where a company operates in different countries, it is critical to understand which jurisdictions recognize legal privileges and the rules that apply. Some countries do not recognize an attorney-client privilege at all. Some countries that have the privilege nonetheless view in-house counsel as not sufficiently ''independent'' from their employer and, thus, no privilege may apply unless outside counsel is involved. Others, like the United Kingdom, do not consider regular company employees to qualify as ''clients'' for privilege purposes. [*Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) (8 May 2017) (rejecting ENRC's claim of privilege over various internal investigation documents, finding that employees were not 'clients' and so communications with them did not trigger privilege protections and also finding that documents prepared in anticipation of an SFO-led criminal investigation were not prepared 'in anticipation of litigation' because a criminal investigation does not necessarily result in prosecution).] Having a checklist and understanding the rules and potential pitfalls of different jurisdictions in advance will pay significant dividends if an urgent situation arises that requires an investigation.

2. *Use Documentation to Build a Strong Foundation for Asserting Privilege*

Corporate policy, where applicable, and more importantly the documentation surrounding an internal investigation, should clearly state that the investigation is being conducted to obtain legal advice in anticipation of litigation for the company. Clearly defining and segregating this work stream from other potential business-related advice (whether conducted by in-house counsel or outside counsel) will be invaluable. In some cases, it will be helpful to prepare an initial investigative memo from the client that: (i) directs that counsel conduct a privileged and confidential investigation to gather facts to provide legal advice to the company; (ii) identifies the litigation anticipated or the facts known that make litigation reasonably likely; (iii) identifies the lawyer(s) who will oversee the investigation; (iv) identifies the lawyer(s) who will conduct the investigation; (v) clearly defines the scope of the investigation; (vi) instructs the lawyer to oversee the work of the investigation team including, in particular, the work of any non-lawyers assigned or engaged to assist in the investigation; and (vii) describes counsel's reporting instructions. Any legal advice or work product prepared thereafter, such as interview materials, analyses, counsel presentations, or

   ISSN 2330-6300

written findings should be handled consistent with this initial directive.

3. *Understand and Proactively Manage the Risks of Engaging Third Parties*

Be cognizant of how the investigation team or client engages with third parties who may be assisting or advising the client on matters connected to the investigation. If not handled carefully, these communications can present a high risk for waiver or failing to establish privilege in the first place. The *Kovel* doctrine, set forth by the U.S. Court of Appeals for the Second Circuit in 1961, provides that communications with a non-attorney third party are privileged if they were intended to be, and remained, confidential, and if the third party was necessary or highly useful to an attorney's rendering of legal advice to a client. [*United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).] In most instances, the case for this argument is stronger if the third party is engaged and supervised by the lawyer conducting the investigation, such as a translator or forensic accountant. If, as was the case in *Bousamra v. Excela Health*, 2017 Pa. Super 235 (July 19, 2017), privileged information is shared with a third party who was engaged by the client, and is not deemed to be material to the attorney's advice (in this case, a public relations firm), courts may find the privilege was waived (along with the subject matter of the advice). The same result may occur if privileged information is shared with former employees. [*Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1194 (2016).] Given the risks presented, it is wise to carefully consider all third party arrangements and interactions, and have a set of guidelines for the team to avoid tripping any wires.

4. *Mark Documents Appropriately; Don't Assume All Materials Are Protected*

Investigative counsel should prepare guidelines regarding appropriate designation of work product and privileged materials. Although the underlying facts are not privileged, documents prepared by counsel typically are protected and should be marked as ''Privileged and Confidential.'' Because opinion work product is more protected than fact work product, written material such as notes and memoranda should include a prominent disclaimer when it incorporates the mental impressions of the attorney who drafted it, and that disclaimer should be consistent with the style of the remaining text. Writing ''this is not a transcript'' at the beginning of a transcribed interview will not make it opinion work product. Memoranda that intertwine facts and mental impressions present a stronger argument for protection than memos where the facts can be easily separated. While counsel may have different strategies for developing protected material in an investigation, depending on the complexities in the case, there should be an agreed-upon plan.

5. *Joint Defense and Common Interest Privilege Must Remain Confidential to Be Protected*

The ''joint-defense privilege''—more aptly referred to as the common-interest rule or doctrine—is not an independent privilege at all, but rather an exception that allows for limited third-party disclosure without waiver. Assuming an otherwise valid protection exists, this rule allows for the sharing of information among attorneys representing different clients who share a common legal interest, whether as defendants or plaintiffs. [*In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990).] Non-privileged material, however, cannot be imbued with privilege simply by sharing it in furtherance of a common interest. Different jurisdictions apply different standards for finding a common interest, with some requiring that the parties have a common interest in actual or prospective litigation at the time of disclosure.

When dealing with potential co-defendants regarding a ''common defense strategy,'' companies should enter into an oral or written ''joint defense agreement'' to ensure that these communications will be exempt from the usual rule that disclosure to a third party results in a privilege waiver. Such non-waiver agreements should include obligations to return all joint defense materials should the common interest cease, such as when a member of the agreement decides to cooperate with the authorities. Companies should also weigh the factors of engaging in one-way exchanges of information with co-defendants such as current or former employees—they are easier to unwind the joint defense relationship if needed, with less risk of dispute if the company decides to cooperate with the authorities—versus a reciprocal exchange of information.

6.*Sharing Investigative Materials and Reports of Investigations Carries Risk—Period*

In most investigations, the investigation team is called upon to report to the General Counsel, management and sometimes the Board of Directors (or a committee of the Board). However, investigating counsel and the client are often called upon to answer questions for, among others: (i) outside auditors, (ii) prospective buyers, (iii) insurers, (iv) regulators, (v) shareholders, or (vi) customers. Discussing ''facts'' should not raise privilege concerns. However, discussing ''findings'' can tip the balance towards waiver.

In May 2017, the U.S. District Court for the District of Columbia found that a client waived the attorney-client privilege for the subject matter after the Board publicly released counsel's report of investigation. The court further found that attorney work product never applied to the underlying interview memoranda and other materials prepared by counsel. While all memoranda were dutifully marked, the investigation did not occur until two years after the client received a letter suggesting the possibility of legal action and, therefore, litigation was no longer reasonably anticipated. Rather, the court found that the investigation was conducted primarily for business purposes. [*Banneker Ventures, LLC v. Graham*, No. 13-CV-391 (RMC), 2017 WL 2124388 (D.D.C. May 16, 2017).]

7. *Don't Depend on ''Selective Waiver'' when Making a Disclosure to the Government, and Don't Underestimate the Creativity of Those Wanting Access to Your Documents*

Although the government no longer expressly pushes companies to waive privilege following internal investigations, companies still face tremendous pressure to assert privilege lightly when dealing with government investigators. For instance, under the Justice Department's (''DOJ'') ''pilot program'' incentivizing self-reporting of Foreign Corrupt Practices Act (''FCPA'') violations, companies are expressly not required to disclose privileged information. [U.S. Department of Justice Criminal Division, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.] They are required, however, to disclose ''facts'' (i.e., the primary output of an investiga-

tion), and they are not permitted to pick and choose which facts they disclose on the basis of privilege if they want to reap the benefits of disclosure. [Press Release, Deputy Attorney Gen. Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016), available at www.justice.gov/opa/speech/deputy-attorney- general-sally-q-yates-delivers-remarks-newyork-city-bar-association (''Companies cannot—in the name of privilege or otherwise—pick and choose which facts to provide if they want credit for cooperation.'').] Any such disclosure of privileged information to the government will risk waiving privilege as to third parties. Many courts have rejected the doctrine of ''selective waiver,'' and those that have not typically require a complex factual analysis before recognizing such a waiver. The Federal Rules of Evidence similarly provide that the intentional disclosure of privileged information in a federal proceeding or to a federal agency extends to all undisclosed information that ''ought in fairness to be considered together'' with the disclosed information. [Fed. R. Evid. 502(a)(3).] Thus, careful consideration is required before any disclosure is made of protected information.

Part of that consideration must be a recognition that third parties can and will be remarkably creative when pursuing documents from an investigation. For instance, in a notorious recent whistleblower action against Kellogg, Brown & Root (KBR), the plaintiff twice convinced the district court to grant him access to documents from a KBR anti-kickback internal investigation. In its first ruling, the district court found that, because KBR had conducted its investigation for business and regulatory reasons in addition to preparing for potential litigation, KBR could not assert privilege or work product protections over the documents. Then, after the D.C. Circuit reversed this ruling, [*In re Kellogg, Brown, & Root, Inc.*, 756 F.3d 754 (2014).] the district court seized on a footnote in a KBR brief to find that KBR had waived its protections by inferring that its investigation had ended positively. The D.C. Circuit reversed this ruling too, [*In re Kellogg, Brown, & Root, Inc.*, 796 F.3d 137 (2015).] and KBR ultimately retained its protections, but only after what must have been significant heartache and legal expense.

Conclusion

Corporate investigations often involve many moving parts, quick decisions, and stressful timelines, any of which can cause attorney-client privilege and work product protection to become an afterthought. Ensuring that there is a clear plan to maintain privilege before and in the early stages of an internal investigation is therefore essential to preventing inadvertent waiver. By implementing sensible strategies early in the process, counsel can protect their clients' interests while avoiding errors that may become costly in the future.

   ISSN 2330-6300