Chapter 2

The Attorney-Client Privilege, Work-Product Protection, and Self-Critical Privilege in Internal Investigations

§ 2:1 Introduction

When it comes to protecting privileged communications and work product, corporations conducting internal investigations are often caught between a rock and a hard place. Government attorneys are increasingly pressing corporations to turn over results from their internal investigations, including "facts" learned from interviews counsel conducted and counsel's findings and conclusions—information derived from privileged communications and attorney work product. If the corporation fails to provide this information, it risks being characterized as "uncooperative," thereby increasing both the corporation's risk of prosecution and the penalties it may face. On the other hand, if it discloses facts and other information to the government to qualify for the benefits of cooperation, the disclosure may come at a high price: It may be deemed a waiver of the attorney-client privilege and work-product protection to the rest of the world as well, including private litigants ready to pounce on the corporation on the heels of its internal investigation.

This chapter addresses the privilege issue in internal investigations, which has been the subject of a raging debate between government attorneys and the white-collar defense bar. It also examines generally both the scope and nature of the attorney-client privilege between the corporation (as distinct from its employees) and its attorneys, as well as the corporate work-product doctrine and some of the practical challenges in this area.

§ 2:2 The Attorney-Client Privilege

John Henry Wigmore provided an oft-cited definition of the attorney-client privilege:

> [W]here legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.[1]

§ 2:2.1 Elements of the Corporate Attorney-Client Privilege

In *Upjohn Co. v. United States*,[2] the U.S. Supreme Court ruled that although it would be convenient for the government to obtain the results of a corporate defendant's internal investigation, "considerations of convenience do not overcome the policies served by the attorney-client privilege." The Court found the corporate attorney-client privilege applicable in *Upjohn* based on the following facts:

- communications were made by corporate employees to counsel;
- communications were made at the direction of corporate superiors, in order for the company to obtain legal advice from counsel;[3]

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1. Wonneman v. Stratford Sec. Co., 23 F.R.D. 281, 285 (S.D.N.Y. 1959) (citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (John T. McNaughten ed., 1961)), *cited with approval in* 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2017 (1970).
2. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981).
3. Courts have grappled with how to evaluate so-called "dual purpose" communications where the intent was to seek both legal and business advice. For example, in *In re* Grand Jury, 23 F.4th 1088 (9th Cir. 2021), *cert. granted*, No. 21-1397, 2022 WL 4651237 (U.S. Oct. 3, 2022), the Ninth Circuit adopted the "primary purpose" test, rejecting the "because of" test that "looks only at causal connection, and not a 'primary' reason." In so doing, the circuit court affirmed the district court's ruling that certain dual-purpose communications were not privileged insofar as the "primary purpose of the documents was to obtain tax advice, not legal advice." In contrast, in *In re* Kellogg Brown & Root, 756 F.3d 754 (D.C. Cir. 2014), the D.C. Circuit found that the attorney-client privilege applied to communications made in connection with a counsel-directed internal investigation that was conducted to comply with certain regulatory requirements. Overturning the district court's finding that the privilege did not apply unless the *sole* purpose of the communication was to obtain or provide legal advice, the D.C. Circuit held: "So long as obtaining or providing legal advice was *one of the significant purposes of the internal investigation*, the attorney-client privilege applies, even if there were other purposes of the internal investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." *Id*. at 758–59 (emphasis added); *see also In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MD-2543 (JMF), slip op. at 12

- the employees were aware that the communications were being made in order for the company to obtain legal advice;
- the information needed was not available from upper management;
- communications concerned matters within the scope of employees' corporate duties; and
- the communications were confidential when made and were kept confidential by the company.[4]

If any one of these elements is missing, there is a risk that the communication will not be privileged.[5]

§ 2:2.2 Applicability to Experts, Attorney Agents, and the Corporation's Former Employees

Significantly, the privilege applies not only to direct one-on-one communications between client and counsel. In the oft-cited *United States v. Kovel* decision, the Second Circuit held that communications between an attorney and an expert, such as an accountant, are protected by the attorney-client privilege as long as the communications were made "in confidence for the purpose of obtaining legal advice from the lawyer."[6] The privilege also applies to communications made

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(S.D.N.Y. Jan. 15, 2015) (citing the D.C. Circuit's analysis and holding that interview notes, summaries, and memoranda generated during a high-profile General Motors internal investigation were protected by the attorney-client privilege, despite the fact that the company's motivation for the inquiry was not "exclusively legal"). In a high-profile state court case, the attorney-client privilege was found not to apply to communications between Penn State University personnel and the law firm hired to investigate the scandal involving former football coach Jerry Sandusky, on the ground that the university's retention letter to the investigating firm did not mention that the engagement was to obtain legal services, legal assistance, or an opinion of law. *See* Paterno v. NCAA, No. 2013-2082, slip op. at 20–21 (Pa. Ct. Com. Pl. Sept. 11, 2014), *aff'd*, Estate of Paterno v. NCAA, 168 A.3d 187, 197 (Pa. Super. Ct. 2017). Although the Supreme Court was poised to weigh in on the issue of privilege for dual purpose communications in *In re Grand Jury*, the Court dismissed its writ of certiorari in January 2023 as "improvidently granted" and declined to wade into the debate for now.

4. *Upjohn*, 449 U.S. at 394–95.
5. *See, e.g.*, Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co., 654 F. Supp. 1334, 1364–65 (D.D.C. 1986), *modified on other grounds*, 944 F.2d 940 (D.C. Cir. 1991).
6. United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). Some courts have interpreted *Kovel* to protect the attorney-client privilege for communications between an attorney and an outside consultant only when the

outside consultant is interpreting information for the lawyer that he or she would not otherwise understand. *See, e.g.*, United States v. Ackert, 169 F.3d 136, 139–40 (2d Cir. 1999) (holding the attorney-client privilege did not apply to communications between in-house counsel and an investment banker because although the communication was important to the attorney's ability to provide legal advice to the company, the attorney was not relying on the investment banker to translate or interpret information but, rather, to obtain information the company did not have); Ravenell v. Avis Budget Grp., Inc., 2012 WL 1150450, at *3 (E.D.N.Y. Apr. 5, 2012) (declining to apply the attorney-client privilege to communications with consultants because their role in examining employee questionnaires and making preliminary assessments as to whether the employees were exempt under the FLSA was one that defendant's in-house counsel had the ability to make themselves); *In re* Refco Sec. Litig., 280 F.R.D. 102, 105 (S.D.N.Y. 2011) (holding attorney-client privilege was waived when attorney shared his client's information with a hedge fund manager because although the attorney relied on the consultant's experience and specialized knowledge, there was no evidence that there was information the attorney could not understand without the consultant translating or interpreting the raw data for him); Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH, 2014 WL 7238354, at *4 (S.D.N.Y. Dec. 19, 2014) (declining to apply attorney-client privilege to communications with marketing firm where defendant had not demonstrated, inter alia, that "revealing otherwise privileged communications to its third-party marketing firm enabled counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice"); *In re* Restasis, 352 F. Supp. 3d 207, 211 (E.D.N.Y. 2019) (finding that disclosure of attorney-client communications to FDA consultants retained by Allergan waived the privilege where "Allergan ha[d] not shown that the information [the consultants] provided to [Allergan's] in-house and outside counsel allowed the attorneys to 'understand aspects of [Allergan's] own communications that could not otherwise be appreciated in the rendering of legal advice'") (internal citation omitted); State of New York v. The Trump Org., Inc., No. 451685/2020, 2020 WL 7360811 (N.Y. Sup. Ct. Dec. 15, 2020) (refusing to apply attorney-client privilege to the Trump Organization's communications with non-lawyer third party Mastromonaco because the Trump Organization had failed to meet New York's higher standard that the communications were "necessary" and "not merely helpful" to the provision of legal advice); Wengui v. Clark Hill, PLC, 338 F.R.D. 7, 13 (D.D.C. 2021) (declining to apply attorney-client privilege to a cybersecurity consultant's report because the "client's true objective was gleaning [the consultant's] expertise in cybersecurity, not in 'obtaining legal advice from its lawyer'"); Monterey Bay Military Hous., LLC v. Ambac Assurance Corp., No. 19 Civ. 9193, 2023 WL 315072, at *14 (S.D.N.Y. Jan. 19, 2023) (finding that communications involving third-party advisors waived attorney-client privilege where plaintiffs failed to demonstrate that those advisors were "necessary for the communication with the lawyers").

in the presence of the investigating attorney's employees and agents, such as private investigators.[7] Several courts have also held that communications by counsel for the corporation with former employees concerning their former employment are privileged because former employees may possess information needed by counsel to advise the corporate client.[8] Other courts, including courts in Illinois, Michigan, California, and Washington, have rejected this protection.[9] A company's ability to protect communications with former employees, therefore, may depend on whether it is before a federal or state court and its location.

§ 2:2.3 Attorney's Duty to Assert Privilege

Generally, the attorney-client privilege belongs solely to the client.[10] When the attorney believes that the privilege applies, he or she has the duty to assert the privilege on the client's behalf.[11]

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7. *See* United States v. Davis, 131 F.R.D. 391, 397–98 (S.D.N.Y. 1990), *modified on other grounds*, 19 F.3d 770 (2d Cir. 1994).
8. The majority of federal courts to address the issue have held that communications with former employees regarding matters related to their prior employment are privileged. *See* Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. 2005) ("[V]irtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment."); *see also* Better Gov't Bureau v. McGraw, 106 F.3d 582, 605–06 (4th Cir. 1997); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); Miramar Constr. Co. v. Home Depot, Inc., 167 F. Supp. 2d 182, 184–85 (D.P.R. 2001). *But see* United States v. Philip Morris USA, Inc., No. CV 99-2496 (GK), 2005 WL 8156890, at *3 (D.D.C. Jan. 21, 2005) (noting that the Supreme Court and D.C. Circuit "have [n]ever extended the *Upjohn* holding to former employees").
9. *See, e.g.*, Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188, 1193 (Wash. 2016) (ruling that the attorney-client privilege did not cover post-employment communications between former employees and corporate counsel, noting that "[w]ithout an ongoing obligation between the former employee and employer that gives rise to a principal-agent relationship, a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party"); *see also* Clark Equip. Co. v. Lift Parts Mfg. Co., 1985 WL 2917 (N.D. Ill. Oct. 1, 1985) (holding former employees are not the "client," and that "post-employment communications with former employees are not within the scope of the attorney-client privilege"); Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303, 306 (E.D. Mich. 2000); Connolly Data Sys., Inc. v. Victor Techs., Inc., 114 F.R.D. 89 (S.D. Cal. 1987).
10. *See* Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 960 (3d Cir. 1984); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967); 8 WIGMORE, *supra* note 1, § 2321.
11. *Republic Gear*, 381 F.2d at 556 ("Not only may an attorney invoke the privilege in his client's behalf . . . but he should do so, for he is 'duty-bound to raise the claim in any proceeding in order to protect communications

§ 2:2.4 What the Privilege Does Not Cover

The transfer of non-privileged documents from the corporation to its attorney, however, will not create a privilege for those documents.[12] The privilege will also not apply if it is intended that the information contained in a communication from client to attorney is to be made known to others.[13]

The corporate attorney-client privilege applies to communications between employees of the corporation and either in-house counsel or outside counsel. A general counsel's participation in an investigation conducted by *management* does not automatically cloak the investigation in the attorney-client privilege.[14] Where the in-house counsel is also a corporate officer with managerial functions, the corporate attorney-client privilege applies only to communications made for purposes of obtaining the counsel's professional legal advice. Communications for business rather than legal purposes are not protected.[15]

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made in confidence.'") (citations omitted); *see Klitzman*, 744 F.2d at 960; Am. Int'l Life Assurance Co. v. Vazquez, 2003 U.S. Dist. LEXIS 2680, at *6 (S.D.N.Y. Feb. 25, 2003).

12. Fisher v. United States, 425 U.S. 391, 403–04 (1976).

13. *See In re* Grand Jury Proceedings, 727 F.2d 1352, 1355–56 (4th Cir. 1984); United States v. Ruehle, 583 F.3d 600, 609 (9th Cir. 2009) (executive being interviewed by outside counsel as part of an internal investigation was aware that his statements were being shared with an independent auditor; in a subsequent criminal case, the Ninth Circuit held that the statements "were not 'made in confidence,' but rather for the purpose of disclosure to the outside auditors," and the attorney-client privilege therefore did not apply); *see also In re* the Search of Info. Associated with [REDACTED]@gmail.com and [REDACTED], No. 1:18-sc-00004-BAH, Doc. 23 (D.D.C. Apr. 27, 2018) (in connection with investigation by Special Counsel's Office, court found that emails sent "with the understanding that the attorney would serve as a conduit" to transmit those emails to a third party were not privileged). However, "the fact that certain information might later be disclosed to others [does not] create the factual inference that the communications were not intended to be confidential at the time they were made." *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984).

14. *See In re* Grand Jury Subpoena Dated Dec. 19, 1978, 599 F.2d 504, 510–11 (2d Cir. 1979).

15. Allied Irish Banks, p.l.c. v. Bank of Am., N.A., 240 F.R.D. 96, 103 (S.D.N.Y. 2007) ("For the privilege to apply, the communication from attorney to client must be made 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.' The communication itself must be 'primarily or predominantly of a legal character.'") (citing Rossi v. Blue Cross & Blue Shield, 540 N.E.2d 703, 706 (N.Y. 1989)); *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d at 1036–38; Urban Box Office Network, Inc. v. Interfase Managers, L.P., 2006

§ 2:2.5 The Crime-Fraud Exception

Although communications regarding past or completed fraud retain the privilege,[16] the attorney-client privilege will not apply when an attorney's advice is obtained by the client in furtherance of a future or ongoing crime.[17] The "crime-fraud" exception to the attorney-client privilege is an important limitation on the privilege and one that has broader application than many practitioners believe.[18] Under the

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U.S. Dist. LEXIS 20648, at *17 (S.D.N.Y. Apr. 18, 2006) ("A test commonly employed is 'whether a document was prepared primarily to seek legal advice.'") (citations omitted); Strategem Dev. Corp. v. Heron Int'l, No. 90 Civ. 6328 (SWK), 1991 WL 274328, at *1–2 (S.D.N.Y. 1991); *see also* Lewis v. Wells Fargo & Co., 266 F.R.D. 433, 445 (N.D. Cal. 2010) (finding the attorney-client privilege did not apply where management did not tell employees, and the questionnaires and checklists did not indicate, that the information was being requested to obtain *legal advice* from counsel). The Seventh Circuit reaffirmed that "factual investigations performed by attorneys *as attorneys* fall comfortably within the protection of the attorney-client privilege." Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 619 (7th Cir. 2010). In reaching its conclusion that outside counsel was hired to provide legal services—not solely investigative services, as the district court had found—the Seventh Circuit considered the engagement letter, which explained that counsel had been hired to "provide legal services," as well as the attorneys' conduct during the investigation, which included providing "*Upjohn* warnings," excluding third parties from attending the interviews, presenting its report to the school board during an executive session not open to the public, and marking its written executive summary as privileged. *Id*. at 620.

16. *See* Alexander v. United States, 138 U.S. 353, 359–60 (1891).

17. "Case law on the crime-fraud exception does not make perfectly clear what wrongdoing must be alleged" for the exception to apply. Chevron v. Salazar, 275 F.R.D. 437, 452 (S.D.N.Y. 2011). Courts have interpreted the exception broadly to include not only statutory violations but also "calculated and purposeful litigation misconduct." *In re* Gen. Motors LLC, No. 14 MC 2543 (JMF), 2015 WL 7574460, at *9 (S.D.N.Y. Nov. 25, 2015). *See* Abbott Labs. v. H&H Wholesale Servs., Inc., No. 1:17-cv-03095, 2018 WL 2459271 (E.D.N.Y. Mar. 9, 2018) (applying attorney-crime fraud exception in the context of civil litigation discovery abuses, concluding that the "Court cannot countenance the use of attorneys as 'front men in a scheme to subvert the judicial process itself.'") (citation omitted).

18. For example, the crime-fraud exception was used by the Department of Justice to obtain documents critical to its case against Lauren Stevens, an in-house lawyer at GlaxoSmithKline (GSK) accused of obstructing an FDA investigation and making false statements in responding to the FDA's inquiry into the alleged off-label marketing by GSK of Wellbutrin. In granting Stevens's Rule 29 Motion for Judgment and acquitting her of all charges, the district judge disagreed with the earlier decision by a different judge, who had ordered disclosure of the privileged communications between Stevens and GSK's outside counsel on the basis of

crime-fraud exception, a party seeking privileged communications need only establish a prima facie case that the communications were in furtherance of a crime or fraud.[19] Circuits vary on the quantum of evidence necessary to establish the requisite crime or fraud. For example, the Seventh Circuit requires that the party seeking discovery under the crime-fraud exception "need only 'give colour to the charge' by showing 'some foundation in fact.'"[20] Other courts have described the burden in other ways.[21] In addition to establishing the

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the crime-fraud exception. The district judge who granted Stevens's Rule 29 motion found that these documents, rather than demonstrating that Stevens had assisted in perpetrating a crime or fraud, instead showed that Stevens had engaged in a "studied, thoughtful analysis of an extremely broad request from the Food and Drug Administration and an enormous effort to assemble information and respond on behalf of the client," which was entitled to protection under the attorney-client privilege. Transcript of Oral Ruling, United States v. Stevens, No. 10-694 (D. Md. May 10, 2011), http://lawprofessors.typepad.com/files/110510stevens.pdf. The crime-fraud exception has also been implicated in the Bernie Madoff scandal, with federal regulators at the Office of the Comptroller of the Currency seeking to invoke the exception to obtain copies of the notes from JPMorgan's outside counsel's interviews with bank employees. The comptroller's office alleged that the interviews were used to obtain advice for the commission of a fraud or crimes—namely, covering up the bank's knowledge of the scandal. DOJ ultimately decided not to pursue the notes, reportedly because it found insufficient evidence to suggest that the interview notes had been made for the purpose of facilitating a crime, as well as concern about potentially developing negative precedent if the issue were to be brought before a court. Ben Protess & Jessica Silver-Greenberg, *A Standoff of Lawyers Veils Madoff's Ties to Bank*, N.Y. TIMES, Mar. 5, 2014, at B1.

19. *See, e.g.*, *In re* Green Grand Jury Proceedings, 492 F.3d 976, 982 (8th Cir. 2007) (requiring "a prima facie showing"); *see also* United States v. Beckman, 787 F.3d 466, 482 (8th Cir. 2015) (affording "considerable deference" to the district court's finding that the crime-fraud exception applied).

20. United States v. BDO Seidman, LLP, 492 F.3d 806, 819 (7th Cir. 2007) (internal citation omitted); *accord* Clark v. United States, 289 U.S. 1, 15 (1933) (explaining that for the crime-fraud exception to apply, "there must be 'something to give colour to the charge'; there must be 'prima facie evidence that it has some foundation in fact'").

21. *See, e.g.*, *In re* Grand Jury Proceedings, 802 F.3d 57, 65 (1st Cir. 2015) ("reasonable basis to believe") (citations omitted); *In re* Grand Jury, 705 F.3d 133, 153 (3d Cir. 2012) ("reasonable basis to suspect"); *In re* Napster Copyright Litig., 479 F.3d 1078, 1094–95 (9th Cir. 2007) ("preponderance of the evidence"), *abrogated on other grounds by* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009); *In re* Grand Jury Proceedings, 417 F.3d 18, 65 (1st Cir. 2005) ("The circuits—although divided on articulation and on some important practical details—all effectively allow piercing of the privilege on something less than a mathematical (more

requisite crime or fraud, the party seeking discovery must also show that the privileged communication "itself" was intended to facilitate or conceal the crime or fraud.[22] That the attorney was unaware that his advice was being used to perpetrate a crime or fraud is typically irrelevant.[23] Courts have also held that there is no obligation that the

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likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud."); *In re* John Doe, Inc., 13 F.3d 633, 637 (2d Cir. 1994) ("probable cause to believe"); *In re* Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997) ("if believed . . . would establish the elements of an ongoing or imminent crime or fraud").

22. *In re* Richard Roe, Inc., 68 F.3d 38, 39–40 (2d Cir. 1995); *see also* United States v. Gorksi, 807 F.3d 451, 462 (1st Cir. 2015) (affirming application of the crime-fraud exception to attorney-client privileged documents upon finding it "reasonable to infer" that defendant had retained the law firm at issue "with the intent of creating outward compliance with the" law so as to perpetuate an ongoing scheme). In *In re* Grand Jury Subpoena, 745 F.3d 681, 691 (3d Cir. 2014), although the Third Circuit noted that it was "a close case," it affirmed the district court's application of the crime-fraud exception. It held that although the communication between attorney and client consisted mainly of the attorney informing the client of the applicable law and advising him against the suggested course of action, the questions posed by the attorney to the client and the explanation given by the attorney about the types of conduct that violate the law were sufficient for the district court to conclude that the advice was used by the client in furtherance of a crime. In contrast, the Third Circuit found the crime-fraud exception inapplicable where an email indicated that the defendant "at most thought about using his lawyer's work product in furtherance of a fraud, but he never actually did so." *In re* Grand Jury Matter #3, 847 F.3d 157, 166 (3d Cir. 2017). The court emphasized that the "in furtherance" requirement exists to ensure that "we are not punishing someone for merely thinking about committing a bad act." *See also In re* Boeing Co., No. 21-40190, 2021 WL 3233505, at *2 (5th Cir. July 29, 2021) (rejecting district court's finding that the documents at issue were "reasonably connected to the fraud" based solely on a "temporal nexus" between the two).

23. *In re Napster*, 479 F.3d at 1090 ("The attorney need not have been aware that the client harbored an improper purpose."); *In re* Grand Jury Investigation, 842 F.2d 1223, 1227 (11th Cir. 1987) (attorney "need not have been aware that he was assisting" in tax evasion); Abbott Labs. v. H&H Wholesale Servs., Inc., No. 1:17-cv-03095, 2018 WL 2459271, at *6 (E.D.N.Y. Mar. 9, 2018) ("'The exception applies even if the attorney is unaware that his advice is sought in furtherance of a crime or fraud' . . . It is enough to find that [the attorney] 'whether he realized it or not' was an instrumentality of the fraud.") (citations omitted); *see also In re* Grand Jury Subpoena, 273 F. Supp. 3d 296, 303 (D. Mass. 2017) ("[T]he actual involvement of the attorney in particular acts has no necessary bearing on whether the two prongs of the crime-fraud exemption are met . . . [w]hat matters is the client's intent."). Some courts have permitted the attorney (although not the client) to assert the work-product privilege

holder of the privilege be informed of the application of the crime-fraud exception where, for example, disclosure might compromise an ongoing investigation.[24]

A district court invoked these principles in connection with emails sought by the House of Representatives Select Committee to Investigate the January 6 Attack on the United States Capitol from a professor, John Eastman, who worked with then-President Trump and his campaign regarding the November 3, 2020, election. In *Eastman v. Thompson*, the district court held that the crime-fraud exception to the attorney-client privilege applied to an email chain sent to Mr. Eastman that had forwarded a draft memo written by Rudy Giuliani, then-President Trump's attorney. The court held that the "draft memo pushed a strategy that knowingly violated the Electoral Count Act" and was "intimately related to and clearly advanced the plan to obstruct the Joint Session of Congress on January 6, 2021."[25] In March 2023, a court ordered Evan Corcoran, former counsel to President Trump, to testify before a grand jury regarding the former President's alleged mishandling of classified documents.[26] In prior testimony before the grand jury, Corcoran had refused to answer certain questions and invoked the attorney-client privilege. In a sealed order, Chief Judge Beryl Howell credited DOJ's arguments regarding the crime-fraud exception and ordered Corcoran to testify again.

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solely for "opinion work product" upon a showing that the attorney was unaware that his services were being used by the client to commit a crime or fraud. *See, e.g.*, *In re* Green Grand Jury Proceedings, 492 F.3d 976, 981 (8th Cir. 2007).

24. *See, e.g.*, United States v. Weed, 99 F. Supp. 3d 201, 205–06 (D. Mass. 2015) (allowing prosecutors to introduce under the crime-fraud exception attorney-client communications between the defendant-attorney and one of his clients—who was not a party to the case, had not been informed of the application of the crime-fraud exception, and had not waived privilege—on the ground that informing the client may compromise ongoing investigations).

25. Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, 2022 WL 894256, at *41–42 (C.D. Cal. Mar. 28, 2022). The court elsewhere noted that "the crime-fraud exception does not require a *completed* crime or fraud but only that the client have consulted the attorney in an *effort* to complete one." *Id*. at *25. The court also articulated the general principles that the exception applies even if the attorney does not participate in the criminal activity, and "even [if] the communication turns out not to help (and perhaps even to hinder) the client's completion of a crime. An attorney's wrongdoing alone may pierce the privilege, regardless of the client's awareness or innocence." *Id*.

26. Kaitlan Collins, Devan Cole, and Katelyn Polantz, *Trump Attorney Ordered to Testify Before Grand Jury Investigating Former President*, CNN (Mar. 18, 2023, 9:39 AM), www.cnn.com/2023/03/17/politics/evan-corcoran-testimony-trump-lawyer/index.html.

Corcoran's testimony and the detailed notes he provided to the grand jury were featured prominently in the June 2023 indictment of the former President for mishandling classified documents.[27]

§ 2:2.6 *Authority to Waive the Corporate Attorney-Client Privilege*

Authority to waive the corporate attorney-client privilege rests with corporate management and is normally exercised by officers and directors of the corporation.[28] Thus, a corporate employee who lacks authority to waive the privilege on behalf of the corporation may be prevented from disclosing privileged communications and asserting an "advice of counsel" defense. In *United States v. Wells Fargo Bank, N.A.*, a bank employee named as a defendant in a civil fraud case was precluded from asserting an "advice of counsel" defense when Wells Fargo refused to waive its attorney-client privilege.[29] Although the court acknowledged that such a result—which prevented the individual from asserting what would be a complete defense to the government's civil allegations—seemed "harsh," it noted that holding otherwise would "render the privilege intolerably uncertain" and incentivize plaintiffs to pursue claims against individual employees to force a waiver of the corporation's privilege.[30] Exercise or waiver by managers of a privilege belonging to a corporation must be consistent with their fiduciary duty to act in the best interests of the corporation and cannot be in their own interest as individuals.[31]

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27. Maggie Haberman, Alan Feuer, and Ben Protess, *Trump Indictment Shows Critical Evidence Came From One of His Own Lawyers*, N.Y. TIMES (June 11, 2023, updated June 13, 2023), www.nytimes.com/2023/06/11/us/politics/trump-indictment-m-evan-corcoran.html.
28. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). *Contra* Stewart Equip. Co. v. Gallo, 107 A.2d 527, 528 (N.J. Super. Ct. 1954) (holding that a person who was both a vice-president and sales manager of his company, but not a director, could not waive the corporate attorney-client privilege because such waiver was not within the scope of his agency); *see also* United States v. Rankin, No. 3:18-CR-00272 (JAM), 2020 WL 3036015, at *2 (D. Conn. June 5, 2020) (former company officer could not assert a claim of attorney-client privilege as to company's documents because the privilege belonged to the company).
29. United States v. Wells Fargo Bank, N.A., 132 F. Supp. 3d 558, 565–66 (S.D.N.Y. 2015).
30. *Id*. at 563 (citing Ross v. City of Memphis, 423 F.3d 596, 604–05 (6th Cir. 2005)). The court also noted that many corporations in a similar situation will choose to indemnify an individual employee where the company's interests in maintaining the attorney-client privilege outweigh the employee's interests in asserting an "advice of counsel" defense. *Id*. at 566.
31. *Weintraub*, 471 U.S. at 348–49.

§ 2:2.7 *Effect of Inadvertent Disclosure of Privileged Information on Waiver*

The privilege may be deemed waived if attorney-client communications are intercepted or if a privileged document is accidentally disclosed. The traditional rule concerning such "inadvertent disclosure" was that the privilege as to the communication is completely waived.[32] On September 19, 2008, new Federal Rule of Evidence 502 was enacted and became effective.[33] It addressed, among other things, the waiver of the attorney-client privilege and the work-product doctrine.

Under the amended rule, inadvertent disclosure of privileged or protected information will not result in a waiver if "reasonable steps" to "prevent disclosure" and "rectify the error" are taken.[34] The Advisory Committee on Evidence Rules summarized a multi-factor test used by most courts as including "the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness."[35] In *Rhoades v. Young Women's Christian Association*, the district court upheld the privilege because the number of inadvertent disclosures (four emails), compared to the extent of the document production (over 1,600 documents), was small; the producing party's categorical review of the documents constituted reasonable precautions to prevent inadvertent disclosure; and the producing attorney's immediate request for the return of the documents followed by a similar letter

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32. *See* Underwater Storage, Inc. v. U.S. Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) (finding that a client waived the privilege as to a letter inadvertently produced by his attorney); 8 WIGMORE, *supra* note 1, § 2325.
33. FED. R. EVID. 502(b).
34. *Id*.
35. FED. R. EVID. 502 advisory committee notes. District courts interpreting the new Rule 502(b) generally apply some variation of the multifactor test discussed in the Advisory Committee Notes accompanying the rule. *See, e.g.*, Thorncreek Apartments III, LLC v. Village of Park Forest, No. 08-C-1225, 2011 WL 3489828, at *7–8 (N.D. Ill. Aug. 9, 2011); Mt. Hawley Ins. Co. v. Felman Prod., Inc., 2010 U.S. Dist. LEXIS 49083, at *35–36 (S.D. W. Va. May 18, 2010); Rhoades v. Young Women's Christian Ass'n of Greater Pittsburgh, No. 09-261, 2009 WL 3319820, at *2 (W.D. Pa. Oct. 14, 2009). *But see* First Am. Core-Logic, Inc. v. Fiserv, Inc., No. 2L10-CV-132-TJW, 2010 WL 4975566, at *4 (E.D. Tex. Dec. 2, 2010) (declining to apply the "five-factor test" because the case did not involve the typical situation that Rule 502 was seemingly designed to address involving "massive discovery where thousands or millions of documents are produced and a few privileged documents are 'inadvertently' disclosed").

five days after discovering the error constituted appropriate measures to rectify the disclosure.[36]

Several decisions provide guidance as to what may be required of a party who inadvertently discloses privileged materials to satisfy Rule 502(b)(3)'s requirement that "the holder promptly took reasonable steps to rectify the error." In *United States v. Sensient Colors, Inc.*, the court interpreted Rule 502(b)(3) to require, upon discovering inadvertent disclosures, the holder of the privilege to recheck its production and reassess its procedures for reviewing privilege in order to determine if other documents had been inadvertently produced.[37] In *Sensient*, the holder, in that case the government, failed to undertake such a review after it "was on notice that something was amiss with its document production and privilege review."[38] As a result, the court held that, although the privilege was not waived as to the first batch of documents discovered to have been inadvertently produced, the privilege was waived with respect to any later-discovered inadvertently produced documents.[39] In *Eden Isle Marina v. United States*, the court found the producing party had waived work-product protection because of the party's nine-and-one-half month delay in placing the document on the privilege log, its failure to seek a protective order, and its failure to object when the document was later used at a deposition, which constituted insufficient measures to rectify the disclosure.[40]

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36. *Rhoades*, 2009 WL 3319820, at *2–3.
37. United States v. Sensient Colors, Inc., Civ. No. 07-1275 (JHR/JS) 2009 WL 2905474 (D.N.J. Sept. 9, 2009).
38. *Id*. at *5.
39. *Id*. at *5–6.
40. Eden Isle Marina v. United States, 89 Fed. Cl. 480, 519 (2009); *see also* Williams v. District of Columbia, 806 F. Supp. 2d 44, 53 (D.D.C. 2011) (finding waiver where the government, after having requested the return of a privileged communication five months after production, and then receiving no response, failed to follow up for over two years); *see also* Novartis Pharms. Corp. v. Super. Ct. of San Diego Cty., No. D077934, 2021 WL 1918774, at *10–11 (Cal. Ct. App. May 13, 2021) (finding waiver where defendant did not take steps to claw back an inadvertently produced privileged document for almost four months after it was introduced at a deposition). Delays of shorter durations have also been found to constitute waiver of the privilege. *See, e.g.*, Mycone Dental Supply Co. v. Creative Nail Design, Inc., No. C-12-00747-RS, 2013 WL 4758053, at *2–3 (N.D. Cal. Sept. 4, 2013) (finding waiver where a third party did not take steps to claw back a document for forty-nine days after it discovered the disclosure during a deposition); *In re* Samaritan All., LLC, No. 07-50735, 2013 WL 653624, at *3–4 (E.D. Ky. Feb. 20, 2013) (finding waiver where the defendant did not assert the privilege until several

Acting promptly and taking reasonable steps to rectify the error will be insufficient to avoid waiver, however, if reasonable steps to prevent disclosure were not taken in the first instance.[41] Where steps have been taken to prevent disclosure, the production size can impact whether a court will find such steps reasonable.[42] Rule 502 also validates certain "claw-back" arrangements, by which parties can agree to produce documents subject to the reservation of privilege claims.[43]

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weeks after plaintiff used an inadvertently produced document in a deposition during which defendant did not raise a privilege objection).

41. *See* Conceptus, Inc. v. Hologic, Inc., No. C 09-02280 (WHA), 2010 WL 3911943, at *2 (N.D. Cal. Oct. 5, 2010) (finding privilege waived because plaintiff did not take reasonable steps to prevent disclosure given that it reproduced documents from a prior litigation without review, in reliance on prior counsel having reviewed the documents before producing them); Shire LLC v. Amneal Pharm., LLC, No. 11-03781, 2014 WL 1509238 (D.N.J. Jan. 10, 2014) (finding use of analytical software to identify privileged documents without attorney involvement in the review process does not constitute reasonable steps to prevent disclosure).

42. *See, e.g.*, LPD N.Y. LLC v. Adidas Am. Inc., 2018 WL 6437078, at *6 (E.D.N.Y. Dec. 7, 2018) (finding defendants had not made a showing to support a clawback, noting that "[t]hough defendants purport to invoke an inadvertent-disclosure clawback provision in a proposed protective order that they drafted but that apparently was never adopted, their failure to have redacted all allegedly privileged emails in their relatively modest production of documents raises questions as to whether their conduct was so careless as to negate a finding of inadvertence"); Stewart Title Guar. Co. v. Owlett & Lewis, P.C., 297 F.R.D. 232 (M.D. Pa. 2013) (finding privilege waived for a document produced twice because the production consisted of only two expandable file folders, "did not involve a large number of documents, and there was no evidence that counsel was under significant time constraints with respect to the production"); Valentin v. Bank of N.Y. Mellon Corp., No. 09 Civ. 9448(GBD)(JCF), 2011 WL 1466122, at *2 (S.D.N.Y. Apr. 14, 2011) (holding that "in light of the small total number of documents [being reviewed], it was appropriate to utilize a simple visual review for privilege," but noting that the same methodology "might not be sufficient in a case where there is a large volume of data, including electronically stored information").

43. *In re* Law Firm of Snow v. Microsoft Corp., 2008 U.S. Dist. LEXIS 99941 (D. Utah Dec. 10, 2008). According to the Advisory Committee Notes to Rule 502(d), a "court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party." FED. R. EVID. 502, Advisory Committee Notes, subd. (d); *see also* Great-W. Life & Annuity Ins. Co. v. Am. Economy Ins. Co., No. 2:11-CV-02082-APG-CWH, 2013 WL 5332410, at *14 (D. Nev. Sept. 23, 2013) (enforcing the parties' agreement as providing that "inadvertently produced documents, upon a determination that the documents are privileged, must be returned without waiver to the disclosing party *regardless of the care taken by the disclosing party*" because "Rule 502 contemplates that parties may enter such agreements and that courts will enforce

These agreements are a useful way to avoid the excessive costs of pre-production review for privilege and work product.[44]

Even if an adversary will not agree to a claw-back provision, a party may be able to obtain one by petitioning the court, under Rule 26(c)(1) of the Federal Rules of Civil Procedure, for a protective order that contains a claw-back provision.[45] Although Rule 502 will assist a party that inadvertently produces privileged documents in having those documents returned and all copies made by the other party destroyed, collateral consequences of the inadvertent disclosure may remain.[46]

§ 2:3 Work-Product Protection

The work-product doctrine, first recognized in the landmark case of *Hickman v. Taylor*,[47] is now governed by a uniform federal standard codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. The doctrine protects against discovery of documents and tangible things

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them") (emphasis added). *But see* Potomac Elec. Power Co. v. United States, 107 Fed. Cl. 725 (Fed. Cl. 2012) (rejecting proposed "claw-back" provision that allowed the parties to retract inadvertent disclosures of privileged material because it did not account for "when such a discovery is made or whether the timing and other circumstances of the discovery is demonstrative of reasonable diligence," as required by Rule 502(b)).

44. Proposed New Evidence Rule 502, Committee on Rules of Practice and Procedure: Judicial Conference of United States (Sept. 2007), *contained in* Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, to Senator Patrick J. Leahy, et al. (Sept. 26, 2007).

45. *See* Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DJW, 2010 WL 2949582, at *5–6 (D. Kan. July 22, 2010) (entering a protective order containing a claw-back provision because such a provision would serve the purposes behind Rule 502 of the Federal Rules of Evidence, such as permitting the parties to respond to discovery in an expeditious manner without the need for time-consuming and costly pre-production privilege reviews).

46. *See, e.g.*, *In re* TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827, 2009 WL 2905898, at *3 (N.D. Cal. Sept. 10, 2009) (ordering that a privileged document inadvertently produced be returned and all copies made by the DOJ destroyed, but declining to rule that the DOJ was prohibited from using its attorney work product that resulted from its review of the privileged document—developing the theory of its investigation, preparing for witness interviews, identifying the author of the privileged communication as a target of the investigation, and building an obstruction of justice case against him—because twenty-two months had passed since the inadvertent disclosure and there was nothing on the face of the document to suggest it was privileged). Therefore, counsel should continue to exercise diligence in reviewing documents for privilege in advance of production.

47. Hickman v. Taylor, 329 U.S. 495, 509–11 (1947).

prepared in anticipation of litigation or for trial.[48] In this regard, the doctrine protects both the attorney and the client, and the attorney should ordinarily be entitled to claim protection for work product even if the client does not.[49]

§ 2:3.1 Work-Product Protection Qualified

In contrast to the absolute protection afforded to attorney-client privileged material, work-product protection is qualified and will give way where a party in a litigation demonstrates "substantial need" for the materials and that it cannot, without "undue hardship," obtain the "substantial equivalent" of the materials.[50] The work-product doctrine distinguishes between "fact work product" and "opinion work product."[51] Opinion work product reflects an attorney's thought

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48. *Id*. Courts have made clear that litigation or trial must be reasonably anticipated for the work-product doctrine to apply. *See, e.g.*, Moore v. Plains All Am. GP, LLC, 2015 U.S. Dist. LEXIS 124794, at *13 (E.D. Pa. Sept. 17, 2015) (materials prepared as part of a process to avoid litigation "can hardly be said to be one in anticipation of litigation") (internal citation omitted); FTC v. AbbVie, Inc., 2015 WL 8623076, at *13 (E.D. Pa. Dec. 14, 2015) (documents that would have been prepared irrespective of litigation are not protected work product).

49. Counsel should be mindful, however, of indiscriminately labeling documents as "Attorney Work Product," as some courts have found that a client's duty to preserve documents begins as of the date on which counsel first begins to assert work-product protection in advance of what ultimately may become a litigation. *See, e.g.*, Siani v. State Univ. of N.Y., No. CV09-407 (JFB) (WDW), 2010 WL 3170664, at *5, *10 (E.D.N.Y. Aug. 10, 2010) (finding that, if litigation was reasonably foreseeable for purposes of asserting attorney work-product protection, "it was reasonably foreseeable for all purposes," including a duty to preserve documents related to litigation); Sanofi-Aventis Deutschland GmbH v. Glenmark Pharm., Inc., No. 07-CV-5855 (DMC-JAD), 2010 WL 2652412, at *5–6 (D.N.J. July 1, 2010) (granting plaintiff's motion for adverse inference based on defendant's destruction of documents after claiming work-product protection applied); *cf.* Allstate Tex. Lloyd's v. McKinney, 964 F. Supp. 2d 678, 686 (S.D. 2013) (granting defendant's motions for sanctions against insurer for disposing of evidence after the date on which it began withholding documents on the basis of work-product protection); Maracich v. Spears, 570 U.S. 48, 90 (2013) (Ginsburg, J., dissenting) (noting that the phrase "in anticipation of litigation" is "commonly used to refer to the time at which the work-product privilege attaches to an attorney's work for a client and the time at which a party has a duty to preserve material evidence").

50. FED. R. CIV. P. 26(b)(3); *see Hickman*, 329 U.S. at 511; John Doe Corp. v. United States, 675 F.2d 482, 492–93 (2d Cir. 1982).

51. *See, e.g.*, Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc., 778 F.3d 142, 151 (D.C. Cir. 2015) (holding that: (1) financial analyses requested by in-house counsel in connection with a litigation settlement

processes, opinions, and conclusions, and thus warrants heightened protection, discoverable only in rare and exceptional circumstances.[52] In addition, although disclosure to a third party (absent an exception) typically waives the protections of the privilege, courts have held that work product protection may survive disclosure to a third party if that disclosure was not to an adversary.[53]

§ 2:3.2 Applicability to Materials from an Internal Investigation

In *Upjohn*, the Supreme Court held that materials prepared in the course of an internal investigation in anticipation of litigation were protected by the work-product doctrine.[54] Future litigation has been found to be a likely possibility where an internal investigation was commenced in response to an investigation by a government agency.[55] In some cases, courts have looked to the timing of the investigation in determining applicability of the work-product doctrine.[56] The

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were attorney work product prepared "in anticipation of litigation," and (2) those materials were "fact," not "opinion," work product and were thus discoverable upon the FTC's showing of "substantial need" and "undue hardship" because the materials consisted of "factual information produced by non-lawyers that . . . [did] not reveal any insight into counsel's legal impression or their views of the case").

52. *See, e.g.*, Upjohn v. United States, 449 U.S. 383, 399–402 (1981).

53. *See, e.g.*, United States v. Sanmina Corp. & Subsidiaries, 968 F.3d 1107, 2020 U.S. App. LEXIS 24936 (9th Cir. Aug. 7, 2020) (finding that company's disclosure to DLA Piper of attorney memoranda for the purpose of obtaining a non-legal opinion regarding valuation, and disclosure to the IRS of DLA Piper's report referencing attorney memoranda, waived attorney-client privilege but not opinion work product protection: "[C]onsistent with our sister circuits as well as precedent on the unique purposes for the work-product doctrine, we hold that disclosure of work product to a third party does not waive the protection unless such disclosure is made to an adversary in litigation or 'has substantially increased the opportunities for potential adversaries to obtain the information.'" (internal citation omitted)).

54. *Upjohn*, 449 U.S. at 397.

55. *See* Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc., 331 F.R.D. 218, 233 (E.D.N.Y. 2019) (work-product doctrine protected materials where, at the time that manufacturer retained counsel, government investigations and civil litigation arising from possible violations of laws were anticipated); *In re* Grand Jury Subpoena, 220 F.R.D. 130, 147 (D. Mass. 2004) ("Many courts have held, however, and this Court agrees, that once a governmental investigation has begun, litigation is sufficiently likely to satisfy the 'anticipation' requirement.") (citations omitted).

56. *See, e.g.*, Banneker Ventures, LLC v. Graham, 253 F. Supp. 3d 64, 72 (D.D.C. 2017) (finding work-product doctrine inapplicable where retention of counsel to conduct investigation occurred more than two

work-product doctrine, however, does not apply simply because "the subject matter of a document relates to a subject that might conceivably be litigated."[57] That a company may be concerned that a party "might bring litigation sometime in the future is not sufficient to qualify for attorney work product protection."[58]

§ 2:3.3 Materials Protected by the Work-Product Doctrine

Protected materials include interview notes and investigative materials, such as memoranda of interviews with current or former employees or non-employee witnesses, that reveal the attorney's analyses and mental processes.[59] In some cases, the work-product doctrine also has been applied to protect otherwise non-privileged documents compiled by an attorney on the theory that the choice and organization of documents may reflect the attorney's mental impressions.[60]

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years after company's receipt of letter raising allegations of improper conduct). *But see* SEC v. NIR Grp., LLC, 283 F.R.D. 127, 134 (E.D.N.Y. 2012) ("While close temporal proximity may provide some indication a particular document was prepared in anticipation of litigation, temporal distance is ultimately an unreliable indicator of the applicability of work product privilege.").

57. United States *ex rel.* Wollman v. Mass. Gen. Hosp., Inc., No. CV 15-11890-ADB, 2020 WL 4352915, at *9 (D. Mass. July 29, 2020).

58. *Id.*; *see also* Hernandez v. The Office of the Comm'r of Baseball, 335 F.R.D. 45 (S.D.N.Y. 2020) (expert's memorandum setting forth his methodology was not protected by work-product doctrine because memorandum was not created at request of the attorney and expert stated that he prepared the memorandum for himself in anticipation of his own deposition).

59. *Upjohn*, 449 U.S. at 399 ("Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes.") (citations omitted); *see also In re* Cardinal Health, Inc. Sec. Litig., 2007 U.S. Dist. LEXIS 36000, at *17–18 (S.D.N.Y. Jan. 26, 2007).

60. *Compare* Sporck v. Peil, 759 F.2d 312, 315–17 (3d Cir. 1985), *and In re Cardinal Health*, 2007 U.S. Dist. LEXIS 36000, at *22–24, *with In re* Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002, 318 F.3d 379, 386 (2d Cir. 2002) (affirming order to compel production, noting that "[t]o fit within the [*Sporck* rule], the party asserting the privilege must show 'a real, rather than speculative, concern' that counsel's thought processes 'in relation to pending or anticipated litigation' will be exposed through disclosure of the compiled documents") (citations omitted), *and In re* Search Warrant for Law Offices Executed on Mar. 19, 1992, 153 F.R.D. 55, 58 (S.D.N.Y. 1994) (holding that a corporation's records do not become confidential work product merely because an attorney removed selected records from the corporation's offices and

§ 2:3.4 Government Assertions of Work-Product Protection over Investigative Materials

The government often successfully relies on work-product protection in civil litigation to shield government attorneys' and agents' investigative notes, memoranda, and other materials from production.[61] This, of course, gives the government an unfair advantage in civil litigation because it deprives the defense of earlier and potentially varying versions of witness statements and information on possible leads.

A 2015 ruling from the U.S. District Court for the District of Columbia, however, focused on this inequity, and found that the defense overcame the government's assertion of work product. In *United States ex rel. Landis v. Tailwind Sports Corp.*,[62] a civil qui tam action against cyclist Lance Armstrong, the defense successfully compelled production of witness interview memoranda that government agents had prepared during the government's earlier criminal investigation of Armstrong, despite the government's claim of work-product protection. The court found that the memoranda were "substantially verbatim agent summaries" of discussions that occurred during the criminal investigation and were thus fact work product (as opposed to opinion work product), and further found that Armstrong had demonstrated a substantial need for the memoranda: "[B]ecause the civil lawyers litigating this qui tam action have received a substantial advantage from having access to the fruits of the prior criminal investigation, fairness dictates that both sides have equal access to relevant witness statements developed by law enforcement in the prior criminal investigation."[63]

§ 2:4 The Department of Justice's Waiver Policy and the Sentencing Guidelines

The corporation's interest in protecting from disclosure its privileged material and work product from an internal investigation must now often give way to the insistence of government attorneys that disclosure be made to reflect corporate cooperation. Cooperation is

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arranged them in his own office while investigating possible illegal activity by the corporation).

61. *See, e.g.*, SEC v. Nadel, 2013 WL 1092144, at *1–3 (E.D.N.Y. Mar. 15, 2013); SEC v. Strauss, 2009 WL 3459204, at *3–7 (S.D.N.Y. Oct. 28, 2009); SEC v. Downe, 1994 WL 23141, at *2–4 (S.D.N.Y. Jan. 27, 1994).
62. United States *ex rel.* Landis v. Tailwind Sports Corp., 303 F.R.D. 429 (D.D.C. 2014).
63. *Id*. at 4. *See also* United States v. Berkeley Heartlab, Inc., No. 9:11-CV-1593-RMG, 2017 WL 1533434, at *4 (D.S.C. Apr. 27, 2017).

the key factor that government prosecutors are currently required to consider in deciding whether or not to charge an organization with criminal wrongdoing. For this chapter, we focus on DOJ's expectations, as reflected in memoranda and guidance, regarding corporate cooperation and the implications of those expectations for corporate waiver. To inform where we are today, we must trace DOJ's evolving views on this issue, as described below.

§ 2:4.1 Evolution of DOJ Policy on Waiver of Privilege

In 1999, then-Deputy Attorney General Eric Holder circulated a memorandum to federal prosecutors titled "Federal Prosecution of Corporations" ("Holder Memorandum").[64]

It was essentially a policy statement that, among other guidelines for the prosecution of corporations, provided: "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, *and to waive the attorney-client and work product privileges*."[65] Although the Holder Memorandum emphasized that waiver was not an absolute requirement for a company seeking cooperation credit, the explicit reference to waiver of privilege as a factor generated substantial concern among corporations.

On January 20, 2003, then-Deputy Attorney General Larry D. Thompson promulgated a revision of the Holder Memorandum, titled "Principles of Federal Prosecution of Business Organizations," which came to be known as the "Thompson Memorandum."[66]

Among the factors identified by the Thompson Memorandum as relevant to a corporate charging decision were the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents," including, "if necessary, the waiver of corporate attorney-client and work product protection."[67]

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64. Memorandum from Eric Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice (June 16, 1999), www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.
65. *Id*. (emphasis added).
66. Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice (Jan. 20, 2003).
67. *Id*. After the Thompson Memorandum was promulgated, DOJ representatives explained that the waiver of core attorney-client privileged communications—that is, the advice given to clients—should be necessary only in the rare circumstances where: (i) employees disregarded advice of counsel that a particular course of conduct would violate the law, in which case successful prosecution of those employees may require government access to that advice of counsel; or (ii) the corporation argues

Notably, whereas the Holder Memorandum apparently was merely advisory, the Thompson Memorandum more clearly *required* that prosecutors apply its principles in every case where a company might be criminally liable.[68]

On November 1, 2004, Amendments to the Federal Sentencing Guidelines took effect, including section 8C2.5, which addresses reductions in sentences for corporations.[69] Application Note 12 to section 8C2.5 stated that "[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in [the applicable] culpability score."[70] In an exception broad enough to swallow this general rule, however, the commentary went on to state that waiver would still be required if "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[71] An amendment deleting the waiver language of Application Note 12 became effective on November 1, 2006. It was a rare reversal by the USSC of itself and, in effect, rebuked the DOJ on its practice of seeking waivers of the attorney-client privilege and work-product protection.

On October 21, 2005, then-Acting Deputy Attorney General Robert D. McCallum issued the McCallum Memorandum, which affirmed the principles of the Thompson Memorandum, including the practice of seeking waivers, but required that each U.S. Attorney's Office and DOJ "component" establish its own review process for waiver requests.[72] The McCallum Memorandum did not require that these review processes be consistent among offices and provided no guidance or minimum standards on what should constitute a meaningful review process for waiver requests.

Increasing criticism of the DOJ's waiver policy led to the McNulty Memorandum, issued by then-Deputy Attorney General Paul J.

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that it had relied in good faith on advice of counsel when it engaged in the conduct at issue. *Interview with United States Attorney James B. Comey Regarding the Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, 51 U.S. ATTORNEYS' BULLETIN, Nov. 2003, at 1, www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf.

68. *Id*. ("Attached to this memorandum are a revised set of principles to guide Department prosecutors as they make the decision whether to seek charges against a business organization.").
69. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2004).
70. *Id*. § 8C2.5 cmt. 12.
71. *Id*.
72. Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., U.S. Dep't of Justice (Oct. 21, 2005).

McNulty on December 12, 2006.[73] The McNulty Memorandum reiterated the Thompson Memorandum factors for a corporate charging decision, but no longer stated that such cooperation includes "if necessary, the waiver of corporate attorney-client and work-product protection."[74] While still identifying waiver as a relevant consideration in determining whether a corporation's cooperation is sufficient to avoid prosecution, the McNulty Memorandum directed prosecutors to request waiver only "when there is a legitimate need for the privileged information," not when "merely desirable or convenient."[75]

§ 2:4.2 The Principles of Federal Prosecution of Business Organizations

On August 28, 2008, the Department of Justice replaced the McNulty Memorandum in the form of the revised "Principles of Federal Prosecution of Business Organizations." The revisions, authored under the direction of then-Deputy Attorney General Mark Filip, are the product of substantial pressure on the Department of Justice to modify its policy that a company's willingness to waive the attorney-client privilege or work-product protection is relevant to the charging decision.[76] That pressure included pending congressional legislation to bar DOJ from making charging decisions based on waiver of privilege. The Principles, bowing to those pressures, expressly state that credit for cooperation will not depend on waiver of the attorney-client privilege, but rather on disclosure of the "facts known to the corporation about the putative criminal misconduct under review."[77] As explained below, however, the Principles leave

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73. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice (Dec. 12, 2006), www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.
74. *Id*. at 4.
75. *Id*. at 8–9.
76. By letter dated July 9, 2008, Deputy Attorney General Mark Filip advised Senators Patrick J. Leahy (D-VT) and Arlen Specter (R-PA), the chairman and ranking member, respectively, of the Senate Judiciary Committee, that "in the coming weeks" DOJ would once again revise its "Principles of Federal Prosecution of Business Organizations." The letter in effect acknowledged that the McNulty memo had not allayed concerns that the "perceived widespread use of privilege waivers has inhibited candid communications between corporate employees and legal counsel whose advice has been sought."
77. U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations § 9-28.710, www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf [hereinafter Principles]. The Principles have also been incorporated into the U.S. Attorneys' Manual. As described in more detail in *supra* chapter 6, the SEC considers similar factors (known as the "Seaboard Factors") when exercising its discretion to bring enforcement

unanswered important questions about whether as a practical matter companies will still have to waive important privilege protections in order to obtain cooperation credit in any charging decision.

Obviously sensitive to the criticism of the McNulty Memorandum and its predecessors, the Principles insist that waiver was never considered an absolute prerequisite for corporate cooperation credit; nonetheless, the Principles acknowledge the widespread concern within the legal community that the prior guidelines "either wittingly or unwittingly" were used to coerce corporations into waiving their privilege.[78] Consequently, the Principles state that, "while a corporation remains free to convey non-factual or 'core' attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so."[79]

The Principles note that corporations may collect information about potential wrongdoing through an internal investigation that may generate materials protected by the attorney-client privilege or the work-product doctrine. However,

> the government's key measure of cooperation must remain the same as it does for an individual: Has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected.[80]

As a practical matter, this likely means that companies will be expected by federal prosecutors to make oral proffers of the facts known to them and/or otherwise uncovered by an internal investigation.

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proceedings against corporations, including "whether the company provided the SEC with the results of its investigation and cooperated with the SEC's investigation." *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23, 2001). That said, the *SEC Enforcement Manual* makes clear that "[a] party's decision to assert a legitimate privilege will not negatively affect their claim to credit for cooperation." SEC ENFORCEMENT MANUAL § 4.3 (Oct. 28, 2016), www.sec.gov/divisions/enforce/enforcementmanual.pdf.

78. *Id*.

79. *Id*.

80. *Id*. § 9-28.720.

Indeed, the Principles give specific direction, albeit within a footnote, with regard to employee interviews conducted by corporate counsel during an internal investigation. In such situations, although the corporation need not produce—and U.S. attorneys should not request—"protected notes or memoranda generated by the lawyers' interviews," the U.S. attorneys may request the relevant factual information that the company attorney acquired from the employees through the interviews.[81]

Under the U.S. Supreme Court's decision in *Upjohn Co. v. United States*,[82] however, communications by individual employees to attorneys for the corporation who are conducting an internal investigation—including communications of facts—are protected by the corporate attorney-client privilege. Even by way of oral proffer, compelling production of the communications on an employee-by-employee basis on pain of loss of cooperation credit would appear to deprive companies of *Upjohn* protection; that is, force them to waive a well-established privilege.

Moreover, while the unproduced interview memoranda and the notes will retain their privileged character in any civil proceedings, the same may not be true of the attorney making the oral proffer. Theoretically, the company's attorney could be compelled to testify, in a civil proceeding, to anything he or she told DOJ. Many attorneys doubtless would prefer to produce their memoranda and notes, rather than make themselves available, to private litigants.

In other areas touching on privilege issues, the Principles largely restate existing policies. For example, the Principles make clear that material not covered by privilege, including emails between non-attorney employees and business records, may still be requested.

Likewise, the Principles reserve the right to request communications underlying an "advice of counsel" defense. According to the Principles,

> [t]he Department cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would otherwise be the appropriate course of prosecutive action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices. Accordingly, where an

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81. *Id*. at n.3. Nor will this likely mean that the company can simply provide an unsourced chronology of facts; rather, DOJ may request the identities of the employees who furnished the factual information and a description of the role of each employee.

82. Upjohn Co. v. United States, 449 U.S. 383 (1981).

> advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.[83]

The Principles also reserve the right to seek communications in furtherance of a crime or fraud, which by law fall outside the scope of the privilege. Separately, the fate of employee discipline as a relevant factor remains uncertain. In a letter to the Senate Judiciary Committee in July, Filip represented that under the forthcoming Principles, prosecutors "will not consider whether the corporation has retained or sanctioned employees in evaluating cooperation."[84]

Although this factor no longer appears in the Principles' subsection on cooperation credit, the subsection on restitution and remediation states that "[a]mong the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct."[85] The Principles explain the relevance of this factor by noting that prosecutors "should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers."[86] Part of the discrepancy between Filip's original letter and the revised Principles is explained by his letter's caveat that, although employee discipline should not be relevant for cooperation, it may still be relevant for evaluating the quality of remedial measures and compliance programs.

However, given that remediation and corporate compliance programs are still relevant factors in determining whether to charge a corporation and "how to resolve corporate criminal cases," it seems likely that this finely nuanced distinction will have no practical effect.

§ 2:4.3 The Yates Memo

On September 9, 2015, DOJ issued a memorandum entitled "Individual Accountability for Corporate Wrongdoing."[87] Authored by then-Deputy Attorney General Sally Yates, the "Yates Memo" provided guidance to federal prosecutors as to the "steps that should be taken in any investigation of corporate misconduct."[88] Although, in

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83. Principles, *supra* note 77, § 9-28.720.
84. Letter from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Senator Patrick J. Leahy, et al. (July 9, 2008).
85. Principles, *supra* note 77, § 9-28.900.
86. *Id*.
87. *See* Memorandum from Deputy Att'y Gen. Sally Quillian Yates, U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo].
88. *Id*.

the past, cooperation has been measured by a sliding scale of sorts, the Yates Memo put corporate cooperation in more black-and-white terms: For a corporation to receive "any" consideration for cooperation credit, it must "provide to the Department *all* facts relating to that misconduct" and "identify culpable individuals at all levels in corporate cases."[89] This means, of course, that to secure cooperation credit, it is not sufficient for defense counsel merely to provide federal prosecutors with a narrative of the facts related to the alleged misconduct along with a corporate organization chart. Instead, counsel has to "name names" as to who within the corporation is responsible for the misconduct, and provide all of the details, even if those facts were derived solely from interviews covered by the attorney-client privilege.[90]

In November 2018, Deputy Attorney General Rod Rosenstein announced modifications to this policy.[91] Although not explicitly retracting the pronouncements expressed in the Yates Memo, Rosenstein clarified that DOJ's focus is only on those corporate actors "who play significant roles in setting a company on a course of criminal conduct," not on those employees "whose involvement was not substantial, and who are not likely to be prosecuted."[92] Rosenstein encouraged companies to have "full and frank" discussions with prosecutors about the facts to help the government identify those employees with substantial involvement in the misconduct.[93]

This policy is consistent with DOJ guidance to companies seeking to obtain cooperation credit in False Claims Act (FCA) investigations. Echoing the modifications announced by Rosenstein, DOJ's FCA guidance exhorts companies seeking to earn credit in FCA investigations to identify "all individuals substantially involved in or responsible for the misconduct" and to "[d]isclos[e] facts relevant to the government's investigation gathered during the entity's independent investigation."[94] The FCA guidance goes further, however, into privileged territory insofar as it also counsels such companies

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89. *Id*. (emphasis added).
90. *Id*.
91. *See* Rod Rosenstein, Deputy Att'y Gen., Remarks at American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018).
92. *Id*.
93. *Id. But see* Deputy Att'y Gen. Lisa O. Monaco, Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021) (restoring the prior guidance outlined in the Yates memo, which had changed in 2018 per Deputy Attorney General Rosenstein's remarks).
94. In her remarks, however, Deputy Attorney General Monaco noted that limiting disclosures to only those "substantially involved" in the misconduct would no longer be sufficient; instead, DOJ expects companies to

to provide the "*attribution of facts to specific sources rather* than a general narrative of facts."[95]

Through pronouncements immediately following issuance of the Yates Memo, DOJ expressed that the Yates Memo has not changed DOJ policy and that companies need not waive privilege to receive cooperation credit.[96] But if counsel were required not only to provide the facts learned during the investigation—including who was interviewed and what facts they reported—but also to apply their subjective judgment and identify the individuals who counsel believe are substantially responsible, the privilege and work-product doctrine are likely to be eroded in practice.

A decision from the Southern District of New York illustrates the difficulties that in-house and outside counsel might face when trying to navigate between cooperation and inadvertent waiver of privilege. In *United States v. Stewart*, the district court held that J.P. Morgan's disclosure of information to FINRA operated as a waiver in a subsequent criminal insider trading case.[97] In *Stewart*, in-house counsel for J.P. Morgan submitted a letter in response to a routine FINRA inquiry, identifying J.P. Morgan employees and disclosing certain information regarding the in-house counsel's communications with one particular employee, Sean Stewart, in response to FINRA's request. Each of J.P. Morgan's letters to FINRA included explicit language that J.P. Morgan, through its responses, did not intend to waive attorney-client privilege. DOJ subsequently charged Stewart and his father with insider trading, after which DOJ moved to compel the in-house attorney's testimony concerning his communications with Stewart. J.P. Morgan resisted, arguing that the in-house attorney's interview of Stewart and email communications were protected by the attorney-client privilege and the work-product doctrine.

The district court disagreed, holding that J.P. Morgan waived the attorney-client privilege to the extent that it had "disclosed the

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"identify all individuals involved in the misconduct, regardless of their position, status or seniority" to qualify for cooperation credit. *Id*.

95. *See* Press Release No. 19-478, U.S. Dep't of Justice, Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual (May 7, 2019), www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.

96. *See* Leslie R. Caldwell, Assistant Att'y Gen., Remarks at Second Global Investigations Review Conference (Sept. 22, 2015) (stating that the Yates Memo "does not change existing department policy regarding the attorney-client privilege or work product protection. Prosecutors will not request a corporate waiver of these privileges in connection with a corporation's cooperation").

97. Mem. Order, United States v. Stewart, No. 1:15-cr-00287-LTS-2 (S.D.N.Y. July 22, 2016), ECF No. 141.

contents of privileged communications" rather than non-privileged facts. The court rejected J.P. Morgan's argument that the privilege was not waived because its disclosure was mandatory under FINRA Rule 8210.[98] The court explained that J.P. Morgan's disclosures were voluntary because FINRA "is a self-regulatory organization and J.P. Morgan's disclosures were not compelled by court or other government order, nor was the information seized."[99]

In a decision from the Southern District of Florida, the court found that outside counsel had waived work-product protection when it voluntarily shared with the SEC oral summaries of the notes and memoranda its attorneys had prepared in connection with company witness interviews. Not convinced that there was any meaningful distinction for waiver purposes between disclosure of materials through actual production versus "oral download[ ]," the court held that the law firm must disclose its interview notes and memoranda for those interviews it summarized for the S.E.C."[100]

Similarly, in *United States v. Coburn*, the court found that when a company's outside counsel provided DOJ with "detailed accounts" of its attorneys' witness interviews, the company had "handed these materials to a potential adversary and destroyed any confidentiality they may have had, undermining the purpose of both attorney-client and work-product privileges." The court found a broad subject matter waiver, requiring production of not only "all memoranda, notes, summaries, or other records of the interviews themselves," but also of any "documents and communications that were reviewed and formed part of the basis of any presentation, oral or written, to the DOJ in connection with the investigation."[101]

In contrast, the Fourth Circuit found that a corporation did not waive attorney-client privilege through its disclosures to the government, and ordered a reversal of the district court's decision on mandamus.[102] In *In re Fluor*, the company made a disclosure to the government, as it was required to do under statute. Although that disclosure was informed by advice of counsel, the Fourth Circuit found that the disclosure did not reveal attorney-client communications

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98. FINRA Rule 8210 requires members "to provide information orally, in writing, or electronically . . . with respect to any matter involved in the investigation, complaint, examination, or proceeding," and further states that "no member . . . shall fail to provide information or testimony . . . pursuant to this Rule."

99. *Stewart*, No. 1:15-cr-00287-LTS-2, at *4.

100. SEC v. Herrera, No. 17-20301-CIV, 2017 WL 6041750, at *4–6 (S.D. Fla. Dec. 5, 2017).

101. United States v. Coburn, No. 2:19-cr-00120 (KM), 2022 WL 357217, at *6 (D.N.J. Feb. 1, 2022).

102. *In re* Fluor Intercontinental, Inc., 803 F. App'x 697 (4th Cir. 2020).

and therefore did not waive the attorney-client privilege.[103] According to the court, "the fact that Fluor's disclosure covered the same topic as the internal investigation or that it was made pursuant to the advice of counsel doesn't mean that privileged communications themselves were disclosed."[104] The court explained that, to find waiver, the evidence must suggest that the "disclosure quoted privileged communications or summarized them in substance and format."[105]

The lesson learned from these cases is that in providing factual findings to regulators—whether in writing or orally—counsel should not relay the actual privileged communications between counsel and company personnel in the form of "I asked him *ABC*, and he told me *XYZ*." But the question remained: Would answers short of that be considered sufficient—in the post-Yates Memo world—to satisfy regulators and DOJ that a company has provided "all" the relevant facts and identified every individual who was substantially involved in or responsible for the conduct? Corporations that do waive privilege—or think they are toeing the line by providing all facts and naming names—must be aware of a potentially significant side effect: Waivers in government investigations may very likely waive attorney-client privilege and work-product protection as to third parties and, as a result, render the corporation more vulnerable to civil lawsuits. We address this important topic below.

§ 2:5 Disclosure to the Government and Its Impact on Waiver of the Attorney-Client Privilege and Work-Product Protection

§ 2:5.1 Attorney-Client Privilege and Selective Waiver

Only one circuit court has upheld the principle of "limited" or "selective" waiver of attorney-client privilege. In *Diversified Industries, Inc. v. Meredith*,[106] the Eighth Circuit held that the privilege was not waived against subsequent private litigants where the corporation "voluntarily surrend[ered]" privileged material from an internal investigation to an agency in response to a subpoena in a nonpublic SEC investigation. The court reasoned that total waiver would provide a disincentive for self-investigation and voluntary reporting of wrongdoing.[107] As the Eighth Circuit stated: "To hold otherwise

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103. *Id*. at 702.
104. *Id*.
105. *Id*.
106. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).
107. *Id*.

may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."[108]

Every other federal appeals court addressing the issue has rejected the *Diversified Industries* "selective waiver" holding and concluded that disclosure of a company's internal investigative files to the government constitutes a complete waiver of attorney-client privilege as to third parties, whether the disclosure to the government was pursuant to a confidentiality agreement or not.[109] As the District of Columbia Circuit stated in *Permian Corp. v. United States*, the "client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit."[110] Although the Second Circuit has not specifically held that disclosure to the government operates as a complete waiver of attorney-client privilege, it expressed clear support for this position in *In re Steinhardt Partners, L.P.*[111]

In addition, waiver of the privilege as to one protected document—particularly if the document is a final report—may be found to waive the privilege with respect to all documents relating to the same subject matter, including notes and questionnaires.[112]

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108. *Id*.

109. *See, e.g.*, *In re* Pac. Pictures Corp., 679 F.3d 1121 (9th Cir. 2012); *In re* Qwest Commc'ns Int'l, Inc. Sec. Litig., 450 F.3d 1179, 1201 (10th Cir. 2006); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294–304 (6th Cir. 2002); United States v. Mass. Inst. of Tech., 129 F.3d 681, 684–86 (1st Cir. 1997); Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1423–27 (3d Cir. 1991); *In re* Martin Marietta Corp., 856 F.2d 619, 623–24 (4th Cir. 1988); *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1369–70 (D.C. Cir. 1984); Permian Corp. v. United States, 665 F.2d 1214, 1220–21 (D.C. Cir. 1981); *see also* Burden-Meeks v. Welch, 319 F.3d 897, 899 (7th Cir. 2003) ("Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option.").

110. *Permian Corp.*, 665 F.2d at 1221.

111. *In re* Steinhardt Partners, L.P., 9 F.3d 230, 234–36 (2d Cir. 1993) (rejecting selective waiver doctrine in the context of finding that voluntary disclosure of legal memorandum waived attorney work-product protection) (citing *Permian Corp.*, 665 F.2d at 1221).

112. *See Martin Marietta*, 856 F.2d at 622–24.

§ 2:5.2 Work-Product Protection and Selective Waiver

Because of the varying purposes of the attorney-client privilege and the work-product doctrine, the rules of waiver differ as well. Courts have distinguished between "the strict standard of waiver in the attorney-client privilege context with the more liberal standard applicable to the work product [protection]."[113] Thus, in contrast to the "strict standard" applicable to attorney-client privilege, "because the work product [protection] looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, it is not automatically waived by the disclosure to a third party."[114]

As a result, there is little uniformity among courts on the issue of under what circumstances disclosure of work product to the government will operate as a complete waiver. The lack of uniformity becomes especially critical when a company has to decide whether to make partial disclosure to a law enforcement agency of the results of an internal investigation.

Although the Eighth Circuit has not yet decided the specific issue, its emphasis on the benefits of corporate cooperation in *Diversified Industries* (which involved only the attorney-client privilege) strongly suggests that it would also apply selective waiver to protect corporate disclosures of work product to government agencies.[115] The Fourth Circuit has expressly adopted the selective waiver doctrine in the context of work-product protection, but only with respect to "opinion work product."[116]

At the other end of the spectrum, the Third and Sixth Circuits take the strict view of completely rejecting selective waiver and finding that work-product protection is waived by disclosure to the government, even where the disclosure is subject to a confidentiality agreement with the government.[117] The First and Tenth Circuits have similarly rejected selective waiver, although neither court indicated

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113. *Permian Corp.*, 665 F.2d at 1219.

114. *In re* Grand Jury Subpoena, 220 F.3d 406, 409 (5th Cir. 2000); 8 WRIGHT & MILLER, *supra* note 1, § 2024.

115. *See* Brown v. NCL (Bah.), Ltd., 155 F. Supp. 3d 1335, 1339 (S.D. Fla. 2015) (citing Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 604, n.1 (8th Cir. 1977), and finding no work-product waiver where disclosure was made voluntarily to a government agency in a non-adversarial context to assist law enforcement).

116. *Martin Marietta*, 856 F.2d at 623.

117. *Columbia/HCA Healthcare*, 293 F.3d at 302–04; *Westinghouse Elec. Corp.*, 951 F.2d at 1428–31; *see In re* Merck & Co. Sec., Derivative & ERISA Litig., No. 05-02367, 2012 WL 4764589, at *3–4 (D.N.J. Oct. 5, 2012) (rejecting selective waiver even when the government and defendant entered into "an *express confidentiality and non-waiver agreement* in connection with the government investigation") (emphasis in original).

whether a sufficiently restrictive confidentiality agreement with the government would have changed the result.[118]

In the middle is the District of Columbia Circuit, which has held that disclosure of work product to the government may not waive protections as to third parties where a confidentiality agreement is in place between the corporation and the government at the time of the disclosure.[119]

The law in the Second Circuit is less settled. In *In re Steinhardt Partners, L.P.*, a company acting pursuant to an SEC request submitted to that agency a memorandum addressing legal and factual issues concerning a potential SEC enforcement action against it.[120] The document displayed the statement, "FOIA Confidential Treatment Requested." There was no agreement that the SEC would maintain the confidentiality of the memorandum. Although the SEC brought no action, the company was named as a defendant in a class action civil suit. The district court granted plaintiffs' motion to compel discovery of the memorandum, despite assertions by the company of work-product protection.[121] In denying a *mandamus* petition, the Second Circuit held that the voluntary disclosure to a government agency waived the protection to other adversaries.[122] The court, however, rejected a "*per se* rule that all voluntary disclosures to the government waive work product protection."[123] For example, voluntary disclosure may not be deemed a waiver when "the disclosing party and the government [ ] share a common interest in developing legal theories and analyzing information. . . ."[124] Another example that

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118. *Mass. Inst. of Tech.*, 129 F.3d at 687; *In re Qwest Commc'ns*, 450 F.3d at 1192. Although the issue of confidentiality agreements was not raised in *Massachusetts Institute of Technology*, the Tenth Circuit described the confidentiality agreements in *In re Qwest Communications* as having done "little to restrict the agencies' use of the materials they received," and expressly limited its rejection of selective waiver as one dictated by "the record in this case." *Qwest Commc'ns*, 450 F.3d at 1194, 1201.

119. *Subpoenas Duces Tecum*, 738 F.2d at 1372, 1375 (finding that work-product confidentiality may be maintained upon disclosure to the government where the company "insist[s] on a promise of confidentiality before disclosure to the SEC"); *Permian Corp.*, 665 F.2d at 1218–19 (upholding trial court's finding of no waiver where disclosure of work product to SEC is covered by confidentiality agreement).

120. *Steinhardt*, 9 F.3d at 232.

121. *Id*.

122. *Id*. at 234–36.

123. *Id*. at 236.

124. *Id*.; *see In re* Cardinal Health, Inc. Sec. Litig., 2007 U.S. Dist. LEXIS 36000, at *27–29 (S.D.N.Y. Jan. 26, 2007) (holding no waiver where law firm shared work product with government agencies, given "common interest" between Audit Committee and government agencies).

the *Steinhardt* court identified where voluntary disclosure would not be deemed a waiver is when "the SEC [or other government agency] and the disclosing party have entered into an explicit agreement that the SEC [or other agency] will maintain the confidentiality of the disclosed materials."[125]

District courts in the Second Circuit have reached different conclusions as to when disclosure of attorney work product to government agencies pursuant to confidentiality agreements waives work-product protection as to third parties.[126] For example, in *Maruzen Co. v. HSBC USA, Inc.*,[127] the court found that disclosure of documents from an internal investigation by a cooperating company, HSBC, did not constitute a waiver of work-product protection because the corporation had entered into confidentiality agreements, including an oral agreement with the U.S. Attorney's Office. The corporation submitted a letter from the Assistant U.S. Attorney stating that "'the understanding between HSBC and the [U.S. Attorney's Office] at the time the Material was produced was that the [Office] would maintain the Material in confidence and not disclose it to any third parties, other than Government agents and agencies, except as required by law.'"[128] On the basis of these confidentiality agreements, the court denied the motion of two civil plaintiffs to compel production from the corporation's internal investigation files.[129] In *Gruss v.*

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125. *Steinhardt*, 9 F.3d at 236.

126. *Compare In re* financialright GmbH, No. 17-MC-105 (DAB), 2017 WL 2879696, at *7 (S.D.N.Y. June 22, 2017); Police & Fire Ret. Sys. v. SafeNet, No. 06 Civ. 5797 (PAC), 2010 WL 935317, at *1–2 (S.D.N.Y. Mar. 11, 2010); Maruzen Co. v. HSBC USA, Inc., 2002 U.S. Dist. LEXIS 13288, at *4–5 (S.D.N.Y. July 23, 2002) (finding work-product protection had been preserved under the selective waiver doctrine because the company had produced documents to the government pursuant to confidentiality agreements), *and In re* Nat. Gas Commodities Litig., 232 F.R.D. 208, 211 (S.D.N.Y. 2005), *with* Alaska Elec. Pension Fund v. Bank of Am. Corp., No. 14-CV-7126 (JMF), 2017 WL 280816, at *3 (S.D.N.Y. Jan. 20, 2017); Initial Pub. Offering Sec. Litig., 249 F.R.D. 457 (S.D.N.Y. 2008), *and* Gruss v. Zwirn, No. 09 Civ. 6441 (PGG)(MHD), 2013 WL 3481350, at *11 (S.D.N.Y. July 10, 2013) (calling into question the applicability of the dicta in *Steinhardt*, which, per the district court in *Gruss*, is "now nearly twenty years old" given the "more recent circuit court decisions" that have rejected selective waiver irrespective of a confidentiality agreement).

127. *Maruzen Co.*, 2002 U.S. Dist. LEXIS 13288, at *4–5.

128. *Id*.

129. *Id*.; *see* Saito v. McKesson HBOC, Inc., No. Civ. A. 18553, 2002 WL 31657622, at *6–10 (Del. Ch. Nov. 13, 2002); *see also* Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412, 433 (N.D. Ill. 2006); *In re* McKesson HBOC, Inc., No. 99-CV-20743, 2005 WL 934331, at *8–10 (N.D. Cal. Mar. 31, 2005); *In re* Symbol Techs., Inc. Sec. Litig., CV 05-3923

Zwirn,[130] however, the court considered whether the disclosure to the SEC of privileged materials—a PowerPoint presentation containing portions of attorney interview notes and summaries—waived work-product protection as to these materials, as well as the factual portions of the underlying notes and summaries on which the presentation was based. Although the producing party had entered into a confidentiality agreement with the SEC, the court found the agreement "illusory" and, therefore, insufficient to preserve the privilege as to the disclosed materials because it gave the SEC broad and unfettered permission to disclose the privileged materials.[131]

In 2006, the Advisory Committee on Evidence Rules initially proposed an amendment to Rule 502 of the Federal Rules of Evidence that would have codified the doctrine of "selective waiver."[132] There was significant opposition to the amendment, however, causing the

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(DRH) (AKT), 2016 WL 8377036 (E.D.N.Y. 2016) (agreement by U.S. attorney's office and SEC to maintain confidentiality of certain materials protected from disclosure to third party, where SEC and Symbol shared a "common interest" in ensuring Symbol was in compliance with the consent judgment's terms). Materials created in connection with settlement negotiations and shared with the government may be entitled to protection from disclosure to third parties even absent a confidentiality agreement. *See* United States *ex rel.* Underwood v. Genentech, No. 03-3983, 2010 WL 3955786 (E.D. Pa. Oct. 7, 2010) (holding communications, including PowerPoint presentations, shared between Genentech and the government during attempted settlement negotiations of a qui tam suit were protected from subsequent disclosure to the relator, given the strong policy reasons for maintaining the confidentiality of settlement negotiations); *In re* Merck & Co. Sec., Derivative & ERISA Litig., No. 2:05-CV-02367-SRC-CLW, 2012 WL 4764589, at *6 (D.N.J. Oct. 5, 2012) (denying plaintiffs' motion to compel Merck to disclose its communications with the government during settlement negotiations where plaintiffs failed to make the "more 'particularized showing' that the evidence sought is relevant and calculated to lead to the discovery of admissible evidence").

130. Gruss v. Zwirn, No. 09 Civ. 6441 (PGG)(MHD), 2013 WL 3481350 (S.D.N.Y. July 10, 2013).

131. *Id*. The court found the confidentiality agreement "provide[d] no meaningful protection to Defendants" because it permitted the SEC to disclose the materials whenever it determined disclosure "would be in furtherance of the Commission's discharge of its duties and responsibilities." *Id*. at *8; *see In re* Aqua Dots Prods. Liab. Litig., 270 F.R.D. 322, 330 (N.D. Ill. 2010) (finding work-product protection was waived as to documents previously disclosed to the U.S. Consumer Products Safety Commission because a "footnote disclaimer on FOIA requests is not the same as an explicit confidentiality agreement that clearly identifies the intent of the parties with respect to work product privilege").

132. FED. R. EVID. 502(c) (proposed 2006). The proposed Rule 502 provided that:

Advisory Committee in 2007 to withdraw it from the proposed Rule 502 ultimately sent to the House and Senate Judiciary Committees.[133]

> [i]n a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

It should also be noted that on October 13, 2006, President Bush signed into law the Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 607, 120 Stat. 1966, which, among other things, provides that a regulated entity's submission of information to a federal, state, or foreign bank regulator for any purpose "shall not be construed as waiving, destroying, or otherwise affecting any privilege" that the entity might claim with respect to any other person or entity. *See also* 12 U.S.C. § 1828(x) (Dec. 20, 2012) ("[t]he submission by any person of any information to the Bureau of Consumer Financial Protection, any Federal banking agency, State bank supervisor, or foreign banking authority . . . shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim . . . as to any person or entity other than such Bureau, agency, supervisor, or authority").

133. In an attachment to a Report of the Advisory Committee on Evidence Rules, the committee summarized the public comment on selective waiver:

> The selective waiver provision proved to be very controversial. The public comment from the legal community (including lawyer groups such as the American Bar Association, Lawyers for Civil Justice, and the American College of Trial Lawyers) was almost uniformly negative. . . . In sharp contrast, federal agencies and authorities (including the Securities Exchange Commission, the Commodity Futures Trading Commission, and the Department of Justice) expressed strong support for selective waiver. . . . The Advisory Committee finally determined that selective waiver raised questions that were essentially political in nature.

Memorandum from Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure (May 15, 2007); *see* Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, to Sen. Patrick J. Leahy, et al. (Sept. 26, 2007).

Courts have relied on the history of Rule 502 and Congress's failure to adopt the proposed amendment to support the rejection of selective waiver. *In re* Pac. Pictures Corp., 679 F.3d 1121, 1128–29 (9th Cir. 2012) ("Given that Congress has declined broadly to adopt a new privilege to protect disclosures of attorney-client privileged materials to the government, we will not do so here."); *In re* IPO Sec. Litig., 249 F.R.D. 457, 463–65 (S.D.N.Y. 2008) (relying on the history of Rule 502 and the defense bar's opposition to the proposed amendment, the court held

§ 2:6 The Common Interest Privilege

Despite its name, the "common interest" privilege—also commonly called the "joint defense" privilege—"'is not an independent basis for privilege but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party.'"[134] The rule "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."[135]

§ 2:6.1 Applicability of the Common Interest Privilege

Most often, parties wishing to take advantage of the added protection of the common interest rule will create a written joint defense agreement to delineate the parties' rights and responsibilities with respect to confidential information that is shared. Even in the absence of such a written agreement, however, parties can take advantage of the doctrine by demonstrating an intent to enter into such a common interest arrangement. To claim protection under the doctrine, the parties "must show that they had a common *legal*, as opposed to commercial, interest, and that they cooperated in formulating a common legal strategy."[136] In *Schaeffler v. United States*, the Second

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"there is a strong presumption against a finding of selective waiver, and it should not be permitted absent special circumstances").

134. United States v. Agnello, 135 F. Supp. 2d 380, 382 (E.D.N.Y. 2001) (quoting Sec. Inv'r Prot. Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 435 (Bankr. S.D.N.Y. 1997)).

135. United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).

136. Walsh v. Northrop Grumman Corp., 165 F.R.D. 16, 18 (E.D.N.Y. 1996) (emphasis added); *see also* Hanwha Azdel, Inc. v. C&D Zodiac, Inc., 617 F. App'x 227, 243 (4th Cir. 2015) (holding that evidence establishing the *details* of a joint legal strategy is not required for the common interest privilege to apply); United States v. Webb et al., No. 1:15-cr-00252, at *7 (E.D.N.Y. Mar. 10, 2017) (holding that South American soccer confederation CONMEBOL and its former president, Juan Angel Napout, could not have a common interest insofar as the former was a victim of the alleged crime purportedly committed by the latter, a defendant, and defendant had "offered no persuasive evidence that this arrangement furthered any cognizable legal interest of CONMEBOL"). It is unnecessary for there to be an actual litigation in progress for the common interest privilege to apply. *Id*. *But see* Ambac Assurance Corp. v. Countrywide Home Loans, 27 N.Y.3d 616 (2016) (finding that pending or reasonably anticipated litigation is required for common interest privilege to apply).

District courts have disagreed as to whether the government and the company being investigated ever have sufficiently common legal interests for the common interest privilege to apply. *Compare In re* Cardinal Health, Inc. Sec. Litig., 2007 U.S. Dist. LEXIS 36000, at *28 & n.7

Circuit held that a shared financial interest does not preclude a court from finding a shared legal interest "where the legal aspects materially affect the financial interests."[137] The district court in *Schaeffler* held that defendants had waived the attorney-client privilege by sharing financial restructuring documents with a consortium of banks; the Second Circuit reversed, finding that defendants and the consortium had a shared legal interest in avoiding future litigation with the IRS, and the attorney-client privilege had thus not been waived.[138]

Even if parties share the requisite common interest to invoke the rule, their communications are not necessarily protected. "Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected."[139] Furthermore, "[a]s in all claims of privilege arising out of the attorney-client relationship, a claim resting on the common interest rule requires a showing that the communication in question was given in confidence and that the client reasonably understood it to be so given."[140] In other words, just because multiple parties share a common interest does not mean that every communication among them is privileged. Rather, the communication must have been

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(S.D.N.Y. Jan. 26, 2007) (finding a common interest sufficient to protect against waiver among the SEC, the U.S. Attorney's Office, and the defendant), *with* United States v. Bergonzi, 216 F.R.D. 487, 496–97 (N.D. Cal. 2003) (holding that common interest exception does not apply to a company's disclosures to the government, even though they entered into a confidentiality agreement, because the company and the government do not share the requisite legal interests).

137. Schaeffler v. United States, 806 F.3d 34, 42 (2d Cir. 2015).

138. *Id*. at 38–39, 41–43.

139. *Schwimmer*, 892 F.2d at 243 (citations omitted); *see BDO Seidman*, 492 F.3d at 816–17 (finding a common interest where an accounting firm and law firm shared documents to advance the interests of their common clients); HSH Nordbank AG v. Swerdlow, 259 F.R.D. 64, 71 (S.D.N.Y. 2009) (applying a two-part test for determining whether the common interest privilege applies: (1) the party that asserts the rule must share a common legal interest with the party with which the information was shared, and (2) the statements for which protection is sought were designed to further that interest); *see also* VR Optics, LLC v. Peloton Interactive, Inc., No. 16-cv-6392, 2019 WL 2121690, at *4 (S.D.N.Y. May 15, 2019) (sharing of confidential information must be made to further a "joint defense effort or strategy" and not merely as part of broader conversations unrelated to the provision of legal services); BCR Safeguard Holding, LLC v. Morgan Stanley Real Estate Advisor, Inc., 614 F. App'x 690, 704 (5th Cir. 2015) (finding that a communication between parties was "diametrically opposed" to the prosecution of the litigation and was therefore not made in *furtherance of* a common legal interest).

140. *Schwimmer*, 892 F.2d at 244.

privileged in the first place for the common interest rule to expand that privilege.[141]

The common interest rule and the use of joint defense agreements raise a host of concerns in the context of corporate investigations. At the outset of an investigation, a corporation and its respective officers will likely share a common interest in demonstrating that no crime was committed and that charges should not be brought. If it is determined that a crime was committed, the common interests may begin to erode as both the corporation and its individual officers attempt to shield themselves from liability. Furthermore, while two parties from the outset may share a common goal of maintaining confidentiality, corporations, as discussed above, have certain incentives to cooperate with government investigations, including waiving privilege.[142] As such, parties are well advised to use joint defense agreements in the corporate investigation context in only the rarest of circumstances.

Nor should corporate executives assume that outside counsel for the company represents them individually, absent clear evidence of a joint representation. In the prosecution of Elizabeth Holmes, the former Chief Executive Officer of Theranos, Holmes argued that because the law firm Boies Schiller Flexner LLP ("BSF") jointly represented Theranos and her individually, she had a privilege interest

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141. *See* Kaplan v. S.A.C. Capital Advisors, L.P., No. 12 Civ. 09350, Dkt. No. 208 (S.D.N.Y. July 21, 2015) (requiring party to produce 5,866 documents it had withheld and logged under the "common interest" privilege because its privilege log failed to identify the underlying privilege—i.e., work product or attorney-client—that warranted common interest protection).

142. *See, e.g.*, United States v. LeCroy, 348 F. Supp. 2d 375, 382–83 (E.D. Pa. 2004), *as amended on reconsideration* (Jan. 10, 2005) (finding that separately represented employees of JP Morgan Chase had waived joint defense privilege protection where they agreed to be interviewed by company's counsel after the latter indicated that it may turn over the interview notes and memoranda to the government). If officers are also named individually, however, they may seek to waive the privilege even as the company seeks to maintain it. In the Department of Justice's case alleging illegal marketing of medical devices by Stryker Biotech and several of its employees, including former company president Mark Philip, it was Philip who sought to waive the attorney-client privilege regarding his communications with the company's in-house and outside counsel, while the company sought to maintain the privilege over these communications. The district court granted Philip's motion to sever the charges against him from the government's case against Stryker. United States v. Stryker Biotech, No. 09-10330, Dkt. No. 270 (D. Mass. Jan. 9, 2012) (granting motion to sever); *see also* SEC v. Rashid, 2018 WL 6573451, at *2 (S.D.N.Y. Dec. 13, 2018) (finding defendant, a separately represented employee, had not demonstrated that he and the company had agreed to pursue a joint legal strategy giving rise to a common interest privilege).

in the corporate documents separate and apart from the Theranos assignee. The court rejected Holmes's argument and ruled that the documents were subject only to the corporate privilege, not her individual privilege.[143] The court found that there was no evidence that "when she approached [BSF] for legal advice, she made it clear that she was seeking legal advice in her personal capacity,"[144] particularly given the absence of any support in an engagement agreement with BSF or evidence that she paid outside counsel "from her own accounts, not Theranos'."[145] Nor did Holmes show that her conversations with BSF were "confidential" as to her alone, insofar as most of the disputed communications included other "Theranos employees and attorneys."[146] Finally, Holmes failed to show that the substance of her communications with outside counsel involved her "individual legal interests" rather than "the general affairs of the company."[147]

§ 2:7 Self-Critical Privilege

Under a narrow set of circumstances, a few courts have recognized the existence of the "self-critical" or "self-evaluative" privilege. Developed under the federal common law of privilege,[148] the self-critical privilege operates to protect the free flow of information when organizations whose activities affect the public interest engage in self-evaluation.[149]

§ 2:7.1 Recognition of the Self-Critical Privilege

In the seminal case, *Bredice v. Doctors Hospital, Inc.*, which involved a hospital's internal review of its medical care, a district court upheld the hospital's assertion of a self-critical privilege in response to the plaintiff's request for documents concerning the review.[150] A four-part test has evolved from *Bredice* to assess the applicability of the self-critical privilege. For the privilege even to apply:

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143. United States v. Holmes, No. 18CR00258EJD1NC, 2021 WL 2309980, at *3 (N.D. Cal. June 3, 2021), *objections overruled sub nom.* United States v. Holmes, No. 5:18-CR-00258-EJD-1, 2021 WL 2711230 (N.D. Cal. July 1, 2021).
144. *Id*.
145. *Id*.
146. *Id*.
147. *Id*. at *4.
148. *See* FED. R. EVID. 501.
149. Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1086–87 (1983).
150. Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, 250–51 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

> (1) the information must result from self-critical analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; (3) the information must be of the type whose flow would be curtailed if discovery were allowed; and, (4) no document should be accorded the privilege unless it was prepared with the expectation that it would be kept confidential.[151]

Furthermore, the privilege has been applied to protect only subjective evaluations and not objective data and is subject to a balancing of the need for discovery with the policy reasons favoring non-disclosure.[152]

In *Flynn v. Goldman, Sachs & Co.*,[153] the self-critical privilege was applied to employee-interview notes and reports prepared for defendant Goldman Sachs by a not-for-profit organization that studies and helps to eliminate barriers to the equal employment of women. The court reasoned that because employees expected their statements to be kept confidential, and because such confidentiality would be necessary to allow the employees at defendant's firm and other firms to speak candidly about the sensitive and important issue of sex discrimination, the self-critical privilege protects such communications from being disclosed.[154] The court employed a similar rationale in deciding that the outside organization's report to Goldman Sachs was also subject to the privilege.[155]

§ 2:7.2 Rejection of the Self-Critical Privilege

A few federal courts have held that the self-critical privilege does not exist at federal common law.[156] Other courts have limited its

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151. United States *ex rel.* Sanders v. Allison Engine Co., 196 F.R.D. 310, 312 (S.D. Ohio 2000).
152. *See, e.g.*, Bracco Diagnostics, Inc. v. Amersham Health, Inc., CV 03-6025 (FLW), 2006 WL 2946469 (D.N.J. Oct. 16, 2006); Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379 (N.D. Ga. 2001).
153. Flynn v. Goldman, Sachs & Co., 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. Sept. 16, 1993).
154. *Id*. at *4–5.
155. *Id*. at *5–7; *cf. In re* Ashanti Goldfields Sec. Litig., 213 F.R.D. 102, 105 n.3 (E.D.N.Y. 2003) (declining to interpret *Flynn* to mean that the relevant consideration is whether disclosure would deter *other* firms from engaging in self-evaluation; rather, *Flynn* was decided based on the important social concern of advancing employment opportunities for women, a concern that was not present under the facts of this case).
156. *See* Todd v. Ocwen Loan Servicing, Inc., No. 219CV00085JMSDLP, 2020 WL 1328640, at *7 (S.D. Ind. Jan. 30, 2020) (declining to recognize self-critical analysis privilege "[b]ecause the Seventh Circuit has explicitly declined to adopt the self-critical analysis."); Moya v. City of Clovis, No. 218CV00494GBWKRS, 2019 WL 4193427, at *2 (D.N.M.

applicability in light of the policy rationale underlying the privilege. In *In re Salomon Inc. Securities Litigation*,[157] the district court rejected the self-critical privilege asserted by Salomon Inc. and Salomon Brothers for documents concerning reviews of the adequacy of internal audits of U.S. Treasury securities trading practices. The court stated that such disclosure would not affect the "free flow of information" that was a desirable part of improvement of internal auditing programs and that there was no "'overwhelming public interest protecting these [documents].'"[158]

Furthermore, some courts have questioned the validity of the privilege following the Supreme Court's ruling in *University of*

Sept. 4, 2019) ("The Tenth Circuit, however, has not recognized such a privilege and has cast doubt on its underpinnings."); Johannes v. Lasley, No. 17CV3899CBAAYS, 2019 WL 1958310, at *3 (E.D.N.Y. May 2, 2019) ("Whether the self-critical analysis privilege should be recognized in federal courts has yet to be decided by the Supreme Court or the Second Circuit."); Lund v. City of Rockford, No. 17 CV 50035, 2017 WL 5891186, at *9 (N.D. Ill. Nov. 29, 2017) (outlining circuit courts' holdings on the issue); Granberry v. Jet Blue Airways, 228 F.R.D. 647, 650 (N.D. Cal. 2005) ("As a matter of federal law—more specifically, as a matter of Ninth Circuit law—it is unlikely that the self-critical analysis privilege exists. The Ninth Circuit has not recognized this privilege."); Spencer Sav. Bank v. Excell Mortg. Corp., 960 F. Supp. 835, 839–44 (D.N.J. 1997); *see also* Zoom Imaging, L.P. v. St. Luke's Hosp. & Health Network, 513 F. Supp. 2d 411, 413, 417 (E.D. Pa. 2007) (finding that a federal common law self-critical privilege should not be recognized).

157. *In re* Salomon Inc. Sec. Litig., 1992 U.S. Dist. LEXIS 17280, at *11–12 (S.D.N.Y. Nov. 12, 1992).

158. *Id*. at *12 (citations omitted); *see* Bobryk v. Durand Glass Mfg. Co., Civ. No. 12-5360 (NLH/JS), 2013 WL 5604342, at *3 (D.N.J. Oct. 11, 2013) (rejecting claim of self-analysis privilege because the inspections at issue were initiated and sometimes paid for by the defendant's business customers and were conducted by a third party for the customers' benefit, not by the defendant to ensure compliance with regulations or to prepare a mandated government report, even though compliance was likely a tangential benefit of the inspections); Ravenell v. Avis Budget Grp., Inc., 2012 WL 1150450, at *5 (E.D.N.Y. Apr. 5, 2012) (declining to apply the self-critical privilege to audits used to assess whether employees were FLSA exempt given "the lack of full acceptance of this privilege," the absence of strong public interest in the issues involved, and the finding that defendants' "conclusory assertion that the impetus to conduct such audits would be chilled in the future" did not satisfy the "detailed and convincing showing" required to invoke the privilege); *cf. Diversified Indus.*, 572 F.2d at 611 (to construe waiver of privilege from disclosure of certain internal investigation materials "may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers").

Pennsylvania v. EEOC,[159] which rejected the "peer review privilege." Courts have found that the rationale for rejecting the peer review privilege necessarily implies a rejection of the self-critical privilege as well.[160]

In light of the uncertain status of the self-critical privilege,[161] or, at least, the nebulous nature of its boundaries, companies seeking to engage in self-evaluative analysis—especially those that turn to outside organizations for assistance—would be well advised to ensure that any such investigations, to the extent feasible, are conducted or directed by attorneys. In this way companies can take advantage of privileges whose protections are far more rigid and certain than those afforded by the self-critical doctrine.

§ 2:8 Government Use of "Filter Teams" to Review Privileged Material

The government routinely uses separate "filter teams"—also known as "taint teams"—to review seized records that may contain attorney-client privileged communications and/or work product. Courts have issued disparate opinions on the practice.

In the oft-cited *In re Search Warrant Issued June 13, 2019*, decision, the Fourth Circuit rejected DOJ's use of a filter team of separate prosecutors and agents, holding that the practice "inappropriately assigned

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159. Univ. of Pa. v. EEOC, 493 U.S. 182, 189–95 (1990).

160. *See, e.g.*, Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 383–84 (N.D. Ga. 2001); Roberts v. Hunt, 187 F.R.D. 71, 75–76 (W.D.N.Y. 1999); *see also* Zikianda v. County of Albany, Civ. No. 1:12-CV-1194, 2013 WL 936446, at *3 (N.D.N.Y. Mar. 18, 2013). Other courts, however, have limited the Supreme Court's rejection of a peer review privilege to employment discrimination actions and have recognized a medical peer review privilege applicable to materials from hospital review committee meetings in medical malpractice actions. Francis v. United States, 2011 U.S. Dist. LEXIS 59762, at *19–20 (S.D.N.Y. May 31, 2011); Sevilla v. United States, 852 F. Supp. 2d 1057 (N.D. Ill. 2012); Veith v. Portage County, No. 5:11CV2542, 2012 WL 4850197 (N.D. Ohio Oct. 11, 2012).

161. *See, e.g.*, Alaska Elec. Pension Fund v. Pharmacia Corp., 554 F.3d 342 n.12 (3d Cir. 2009) ("The self-critical privilege has never been recognized in this court and we see no reason to recognize it now."); *In re* Air Crash Near Clarence Ctr., No. 09-md-2085, 2013 WL 5964480, at *6 (W.D.N.Y. Nov. 8, 2013) (finding that "self-critical analysis privilege is not recognized in [the Second] circuit and has been specifically rejected in this district"); Duenez v. City of Manteca, No. 2:11-cv-1820 LKK AC, 2013 WL 684654, at *11 (E.D. Cal. Feb. 22, 2013) (rejecting defendant's claim of a self-critical analysis privilege because "the Ninth Circuit does not recognize" such a privilege).

judicial functions to the executive branch."[162] The court ruled that a magistrate judge or an appointed special master, rather than the filter team, should be in charge of reviewing the seized materials.[163] The court held that the practice enabled government agents and prosecutors to conduct an extensive review of client communications and lawyer emails "in disregard of the attorney-client privilege, the work-product doctrine, and the Sixth Amendment."[164]

Other courts, however, have gone the other way and endorsed the Justice Department's use of filter teams.[165] In *United States v. Avenatti*, for example, the Southern District of New York held that the filter team practice was proper.[166] The court respectfully disagreed with the Fourth Circuit's "unique" *In re Search Warrant* decision and noted that the decision was not binding in the Second Circuit.[167] The court found that Second Circuit courts have long blessed such procedures and held that as long as a defendant has the opportunity to seek judicial review before his materials are turned over to the government, as Avenatti did in this case, the government should be allowed to review lawfully seized documents through the filter team process.[168]

§ 2:9 Additional Practical Waiver Problems in Internal Investigations

§ 2:9.1 Internal Investigations Because of Business Necessities

Increasingly, internal investigations are undertaken by companies for reasons other than litigation—for example, to discipline employees,

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162. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 164 (4th Cir. 2019), *as amended* (Oct. 31, 2019).
163. *Id*. at 176.
164. *Id*. at 179; *see also* Harbor Healthcare Sys., L.P. v. United States, 5 F.4th 593, 595 (5th Cir. 2021) (reversing a lower court's denial of health care provider's Rule 41(g) motion for return of document seized by search warrant and finding there to be no practical purpose to a "taint team" if the government does not return or destroy copies of the privileged documents).
165. *See, e.g.*, *In re* Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means, No. 20-14223, 2021 WL 3852229, at *9 (11th Cir. Aug. 30, 2021) (holding that the district court did not abuse its discretion by imposing filter-team protocol allowing claimants to conduct initial review for attorney-client and work-product materials).
166. United States v. Avenatti, No. 19-CR-374-1 (JMF), 2021 WL 4120539, *appeal docketed*, No. 22-1242 (S.D.N.Y. Sept. 9, 2021).
167. *Id*. at *5.
168. *Id*. at *1.

to reassure investors, or to counter negative publicity. This can carry the price of losing attorney-client privilege and work-product protection for attorney notes, interview memoranda, and the like.

For example, in *Doe 1 v. Baylor University*, Baylor University hired outside counsel to conduct an independent and privileged investigation of Baylor's response to Title IX and related compliance issues.[169] Baylor subsequently released a thirteen-page summary of the investigation and its conclusions, as well as a ten-page list of recommendations. Plaintiffs in a Title IX action against Baylor moved to compel disclosure of the materials provided to and produced by the law firm in the investigation. The court granted plaintiffs' motion, holding that Baylor waived attorney-client privilege because Baylor's disclosures "provide[d] substantial detail about what Baylor and its employees told [outside counsel] and what advice Baylor received in return."[170] In terms of the breadth of the waiver, the court found that "because of the level of detail publicly released about the investigation as a whole," the waiver "encompass[ed] the entire scope of the investigation."[171]

The attorney-client privilege will not apply unless the company meets its burden of "'clearly showing' that the in-house attorney gave advice in her legal capacity, not in her capacity as a business advisor."[172] The protections of the work-product doctrine cover only those materials that were created "in anticipation of" actual or impending litigation.[173] Under this standard, although the work product need not have been created "principally or exclusively" in anticipation of litigation, protection will be withheld for "documents that are prepared in the ordinary course of business or that would have been created in

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169. Doe 1 v. Baylor Univ., 320 F.R.D. 430 (W.D. Tex. 2017).

170. *Id*. at 437.

171. *Id*. at 440.

172. Ames v. Black Entm't Television, No. 98CIV0226(LMM)(AJP), 1998 WL 812051, at *8 (S.D.N.Y. 1998) (holding that general counsel, who also held an executive position and was involved in business matters, was acting in her legal capacity when investigating rumors of sexual misconduct and privilege thus applied).

173. *See, e.g.*, Sec. & Exch. Comm'n v. Navellier & Assocs., Inc., Civ. No. 17-11633, 2019 WL 285957, at *3–4 (D. Mass. Jan. 22, 2019) (finding work product protection inapplicable to investigatory materials prepared by a third-party consultant where company did not reasonably anticipate litigation, as evidenced by the lack of contemporaneous communications showing that counsel hired the consultant, the absence of any materials showing why the consultant's retention was necessary to provide legal advice, and where the government did not commence its investigation of the company until three years later); United States v. Adlman, 134 F.3d 1194, 1195, 1202 (2d Cir. 1998); Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992).

essentially similar form irrespective of the litigation."[174] Where the internal investigation would have been undertaken because of "business necessities" even if no litigation were anticipated, work-product protection will not apply.[175]

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174. *Adlman*, 134 F.3d at 1202–03. The majority of jurisdictions, like *Adlman*, have adopted a "because of litigation" test to assess whether documents are protected by the work-product doctrine. *See, e.g.*, United States v. Deloitte LLP, 610 F.3d 129, 136–37 (1st Cir. 2010) (collecting cases). The Fifth Circuit has found that "documents would only be protected if the 'primary motivating purpose' of their production was litigation." Alton & S. Ry. Co. v. CSX Transp., Inc., No. 3:17-CV-01249-NJR, 2020 WL 4933652, at *2 (S.D. Ill. Aug. 24, 2020). The First Circuit has conditioned work product protection on whether the materials at issue were "prepared for use in litigation." Applying this test, the First Circuit held that tax accrual work papers prepared by counsel evaluating the company's chance of prevailing in litigation against the IRS and the dollar amount the company should reserve were not protected by the work-product doctrine because they were not prepared for use in litigation but, rather, to support financial filings and gain auditor approval. United States v. Textron, Inc., 577 F.3d 21, 28–30 (1st Cir. 2009) (en banc). The *Textron* decision is also a departure from the body of federal case law holding that documents relating to individual litigation reserves are privileged work product. *See, e.g.*, Simon v. G.D. Searle, 816 F.2d 397 (8th Cir. 1987) (finding individual reserve information, but not aggregate reserve information, to be protected work product); Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 139 F.R.D. 609, 613–15 (E.D. Pa. 1991). If interpreted broadly, *Textron* makes it less likely that other documents created for dual purposes will be protected by the work-product doctrine.

175. *In re* Kidder Peabody Sec. Litig., 168 F.R.D. 459, 465 (S.D.N.Y. 1996) (finding that company "would have hired outside counsel to perform [an internal investigation] even if no litigation had been threatened at the time" given the crisis facing the business); *accord* Allied Irish Banks, p.l.c. v. Bank of Am., N.A., 240 F.R.D. 96, 107 (S.D.N.Y. 2007); *see also In re* RPM Int'l Inc., No. 20-5052, 2020 Us App Lexis 14194 (D.C. Cir. May 1, 2020) (denying mandamus to vacate a district court order that required RPM to produce nineteen witness interview memoranda prepared by lawyers upon finding, *inter alia*, that the law firm was retained in response to the recommendation of an auditor that the company conduct an internal investigation to determine the appropriateness of certain disclosures, not in anticipation of litigation); *In re* Capital One Data Breach Litig., No. 1:19-md-02915, 2020 WL 2731238 (E.D. Va. May 26, 2020) (finding work-product doctrine inapplicable to a report produced by a cybersecurity consultant because, *inter alia*, the company's pre-existing (pre-litigation) relationship with the consultant suggested that report was not prepared in anticipation of litigation); Wengui v. Clark Hill, PLC, 338 F.R.D. 7, 10–11 (D.D.C. 2021) (holding work-product doctrine inapplicable to a cybersecurity report created after a data breach because the defendant corporation could not demonstrate that the report would not have been created in the normal course of business); *In re* Rutter's Data

§ 2:9.2 Investigation by and for Management

Management may conduct a preliminary investigation to determine whether outside counsel is needed and may enlist non-lawyer employees to assist the general counsel in this preliminary review. Notably, however, "[p]articipation of the general counsel does not automatically cloak the investigation with legal garb."[176] In *In re Grand Jury Subpoena Dated Dec. 19, 1978*, the corporation's general counsel conducted a preliminary investigation that led to the retention of an outside law firm in response to its outside accountants' concern over possible foreign bribery payments.[177] The general counsel "deputized" three senior non-lawyer officials to interview employees and instructed employees to cooperate.

Noting that "management will often try to find the facts on its own, preliminary to a determination of whether to seek legal advice or simply in order to formulate business policy," the Second Circuit ruled that the corporation did not meet its burden of demonstrating that the communications by the non-lawyer "deputies" were made for the purpose of providing legal advice.[178] As the court stated, "[t]he purpose of the first investigation seems to have been to discover facts for a report to the Audit Committee. . . ."[179]

In contrast, where a general counsel used a non-lawyer manager to investigate a claim of sexual harassment, the privilege was held not waived because the manager "clearly conducted the interviews in

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Sec. Breach Litig., No. 1:20-CV-382, 2021 WL 3733137, at *2 (M.D. Pa. July 22, 2021) (finding that consultant's data breach incident report was not protected by the work-product doctrine because the "primary motivating purpose" of the report "was not to prepare for the prospect of litigation").

176. *In re* Grand Jury Subpoena Dated Dec. 19, 1978, 599 F.2d 504, 511 (2d Cir. 1979).

177. *Id*.

178. *Id*. at 510–11.

179. *Id*. at 510; *see also* Wultz v. Bank of China Ltd., 61 F. Supp. 3d 272 (S.D.N.Y. 2013) (holding documents pertaining to internal investigation conducted by a company's compliance department following receipt of a demand letter were not protected by the attorney-client or work-product privilege because there was no indication that any attorneys were involved in the investigation). In a later decision, the magistrate judge similarly held that related investigation materials were not privileged. The judge rejected the argument that employees had prepared the documents with the expectation of *later* providing them to a company attorney, finding again no proof that any of the documents at issue were prepared *at the direction* of an attorney. Wultz v. Bank of China Ltd., 304 F.R.D. 384, 391–92 (S.D.N.Y. 2015).

question at the request of counsel and for the exclusive use of counsel in rendering legal representation."[180]

§ 2:9.3 Use of Regularly Employed Auditor

Communications between an attorney and an expert, such as an accountant, are protected by the attorney-client privilege as long as the communications are made "in confidence for the purpose of obtaining legal advice from the lawyer."[181] By using a company's regularly employed auditors to conduct an internal investigation, however, a company may leave itself vulnerable to the argument that it is seeking "not legal advice but only accounting service" or that "the advice sought is the accountant's rather than the lawyer's."[182]

In *United States v. Adlman*,[183] the Second Circuit ruled that the attorney-client privilege did not apply to a memorandum prepared by an outside auditor at the request of in-house tax counsel because, inter alia, the auditor was regularly employed by the company "to furnish auditing, accounting and advisory services," and there was no "contemporaneous documentation" that the auditor was "working under a different arrangement from that which governed the rest of its work" for the company. The Second Circuit remanded for a determination of whether the memorandum was prepared in anticipation of litigation and was thus subject to work-product protection.[184]

§ 2:9.4 The Pseudo-Hypothetical

Posing a "hypothetical" derived from privileged communications for the purpose of obtaining an unqualified audit has been held to constitute a waiver of the attorney-client privilege. In *In re Subpoena*

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180. Carter v. Cornell Univ., 173 F.R.D. 92, 94 (S.D.N.Y. 1997); *see* First Chi. Int'l v. United Exch. Co., 125 F.R.D. 55, 57–58 (S.D.N.Y. 1989) (documents generated during an internal corporate investigation conducted by an employee acting at the request of in-house counsel were protected from disclosure because they would not have been created had the corporation not needed the advice of counsel).

181. United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); *Coburn*, 2022 WL 357217, at *6 (upholding privilege finding with respect to company's communications with accounting firm about internal investigation because "the nature of the allegations against Defendants and the scope of [the company's] internal investigation would understandably make accounting expertise vital to any law firm representing" the company) (citing *Kovel*).

182. *Kovel*, 296 F.2d at 922.

183. United States v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995).

184. *Id*. at 1502.

Duces Tecum Served on Willkie Farr & Gallagher,[185] the judge ruled that the company waived its privilege by disclosing to the auditors the "paraphrased statements of what [company] employees had stated in confidence to [the outside attorneys]."[186]

§ 2:9.5 Disclosures to Public Relations Consultants

The use of public relations (PR) consultants to aid in litigation has become increasingly popular, especially in high-profile white-collar cases involving well-known companies. The question of whether client communications with PR consultants are protected as privileged communications is not settled. In *Calvin Klein Trademark Trust v. Wachner*,[187] the district court refused to extend the attorney-client privilege to communications with a PR firm hired prior to any litigation and providing "ordinary public relations advice," but upheld assertions of work-product protection as to certain categories of documents shared with the PR firm.[188] On the other hand, however, in *In re Grand Jury Subpoenas Dated March 24, 2003*, the court held that:

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185. *In re* Subpoena Duces Tecum Served on Willkie Farr & Gallagher, No. M8-85, 1997 WL 118369 (S.D.N.Y. Mar. 14, 1997).

186. *Id*. at *3; *see also In re* OM Grp. Sec. Litig., 226 F.R.D. 579, 591–93 (N.D. Ohio 2005) (referencing *Willkie* and holding that, by summarizing the results of an investigation via a Microsoft PowerPoint presentation, a company waived privilege as to the underlying documents). *But see* United States v. Zuckerman, 88 F. Supp. 2d 9, 15 (E.D.N.Y. 2000) ("[d]isclosure of a general description of the subject matter of a privileged communication does not operate as a waiver of the privilege").

187. Calvin Klein Trademark Tr. v. Wachner, 198 F.R.D. 53, 54–55 (S.D.N.Y. 2000).

188. *Id*.; *see* Chevron Corp. v. Salazar, 2011 U.S. Dist. LEXIS 92628, at *5–6 (S.D.N.Y. Aug. 16, 2011) (recognizing that "attorney work product otherwise entitled to protection does not lose its immunity when it is conveyed in confidence to a public relations consultant, particularly where the consultant may use that information to advise the attorney about the course of litigation," but rejecting work-product protection in this case because "the vast bulk of the public relations documents do not reflect underlying work product in the first place"); *see also* Metso Paper USA, Inc. v. Bostik, Inc., 2011 U.S. Dist. LEXIS 75717, at *4 (M.D. Pa. July 13, 2011) (finding that use of a public relations firm in trial preparation did not waive work-product protection because all the parties on whom the defendant relied were "integrally involved in each step of trial preparation, [and] revelation of those documents would chill formulation of legal theories and case preparation"); *In re* Vioxx Prods. Liab. Litig., 2007 U.S. Dist. LEXIS 23164, at *11 n.3 (D. La. 2007). *But see* Bloomingburg Jewish Educ. Ctr. v. Vill. of Bloomingburg, 171 F. Supp. 3d 136 (S.D.N.Y. 2016) (declining to extend privilege to PR firm where defendants had failed to demonstrate that the firm served "a function beyond that which a public relations firm might ordinarily be called upon to do."); *In re*

> (1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege.[189]

In this regard, the analysis with respect to the application of the attorney-client privilege to communications with a PR firm is similar to that involving communications with other independent contractors. When courts find such contractors to be the "functional equivalent" of the corporation's employees, the privilege will cover the communications between the corporation and those contractors.[190]

Prograf Antitrust Litig., No. 1:11-md-02242-RWZ, 2013 WL 1868227, at *3 (D. Mass. May 3, 2013) (declining to apply work-product protection where the consultants provided standard public relationship services and there was no showing that the communications were highly useful or necessary for the rendering of legal advice); Jackson v. Deen, No. CV 412-139, 2013 WL 1911445, at *12 (S.D. Ga. May 8, 2013) (declining to apply work-product protection where consultants provided publicity management and damage control, but there was no evidence that the consultants were necessary to obtain legal advice); NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 141–42 (N.D.N.Y. 2007) (declining to extend work-product protection where the PR firm did not receive the report at issue from counsel or consult with counsel about the report).

189. *In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003); *see also In re* Riddell Concussion Reduction Litig., No. 13-7585, 2016 U.S. Dist. LEXIS 168457, at *26 (D.N.J. Dec. 5, 2016) (finding certain communications between outside counsel and PR firm privileged); F.T.C. v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002); *In re* Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 219 (S.D.N.Y. 2001). *But see* McNamee v. Clemens, 2013 WL 6572899, at *5–6 (E.D.N.Y. Sept. 18, 2013) (declining to apply attorney-client privilege to communications with PR consultants whose primary goal was to protect the defendant's [baseball player Roger Clemens] public image and reputation, which distinguished the case from *In re Grand Jury Subpoenas Dated March 24, 2003*, where PR consultants were hired "with the specific aim of reducing public pressure on prosecutors and regulators to bring charges" against their client); Scott v. Chipotle Mexican Grill Inc., 2015 WL 1424009, at *3 (S.D.N.Y. 2015); Fine v. ESPN, Inc., No. 5:12-CV-0836 (LEK/DEP), 2015 WL 3447690, at *11 (N.D.N.Y. 2015); *Coburn*, 2022 WL 357217, at *6 (finding that communications with a public relations firm regarding "public disclosure, communications, potential litigation and related legal strategy" relevant to an internal investigation were not protected by the attorney-client privilege or work-product doctrine because "they bear too tenuous a connection to the provision of legal advice or confidential preparations for litigation").

190. *See, e.g.*, Schaeffer v. Gregory Vill. Partners, L.P., 78 F. Supp. 3d 1198, 1203–05 (N.D. Cal. 2015) (public relations consultant found to be the

The difficulty for the practitioner, however, is the ability to predict whether such communications will be privileged, given the disparate approaches courts have adopted regarding the "functional equivalent" standard.[191]

"functional employee" of defendant in environmental contamination case on the grounds that (1) defendant was already facing regulatory action and potential litigation at the time it hired consultant; (2) consultant interacted with potential opponents in the litigation; (3) defendant's attorneys regularly required consultant's counsel; and (4) consultant acted as the "public face of the company" during the dispute).

191. *Compare In re* Bristol-Myers Squibb Sec. Litig., Civ. No. 00-1990 (SRC), 2003 WL 25962198, at *4 (D.N.J. June 25, 2003) (endorsing a "multi-factor test" considering whether the consultants "(1) were incorporated in the staff to perform a corporate function, *which is necessary in the context of actual or anticipated litigation*; (2) possessed information needed by attorneys in rendering legal advice; (3) possessed authority to make decisions on behalf of the company; and (4) were hired because the company lacked sufficient internal resources and/or adequate prior experience within the consultant's field") *and* Universal Standard Inc. v. Target Corp., 331 F.R.D. 80 (S.D.N.Y. 2019) (analyzing factors, including independent authority, primary responsibility and level of integration in the client's organizational structure), *with In re* Flonase Antitrust Litig., 879 F. Supp. 2d 454, 459–60 (E.D. Pa. 2012) (adopting a "broad practical approach" instead of a multi-factor test and holding that consultants who were integrated members of the team and were intimately involved in the creation, development and implementation of a brand maturation plan, which touched on several legal and regulatory issues, were the functional equivalent of employees). The uncertainty surrounding application of the "functional equivalent" standard and whether communications with a third party will be found to waive privilege led, in part, to one court's rejection of the test. BSP Software, LLC v. Motio, Inc., No. 12 C 2100, 2013 WL 3456870, at *4 (N.D. Ill. July 9, 2013) (rejecting "functional equivalent" test because it would increase uncertainty and potentially expand the scope of the privilege and noting that the "functional equivalent" test has been treated skeptically by district courts in the Seventh Circuit); *see also* Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-CV-585, 2014 WL 7238354, at *1 (S.D.N.Y. Dec. 19, 2014) (noting that the Second Circuit has not recognized the functional equivalent exception to privilege waiver); Monterey Bay Military Hous., LLC v. Ambac Assurance Corp., No. 19 Civ. 9193, 2023 WL 315072, at *14 (S.D.N.Y. Jan. 19, 2023) (declining to find third-party advisors functional equivalents of company employees and distinguishing "[t]he rare cases that have applied the functional equivalent doctrine to find that the privilege was not waived").

§ 2:10 Practitioner's Checklist for Obtaining Benefits of Cooperation Without Waiver

Based on the above cases and the DOJ's clarifications of its policy, there are several practical steps that a company can take to try to both obtain the benefits of cooperation and attempt to avoid waiver.

- *First*, in conducting employee interviews, attorneys should take notes and prepare memoranda on the assumption that such materials may have to be disclosed. The notes and memoranda should be as accurate as possible and avoid interpretations or judgmental pronouncements that may be construed as admissions—a "Just the facts, Ma'am," approach (although, as an important cautionary note, a verbatim or transcript-like recitation of a witness interview may not be protected as work product).[192]
- *Second*, a cooperating company should first attempt to make disclosures through witnesses rather than through its attorneys.
- *Third*, where witnesses are unavailable or uncooperative, before disclosing attorney work product, the company should ask prosecutors and regulators to enter into an express confidentiality agreement. If the government is amenable to an agreement, the company should attempt to negotiate one that affords the government little discretion to unilaterally disclose. Agreements that permit the government to disclose, for example, when "in furtherance of its discharge of its duties and responsibilities," could be found by a court to be insufficiently protective of the corporation's work product as to constitute a general waiver as to third parties.
- *Fourth*, a company seeking to cooperate by disclosing relevant facts to prosecutors should disclose such facts without attributing statements directly to particular individuals interviewed, lest that disclosure later be deemed a waiver of attorney client privilege and work product protection.

192. *See* Redvanly v. Nynex Corp., 152 F.R.D. 460, 463–67 (S.D.N.Y. 1993).