

**Global Investigations Review**

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# The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the  
United Kingdom and the United States

Fifth Edition

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**Editors**

Judith Seddon, Eleanor Davison, Christopher J Morvillo,  
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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# 37

## Privilege: The US Perspective

Richard M Strassberg and Meghan K Spillane<sup>1</sup>

### Privilege in law enforcement investigations

37.1

#### Attorney–client privilege

37.1.1

The attorney–client privilege is recognised in the United States as ‘the oldest of the privileges for confidential communications known to the common law’.<sup>2</sup> It is viewed as serving a crucial function in ‘encourag[ing] full and frank communication between attorneys and their clients’ and thereby promoting ‘the observance of law and administration of justice’.<sup>3</sup> The attorney–client privilege protects information shared between a lawyer and the client, where the information is (1) a communication, (2) made in confidence, (3) between a person who is, or is about to become, a client (4) and a lawyer (5) for the purpose of obtaining legal advice or assistance.<sup>4</sup> Attorney–client privileged communications may take many forms, from oral communications, to emails, to text messages, so long as each communication is undertaken in confidence for the purpose of seeking or rendering legal advice.<sup>5</sup> Once the privilege is created, the privilege continues, and may be invoked at any time (unless it has been waived or is otherwise subject to an exception), even following the termination of the attorney–client relationship or the death of the client.<sup>6</sup>

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1 Richard M Strassberg and Meghan K Spillane are partners at Goodwin.

2 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

3 *Id.* at 392.

4 See, e.g., *In re Richard, Inc.*, 68 F.3d 38, 39–40 (2d Cir. 1995).

5 See, e.g., *Haines v. Liggett Grp.*, 975 F.2d 81, 90 (3d Cir. 1992) (explaining that privilege extends to verbal statements, documents and tangible objects conveyed in confidence for the purpose of legal advice).

6 David M Greenwald and Michele L Slachetka, *Protecting Confidential Legal Information*, Jenner & Block LLP 104 (2015), [https://jenner.com/system/assets/assets/8948/original/2015Jenner\\_](https://jenner.com/system/assets/assets/8948/original/2015Jenner_)

In *Upjohn Co. v. United States*,<sup>7</sup> the United States Supreme Court held that a company's attorney–client privilege extends to company counsel's communications with employees in certain prescribed circumstances.<sup>8</sup> Rather than providing a simple objective test, the *Upjohn* court instead established five factors to guide courts in determining whether the company's privilege should extend to counsel's communications with its employees: (1) whether the communications were made by employees at the direction of superior officers of the company for the purpose of obtaining legal advice; (2) whether the communications contained information necessary for counsel to render legal advice, which was not otherwise available from 'control group' management; (3) whether the matters communicated were within the scope of the employee's corporate duties; (4) whether the employee knew that the communications were for the purpose of the company obtaining legal advice; and (5) whether the communications were ordered to be kept confidential by the employee's superiors, including that the communications were considered confidential at the time and kept confidential subsequent to the interview.<sup>9</sup> When these elements are established, courts generally consider communications between company counsel and an employee to be within the scope of the company's attorney–client privilege.<sup>10</sup>

See Section 37.3.1

While the privilege provides broad protection for confidential communications among those within the attorney–client relationship, disclosing the contents of these communications to a third party outside the scope of the protection – such as a government agency – may result in a waiver of the applicable privilege.

See Section 37.4

#### 37.1.1.1 Crime–fraud exception

The attorney–client privilege does not offer an absolute protection for all of a lawyer's communications with the client. An important exclusion is the crime–fraud exception, which removes the protection of the attorney–client privilege for communications concerning contemplated or continuing illegal or fraudulent acts.<sup>11</sup>

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26BlockAttorney–clientPrivilegeHandbook.pdf (citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950); *Swidler & Berlin v. United States*, 524 U.S. 399, 405–06 (1998)).

7 449 U.S. 383 (1981).

8 *Id.*

9 *Id.* at 394–96. While the majority of jurisdictions have adopted *Upjohn's* approach, some states employ other tests to determine if conversations with an employee are covered by the company's privilege. See, e.g., *Motorola, Inc. v. Lemko Corp.*, No. 08 C 5427, 2010 WL 2179170, at \*1–2 (N.D. Ill. 1 June 2010) (noting that Illinois continues to apply the control group test and assess privilege questions accordingly).

10 To ensure that the employee understands the purpose of the interview, the expectation of confidentiality, and the scope of the attorney–client privilege, company counsel typically begins each meeting with a company employee by providing a summary of these factors, known as an '*Upjohn* warning'.

11 See, e.g., *United States v. Zolin*, 491 U.S. 554, 563 (1989) (explaining that the crime–fraud exception 'assure[s] that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime') (citation omitted); *Clark v. United States*, 289 U.S. 1, 15 (1933); *In re Antitrust Grand Jury*,

After a party has invoked the attorney–client privilege, the person seeking to abrogate the privilege under this exception has the burden of making a *prima facie* case that (1) the client was committing or intending to commit a crime or fraud and (2) the attorney–client communications at issue were in furtherance of that alleged crime or fraud.<sup>12</sup> Significantly, for the exception to be applicable, the party need not show that the alleged crime or fraud was actually completed, only that the crime or fraud was the objective of the communication.<sup>13</sup> Further, the party need not show that the attorney was aware of the alleged fraud or misconduct. In fact, the attorney’s knowledge or ignorance of the crime is irrelevant. Instead, courts look to the client’s intent or objective in the subject communication.<sup>14</sup> As the Supreme Court stated in *Clark v. United States*: ‘A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.’<sup>15</sup>

For example, in the case of *United States v. Gorski*,<sup>16</sup> a defendant was indicted for making fraudulent representations related to the ownership and control of his company when bidding on government contracts.<sup>17</sup> The government alleged that the defendant fraudulently represented that his business qualified as a service-disabled veteran-owned small business entity,<sup>18</sup> and also sought to restructure his company through backdated documents to give the appearance of compliance with ownership regulations.<sup>19</sup> In response to a government subpoena for access to communications between the defendant and his lawyer regarding the ownership and restructuring efforts, the trial court held an *in camera* review and *ex parte* hearing, and determined that the requested documents should be produced under the crime-fraud exception.<sup>20</sup> On appeal, the First Circuit upheld the trial court’s ruling, finding that (1) the indictment provided a reasonable basis to believe that the defendant was engaged in criminal or fraudulent activity and (2) there was a reasonable basis to

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805 F.2d 155, 162 (6th Cir. 1986); *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d 204, 206 (8th Cir. 1985); *United States v. Horvath*, 731 F.2d 557, 562 (8th Cir. 1984).

12 See *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (3d Cir. 2000); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985).

13 See *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (2d Cir. 1984).

14 See, e.g., *United States v. Weingold*, 69 Fed. Appx. 575, 578 (3d Cir. 2003) (noting that the privilege may be disregarded even if the lawyer is innocent in relation to the fraudulent scheme); *In re Grand Jury Proceedings*, 87 F.3d 377, 381-82 (9th Cir. 1996). (‘[I]t is the client’s knowledge and intentions that are of paramount concern to the application of the crime-fraud exception; the attorney need know nothing about the client’s ongoing or planned illicit activity.’); *In re Sealed Case*, 754 F.2d at 402 (‘[A]n attorney’s ignorance of his client’s misconduct will not shelter that client from the consequences of his own wrongdoing.’); *Horvath*, 731 F.2d at 562. (‘Whether the attorney is ignorant of the client’s purpose is irrelevant.’)

15 289 U.S. 15 (1933).

16 807 F.3d 451 (1st Cir. 2015).

17 *Id.* at 455-56.

18 By representing his company as being a service-disabled-veteran-owned small business, the defendant was awarded certain set-aside or sole source government contracts for which he would not have otherwise been eligible. See 13 C.F.R. §125.8-125.10.

19 *Id.*

20 *Id.* at 456-57.



believe that the attorney–client communications ‘were intended by the client to facilitate or conceal the criminal or fraudulent activity’.<sup>21</sup> In so ruling, the court specifically noted that the crime-fraud exception does not require – and therefore does not reflect – any finding on the ultimate question as to whether the defendant acted wrongfully, nor does it bear on the conduct or intent of the lawyers involved.<sup>22</sup>

The crime-fraud exception has also been found to apply because of an attorney’s misconduct, even if the client is found to be innocent of any wrongdoing.<sup>23</sup> The exception does not apply to attorney–client communications that reflect the solicitation or provision of legal advice concerning crimes or frauds that occurred in the past; such attorney–client communications remain protected,<sup>24</sup> unless the communications are made for the purpose of covering up past misconduct or obstructing justice.<sup>25</sup> Attorney–client communications reflecting advice about the legality of a client’s intended course of conduct are likewise protected as privileged.<sup>26</sup> Finally, communications where an attorney dissuades or prevents the

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21 *Id.* at 460-61 (internal quotation marks omitted).

22 *Id.* at 462.

23 See *Drummond Co. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1338 (11th Cir. 2018) (applying a balancing test ‘to weigh the client’s interest in secrecy against the reasons for disclosure’; see also *Navient Sols., LLC v. Law Offices of Jeffrey Lohman*, 19-cv-461, 2020 WL 1917837, \*6 (E.D. Va. 20 April 2020) (finding that ‘the crime-fraud exception can apply where, as here, the attorney alone purportedly committed a crime or fraud of which the client was a victim.’)).

24 See, e.g., *Zolin*, 491 U.S. at 562 (explaining that the crime-fraud exception applies ‘where the desired advice refers not to prior wrongdoing, but to future wrongdoing’) (citation omitted).

25 See, e.g., *In re Grand Jury Proceedings*, 102 F.3d 748, 751 (4th Cir. 1996) (noting that the crime-fraud exception includes ‘concealment or cover-up of [the client’s] criminal or fraudulent activities’); *United States v. Laurins*, 857 F.2d 529, 540 (9th Cir. 1988). (‘Obstruction of justice is an offense serious enough to defeat the privilege.’)

26 If a client seeks advice from counsel about the legality of a course of conduct and then relies to his or her detriment on that advice in taking action later determined to be unlawful, the client may choose to assert an ‘advice of counsel’ defence to demonstrate a lack of wrongful intent. The client generally must show (1) full disclosure of all material facts to the attorney before seeking advice; and (2) actual reliance on counsel’s advice in the good faith belief that the conduct was legal. See, e.g., *United States v. West*, 392 F. 3d 450, 457 (D.C. Cir. 2004). Invoking the ‘advice of counsel’ defence generally waives the attorney–client privilege protecting the underlying communications with counsel related to the advice, since the client is putting the contents of those communications at issue. See, e.g., *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992).

There are limits to the ability of an individual employee to assert the advice-of-counsel defence where the client is the company, rather than the individual. In the civil context, for example, if the corporation controls the privilege over the attorney advice at issue, at least one court has found that the company may refuse to waive that privilege on behalf of the individual employee, even if the disclosure would amount to a complete defence of the individual. See *United States v. Wells Fargo Bank, N.A.*, 132 F. Supp. 3d 558, 566 (S.D.N.Y. 2015). In the criminal context, however, there appears to be split authority as to whether an individual’s right to present his defence may trump the company’s interest in preserving the privilege. Compare *United States v. Grace*, 439 F. Supp.2d 1125, 1142 (D. Mont. 2006) (finding that such evidence may be ‘of such probative and exculpatory value as to compel the admission of the evidence over [the company’s] objection as the attorney–client privilege holder.’), with *Wells Fargo Bank, N.A.*, 132 F. Supp 3d at 562-63 (suggesting that the Supreme Court’s rejection of a ‘balancing test’ for attorney–client privilege in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), may extend to criminal cases as well).

client from engaging in further illegal conduct are also protected; such communications are viewed as serving an important purpose in the administration of justice by promoting legal conduct.<sup>27</sup>

### Derivative claim exception

37.1.1.2

Another exception to a company's assertion of attorney–client privilege arises from the case of *Garner v. Wolfenbarger*,<sup>28</sup> where shareholders filed a derivative suit against a company, charging management with fraud and seeking discovery of privileged communications between management and in-house counsel.<sup>29</sup> In an effort to balance the importance of maintaining the confidentiality of attorney communications with the need to keep the shareholders informed of matters affecting the corporation, the Fifth Circuit created an exception to attorney–client privilege, which has become known as the *Garner* doctrine. The doctrine permits a company's shareholders who are suing on behalf of the corporation to bypass the company's attorney–client privilege upon a showing of 'good cause', based on a nine-factor analysis.<sup>30</sup> The *Garner* doctrine has been recognised as creating a shareholder fiduciary exception to attorney–client privilege, though the doctrine is not universally accepted by the courts.<sup>31</sup> Furthermore, whether the *Garner* doctrine's 'good cause' exception extends to attorney work product also remains unsettled.<sup>32</sup>

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27 See, e.g., *In re Grand Jury Investigation*, 772 N.E.2d 9, 21-22 (Mass. 2002).

28 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974, 91 S. Ct. 1991, 28 L.Ed.2d 323 (1971).

29 Id. at 1095-96.

30 Id. at 1104 (outlining the 'indicia' of the presence or absence of 'good cause' to include: (1) the number of shareholders and the percentage of stock they represent; (2) the bona fides of the shareholders; (3) the nature of the shareholders' claim and whether it is obviously colourable; (4) the apparent necessity and desirability of the shareholders having the information and the availability of it from other sources; (5) whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; (6) whether the communications related to past or to prospective actions; (7) whether the communication is of advice concerning the litigation itself; (8) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and (9) the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons).

31 See, e.g., *Wal-Mart Stores Inc. v. Indiana Elec. Workers Pension Fund Trust IBEW*, 95 A.3d 1264, 1278-80 (Del. 2014) (adopting the 'fiduciary' exception outlined in *Garner* and finding that plaintiff shareholders who make a showing of good cause can inspect documents concerning a corporation's internal investigation, even if those documents were otherwise governed by the attorney–client privilege); *NAMA Holdings, LLC v. Greenberg Traurig, LLP*, 18 N.Y.S.3d 1, 9-10 (N.Y. App. Div. 2015) (adopting the fiduciary exception test enunciated in *Garner* and rejecting the corporation's argument that the fiduciary exception is inapplicable once its shareholder-plaintiffs become adverse to the company); but see *Hoiles v. Superior Court*, 204 Cal. Rptr. 111, 115 (Cal. Ct. App. 1984) (rejecting *Garner* and holding that California does not afford an 'extraordinary avenue . . . to petitioners to pierce the privilege in their capacity as shareholders'); *Pittsburgh History & Landmarks Foundation v. Zeigler*, 200 A.3d 58 (Pa. 2019) (rejecting the 'good cause' standard articulated in *Garner* as inconsistent with the basic tenets of attorney–client privilege law because it introduced uncertainty into the application of the privilege).

32 See *Murphy v. Gorman*, 271 F.R.D. 296, 311-313 (D.N.M. 2010) (collecting cases).

While the *Garner* case arose in the context of a shareholder derivative suit, its principles apply more broadly to other situations where a company owes a fiduciary duty to the party seeking to abrogate the privilege.<sup>33</sup> In a case where, for example, a special litigation committee has undergone an internal investigation into the merits of such a claim, derivative plaintiffs might seek access to the investigation materials under *Garner*. To protect attorney–client privileged communications in this context from the risk of later disclosure to the company’s shareholders, counsel should diligently mark any written legal advice as attorney–client privileged and, where applicable, attorney work-product. Counsel should also seek to avoid situations where the only evidence of an unprivileged fact is a privileged writing, as this may support a shareholder’s ‘good cause’ to pierce the attorney–client privilege to discover that underlying fact.

### 37.1.2 Attorney work-product

In the United States, the doctrine of ‘attorney work-product’ also protects from disclosure certain documents and other materials prepared in anticipation of litigation or for trial. Although such work-product is most commonly prepared by an attorney, work-product protection may extend to materials prepared in anticipation of litigation by certain third parties at the attorney’s direction, including materials prepared by the client.<sup>34</sup> But while the work-product doctrine offers certain protections for an attorney’s impressions, opinions and legal conclusions, such documents are not considered ‘privileged’ like attorney–client communications, but instead are afforded a qualified protection from discovery.<sup>35</sup>

In the seminal case of *Hickman v. Taylor*,<sup>36</sup> the United States Supreme Court formally recognised the attorney work-product doctrine, establishing the scope of the protection to include materials prepared in anticipation of litigation.<sup>37</sup> The *Hickman* court also qualified this work-product protection by finding that, upon a showing of good cause, an adversary could obtain discovery of documents containing ‘factual work product’.<sup>38</sup> The Court recognised that substantially greater

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33 See, e.g., *Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co., Inc.*, Civil Action No. 9250-VCG, 2018 WL 346036, at \*3 (Del. Ch. 10 January 2018) (suggesting that *Garner* could apply to situations in which former stockholders assert a direct claim against a corporation that a class of shareholders was injured by corporate fiduciaries); but see *Morris v. Spectra Energy Partners (DE) GP, LP*, Civil Action No. 12110-VCG, 2018 WL 2095241, at \*5 (Del. Ch. 7 May 2018) (holding that the *Garner* exception does not apply to a limited partnership that has eliminated common-law fiduciary duties, reasoning that *Garner*’s applicability depends on the existence of a mutuality of interest between parties).

34 *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 (D.D.C. 2003).

35 See Fed. R. Civ. P. 26(b)(3).

36 329 U.S. 495 (1947).

37 *Id.* at 511.

38 *Id.* at 511-12.

– if not absolute – work-product protection should be given to documents that reflect the attorney’s legal theories, strategy, assessments and mental impressions (opinion work-product).<sup>39</sup>

In *United States v. Nobles*,<sup>40</sup> the Supreme Court extended the work-product doctrine beyond the scope of materials created by counsel, recognising that attorneys often rely on the assistance of investigators and other agents in preparation for trial. The Court found that it is ‘necessary that the [attorney work-product] doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself’.<sup>41</sup> Following the Supreme Court’s guidance in *Nobles*, work-product protection is understood to be extended to material prepared ‘by or for [a] party’s representative’ as long as the agent is assisting in preparing for litigation and working at the direction of the attorney.<sup>42</sup>

The modern federal work-product doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure (the Federal Rules), and stands in line with the Supreme Court’s guidance in *Hickman* and *Nobles*. In particular, Rule 26(b)(3) eliminates the distinction between attorney work-product and non-attorney work-product, focusing on whether the materials were prepared in anticipation of litigation or trial.<sup>43</sup> Further, Rule 26(b)(3) preserves work-product protections unless the party seeking discovery has a ‘substantial need’ for the materials in the preparation of the party’s case and the party is unable without ‘undue hardship’ to obtain the ‘substantial equivalent’ of the materials by other means.<sup>44</sup>

While the attorney work-product doctrine offers a qualified protection for documents created in anticipation of litigation, disclosing the contents of such documents to a third party outside of the attorney–client relationship (such as a government agency) may result in a waiver of this protection.<sup>45</sup> In addition, courts will examine the temporal proximity of the investigation to the threatened litigation in determining whether the work-product doctrine applies.<sup>46</sup>

See Section 37.4

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39 *Id.* at 511 (noting that ‘[p]roper preparation of a client’s case’ involves creating such documents, and that providing them to opposing counsel on ‘mere demand’ would be ‘demoralizing’ to the legal profession and disserve both clients and the ‘cause of justice’).

40 422 U.S. 225, 238-39 (1975).

41 *Id.*

42 See Fed. R. Civ. P. 26(b)(3) advisory committee’s note to 1970 amendment (‘[T]he weight of authority affords protection of the preparatory work of both lawyers and nonlawyers . . .’).

43 See Fed. R. Civ. P. 26(b)(3).

44 *Id.*

45 See *Quest*, 450 F.3d at 1181, 1192.

46 See *Banneker Ventures, LLC v. Graham*, Civil Action No. 13-391 (RMC), 2017 WL 2124388, at \*1-2, \*4-5 (D.D.C. 16 May 2017) (finding that an internal investigation conducted ‘over two years’ after litigation was threatened was not conducted in anticipation of litigation and thus was not protected by the work-product doctrine).

### 37.1.3 Common interest or joint defence privilege

The joint defence (or ‘common interest’) privilege is a doctrine that preserves the attorney–client privilege and work-product doctrine, despite disclosure of otherwise protected information to third parties.<sup>47</sup> As explained by the Second Circuit Court of Appeals, the privilege ‘serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defence effort or strategy has been decided upon and undertaken by the parties and their respective counsel’.<sup>48</sup> In general, a party asserting the privilege must demonstrate that (1) the communications were made in the course of a joint defence effort, (2) the statements were designed to further the effort and (3) the privilege has not otherwise been waived.<sup>49</sup> If the privilege is challenged, the burden is on the defendants to demonstrate the existence of a joint defence arrangement.<sup>50</sup>

While a joint defence arrangement has not been held to create a direct attorney–client relationship between counsel for one party and another, some courts have found that the sharing of confidential information creates an implied attorney–client relationship among the parties to the joint defence. In *United States v. Henke*,<sup>51</sup> for example, the Ninth Circuit held that the joint defence privilege can, in certain circumstances, create an implied attorney–client relationship, as well as a disqualifying conflict of interest. In that case, three executives – Gupta, Desaiogudar and Henke – were charged with conspiracy, making false statements, securities fraud and insider trading.<sup>52</sup> All three defendants participated in joint defence meetings where they shared confidential information.<sup>53</sup> On the eve of trial, however, Gupta entered into a co-operation agreement and agreed to testify for the government.<sup>54</sup> Gupta’s lawyers threatened Desaiogudar and Henke’s attorneys with legal action if they revealed any confidential information obtained as part of the joint defence meetings. Desaiogudar and Henke’s attorneys eventually moved to withdraw because they believed their duty of confidentiality to Gupta prevented them from effectively cross-examining him.<sup>55</sup> The Ninth Circuit held that the lower court erred in denying the motions to withdraw, as the joint defence privilege created ‘a disqualifying conflict where information gained in confidence by an attorney [became] an issue’.<sup>56</sup>

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47 See *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989), cert. denied, 502 U.S. 810 (1991).

48 Id.

49 See, e.g., *United States v. Bay State Ambulance*, 874 F.2d 20, 28 (1st Cir. 1989); *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. 381, 385 (S.D.N.Y. 1975).

50 See *United States v. Weissman*, 195 F.3d 96, 100 (2d Cir. 1999).

51 222 F.3d 633 (9th Cir. 2000).

52 Id. at 635.

53 Id. at 637.

54 Id.

55 Id. at 637–38.

56 Id. at 637.

To mitigate the risk that information shared in the context of a joint defence agreement may lead to disqualification at a later time, many lawyers choose to include written disclaimers in their joint defence agreements along the following lines:

*Nothing contained [in this agreement] shall be deemed to create an attorney–client relationship between any attorney and anyone other than the client of that attorney . . . and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any joint defense participant who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such an attorney’s participation in this agreement, and it is herein represented that each party to this agreement has specifically advised his or her client of this clause.*<sup>57</sup>

Courts have found such provisions to permit an attorney to cross-examine a witness who was a former member of a joint defence arrangement and has since become a government co-operator, and have even permitted counsel to impeach the witness using statements that would otherwise be protected as privileged under the joint defence.<sup>58</sup>

The recent case of *SEC v. Rashid*<sup>59</sup> demonstrates the importance of both confirming and recording the intention to enter into a common interest relationship. In *Rashid*, the SEC was investigating the defendant’s use of corporate expenses while employed at Apollo Management LP. During the investigation, the defendant retained counsel separate from that of the company, and eventually hired a separate firm to replace the first. During a later deposition of a representative from his prior law firm, the SEC sought to inquire about discussions with company counsel. When the defendant claimed such communications were protected by common interest privilege, the SEC moved to compel the testimony, arguing that the common interest privilege is narrowly constructed and that the defendant did not meet his burden of showing that such a relationship existed. The court ordered the deposition to proceed, finding insufficient evidence of a common interest relationship. In so ruling, the court considered, among other things, (1) the lack of a written common interest agreement; (2) testimony from company counsel that they did not recall entering into a common interest relationship; (3) the

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<sup>57</sup> See *Weissman*, 195 F.3d at 100.

<sup>58</sup> See, e.g., *United States v. Almeida*, 341 F.3d 1318, 1326 (11th Cir. 2003) (holding that statements made under the joint defence doctrine ‘do not get the benefit of the attorney–client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence’); *United States v. Stepney*, 246 F. Supp. 2d 1069, 1086 (N.D. Cal. 2003). (Finding that when a former co-defendant testified on behalf of the government, the joint defence team could cross-examine him on statements made pursuant to a joint defence agreement that (1) specified that the agreement would not create a duty of loyalty or an attorney–client relationship; and (2) explicitly permitted the lawyer to use any material or information provided by the testifying defendant during the course of the joint defence in later cross-examining the witness.)

<sup>59</sup> 17-cv-8223, 2018 WL 6573451 (PKC) (S.D.N.Y. 13 December 2018).

defendants' lack of ability to recall specific details of the terms of the alleged agreement; and (4) that company counsel had delivered the *Upjohn* warnings at their first meeting with the defendant. The court determined that the common interest privilege cannot apply in a circumstance where there is no evidence that both parties agreed to pursue a joint legal strategy.

Further, to preserve the attorney–client privilege in the context of a joint defence arrangement, confidentiality must still be maintained against those outside the arrangement, because disclosure to a single outsider could constitute waiver of the information discussed in the outsider's presence.

## 37.2 Identifying the client

The 'client' in an attorney–client relationship is generally defined as the intended and immediate beneficiary of the lawyer's services, who communicates with the attorney to obtain legal advice, and interacts with the attorney to advance his or her own interests.<sup>60</sup> Defining the 'client' becomes more difficult in the context of corporate representation, as a company typically speaks by and through its employees, but the corporation's counsel represents not those individual agents, but rather the corporation itself.<sup>61</sup> As a general matter, a corporation's attorney–client privilege is controlled by the management of the organisation.<sup>62</sup> An employee or officer cannot assert the corporation's privilege if the corporation waives it,<sup>63</sup> and an employee cannot waive the corporation's privilege if the corporation asserts it.<sup>64</sup>

In cases where the interests of an employee are or may become adverse to that of the company during a government investigation, the Rules of Professional Conduct<sup>65</sup> dictate that attorneys explain clearly whom they represent.<sup>66</sup> Interviewing employees in the context of a government investigation inevitably creates situations in which conflict between company and employee may arise. In particular, individuals should be advised to obtain separate counsel in situations where they are (1) the target of the investigation, (2) a probable whistleblower or (3) an employee facing risk of criminal liability. In any of these circumstances, employees should not be involved in the day-to-day supervision of company counsel's own investigation, including serving in the reporting chain.

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60 Greenwald and Slachetka, *supra* note 6, at 15–16 (citing *Wylie v. Marley Co.*, 891 F.2d 1463 (10th Cir. 1989)).

61 See, e.g., *Judson Atkinson Candies, Inc. v. Latini-Hobberger Dhimantec, Inc.*, 529 F.3d 371, 389 n.4 (7th Cir. 2008).

62 See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (noting that 'the power to waive the corporate attorney–client privilege rests with the corporation's management').

63 See *In re Bevill*, 805 F.2d at 124–25; *In re Hechinger Inv. Co.*, 285 B.R. 601, 606 (D. Del. 2002) (finding that former officers and employees could not assert the corporation's privilege).

64 See *In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000).

65 American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct (2016), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html).

66 ABA Model Rule of Professional Conduct 1.13(f).

Company counsel may encounter circumstances where an employee seeks to assert the attorney–client privilege to prevent the disclosure of information uncovered by counsel during investigative interviews by arguing that company counsel represents the employee as an individual. The Third Circuit in *In re Bevill Bresler & Schulman Asset Management Corp*, developed a five-part test (the *Bevill* test) to examine the merits of such an assertion by an individual employee against company counsel.<sup>67</sup> Under this test, employees must show that (1) they approached corporate counsel for the purpose of seeking legal advice, (2) they made it clear that they were seeking advice in their individual capacity, (3) counsel sought to communicate with the employee in this individual capacity, mindful of the conflicts with its representation of the company, (4) the communications were confidential and (5) the communications did not concern the employee’s official duties or the general affairs of the company.<sup>68</sup> The *Bevill* test has been recognised by other jurisdictions as a means of assessing whether a company employee may assert attorney–client privilege in an individual capacity arising out of communications with corporate counsel.<sup>69</sup>

See Chapter 14 on  
employee rights

In *United States v. Blumberg*,<sup>70</sup> for example, the District of New Jersey applied the *Bevill* test where an individual employee sought to claim personal privilege protection for communications with the company’s lawyer. In assessing the fifth factor of the test, the court considered the individual employee’s claim that he had discussed with company counsel his ‘potential for criminal exposure’ and the fact that he was just a ‘fact witness’.<sup>71</sup> The court ultimately concluded that this exchange did not create an individual attorney–client relationship, and that the company still owned the privilege covering the employee’s communications, and thus could waive it (presumably over his objection).<sup>72</sup>

To mitigate the risks created by potentially divergent interests between the company and individual employees, counsel should be clear in their engagement letter about not only whom they represent, but also whom they do not. Further, mindful of the considerations outlined by the *Bevill* court, company counsel should take care during interviews with individual employees to limit their discussions to matters within the scope of the employee’s official duties, rather than matters that may implicate the employee’s personal interests. Finally, in the event that discussions with an individual employee diverge to matters implicating legal advice in the employee’s individual capacity, counsel should reiterate

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67 805 F.2d 120, 123, 125 (3rd Cir. 1986).

68 *Id.*

69 See, e.g., *United States v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, AFL-CIO, 119 F.3d 210, 215 (2d Cir. 1997); *United States v. Graf*, 610 F.3d 1148, 1160-61 (9th Cir. 2010) (adopting the *Bevill* test and listing other jurisdictions who have adopted the test as well).

70 2017 U.S. Dist. LEXIS 47298 (D.N.J. 27 Mar. 2017).

71 *Id.* at \*14.

72 *Id.* at \*14-15.



to the employee that they have been retained to represent the company and the company's interests, and potentially advise the employee to retain separate counsel with respect to these other matters.

## 37.3 Maintaining privilege

### 37.3.1 Employee interviews

It is generally best if counsel conducts the employee interviews in the context of a government investigation, to ensure that what is said during the interview is covered by the attorney–client privilege, and that notes or memoranda documenting the interview are similarly privileged.<sup>73</sup> Recordings of interviews may, however, be considered purely factual communications that – as verbatim transcriptions – may not be subject to the attorney work-product doctrine.<sup>74</sup> Accordingly, it is general practice to have the attorney interviewer (or, more likely, another attorney in the room) take written notes of the interviews that include his or her thoughts and mental impressions. And because opinion work-product receives greater protection than fact work-product, it is more likely that written notes including an attorney's thoughts and impressions will be protected.<sup>75</sup>

While it is often most advantageous to have counsel conduct the witness interviews in an investigation, a court may still find that interviews conducted by non-lawyers maintain attorney–client privilege if they are acting as agents for lawyers. For example, in *In re Kellogg Brown & Root Inc (KBR)*,<sup>76</sup> the DC Circuit court held that the work of an engineering and construction firm involved in an internal investigation was afforded work-product protection where the investigation was conducted 'under the auspices of KBR's in-house legal department, acting in its legal capacity.'<sup>77</sup> The court held that '[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation,

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73 *Upjohn*, 449 U.S. at 394-99 (explaining that attorney–client privilege protects attorney notes taken during interviews with employees during internal investigations); see also *In re Gen. Motors Ignition Switch Litig.*, 80 F. Supp. 3d 521, 527-28 (S.D.N.Y. 2015) (finding that documents related to the internal investigation were protected from discovery because (1) the investigation was conducted at the direction of counsel; (2) those interviewed were told that the purpose of the interview was to facilitate the rendering of legal advice; (3) they were told that the content of the discussions should remain confidential; and (4) the communications underlying the published report were not shared with third parties).

74 See Fed. R. Crim. P. 26.2(a), (f)(2); see also *United States v. Nobles*, 422 U.S. 225, 230-32 (1975).

75 It is critical for counsel to establish the expectation of confidentiality and attorney–client privilege protection at the outset of each interview, as interview memoranda merely labelled as privileged and confidential will not 'retroactively render the earlier, otherwise-unprivileged discussions subject to the attorney–client privilege.' See *Erickson v. Hocking Technical College*, Case No. 2:17-cv-360, 2018 U.S. Dist. LEXIS 50075, at \*6, \*8 (S.D. Ohio 27 March 2018).

76 756 F.3d 754 (D.C. Cir. 2014).

77 *KBR*, 756 F.3d at 757 (citing *Upjohn*, 449 U.S. 383).

the attorney–client privilege applies'.<sup>78</sup> The court's decision in *KBR* underscores the importance of making it clear that witness interviews conducted in the context of an internal investigation are for the purpose of rendering legal advice.<sup>79</sup>

Consistent with these principles, at the outset of any employee interview, counsel should give the employee an *Upjohn* warning, which makes clear that the communications between company counsel and the employees are confidential and protected as attorney–client privileged, and specifies that the privilege belongs to the company, and the company may choose to waive that privilege in the future. If clearly given, an *Upjohn* warning sets the boundaries of the interview and removes any doubt about whether counsel represents the employee.

In *KBR*, the DC Circuit noted that there are no 'magic words' that must be used to deliver a proper *Upjohn* warning.<sup>80</sup> Nevertheless, in practice, *Upjohn* warnings typically include some variation of the following components:

- *The lawyer represents the company only and not the witness personally.*
- *The lawyer is collecting facts for the purpose of providing legal advice to the company.*
- *The communication is protected by attorney–client privilege, which belongs exclusively to the company, not the witness.*
- *The company may choose to waive the privilege and disclose the communication to a third party, including the government.*
- *The communication must be kept confidential, meaning that it cannot be disclosed to any third party other than the witness's counsel.*<sup>81</sup>

Once the *Upjohn* warning is given, and before any substantive interview commences, counsel should confirm that the witness understands the warning, answer any questions the witness has about it and establish that the witness is agreeable to being interviewed under these terms. As an additional precaution, counsel should remind the witness at the conclusion of the interview not to discuss the substance of the interview with anyone else, except to the extent that the witness wishes to convey additional information or to ask follow-up questions of counsel.

Once a witness interview is complete, memorialising the content of the interview is essential to the investigation. The summary should state expressly that it does not constitute a verbatim transcription of the interview and that the

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<sup>78</sup> *Id.* at 758–59.

<sup>79</sup> In contrast, in *Wultz v. Bank of China*, the Southern District of New York granted a motion to compel documents collected by non-lawyers in the context of an internal investigation, where the party invoking the privilege failed to demonstrate that the documents were collected at the direction of an attorney to assist the attorney in providing legal advice. 304 F.R.D. 384, 395–97 (S.D.N.Y. 2015). The court also found that the work-product doctrine would not protect the documents from disclosure because the bank had failed to show that the documents would not have been created in 'essentially similar form irrespective of the litigation.' *Id.* at 395.

<sup>80</sup> *KBR*, 756 F.3d at 758.

<sup>81</sup> See, e.g., ABA, White Collar Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts With Corporate Employees* (17 July 2009).

summary contains the thoughts, mental impressions and legal conclusions of counsel. The summary should also confirm the delivery of the *Upjohn* warning, indicating the employee's understanding of the warning and willingness to proceed with the interview.

The importance of recording the provision of the *Upjohn* warning is underscored by the case of *United States v. Ruehle*.<sup>82</sup> In *Ruehle*, outside counsel conducted an interview of an employee, William J Ruehle, during an internal investigation. During the interview, Ruehle made statements that he later sought to suppress from his criminal trial. He argued that the statements were privileged because outside counsel had previously represented him in his individual capacity in a shareholder lawsuit, and counsel had not otherwise advised him that his statements during the internal investigation could be disclosed to third parties. The court found there to be inadequate evidence that Ruehle had been given *Upjohn* warnings, finding it persuasive that there was no reference to their delivery in counsel's interview memoranda. While the court's decision was later reversed on other grounds, this case illustrates the importance of maintaining a record of the delivery of *Upjohn* warnings. The absence of an *Upjohn* warning is not dispositive, however, as courts will also consider whether the employee and attorney 'explicitly or by their conduct manifest[ed] an intention to create an attorney/client relationship'.<sup>83</sup> Without an *Upjohn* warning, courts will assess whether the attorney had 'reason to suspect that the firm's interests and the [employee's] interests diverged' during the period in question and also whether the employee's 'assumption' that the Company attorney was his personal attorney was 'reasonable' for someone of his knowledge and experience.<sup>84</sup>

Issues may also arise when interviewing current employees in the context of an internal investigation, to the extent that the investigation is prompted by a government inquiry when there is extensive coordination with a government regulator. In *United States v. Connolly*,<sup>85</sup> a bank engaged outside counsel to conduct an investigation into the bank's LIBOR practices that was prompted by a letter from the Commodity Futures Trading Commission (CFTC) requesting that the bank 'cooperate fully' by 'voluntarily engaging' outside counsel to conduct a review. During the investigation, outside counsel 'coordinated extensively' with both the CFTC and the Department of Justice (DOJ), and the government agencies gave substantial direction to the lawyers as to which employees should be interviewed and how to approach the interviews. After a bank employee, Connolly, was later indicted and convicted for conspiracy and wire fraud for his conduct in connection with the manipulation of LIBOR, he moved to vacate his conviction on the theory that his prosecution was predicated on, and fatally tainted by, statements that he gave in interviews conducted by outside counsel during the investigation.

See Chapters 8 on witness interviews and 14 on employee rights

82 583 F.3d 600 (9th Cir. 2009).

83 See *In re Grand Jury Investigation*, No. 19-15, 2019 WL 217916, \*13 (D. D.C. 4 March 2019).

84 *Id.* at \*16 (finding that a sophisticated attorney would have no need for an *Upjohn* warning to understand that company counsel was not his personal attorney).

85 No. 16-Cr-00370, 2019 WL 2120523 (S.D.N.Y. 2 May 2019).

He argued that counsel was effectively deputised by the government in conducting the interviews, and as a result his statements should be deemed involuntary and rendered inadmissible under *Garrity v. New Jersey*,<sup>86</sup> since he made the statements under the threat of termination of employment in violation of his Fifth Amendment rights. Chief Judge Colleen McMahon of the Southern District of New York found that outside counsel here was ‘*de facto* that Government for *Garrity* purposes’ and noted that she was ‘deeply troubled by this issue’, which had ‘profound implications’ for how government investigations are conducted. And while the Court ultimately declined to overturn the employee’s conviction, holding that the government did not ‘use’ his compelled statements in indicting or prosecuting him, the Court’s comments and admonition will undoubtedly have a significant impact on the level of coordination with government agencies in investigations going forward.

See Chapter 10  
on co-operating  
with authorities

### Former employees

37.3.2

Interviews with former corporate employees about matters within the scope of their prior employment may also be protected by the attorney–client privilege.<sup>87</sup> Indeed, while courts of different jurisdictions are split as to whether attorney–client privilege should extend to discussions with former employees as a general matter,<sup>88</sup> most courts agree that narrowly tailored discussions related to the period of the individual’s former employment should remain privileged.<sup>89</sup> As such, counsel conducting an investigation should carefully focus the interview with a former employee on matters that occurred during the former employee’s tenure, as some district courts have held that interviews with a former employee on subjects that occurred after the employment had ended are not privileged.<sup>90</sup>

86 385 U.S. 493 (1967).

87 *Upjohn*, 449 U.S. at 403 (Burger, C.J., concurring) (finding a former employee’s communication is privileged when the employee ‘speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment’).

88 Compare *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 658 F.2d 1355, 1361 n. 7 (9th Cir. 1981) (finding that the *Upjohn* rationale extended the attorney–client privilege to former employees because ‘former employees . . . may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties.’), with *Clark Equip. Co. v. Lift Parts Mfg Co.*, No. 82 C 4585, 1985 WL 2917, at \*5 (N.D. Ill. 1 Oct. 1985) (declining to apply privilege protection to communications with former employees, noting that ‘[i]t is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit’).

89 See, e.g., *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004) (‘the line to be drawn is not difficult: if the communication sought to be elicited relates to [the former employee’s] conduct or knowledge *during* her employment . . . , or if it concerns conversations with corporate counsel that occurred *during* her employment, the communication is privileged; if not, the attorney–client privilege does not apply’) (emphasis in original).

90 See, e.g., *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999). Interviews about such topics may, however, be covered by work-product protection.

In determining whether a former employee is likely to be co-operative or to maintain the confidentiality of the interview, counsel should consider (1) the circumstances of the employee's departure and (2) whether the employee will be contractually obliged to maintain the confidentiality of the interview, through a severance agreement, for example.

### 37.3.3 Non-legal advice

At the outset of an internal investigation, the corporation should document that the investigation is being conducted for the purpose of obtaining legal advice and at the direction of counsel. If such intention is not documented, and it appears instead that employee interviews are being conducted in the context of a non-legal investigation, such communications may not be effectively cloaked in the attorney–client privilege. In *Koumoulis v. Independent Financial Marketing Group Inc.*,<sup>91</sup> for example, plaintiffs were former and current employees of a company in the business of providing investment products to financial institutions.<sup>92</sup> The Eastern District of New York found that reports documenting internal discrimination complaints and the subsequent investigation by the company's human resources managers were not protected as attorney–client privileged because 'their predominant purpose was to provide human resources and thus business advice, not legal advice'.<sup>93</sup>

In light of *Koumoulis*, counsel must be ever mindful of stating explicitly at the outset of an investigation that its communications are outside the course of the day-to-day operation of the client's business and are explicitly aimed at assisting the delivery of legal advice. To the extent that litigation is reasonably foreseeable, it should be noted in all memoranda generated in the context of the investigation. Further, counsel should confirm with individual employees that when they are seeking legal advice – rather than business advice – the employees should be similarly explicit in their communications, labelling them as 'attorney–client privileged'. More important than any label or transcription, however, is that the context of such documents must reflect the solicitation and receipt of legal, rather than business, advice.<sup>94</sup>

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91 295 F.R.D. 28 (E.D.N.Y. 1 November 2013), *aff'd* in part, 29 F. Supp. 3d 142 (E.D.N.Y. 21 January 2014).

92 *Id.* at 33.

93 *Id.* at 46. See also *Welland v. Trainer*, No. 00 Civ. 0738(JSM), 2001 WL 1154666, at \*2 (S.D.N.Y. 1 October 2001) (finding certain communications between the investigator, who conducted the internal investigation, and in-house and outside counsel are protected by attorney–client privilege because the investigator received legal advice from counsel under circumstances in which the employee under investigation was an executive and litigation was expected if the employee were terminated).

94 *Koumoulis*, 29 F. Supp. 3d at 147 (finding that legal memoranda must contain more than 'a stray sentence or comment within an email chain referenc[ing] litigation strategy or advice').

## Waiving privilege

Even if all the prerequisites for establishing attorney–client privilege are met, whenever a client discloses confidential communications to third parties, including government agencies, the disclosure may constitute a waiver of the privilege as to both the communication that has been disclosed and other communications relating to the same subject matter. Federal Rule of Evidence 502(a) governs disclosures made to a federal officer or agency and also the scope of waiver in such disclosures.<sup>95</sup> The rule explicitly states that disclosures of attorney–client or work-product protection to the federal government creates a waiver that extends to other undisclosed communication or information in a federal or state proceeding if: (1) the waiver is intentional, (2) the disclosed and undisclosed communications or information concern the same subject matter and (3) they ought in fairness to be considered together.<sup>96</sup>

While the ‘fairness’ requirement of Rule 502(a) creates some uncertainty as to when subject-matter waiver might occur, in practice, courts typically look to the reason for the initial disclosure when determining the scope of a waiver. If a court determines that a party selectively disclosed privileged information to gain a strategic advantage to the government’s detriment, it is more likely to find a full subject-matter waiver.<sup>97</sup> But, if the disclosure occurred outside the context of litigation, or if the disclosure was not intended for – or did not actually result in – a strategic advantage to the disclosing party, the court is likely to find a limited waiver.<sup>98</sup> In the case of *United States v. Treacy*,<sup>99</sup> for example, Judge Rakoff of the Southern District of New York quashed a defendant’s subpoena for a law firm’s interview memoranda that had not previously been provided to the government, rejecting the theory that furnishing some interview memoranda to the government waived privilege to others covering the same subject matter.<sup>100</sup> The Court relied on the advisory committee notes in Rule 502(a) in support of its ‘fairness’ assessment, finding that subject-matter waiver should be reserved for the narrow circumstances where a party seeks to disadvantage their adversary through a selective or misleading disclosure.<sup>101</sup> Further, if a party chooses to disclose attorney

95 Fed. R. Evid. 502(a).

96 Id.

97 See, e.g., *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007). (‘When one party takes advantage of another by selectively disclosing otherwise privileged communications, courts broaden the waiver as necessary to eliminate the advantage.’)

98 See, e.g., *In re Keeper of the Records*, 348 F.3d 16, 24 (1st Cir. 2003) (holding that ‘the extrajudicial disclosure of attorney–client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter’); *Swift Spindrift, Ltd. v. Aluada Ins. Inc.*, No. 09 Civ. 9342 (AJN)(FM), 2013 WL 3815970, at \*5 (S.D.N.Y. 24 July 2013) (finding that the intentional disclosure of two privileged emails did not result in a broader waiver of the attorney–client privilege because (1) the emails were actually unfavourable to the disclosing party’s position; and (2) therefore could not be used to the other parties’ disadvantage).

99 No. S2 08 CR 366 (JSR), 2009 WL 812033 (S.D.N.Y. 24 Mar. 2009).

100 Id. at \*1-2.

101 Id.

work-product to the government – in the form of White Papers, presentations or other memoranda – with the purpose of dissuading the government from bringing suit, one court has recently held that such a disclosure will waive any privilege with respect to those materials, which may subsequently be discoverable by third parties.<sup>102</sup>

### 37.4.1 Co-operation credit and waiver

Corporations subject to criminal or regulatory investigations have long faced the question of whether and when to turn over privileged material to the government. Waiving privilege has historically resulted in increased co-operation ‘credit’ from the DOJ<sup>103</sup> and the Securities and Exchange Commission (SEC).<sup>104</sup> However, changes to DOJ guidelines now forbid the government from requesting that companies waive attorney–client privilege, and preclude consideration of whether the corporation waived privilege in assessing co-operation credit.

Indeed, in response to pressure from the private sector and the legislative and judicial branches, on 12 December 2006, the then Deputy Attorney General Paul J McNulty issued a memorandum containing new corporate charging guidelines for federal prosecutors through a revision to the Principles of Federal Prosecution of Business Organizations.<sup>105</sup> The McNulty Memorandum required that, before requesting a waiver of attorney–client or work-product privileged information from a corporation under investigation, prosecutors must establish a ‘legitimate need’ for privileged communications and seek approval of the US Attorney, who must obtain written approval of the Deputy Attorney General.<sup>106</sup>

In 2008, the DOJ replaced these guidelines in a memorandum authored by then Deputy Attorney General Mark R Filip.<sup>107</sup> The Filip Memorandum further adjusted what factors the government should consider in determining

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102 See *Alaska Electrical Pension Fund v. Bank of America Corp.*, 2017 WL 280816, at \*2–3 (S.D.N.Y. 20 January 2017); See also SEC Division of Enforcement, Enforcement Manual, Office of the Chief Counsel, §3.2.3.2 (28 October 2016) (specifying that White Papers, excluding Wells notices, submitted to the SEC may be discoverable by third parties in accordance with applicable law).

103 See, e.g., Memorandum from Larry D Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys, regarding Principles of Federal Prosecution of Business Organizations (20 January 2003) (Thompson Memorandum); see also Memorandum from Paul McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys, regarding Principles of Federal Prosecution of Business Organizations (12 December 2006) (McNulty Memorandum).

104 See, e.g., Sec. & Exch. Comm’n, SEC Rel. No. 34-44969, 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 (the Seaboard Report) (23 October 2001) (explaining that a company that disclosed internal investigation interviews without asserting privilege had fully co-operated).

105 McNulty Memorandum, *supra* note 97.

106 *Id.* at 8-9.

107 Memorandum from Mark R Filip, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys, regarding Principles of Federal Prosecution of Business Organizations (28 August 2008) (Filip Memorandum).

whether a corporation deserves ‘co-operation credit’: where co-operation credit had previously turned on factors including waiver of attorney–client privilege or work-product protections, it will now focus on disclosure of relevant facts.<sup>108</sup> In other words, a company could receive the same co-operation credit if it disclosed facts contained in non-privileged materials as it would if it disclosed facts contained in privileged materials, so long as the company discloses all relevant facts known to it.

In September 2015, the DOJ issued a memorandum authored by then Deputy Attorney General Sally Quillian Yates entitled ‘Individual Accountability for Corporate Wrongdoing’.<sup>109</sup> The Yates Memorandum set forth policies intended to guide the DOJ in holding individual defendants civilly and criminally liable for corporate misconduct.<sup>110</sup> Significantly, the Yates Memorandum now requires a company to disclose ‘all relevant facts relating to the individuals responsible for the misconduct’ for the company ‘to be eligible for any cooperation credit’.<sup>111</sup> While Yates has publicly remarked that these new policies are not intended to undermine the Filip Memorandum’s guidance regarding the waiver of attorney–client privilege,<sup>112</sup> the mandate to disclose ‘all relevant facts’ creates some uncertainty as to whether, at least practically speaking, such a waiver may now be required once again. In describing the impact of the Yates Memorandum on companies seeking co-operation credit, Yates explained the DOJ’s view that ‘facts are not [privileged]’, and therefore a company must ‘produce all relevant facts – including the facts learned through . . . interviews [with company employees] – unless identical information has already been provided.’<sup>113</sup>

In November 2017, the DOJ adopted the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, which provided guidance regarding the credit that the DOJ might provide to companies who self-report FCPA violations. The policy authorises certain benefits – including a presumption that self-reporting companies will not be criminally charged – for companies that meet the DOJ’s rigorous requirements of disclosure, co-operation and remediation, including disgorgement of ill-gotten gains.<sup>114</sup> In March 2018, the DOJ announced an expansion of the FCPA Corporate Enforcement Policy, noting that it may be employed

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108 Id.

109 Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys, regarding Individual Accountability for Corporate Wrongdoing (9 September 2015) (Yates Memorandum).

110 Id. at 1.

111 Id. at 2.

112 Remarks of Deputy Att’y Gen. Sally Quillian Yates delivered at American Banking Association and American Bar Association Money Laundering Enforcement Conference (16 November 2015), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0> (‘[T]here is nothing in the new policy that requires companies to waive attorney–client privilege or in any way rolls back the protections that were built into the prior factors.’).

113 Id.

114 Corporate Enforcement Policy, U.S. Dep’t of Justice, Justice Manual § 9-47.120 (2017), available at <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy>.



as non-binding guidance in criminal cases beyond those arising under the FCPA. This announcement underscores the DOJ's encouragement of self-reporting and co-operation by companies in a wide range of criminal cases.

On 29 November 2018, Deputy Attorney General Rod J Rosenstein delivered remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act<sup>115</sup> that reaffirmed the central tenets of the Yates Memorandum, but also announced a revised policy that provides federal prosecutors with greater discretion concerning whether to pursue individuals, based on varying standards between civil and criminal investigations. In particular, Rosenstein stated that companies are no longer expected to 'admit the civil liability of every individual employee' to qualify for co-operation credit. Instead, companies should focus on identifying individuals who were 'substantially involved in or responsible for the misconduct', including members of senior management or the board of directors. While Rosenstein's comments have been considered as a reversion to pre-Yates priorities, where the 'primary goal' in civil cases is to recover money, recent court decisions have demonstrated a continued focus on the concepts of individual accountability articulated by Yates.<sup>116</sup>

In light of this recent guidance, corporate counsel must be mindful about entering into joint defence agreements that might limit their ability to share with the government the underlying facts learned during the investigation, especially if the company is facing exposure to a potentially devastating criminal charge if it does not receive credit for co-operating with the government. In addition, the Yates Memorandum underscores the importance of issuing comprehensive *Upjohn* warnings when interviewing company employees, as a mandate to disclose 'all relevant facts' may involve the revelation to the government of facts disclosed by (potentially culpable) employees in the context of investigative interviews.

### 37.4.2 Inadvertent disclosure of privileged material

Particularly in cases where large numbers of documents are produced, it is not uncommon that a party might inadvertently disclose privileged communications. Federal Rule of Evidence 502(b) governs the court's treatment of attorney–client privileged and work-product material that has been inadvertently disclosed. The rule provides that, when making a disclosure in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: '(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder

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115 See Deputy Attorney General Rod J Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, Office of Public Affairs, U.S. Dep't of Justice (29 November 2018) <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rostenstein-delivers-remarks-american-conference-institute-0>.

116 See *United States ex rel. Doe v. Heart Solutions PC et al.*, 923 F.3d 308, 314–15 (3d Cir. 2019) (sustaining summary judgment against an individual defendant even though she had no financial stake in the corporation profiting from the fraud, citing the Yates memorandum as endorsing enforcement under the false claims act against individuals 'at all levels' of the corporate structure.)

promptly took reasonable steps to rectify the error.<sup>117</sup> According to Rule 502(b)'s advisory committee explanatory notes, courts are to consider several factors in determining whether the privilege holder took steps to promptly rectify the error, including (1) the reasonableness of precautions taken, (2) the time taken to rectify the error, (3) the scope of discovery, (4) the number of documents reviewed and the time constraints for production, (5) the extent of disclosure and (6) 'the overriding issue of fairness'.<sup>118</sup> The explanatory notes also suggest that a party can help demonstrate that its steps were reasonable by employing 'advanced analytical software applications and linguistic tools' in screening for privilege.<sup>119</sup>

Federal Rule of Civil Procedure 26(b)(5)(B) provides additional guidance on how clawback provisions may intersect with a claim of inadvertent disclosure. Under this rule, if information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, 'the party making the claim may notify any party that received the information of the claim and the basis for it'.<sup>120</sup> After being notified, a party:

*must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.*<sup>121</sup>

While the same clawback procedure is not explicitly contemplated in the criminal context, parties making disclosures in federal proceedings or to a federal office or agency may choose to enter into a voluntary clawback arrangement under Rule 502(e), including an explicit agreement that inadvertent disclosure will not constitute a waiver.<sup>122</sup> Such agreements are generally binding only on the parties to the agreement.<sup>123</sup> A carefully drawn clawback agreement can be to the benefit of everyone in the context of a government investigation: the agency will benefit from receiving discovery more expeditiously, and the producing party will benefit from minimising the risk and added review costs in the absence of such an agreement.<sup>124</sup> Even where counsel takes reasonable steps to prevent the disclosure of privileged material, the complexity of government investigations creates a real risk

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117 Fed. R. Evid. 502(b).

118 Fed. R. Evid. 502 advisory committee's note.

119 Id.

120 Fed. R. Civ. P. 26(b)(5)(B).

121 Id.

122 Fed. R. Evid. 502(e).

123 Id.

124 In the context of an investigation that is already public, a party may choose to request a court order limiting the scope of waiver and/or setting forth a clawback procedure to govern its production. See Fed. R. Evid. 502(d).

that such materials may still be inadvertently produced. To further mitigate this risk, document production letters should include unequivocal language, preserving the client's ability to claw back and recover inadvertently disclosed documents.

### 37.5 Selective waiver

The attempt to disclose privileged material to the government in the context of an investigation, while still claiming privilege and confidentiality over that same material as to other third parties, is called 'selective waiver'. Generally, courts have refused to sanction selective waiver, finding that the disclosure of privileged material to the government destroys the confidentiality necessary to maintain a claim of privilege in the first place, and therefore waives the privilege with respect to other third parties as well.<sup>125</sup>

The leading case applying the selective-waiver analysis is *Diversified Industries Inc v. Meredith*.<sup>126</sup> In *Diversified Industries*, a corporation retained external counsel to conduct an internal investigation into allegations of bribery.<sup>127</sup> The internal report prepared by external counsel was then produced to the SEC.<sup>128</sup> The Eighth Circuit held that this disclosure constituted only a 'limited waiver' that did not preclude the corporation from subsequently withholding the report from private litigants on the grounds of attorney–client privilege.<sup>129</sup> The court reasoned that a contrary ruling may undermine corporate incentives to initiate internal investigations conducted by counsel.<sup>130</sup>

But while *Diversified Industries* is still good law, the concept of selective waiver is disfavoured by most federal circuit courts,<sup>131</sup> which routinely hold that selective disclosure of a document to the government constitutes complete waiver of the privilege. As the DC Circuit reasoned, the privilege was not designed to allow a client 'to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others'.<sup>132</sup>

The Second Circuit confronted the issue of selective waiver in *In re Steinhardt Partners LP*.<sup>133</sup> While expressing reluctance to embrace selective waiver, the *Steinhardt* decision refused to foreclose the possibility that selective waiver may be found in some cases, at least where the disclosing party and the government share a common interest or the disclosing party has entered into an explicit agreement

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125 See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

126 572 F.2d 596 (8th Cir. 1977) (en banc).

127 *Id.* at 607.

128 *Id.* at 600.

129 *Id.* at 611.

130 *Id.*

131 See, e.g., *In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012) (asserting that the doctrine has been 'rejected by every other circuit to consider the issue since' *Diversified Industries*).

132 *Permian Corp.*, 665 F.2d at 1219-20.

133 9 F.3d 230 (2d Cir. 1993).

with the government to maintain the confidentiality of the disclosed materials.<sup>134</sup> As a result, in the Second Circuit, a case-by-case analysis of the facts is necessary to determine whether selective waiver may apply.<sup>135</sup>

The recent case of *SEC v. Herrera*<sup>136</sup> illustrates the risks of selective waiver inherent in making a proffer to the government. In *Herrera*, external counsel conducted an internal investigation into certain apparent accounting errors in the company's books and records. During a subsequent SEC investigation, counsel was forthcoming to the SEC about documents that it uncovered over the course of its investigation, provided the SEC with a PowerPoint presentation that set forth its investigative steps and factual findings, and provided 'oral downloads' to the SEC of each of the 12 witness interviews it conducted. When former officers of the company were later sued in an SEC action, the defendants subpoenaed the records from the internal investigation during discovery, requesting (among other things) the law firm's written notes and memoranda from the witness interviews that had been described to the SEC and referenced in the PowerPoint presentation. The court rejected the law firm's argument that work-product protection still applied to the interview memoranda, finding that counsel's oral disclosures of their contents was the 'functional equivalent' of giving the SEC the memoranda themselves, removing any protection from them. The court acknowledged that the outcome may have been different had the external law firm only provided 'vague references' to the contents of the memo, or 'conclusions or general impressions' that were free of detail.<sup>137</sup> The court, reflecting the fact-specific nature of these determinations, however, did not find a broader subject matter waiver to the other findings referenced in counsel's presentation.

In *In re Grand Jury Investigation*,<sup>138</sup> in the context of the United States Special Counsel's Office (SCO) investigation of foreign interference in the 2016 presidential election, the SCO uncovered evidence that Paul Manafort (President Donald Trump's former campaign manager), his lobbying company and its employees made false statements in two letters submitted to the Foreign Agent Registration Act Registration Unit. In the first letter, counsel made factual representations that her clients did not have any agreements to provide services to a foreign entity. In the follow-up letter, counsel represented that one client could 'recall interacting' with consultants for a foreign entity, but did not recall meeting with or conducting outreach or facilitating any phone calls. The grand jury subsequently subpoenaed the attorney to testify about the communications underlying the factual

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134 *Id.* at 236.

135 *Id.*

136 324 F.R.D. 258 (S.D. Fl. 2017).

137 *Id.* at 264; see also *In re Fluor Intercontinental, Inc.*, 803 Fed. Appx. 697, 701-702 (4th Cir. 2 March 2020) (rejecting an employee's attempt to compel production of his employer's investigation file following the disclosure of investigative findings to the Office of the Inspector General, finding that waiver cannot be inferred 'merely because the party's disclosure covers "the same topic" as that one which it had sought legal advice,' but only when 'there has been disclosure of protected communications.')

138 No. 17-2336, 2017 WL 4898143 (D. D.C., 2 October 2017).

representations in the letters. The attorney refused to answer the questions, citing attorney–client privilege and work-product protection. The court found that counsel had waived, through voluntary disclosure, all attorney–client privilege as to the contents of the letters, which ‘made specific factual representations’ that are ‘unlikely to have originated from sources other than the Targets, and, in large part, were attributed to the Targets’ recollections’,<sup>139</sup> and extended the waiver to all communications on that same subject matter. The court also found that the crime-fraud exception provided an independent basis for waiver of privilege with respect to several of the questions posed to counsel in the grand jury.<sup>140</sup>

Some courts have suggested that production pursuant to a valid confidentiality agreement entered into with the government prior to the disclosure of attorney–client privileged or work-product information effectively preserves the privilege and does not amount to a waiver as to third parties.<sup>141</sup> Consequently, if the company does intend to disclose privileged material to the government, it should first attempt to obtain such an agreement from the government that it will keep the information confidential (a McKesson letter).<sup>142</sup> But even though future plaintiffs would not be parties to such an agreement, some courts have still found that the production of privileged materials pursuant to confidentiality agreements with the government nonetheless constitutes a waiver.<sup>143</sup> In light of federal courts’ reluctance to find selective waiver, when a company voluntarily discloses documents or communications to government agencies, it must do so with the understanding that the documents and communications may lose the protection of the privilege and be subject to discovery by other parties, including private litigants.

### *Safe harbours*

Banks, in particular, often face pressure to share privileged materials with the government, both in the context of enforcement actions aimed at suspected wrongdoing and during routine regulatory oversight. But as a statutory matter, sharing privileged materials with bank supervisors results in a waiver of privilege only with respect to those supervisors; it does not waive applicable privileges with respect to third parties. Under Section 1828(x) of the Regulations Governing Insured Depository Institutions, the submission of information to ‘the Bureau of Consumer Financial Protection, any [f]ederal banking agency, [s]tate bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process’ shall not be construed as waiving privilege ‘as to any

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139 *Id.* at \*11.

140 *Id.* at \*15.

141 See, e.g., *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1375 (D.C. Cir. 1984); *In re Natural Gas Commodity Litig.*, No. 03 Civ. 6186 (VM) (AJP), 2005 U.S. Dist. Lexis 11950, at \*39 (S.D.N.Y. 21 June 2005).

142 See David N. Powers & Sara E. Kropf, *Disclosure of Internal Investigation Reports: A Legislative Solution to the McKesson Letter Dilemma*, 32 *Sec. Reg. L.J.* 340, 341 (2004).

143 See, e.g., *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 302-04; *Westinghouse Elec. Corp.*, 951 F.2d at 1424-27, 1431.

person or entity other than such agency, supervisor, or authority'.<sup>144</sup> This approach provides one of the few examples of federal statutes that explicitly allow for the idea of selective waiver.<sup>145</sup>

## Taint teams

37.6

When a practising attorney's communications or work-product is seized as part of a government investigation, the DOJ has traditionally used an independent team called a 'taint team' to conduct an initial review of the documents to ensure there is no violation of the attorney–client privilege.<sup>146</sup> Taint teams are staffed with federal prosecutors and agents who are not otherwise involved with the underlying investigation.<sup>147</sup> The team's role is to perform a preliminary review of the materials that have been seized to filter out attorney–client privileged communications before the materials are reviewed by the investigating team.<sup>148</sup>

Courts have scrutinised the DOJ's use of taint teams, identifying the potential for leaks of confidential information and the inherent conflict created when the same government office responsible for the review of the privileged materials has an interest in prosecuting the subject.<sup>149</sup> In rejecting the use of a government taint team for a privilege review, the Fourth Circuit observed that, 'prosecutors have a responsibility to not only see that justice is done, but to also ensure that justice appears to be done. . . . Federal agents and prosecutors rummaging through law firm materials that are protected by attorney–client privilege and the work-product doctrine is at odds with the appearance of justice'.<sup>150</sup> When the independence or propriety of a taint team is challenged, some courts have removed the task of reviewing the potential attorney client documents from the purview of the DOJ, assigning the process to be governed by an independent, court-appointed official, such as a magistrate judge or a special master.<sup>151</sup>

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144 12 U.S.C. § 1828(x).

145 Section 1828(x)'s companion statute, 12 U.S.C. § 1785(j), applies the same rule to credit unions.

146 Justice Manual § 9-13.420, at § E (2018), <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence>. Taint teams are also known as 'privilege' or 'filter' teams.

147 *Id.*

148 *Id.*

149 See *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) ('Furthermore, taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors. That is to say, the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations. It is thus logical to suppose that taint teams pose a serious risk to holders of privilege, and this supposition is substantiated by past experience.').

150 *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 183 (4th Cir. 2019).

151 See Alan Feuer and Benjamin Weiser, Former Judge Chosen to Review Materials Seized From Michael Cohen, *The New York Times* (26 April 2018), <https://www.nytimes.com/2018/04/26/nyregion/michael-cohen-investigation-special-master.html> (where the court appointed a special master to oversee the process of reviewing seized materials); see also *In re Search Warrant*, 942 F.3d at 181 ('[W]e are satisfied that the magistrate judge (or an appointed special master) – rather than the Filter Team – must perform the privilege review of the seized materials.')

In the face of scrutiny, the Criminal Division of the DOJ recently created a Special Matters Unit within the Fraud Section to standardise the use of taint teams. Attorneys in this unit work full-time – rather than *ad hoc* – to ‘conduct, supervise, and litigate legal privilege matters and filter reviews on behalf of the Fraud Section’s three litigating units’.<sup>152</sup> The Special Matters Unit’s aim is to establish a set of ‘uniform practices for handling evidence collection and review that implicate claims of attorney–client or other privileges’, addressing some of the concerns previously raised by the courts regarding the potential conflicts arising from traditional taint teams.<sup>153</sup> Even still, courts continue to recognise the ‘reasonably foreseeable risks to privilege’ posed by taint teams, and some courts still view such practices as a potentially improper delegation of judicial functions to the executive branch.<sup>154</sup>

### 37.7 Disclosure to third parties

Generally, the attorney–client privilege is waived if the holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the communication to a third party or stranger to the attorney–client relationship.<sup>155</sup> A third-party agent may have communications with an attorney that remain covered by the attorney–client privilege if the agent’s role is limited to helping a lawyer give effective advice to the client.<sup>156</sup> Whether disclosure to external consultants will constitute a waiver will depend on the surrounding facts and circumstances, including the purpose for the disclosure and the involvement of counsel with that third party.<sup>157</sup>

*United States v. Kovel* is the seminal case concerning the bounds of attorney–client privilege with respect to third-party consultants.<sup>158</sup> In *Kovel*, a law firm employed an accountant who was held in criminal contempt for refusing to testify about his conversations with the law firm’s client under a claim of privilege.<sup>159</sup> In considering whether the accountant had a basis to assert attorney–client privilege, the Second Circuit recognised that there are situations ‘where the lawyer needs outside help’, and found that when the accountant assists in the ‘effective

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152 <https://www.justice.gov/legal-careers/job/trial-attorney-special-matters-unit>.

153 *Id.*

154 *In re Search Warrant*, 942 F.3d at 177 (citing *In re Grand Jury Subpoenas*, 454 at 523).

155 See *In re Grand Jury Proceedings*, No. M-11-189 (LAP), 2001 WL 1167497, at \*7 (S.D.N.Y. 3 October 2001).

156 See *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

157 See, e.g., *Fed. Trade Comm’n v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002) (finding ‘no reason to distinguish between a person on the corporation’s payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice’); *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 131–32 (N.D.N.Y. 2007) (finding that when attorney acted solely as coordinator of media relations, communications between attorney and client were not protected). See generally Michele DeStefano Beardslee, *The Corporate Attorney–Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. Rev. 727, 744–55 (2009) (outlining the doctrine of attorney–client privilege when third parties are involved).

158 296 F.2d 918 (2d Cir. 1961).

159 *Id.* at 919.

consultation between the client and the lawyer which the privilege is designed to permit', the privilege should protect the communications.<sup>160</sup> The *Kovel* court analogised the accountant's role to that of an interpreter, which is sometimes necessary for the attorney effectively to communicate with his or her client.<sup>161</sup> The *Kovel* doctrine has been recognised by many courts as protecting attorney–client privilege in circumstances where a third party has specialised knowledge or skills that assist the attorney in rendering legal advice.<sup>162</sup> To preserve attorney–client privilege in such circumstances, the consultant is typically appointed directly by counsel and works under counsel's supervision. The mere hiring of the consultant through counsel, however, will not automatically cloak the third-party communications in privilege, if the consultant is otherwise performing a business function.<sup>163</sup> Instead, the company must show that the consultant's involvement was indispensable to – or served some specialised purpose in facilitating – the legal advice.<sup>164</sup>

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160 *Id.* at 922.

161 *Id.* at 921.

162 See, e.g., *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995) ('Under certain circumstances . . . the privilege for communication with attorneys can extend to shield communications to others when the purpose of the communication is to assist the attorney in rendering advice to the client.');

*United States v. Ackert*, 169 F.3d 136, 139 ('[T]he inclusion of a third party in attorney–client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client.');

*Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (recognising, under *Kovel*, that 'communications with a financial adviser are covered by the attorney–client privilege if the financial adviser's role is limited to helping a lawyer give effective advice by explaining financial concepts to the lawyer').

163 See *In re Premiera Blue Cross Customer Data Security Breach Litigation*, 296 F. Supp. 3d 1230, 1244–46 (D. Or. 2017) (declining to extend attorney–client privilege to a third party consulting firm hired in the context of a data breach, where (1) the firm began its work on the project before counsel was retained; and (2) while the firm later entered into an agreement with the law firm directly, the consulting firm's scope of work did not otherwise change); *Durling v. Papa John's International, Inc.*, No. 16 Civ. 3592 (CS) (JCM), 2018 U.S. Dist. LEXIS 11584, at \*14 (S.D.N.Y. 24 January 2018) (declining to extend attorney–client privilege protection to a consultant hired to analyse how a pizza company should reimburse its delivery drivers, finding that the consultants' role was not as a translator or interpreter of client communications', and that the company retained the consultant 'not to improve the comprehension of the communications between attorney and client, but rather to obtain information that [the company] did not already have'; *In re Restasis Antitrust Litigation*, 352 F. Supp. 3d 207, 214–215 (E.D.N.Y. 2019) (rejecting the argument that outside consultants were 'functionally equivalent' of employees for the purposes of attorney–client privilege where (1) they did not exercise independent thinking on the company's behalf; (2) their advice supplemented the knowledge of other employees; (3) they did not appear as company representatives to third parties; (4) they did not spend a substantial amount of time working in the company's office; and (5) they did not seek legal advice from corporate counsel regarding their work at the company).)

164 See, e.g., *Narayanan v. Southern Global Holdings Inc.*, 285 F. Supp. 3d 604, 611–12 (W.D.N.Y. 2018).



For example, a client's statements to a private investigator hired by the client's attorney are often protected by the attorney–client privilege when the investigator acts as an agent of the attorney.<sup>165</sup> Similarly privileged (as work-product) are an investigator's interviews to gather background information for the attorney.<sup>166</sup> If, however, the investigator is going to be a fact witness concerning the information he or she has gathered, then all aspects of the investigator's fact gathering may be open to discovery, including statements by third parties to the investigator and the underlying factual data gathered by the investigator. Therefore, any work-product privilege that might have protected that information is waived by virtue of the private investigator's decision to testify.<sup>167</sup>

Courts have also extended attorney–client privilege to include public relations consultants under certain circumstances.<sup>168</sup> In particular, communications with public relations consultants have been found to maintain privilege if the primary purpose of the communication was to aid in the rendering of legal advice.<sup>169</sup> Such communications are found within the bounds of attorney–client privilege if the consultant provides services necessary to promote the attorney's effectiveness in the client's legal representation or the consultant is essentially an extension of the attorney under agency principles, or both.<sup>170</sup>

Even with this guidance, the extent to which public relations consultants come within the bounds of attorney–client privilege is often unclear. For example, in *Calvin Klein Trademark Trust v. Wachner*, a court in the Southern District of New York refused to extend the attorney–client privilege to protect documents and testimony sought from Robinson Lerer & Montgomery (RLM), a public-relations firm retained by counsel to Calvin Klein.<sup>171</sup> In so ruling, the court held, *inter alia*, that the 'possibility' that communications between counsel and RLM might

See Chapter 39  
on publicity

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165 See *U.S. Dept. of Educ. v. National Collegiate Athletic Ass'n.*, 481 F.3d 936, 937 (7th Cir. 2007) (recognising that, while there is no 'private investigators privilege,' there are circumstances where attorney–client privilege can 'embrace a lawyer's agents (including an investigator.); see also, e.g., *Clark v. City of Munster*, 115 F.R.D. 609, 613 (N.D. Ind. 1987) (finding that statements made by a defendant to a private investigator employed by his attorney are protected by attorney–client privilege.)

166 *Clark*, 115 F.R.D. at 614.

167 See *Brown v. Trigg*, 791 F.2d 598, 601 (7th Cir. 1986); *United States v. Nobles*, 422 U.S. 225 (1975) (finding that by electing to present the investigator as witness, the defendant waived his privilege as to information collected by the investigator and his attorney).

168 See *Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 321 (S.D.N.Y. 2003); *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

169 See, e.g., *Grand Jury Subpoenas*, 265 F. Supp. 2d at 325; but see *Guiffre v. Maxwell*, No. 15 Civ. 7433 (RWS), 2016 U.S. Dist. LEXIS 58204, at \*23-25 (S.D.N.Y. 2 May 2016). (Finding that the media agent's involvement in otherwise privileged communications between the defendant and her lawyer destroyed any privilege protection because the defendant failed to establish (1) 'that [the agent] was necessary to implementing [the lawyer's] legal advice;' (2) that she 'was incapable of understanding counsel's advice . . . without the intervention of a "media agent";' or (3) 'that [the agent] was translating information between [the lawyer] and Defendant in the literal or figurative sense.')

170 See *Haugh v. Schroder Inv. Mgmt. N. Am., Inc.*, No. 02 Civ. 7955 (DLC), 2003 U.S. Dist. Lexis 14586, at \*8 (S.D.N.Y. 25 August 2003); *GlaxoSmithKline*, 294 F.3d at 148.

171 198 F.R.D. at 54.

help counsel formulate legal advice was ‘not in itself sufficient to implicate the privilege’,<sup>172</sup> and that extending the privilege to the documents and communications at issue would apply the privilege too broadly because RLM did not appear to perform functions ‘materially different from those that any ordinary public relations firm would have performed’.<sup>173</sup>

A few months later, in *In re Copper Market Antitrust Litigation*, a different judge from the same district court reached the exact opposite conclusion regarding the same public relations firm, finding that RLM acted as the company’s ‘spokesperson’ when dealing with issues related to a copper trading scandal, and frequently conferred with counsel.<sup>174</sup> Under these facts, the court found that RLM acted as the ‘functional equivalent of an in-house public-relations department with respect to Western media relations’ and therefore found that the communications between RLM, the company and counsel were made for the purpose of facilitating the provision of legal advice.<sup>175</sup>

Similarly, in *FTC v. GlaxoSmithKline*, the US Court of Appeals for the DC Circuit found that communications with a public relations firm were protected by the privilege.<sup>176</sup> In so ruling, the court adopted the *Copper Market* court’s rationale, crediting a party affirmation that the consultant became an ‘integral member of the team assigned to deal with the issues [that] . . . were completely intertwined with [the client’s] litigation and legal strategies’,<sup>177</sup> Hence, to improve the likelihood that communications with a public relations firm will be cloaked in attorney–client privilege, the firm should interact regularly with counsel, and act as an agent at counsel’s direction.<sup>178</sup>

In sum, a party claiming the benefit of attorney–client privilege has the burden of establishing all of the essential elements to qualify for the protections of the privilege.<sup>179</sup> Consequently, an attorney who wishes to consult with a non-attorney professional must seek to establish that the third party’s involvement will facilitate legal advice from the beginning of the engagement.<sup>180</sup>

To support its claim that communications with, and documents generated by, a third party consultant are protected under the attorney–client relationship, counsel should memorialise the nature of the consultant’s engagement in a *Kovel*

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172 *Id.*

173 *Id.* at 55.

174 200 F.R.D. 213, 215 (S.D.N.Y. 2001).

175 *Id.* at 216.

176 294 F.3d 141 (2002).

177 *Id.*

178 But see *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1242 (D. Or. 2017). (Declining to extend attorney–client privilege to communications with a public relations firm because ‘drafting press releases relating to a security breach is a business function’ and ‘[h]aving outside counsel hire a public relations firm is insufficient to cloak that business function with the attorney–client privilege.’)

179 See *Adlman*, 68 F.3d at 1500 (finding that a party claiming protection under the attorney–client privilege has the burden of proving each of the elements of such a privilege by contemporaneous proof of a *Kovel* agreement).

180 See, e.g., *In re G-I Holdings, Inc.*, 218 F.R.D. 428, 436 (D.N.J. 2003).

letter. Such a letter should (1) state that counsel is retaining the consultant to assist with the provision of legal advice to the client, (2) instruct the consultant about specific tasks to be performed in support of the provision of that legal advice, (3) state that all work-product generated under the scope of the engagement is the property of counsel and (4) instruct the consultant to maintain the confidentiality of all information received or created in the course of the engagement. Further, the consultant should be guided in his or her actions by the attorney, rather than independently by the client.

### 37.7.1 Disclosure to the company's auditors

The disclosure of attorney–client privileged information to a company's external auditors ordinarily constitutes a subject-matter privilege waiver.<sup>181</sup> To the extent that counsel anticipates that the company's external auditors may require information about the status of an ongoing investigation, counsel should be prepared to communicate with auditors in a way that will limit any waiver of privilege. For example, counsel may provide the external auditor detailed information about the investigative process – including the structure, the personnel involved, the document preservation steps that were taken, general information about the process of reviewing documents and conducting interviews, and external consultants employed to assist in the investigation – which may provide the external auditors with a level of comfort about the comprehensive nature of the investigative process, without waiving the privilege regarding the substance of the investigation.

And while the disclosure of privileged information to auditors will likely waive the attorney–client privilege, work-product protection may remain intact if the auditor's interests are found not to be 'adverse' to the client. For instance, in *Merrill Lynch & Co v. Allegheny Energy Inc.*,<sup>182</sup> Allegheny sought to compel discovery of two internal investigation reports (prepared by counsel) that Merrill Lynch had disclosed to its auditor, arguing that the disclosure constituted a waiver of any applicable privilege.<sup>183</sup> The court disagreed, stating that the 'critical inquiry' is whether the auditors 'should be conceived of as an adversary or a conduit to a potential adversary'.<sup>184</sup> The court held that 'any tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work-product doctrine'.<sup>185</sup> Consistent with the *Allegheny* court's guidance, if the client cannot avoid disclosure of privileged information to its auditors, counsel may be able to argue in subsequent civil litigation that work-product protection remains intact under this principle.

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181 See, e.g., *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).

182 229 F.R.D. 441 (S.D.N.Y. 2004).

183 Id. at 444.

184 Id. at 447.

185 Id. at 448.

## Disclosure to foreign governments

37.7.2

When analysing issues of waiver surrounding productions to foreign governments, courts of the United States tend to focus on whether the production of privileged material was compelled or voluntary. Where the submission is compelled or where there was no opportunity to assert the privilege, United States courts will generally find that the privilege was not waived.<sup>186</sup>

## Expert witnesses

37.8

Where government investigations involve complex financial transactions and other areas requiring specialised knowledge, counsel will often retain experts during the investigative stage to assist in their assessment of potential liability and in the building of the defence case. As with any external consultants, counsel should take steps to clarify that experts are being retained to assist counsel in their provision of legal advice, to maintain privilege over communications with the expert and their underlying analysis.

In the context of a criminal action that may follow an internal investigation, unless counsel determines that it would be advantageous to present expert analysis in conjunction with a report of its investigative findings to the government or regulatory authority, consulting expert materials will otherwise remain shielded from discovery as attorney–client privileged materials. If the defence intends to call an expert witness at trial, however, counsel may be obliged – at the government’s request – to provide a written summary of the testimony that the defendant intends to offer at trial.<sup>187</sup> And while Federal Rule of Criminal Procedure 16 contemplates that the expert’s underlying memoranda and other documents created during the case investigation will remain protected from disclosure,<sup>188</sup> counsel will still be required to produce documents that may qualify as ‘statements’ of a testifying expert under Rule 26.2 prior to trial.<sup>189</sup>

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186 See *In re Grand Jury Proceedings*, 219 F.3d at 191 ([V]oluntary (as opposed to compelled) disclosure of documents to the SEC waived the company’s work-product privilege as to other parties.); *Westinghouse Elec. Corp.*, 951 F.2d at 1427 n.14 (finding privilege waiver in subsequent litigation where the party withdrew objections to SEC subpoena production and produced documents and noting that ‘had [party] continued to object to the subpoena and produced the documents only after being ordered to do so, we would not consider its disclosure of those documents to be voluntary’); *In re Vitamin Antitrust Litig.*, No. MC 99-197 (TFH), 2002 WL 35021999, at \*28 (D.D.C. 23 January 2002) ([C]ompulsion avoiding waiver requires that a disclosure be made in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for noncompliance, and that any available privilege or protection must be asserted.).

187 See Fed. R. Crim. P. 16(b)(1)(C).

188 See Fed. R. Crim. P. 16(b)(2)(A).

189 See Fed. R. Crim. P. 26.2(f) (listing ‘statement[s]’ of testifying witnesses to include (1) a written statement that the witness makes and signs, or otherwise adopts or approves; (2) a substantially verbatim, contemporaneously recorded recital of the witness’s oral statement that is contained in any recording or any transcription of a recording; or (3) the witness’s statement to a grand jury, however taken or recorded, or a transcription of such a statement).

In the context of civil litigation that may follow an internal investigation, however, expert discovery will be governed by Federal Rule of Civil Procedure 26. Prior to 2010, there was a significant risk that any documents provided to a testifying expert witness would be discoverable under Rule 26, even if they were previously considered attorney–client privileged.<sup>190</sup> But the 2010 amendments to the rule made significant changes that strictly limited the discovery of communications between counsel and experts, including the discovery of draft expert reports. For example, Rule 26(b)(4)(B) was added to provide work-product protection for drafts of expert reports or disclosure.<sup>191</sup> In addition, Rule 26(b)(4)(C) was added to provide work-product protection for attorney-expert communications.<sup>192</sup> These amendments to Rule 26 were designed to protect counsel’s work-product and ensure that lawyers may interact with experts ‘without fear of exposing those communications to searching discovery’.<sup>193</sup>

Although the 2010 amendments provide significant protection for expert drafts and attorney–expert communications, counsel should still make efforts to limit the scope of potential disclosure by effectively managing a testifying expert’s access to information and the development of the expert’s opinions. For example, Rule 26 does not preclude discovery of facts or data provided to the expert by an attorney, such as fact work-product prepared for the expert by counsel.<sup>194</sup> Consequently, counsel should create an inventory of all factual materials provided to a testifying expert and ensure that all of such factual materials are accurate and final, and that such materials have been produced or are otherwise matters of public record. Further, where the committee notes accompanying Rule 26 extend to ‘any materials considered by’ an expert, counsel should ensure that all of the facts made available to a testifying expert are based upon the record in the case, rather than as the result of attorney–client privileged communications.

Finally, while the amendment to Federal Rule 26 protects drafts of expert reports from disclosure, state court rules of civil procedure may vary as to whether such drafts are discoverable. If there is any question as to whether drafts of an expert report may be discoverable, especially if the matter is pending in a jurisdiction governed by state law, it may be advisable to negotiate a stipulation that explicitly extends the protection of the Federal Rules to expert discovery.

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190 See *Synthes Spine v. Walden*, 232 F.R.D. 460, 463 (E.D. Pa. 2005) (collecting cases and requiring disclosure of privileged material); see also *Galvin v. Pepe*, No. 09-cv-104-PB, 2010 WL 3092640, at \*6-7 (D.N.H. 5 August 2010) (citing *id.*).

191 Fed. R. Civ. P. 26(b)(4) advisory committee’s note.

192 *Id.*

193 See *Commodity Futures Trading Comm’n v. Newell*, 301 F.R.D. 348, 352 (N.D. Ill. 2014) (explaining that the government is not allowed to discover drafts of expert reports or attorney expert communications, unless communications fall within one of the three specific exceptions in Rule 26(b)(4)(C)).

194 Fed. R. Civ. P. 26(b)(4)(D).

# Appendix 1

## About the Authors of Volume I

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Rich Strassberg, chair of Goodwin's white-collar crime and government investigations practice and a former member of the firm's executive committee, specialises in white-collar criminal defence, SEC enforcement proceedings, FCPA compliance and investigations, internal investigations, and complex business and financial litigation. Mr Strassberg is a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America. He has twice been recognised by *The American Lawyer* as 'Litigator of the Week' as a result of his securing extraordinary victories in some of the most closely followed white-collar trials in the country. He is also acknowledged by his peers as being one of the finest white-collar attorneys, twice being cited in *Law360* by white-collar partners at other firms as being the white-collar lawyer that impressed them, or that they most feared to go up against in court. Mr Strassberg is consistently ranked in Band One by *Chambers USA* as among the top New York-based white-collar defence lawyers, is rated as being among the Top 100 lawyers in New York by *New York Super Lawyers* and is regularly included in *The Best Lawyers in America* and other surveys of the top white-collar litigators in the country. Mr Strassberg co-authors a quarterly column on Federal Civil Enforcement in the *New York Law Journal*, authored a chapter in the book *Beyond A Reasonable Doubt*, has published numerous articles in various legal periodicals, including several on the FCPA, has been a legal commentator on numerous programmes, including NPR, Fox News, Dateline and the Financial Management Network, and has been a guest speaker for various organisations, including the American Bar Association, the New York Council of Defense Attorneys, and the Federal Bar Council. Prior to joining the firm, Mr Strassberg was the Chief of the Major Crimes Unit in the US Attorney's Office for the Southern District of New York, responsible for supervising approximately 25 Assistant US Attorneys in the prosecution of complex white-collar criminal cases.

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Meghan Spillane, a partner in Goodwin's securities litigation and white-collar defence group, focuses her practice on white-collar criminal defence, corporate internal investigations, and complex business and financial litigation. Her experience includes federal criminal and civil investigations, securities class actions and derivative suits, SEC actions, and complex civil litigation matters. In addition to her other client work, Ms Spillane represents indigent criminal defendants on a *pro bono* basis in a variety of state and federal matters. Ms Spillane is a member of the bar of the State of New York and is admitted to practise before the US District Court for the Southern District and Eastern District of New York. Ms Spillane was named as a 2018 Law360 Rising Star in 'White Collar', was recognised in Who's Who Legal's *Investigations 2019 – Future Leaders* and has been named consistently by *New York Super Lawyers* as a leading white-collar defence practitioner from 2015 to 2020. She was also recognised by Benchmark Litigation's '40 & Under Hot List' for 2020 for her work in white-collar defence.

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