



PROGRAM MATERIALS

Program #31130

July 28, 2021

**Attorney-Client Privilege and Work
Product Doctrine in Internal
Investigations:
Latest Developments for Corporate,
Securities and White-Collar Attorneys**

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ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN INTERNAL INVESTIGATIONS

Latest Developments for Corporate, Securities
& White Collar Attorneys

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AGENDA

1. Fundamentals of Attorney-Client Privilege & Work Product Doctrine
2. Practical Considerations in Conducting Investigations
3. Tips for Navigating Privilege in a Global Context
4. Select Recent Cases



AGENDA

1. **Fundamentals of Attorney-Client Privilege & Work Product Doctrine**
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THE ATTORNEY-CLIENT PRIVILEGE

- Prevents lawyers from disclosing or being compelled to disclose the substance of confidential communications to outside parties
- Precludes the disclosure of attorney-client discussions in litigation or other investigations
- “Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn v. United States*, 449 U.S. 383, 389 (1981).
- Allows for more complete risk assessments and legal strategies

FUNDAMENTALS OF ATTORNEY-CLIENT PRIVILEGE

- Attorney-client privilege applies to:
 - confidential
 - communication(s)
 - between a lawyer and a client (or agents)
 - *U.S. v. Kovel* (2d Cir. 1961) (third-party does not destroy privilege if assistance is necessary or highly useful for effective communication between client and lawyer – e.g., interpreter)
 - that is made for purposes of legal advice
- Protects communications, not facts
- Privilege belongs to client
- No adverse inferences when relied upon

FUNDAMENTALS OF ATTORNEY-CLIENT PRIVILEGE

- Narrowly construed
- Can be waived by:
 - Sharing communications with third-parties
 - Sharing legal advice with non-client
 - Including non-lawyer clients without need to know on communications
- Does not protect business advice – privilege does not necessarily apply because (i) an email says “privileged” in subject line or (ii) a lawyer is copied on the email
- Confidential does not mean privileged
- Crime-fraud exception: No privilege to aid in criminal or fraudulent activity
 - E.g., If an attorney advises a company on how to do something illegal, the privilege will not protect the communication

ABA MODEL RULE 1.06: CONFIDENTIALITY OF INFORMATION

- A lawyer shall not reveal confidential information relating to the representation without informed consent. But a lawyer may reveal information relating to representation in specific circumstances, including:
 - To prevent reasonably certain death or substantial bodily harm
 - To prevent crime or fraud furthered by lawyer's services
 - To comply with a court order
 - To secure legal advice about lawyer's compliance with ethical rules
 - To establish a claim or defense in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer (based upon the client's conduct), or to respond to allegations concerning the lawyer's services

ABA MODEL RULE 1.13: ORGANIZATION AS CLIENT

- A lawyer employed or retained by an organization represents the entity acting through its duly authorized constituents
- A lawyer will report to and accept direction from an organization's authorized constituents
- A lawyer shall proceed as reasonably necessary in the best interest of the organization without:
 - involving unreasonable risks of disrupting the organization
 - revealing information relating to the representation to outside persons
- A lawyer representing an organization must take reasonable remedial actions in certain circumstances

FEDERAL RULES OF EVIDENCE

- FRE 501
 - Common and state law govern claims of privilege
- FRE 502
 - (a) Effect of disclosure in federal proceeding
 - (b) Effect of inadvertent disclosures
 - (c) Effect of disclosure in state proceedings
 - (d) & (e): Court orders / agreements regarding waivers

FUNDAMENTALS OF ATTORNEY WORK-PRODUCT DOCTRINE

- A party is not entitled to obtain discovery of “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative” unless the party shows substantial need and an inability to obtain the substantial equivalent of the documents without undue hardship
 - Fed. R. Civ. P. 26(b)(3)
- Work-product doctrine is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye towards litigation free from unnecessary intrusion by adversaries.
 - *Hickman v. Taylor*, 329 U.S. 495 (1947)
- Fact vs. opinion work product

ATTORNEY CLIENT PRIVILEGE VS. ATTORNEY WORK PRODUCT DOCTRINE

- **How the Work Product Doctrine Differs from the Attorney-Client Privilege:**
 - Work product doctrine protects more than “communications” between attorney and client – it protects materials prepared by persons other than the attorney
 - It is limited to the context of current or impending litigation, whereas the attorney-client privilege applies at any point of an attorney-client relationship



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PRACTICAL CONSIDERATIONS IN CONDUCTING INVESTIGATION

Initial Considerations That Affect Analysis of Privilege / Work Product

- Who is the attorney?
- Who is the client?
- Who should direct the investigation?
- Who should conduct the investigation?
- Is the investigation being conducted to provide legal advice?
- To whom should the investigators report?
- Involvement of / reporting to other stakeholders (e.g., outside auditors)?

WHO IS THE ATTORNEY?

- Company's internal / external attorneys
- Personnel working on attorneys' behalf (if necessary to facilitate legal assistance or advice and under attorneys' direction)
- Potentially: Third-parties that attorneys retained to assist them in providing legal advice to Company

WHO IS THE CLIENT?

- Company and subsidiaries
 - Can be affected by conflicts of interest and/or changes (e.g., divestitures)
- Company's attorneys do not represent an employee's individual interests
 - Conversations between Company and Company's attorneys are protected by privilege
 - Company owns the privilege; not individual Company employees

WHO IS THE CLIENT?

- Reporting issues
 - Protocols regarding sharing investigative information
 - Should anyone be excluded based on allegations of wrongdoing?
 - Other stakeholders (e.g., auditors, D&O insurers, etc.)
- Importance of the *Upjohn* warning
 - *SEC v. Rashid* (S.D.N.Y. 2018) (court granted SEC's motion to compel where individual defendant could not establish "common interest" in part because of *Upjohn* warning given by company counsel)

PRACTICAL CONSIDERATIONS

- Who should direct the investigation?
 - Internal counsel
 - Company's Board of Directors or committee thereof
 - Internal audit / finance / business unit
- Who should conduct the investigation?
 - Internal or external counsel
 - Internal or external investigator
 - Internal audit or HR personnel

PRACTICAL CONSIDERATIONS

- Who should conduct the investigation?
 - Investigation must be done for purpose of obtaining or providing legal advice. **No per se rule** that investigation conducted by attorney is privileged or protected by work product. *Cicel (Beijing) Science & Tech. Co. v. Misonix* (E.D.N.Y. 2019)
 - *Miller v. City of Los Angeles* (C.D. Cal. 2015) (city properly asserted work product over **investigation conducted by consultant hired by city's attorney** as an agent of the city)
 - *Koumoulis v. Indep. Fin. Mktg. Grp. Inc.*, (E.D.N.Y. 2014) (**work product did not apply to internal investigation conducted by H.R. employee**, even though employee consulted with counsel about how to conduct the investigation)

PRACTICAL CONSIDERATIONS

- For what purpose is the investigation being conducted?
 - To provide legal advice?
 - As part of ordinary course of business?
 - In anticipation of litigation vs. normal business operations
 - *E.g., Halladay v. Royal Caribbean Cruises* (S.D. Fla. 2020) (cruise line failed to establish that post-accident engineering report was prepared in anticipation of litigation; rather, it was “the type of report which a cruise ship operator would have assigned in the ordinary course of business after an accident, regardless of whether litigation was anticipated”; report was therefore ordered produced)
 - Consider expressly memorializing in engagement letter

BUSINESS VERSUS LEGAL ADVICE

- Ordinary business communications or business advice are not protected, even if provided by an attorney
- Examples of unprotected material include
 - Underlying facts
 - Policies and procedures
 - Employment contracts, pay records, disciplinary records, other human resources documents
 - Non-legal discussions at team meetings simply because a lawyer is in the room

WORK PRODUCT PROTECTION APPLICABILITY

- **At what point is litigation anticipated?**
 - When a whistleblower allegation comes in?
 - Media report at a client for whom Company manages data?
 - Disgruntled employee complains to a manager?
- No bright line rule; courts have adopted different tests:
 - Actual or a potential claim following an actual event or series of events that reasonably could result in litigation.
 - “Function of the document” test
 - “Primary motivation test”: primary motivation is to assist in possible future litigation.

PRACTICAL CONSIDERATIONS

- Interview Notes & Memoranda
 - Most courts view as protected work product and may be considered “opinion” work product if they contain attorneys’ mental impressions and analysis (vs. a transcript of the interview)
 - *E.g., In re Cardinal Health Inc. Sec. Litig.* (S.D.N.Y. 2007) (quashing subpoena for investigative materials where notes contained mental impressions and analyses because such information is “classic, core work product”)
 - BUT ... potential waiver of privilege if investigative information is shared with regulatory agencies

CONFIDENTIALITY REQUIREMENTS

- Privilege protects confidential communications only
 - Must be made in confidence (need-to-know basis)
 - Must be kept in confidence within Company (no sharing with outsiders or adversaries)
- Examples of waiver
 - Inviting non-Company employees to privileged discussions
 - Forwarding emails outside the company
 - Discussing legal issues outside the company

USE OF PRIVILEGED AND WORK PRODUCT DESIGNATIONS

- Labeling a document or email “privileged” or “work product” or copying a lawyer does not automatically protect the document
- Test is whether the communication meets the elements for privilege and/or work product
- There are no designations that can transform a business communication to a privileged communication
- Over-designation carries risks

PRACTICAL CONSIDERATIONS

- Potential waiver if investigative information is shared
- Subject matter waiver is possible
 - FRE 502(a): If a disclosure is made ... to a federal agency and waives attorney-client privilege or work product protection, **the waiver extends to undisclosed communications only if:**
 - the waiver is intentional
 - the disclosed and undisclosed communications or information concern the same subject matter, and
 - they ought in fairness to be considered together.
 - Often considered a “sword and shield” issue
 - *Pearlstein v. Blackberry Ltd.* (S.D.N.Y. 2019) (per 502(a), ordering production of certain privileged communications that contained information that had been shared with SEC)

PRACTICAL CONSIDERATIONS

- Possible privilege waiver by sharing information with regulatory agencies
 - *In re Banc of California Sec. Litig.* (C.D. Cal. 2018) (ordering production of counsel's notes / memoranda of interviews after interview summaries shared with SEC)
 - *In re GM LLC Ignition Switch Litig.* (S.D.N.Y. 2015) (protected interview memos and attorney notes from production in litigation even though final report was produced to government)
 - *In re Weatherford Int'l Sec. Litig.* (S.D.N.Y. 2013) (court ordered production of materials actually disclosed to SEC and factual work product underlying attorney interview notes; but opinion work product protected)
 - *Gruss v. Zwirn* (S.D.N.Y. 2013) (ordering production of interview notes and summaries because portions of them were voluntarily and selectively disclosed to SEC in PowerPoint presentation)

PRACTICAL CONSIDERATIONS

- Disclosure to public relations consultant
 - *U.S. ex rel Wollman v. Mass. Gen. Hosp.* (D. Mass. 2020) (in False Claims Act case, privilege waived when outside counsel's report shared with public relations firm (and later Boston Globe) but waiver limited to report)
 - *Buckley LLP v. Series 1 of Oxford Ins. Co.* (N.C. Super. Ct. 2020) (communications with public relations firm were privileged to extent they were made to facilitate legal advice); *Pearlstein v. Blackberry Ltd.* (S.D.N.Y. 2019) (narrow exception to waiver if public relations consultant is assisting lawyers during grand jury investigation)
- Putting investigation & report "at issue" (e.g., reasonableness of investigation)
 - *Doe v. USD No. 37* (D. Kan. 2019) (granting motion to compel production of investigative report prepared by outside counsel after school district put investigation and report "at issue" pursuant to affirmative defense (which waived privilege and work product protections))

PRACTICAL CONSIDERATIONS

- Confidentiality agreements are helpful but not foolproof
 - *In re Pacific Pictures Corp.* (9th Cir. 2012) (privilege was waived as to documents produced to DOJ despite existence of confidentiality agreement)
 - *Zwirn* (S.D.N.Y. 2013) (defendants waived privilege and work product protection as to attorney notes and summaries of interviews, excerpts of which were voluntarily provided to SEC; confidentiality agreement with SEC did not restrict SEC's use of disclosed information)
 - *In re Steinhardt* (2d Cir. 1993) (recognizing that confidentiality agreements may be effective)



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SEVERAL CONSIDERATIONS TO ASSESS WHEN ANALYZING PRIVILEGE

- Which laws apply?
- Does the relevant jurisdiction recognize privilege?
- Do privilege laws apply to in-house counsel?
- Is a factual internal investigation covered by privilege in the relevant jurisdiction?
- Does privilege or related protection apply to interviews of company employees?
- Can a work product or defense privilege apply to an internal investigation before charges are anticipated?
- Can law enforcement seize or subpoena electronic information stored outside the jurisdiction?
- Does self-disclosure and cooperation with authorities undermine privilege or work product?

WHICH PRIVILEGE LAW APPLIES?

Which privilege law applies depends on the circumstances.

- What if there are multiple jurisdictions at issue?
 - Touch base test: Country that has the “predominant or the most direct and compelling” interest in the confidentiality of the advice.
 - Jurisdiction where client receives advice?
 - Jurisdiction where search warrant is executed?

- As practical matter, courts tend to look to forum law so long as there’s some relationship with the parties and the relief sought.
- But choice of forum is often in hands of prosecutors/opponents

OTHER JURISDICTIONS DEFINE PRIVILEGE DIFFERENTLY

UK

- **Legal Advice Privilege** - confidential communications between the client and lawyers in connection with the provision of legal advice
- **Litigation Privilege** – confidential communications between parties for advice in connection with existing or contemplated litigation.

Germany

- **Professional Secrecy Obligation** - intended to protect the relationship of trust between client and lawyer
- German Code of Criminal Procedure does not exempt from seizure all internal investigations documents

Brazil

Brazilian constitution recognizes protection comprising of:

- Confidentiality of legal communications prepared for professional use;
- Client-lawyer privilege; and
- Lawyers' offices and related work files.

CASE STUDY: GERMANY



Outside Counsel	Summaries of facts and reports	<ul style="list-style-type: none"> • Diverging decisions by Regional Courts on this issue • Documents might only be protected vis-a-vis a specific prosecutor investigating the specific subject of the attorney engagement • Potentially no protection across a group of companies • Engagements should make clear that lawyers performing criminal defense work
	Interview memo/notes	
	Legal advice based on investigation	
In-House Counsel	Summaries of facts and reports	<ul style="list-style-type: none"> • Not protected
	Interview memo/notes	
	Legal advice based on investigation	
3rd Party Retained by Counsel	Written work product	<ul style="list-style-type: none"> • Not protected

DOES THE RELEVANT JURISDICTION RECOGNIZE PRIVILEGE?

U.S., Germany, India, UK

Yes, like most jurisdictions, these countries recognize the attorney-client privilege

Japan

Recognizes a confidentiality obligation, which is similar to the attorney-client privilege

China

Does not recognize the attorney-client privilege

DO PRIVILEGE LAWS APPLY TO IN-HOUSE COUNSEL?

U.S.

- Generally yes, if acting as lawyers rather than business advisors.
- There are, however, choice of law issues. For example, one US court rejected in-house privilege for lawyer based in China.

Common Law Countries

- Generally yes, if acting as lawyers rather than business advisors.
- However, in-house lawyer communications with the Company are not protected in competition cases before the European Commission.

Civil Law Countries

- Depends
- Yes: Brazil
- No: France, Germany, other EU member countries, Russia, Saudi, UAE
- Maybe: South Korea (only if licensed in SK)

BE MINDFUL OF RISKS IF IN-HOUSE COUNSEL...

**is in a civil law
jurisdiction**

**is admitted in a country
other than the country
he/she is located in and
is providing advice**

**has let bar status lapse
in jurisdiction where
he/she is admitted**

**provides advice to
jurisdiction outside the
location where he/she is
admitted or is located**

**provides business as
well as legal advice**

IS A FACTUAL INTERNAL INVESTIGATION COVERED BY PRIVILEGE IN THE RELEVANT JURISDICTION?

U.S.

- Yes, when conducted by or under supervision of a lawyer for the purpose of rendering legal advice or in anticipation of litigation.

Civil Law Countries

- Civil Law Tradition: Fact-gathering is not core legal work. Lawyers traditionally opined on facts as presented by client.
- Prosecutors may resent private lawyers invading their space.

DOES PRIVILEGE OR A RELATED PROTECTION APPLY TO INTERVIEWS OF COMPANY EMPLOYEES?

U.S.

Yes, if the employee is directed by management to assist counsel and is interviewed regarding matters within the scope of their employment.

Common Law Countries

UK:

- Privilege only applies to communications with control group.
- Interviews with low-level employees are not protected.

Civil Law Countries

Civil Law Tradition: Counsel is bound by professional secrecy to protect confidentiality of all facts obtained in course of mandate, regardless of source. But that may not bind the government in all jurisdictions or circumstances.

CAN A WORK PRODUCT OR DEFENSE PRIVILEGE APPLY TO AN INTERNAL INVESTIGATION BEFORE CHARGES ARE ANTICIPATED?

U.S.

Yes. Allegations of wrongdoing potentially expose company to liability. Investigation is essential part of developing defense strategy.

Common Law Countries

ENRC (UK): “Dominant purpose test.” Documents prepared during course of internal investigation were covered by litigation privilege, given likelihood of a criminal investigation.

Civil Law Countries

Traditional German rule: Defense privilege applies after charges filed. Split of authority re whether admin (vs criminal) charges or charges filed in a different state qualify. Allows prosecutors to play games with timing.

CAN LAW ENFORCEMENT SEIZE OR SUBPOENA ELECTRONIC INFORMATION STORED OUTSIDE THE JURISDICTION?

U.S.

- Takes broad view
- CLOUD Act: Permits DOJ to compel U.S.-based technology companies via warrant or subpoena to provide requested data stored on U.S. and foreign servers

Other Countries

- Germany: Search warrant only entitles police to seize materials stored locally
- Belgium: Police can seize any data that can be accessed from a device covered by the search warrant
- MLAT requests: Quicker than ever, now not an impediment in many jurisdictions

DOES SELF-DISCLOSURE AND COOPERATION WITH AUTHORITIES UNDERMINE PRIVILEGE OR WORK PRODUCT?

U.S.

No. Waiver is a risk when information is shared with the government, but the fact of cooperation does not alone undermine the work product doctrine.

Common Law

ENRC (UK): Litigation privilege still attaches even though counsel told government at outset that it anticipated conducting an internal investigation and sharing the results.

Civil Law

German prosecutor: When company is seeking cooperation credit from DOJ, counsel becomes an agent of DOJ, rather than a lawyer for the client.

Where Documents Are Stored Is Also a Consideration

ISSUES TO CONSIDER IN DATA MANAGEMENT

Where and how should documents be saved?

- Segregate privileged materials
- Locally saved vs. foreign server
- Border risks

Jurisdictional differences create challenging questions related to where data is stored

- If German authorities raid a company in Germany, can they take internal investigation materials that are stored on a server outside of Germany?
- Does it matter if the server is in an EU nation or outside the EU?
- Can a company avoid this issue by storing all internal investigation materials outside of Germany? Outside the EU?

AGENDA

Privilege Law Overview



Important Developments in Privilege Law



Navigating Privilege in a Global context



There Is Global Uncertainty and Risk

CURRENT STATUS OF PRIVILEGE LAWS, APPLIED TO INTERNAL INVESTIGATIONS

- In many jurisdictions around the world, there is uncertainty about whether internal investigation materials are protected from compelled disclosure
- If such materials are not protected, they are subject to seizure (dawn raids) or compelled disclosure (subpoena)
- Risk of compelled disclosure is compounded where there are multiple sovereign investigations
 - For example, if the U.S., Germany, and France are all investigating the same company, German and French authorities may be entitled to receive internal investigation materials; American authorities are not

There Are Several Practical Tips and Considerations

PRACTICAL TIPS

**Maintain confidentiality
and limit distribution to
“need to know”**

**Make sure the circulation
group isn’t too broad to
lose “client” status**

**Use verbal
communications where
possible and/or involve
outside counsel**

**Don’t automatically
assume that privilege
protections apply abroad
/ work with counsel to
understand local
privilege laws**

**Assume privilege rules
of multiple jurisdictions
may come into play**

**Mark appropriate
documents as privileged
and keep record of
privilege justification but
don’t over designate**

PRACTICAL TIPS

**Protect communications
and work product within
the scope of each
relevant privilege**

**Consider maintaining
privileged materials and
information in the
appropriate jurisdiction**

**Prepare for the
possibility of a raid that
could compromise
privileged files**

**Limit mixing business
and legal advice**

**Create awareness within
the organization**

**If privileged files are
compromised, take steps
to preserve privilege
over files**

IMPLICATIONS FOR COMPANY

- Other applicable legal standards
- Relevant law enforcement practices

If enforcement activity is contemplated or in effect:

- Develop strategy for interaction with authorities (e.g., dawn raids)

If disclosures are to be made:

- Develop strategy for order, timing, and scope of exchanges with multiple authorities



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SELECT RECENT CASES

- ***Wengui v. Clark Hill P.C.* (D.D.C. 2021)**
 - Plaintiff sued former employer (law firm) after firm suffered cyberattack, which caused disclosure of plaintiff's confidential information
 - Plaintiff moved to compel production of reports of forensic investigation into the cyberattack
 - Law firm argued that work product and privilege protected documents prepared by external security-consulting firm
 - Outside litigation counsel hired consulting firm to help “prepare for litigation stemming from the attack”

SELECT RECENT CASES

- ***Wengui v. Clark Hill P.C.* (D.D.C. 2021)**
 - District Court grants motion to compel
 - Law firm failed to show that the report would not have been created in the ordinary course of business
 - Discovering circumstances of cyberattack is a necessary business function; likely that law firm would have conducted investigation into the attack's cause, nature and effect, irrespective of litigation possibility
 - Law firm's argument that report was prepared in anticipation of litigation because it was the result of a "two-tracked investigation" was unsupported by record
 - Track 1: Law firm's cybersecurity vendor worked to preserve business continuity
 - Track 2: Consulting firm (hired by counsel) helping gather information necessary to render legal advice
 - Rejects law firm's argument that report privileged under *Kovel* doctrine

SELECT RECENT CASES

- ***Mass. AG v. Facebook (Mass. 2020)***
 - March 2018: Media reports that data from ~87 million Facebook users was accessed and sold to Cambridge Analytica, which used data to send targeted political advertising to users
 - Facebook's internal / external counsel begin to design, manage and oversee investigation and "gather facts necessary for providing advice to Facebook about litigation, compliance, regulatory inquiries, and other legal risks"
 - Goal of investigation was to identify any other apps that misused user data and to assess possible legal liability
 - Outside counsel hired outside technical experts and investigators
 - Facebook provided periodic updates to public about the investigation

SELECT RECENT CASES

- ***Mass. AG v. Facebook (Mass. 2020)***
 - Mass. AG investigation seeks information regarding the apps and developers that Facebook identified and reviewed as part of the investigation
 - Facebook resists certain requests based on privilege and work product
 - Trial court grants AG's motion to compel
 - Investigation conducted as part of ongoing app enforcement, not in anticipation of litigation
 - Discoverable “fact” work product and AG had substantial need for info
 - Privilege did not apply to most information sought because factual in nature and Facebook had “touted” investigation in public
 - As to certain communications, orders Facebook to prepare privilege log

MASS AG V. FACEBOOK (MASS. SUP. CT. 2021)

- ***Mass. AG v. Facebook (Mass. 2020)***
 - Mass. Supreme Court: Attorney Client Privilege
 - Requests 1-5 sought production of factual information concerning apps, not communications with attorneys; therefore not privileged
 - Request 6 sought “[a]ll Facebook internal communications and internal correspondence concerning” certain categories of apps sought in other requests
 - Privilege applies to communications between counsel and client made as part of internal investigation (conducted for purposes of legal advice), such as the one at issue here
 - Curt agreed that privilege logs were appropriate

SELECT RECENT CASES

- ***Mass. AG v. Facebook (Mass. 2020)***
 - Mass. Supreme Court: Attorneys' Work Product
 - App information “clearly covered by the work product doctrine”
 - If app information is not “opinion” work product, then must be disclosed because AG demonstrated a substantial need for the information
 - Remanded to trial court to distinguish between “fact” and “opinion” work product
 - Focus on specific information requested, not on investigation as a whole
 - Disagreed with trial judge that investigation was not conducted in anticipation of litigation; investigation was “meaningfully distinct” from Facebook’s ongoing enforcement program

SELECT RECENT CASES

- ***SEC v. RPM Int'l* (D.D.C 2020)**
 - SEC sought production of 19 interview memoranda prepared by outside counsel engaged by audit committee to investigate whether a potential loss should have been disclosed under relevant accounting and disclosure rules
 - Company argued that all memos protected by work product and 16 memos protected by privilege
 - SEC argued that company waived privilege and work product protection by providing contents of interviews to company's auditors, who then shared information with SEC
 - District Court orders that interview memos be produced to SEC

SELECT RECENT CASES

- ***SEC v. RPM Int'l* (D.D.C 2020)**
 - Memos not protected by work product doctrine because not prepared in anticipation of litigation
 - Evidence showed counsel hired to investigate timing of prior disclosures and accruals in question
 - Audit committee hired outside counsel after auditors suggested investigation was necessary to sign off on Form 10-K
 - Memos devoid of legal opinions, thoughts or mental impressions. Simply recount facts or set forth what witnesses said, remembered or indicated
 - Even if protected by work product, protection was waived when company authorized auditors to share substance of interviews with SEC

SELECT RECENT CASES

- ***SEC v. RPM Int'l* (D.D.C 2020)**
 - Attorney-Client Privilege
 - SEC did not dispute that privilege applies to 16 memos
 - Privilege waived when company disclosed contents of interviews to auditor (who thereafter disclosed to the SEC)
 - Outside counsel briefed auditors concerning witness statements and auditors memorialized those statements in a memo that was shared with SEC
- Court of Appeals denied company's request for mandamus without comment

SELECT RECENT CASES

- ***In re Capital One Consumer Data Sec. Breach Litig.* (E.D. Va. 2020)**
 - District Court affirms Magistrate Judge's order requiring production of forensic report concerning cybersecurity breach event
 - July 2019: Defendant confirms that it had experienced data breach and hired law firm to provide legal advice in connection with incident
 - Law firm enters into separate engagement with consulting firm to provide services and advice, as directed by counsel, but subject to T&Cs of existing MSA with defendant company
 - Sept. 2019: Consulting firm prepares report which is sent to law firm and inhouse legal department, but later shared with Board, financial regulators, outside auditor and “dozens” of company employees
 - In litigation, defendant argued that report was protected by work product doctrine

SELECT RECENT CASES

- ***In re Capital One Consumer Data Sec. Breach Litig.* (E.D. Va. 2020)**
 - District Court affirms Magistrate Judge's order requiring production of forensic report concerning cybersecurity breach event
 - Rejects defendant's argument that document would not have been "created in essentially the same form in the absence of litigation"
 - Consulting firm's SOWs under MSA and separate engagement were nearly identical; primary difference was outside counsel's role in separate engagement
 - "In short, no difference between what [consulting firm] produced and what it would have produced in the ordinary course of business absent [law firm's] involvement can be reasonably inferred from any differences in substance between the 2019 SOW and Letter Agreement; and [defendant] failed to produce evidence sufficient to establish any such likely differences."

SELECT RECENT CASES

- ***Utesch v. Lannett Co., Inc.* (E.D. Pa. 2020)**
 - In securities fraud class action, plaintiffs allege that defendant made material misrepresentations concerning internal investigation into potential antitrust violations and the likelihood of price-fixing prosecutions
 - Plaintiffs sought to compel discovery related to alleged misrepresentations concerning the scope, substance and results of internal investigation
 - Defendants contend that responsive documents generated during course of internal investigation are privileged and protected by work product

SELECT RECENT CASES

- ***Utesch v. Lannett Co., Inc.* (E.D. Pa. 2020)**
 - District Court finds:
 - Privilege and work product doctrine apply to subject materials
 - Primary purpose of internal investigation was the provision of legal advice
 - Defendants' anticipation of future litigation was objective reasonable
 - Documents concerning factual circumstances of relationship between outside counsel and defendants (e.g., engagement letter) are discoverable
 - Certain information subject to redaction (e.g., nature of services performed)

SELECT RECENT CASES

- ***Utesch v. Lannett Co., Inc.* (E.D. Pa. 2020)**
 - District Court finds:
 - Materials prepared in connection with investigation (e.g., interview memos) are protected (*Upjohn*)
 - Defendants had not impliedly waived privilege or work product protection by:
 - denying allegations in the complaint concerning the results of the investigation
 - invoking the investigation when denying wrongdoing in public statements
 - Plaintiff “cites to no facts indicating that Defendants have invoked the investigatory report(s) ... in the present litigation” and therefore defendants had not put the report “at issue” in the litigation



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