

## Corporate Litigation:

### Privilege and Work Product in Internal Investigations

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APRIL 10, 2014

When a client decides to conduct an internal investigation, one of the threshold responsibilities of the client's advisors ordinarily is to structure the investigation in a manner that maximizes the client's flexibility to assert attorney-client privilege and work product protection over the investigation and its conclusions. Chief among the initial considerations will be (a) after assessing potential conflicts, determining who will oversee and who will conduct the investigation, (b) defining the scope and objectives of the investigation, and (c) deciding when and with whom the results are reported and subsequently shared, and in what form. This column focuses on recent guidance on the circumstances under which materials created in a company's internal investigation are subject to the attorney-client privilege and work product protection.

Last month, the U.S. District Court for the District of Columbia ruled that certain reports relating to a company's internal investigation were not entitled to either attorney-client privilege or work product protection. In two decisions in *Barko v. Halliburton*,<sup>1</sup> addressing a challenge by a former employee bringing a qui tam action, the court concluded that investigative documents were not privileged because the defendants failed to establish that the documents were created for the primary purpose of seeking legal advice, and were not attorney work product because they were not created in anticipation of litigation.

The *Barko* decisions do not undermine or qualify established practice under [Upjohn v. United States](#),<sup>2</sup> the seminal U.S. Supreme Court decision applying the attorney-client privilege and work product doctrine in the corporate context. The *Barko* cases (and other recent case law) remind practitioners, however, that a client's ability to

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shield from discovery materials and communications created during an internal investigation depends on how the internal investigation is structured and conducted, and with whom materials are subsequently shared.

### **Attorney-Client Privilege**

The attorney-client privilege has long been held to apply to communications between attorneys and their corporate clients. The Supreme Court in *Upjohn* acknowledged the privileged nature of communications made by a company's employees, regardless of rank, to the company's counsel, "at the direction of corporate superiors in order to secure legal advice from counsel." *Upjohn* is a reminder of the hallmarks of protected corporate communications. There, the court recognized privilege for communications between the company's employees and its counsel made during an internal investigation into questionable payments made to foreign government officials.

*Upjohn* highlighted that in-house and outside counsel can be integral to the management of a corporate investigation. In the investigation, the company's attorneys drafted and sent a letter containing a questionnaire to company managers, seeking detailed information concerning the relevant payments. The letter noted that the chairman of Upjohn's board had requested that the company's general counsel conduct an investigation to determine the nature and size of the payments. A policy statement included with the questionnaire explained the legal nature of the investigation, and specified that any questions regarding the policy should be addressed to the company's general counsel.

The employees also were informed that the reason they were being questioned was to facilitate the provision of legal advice to the company. Finally, the responses to the questionnaire were sent directly to Upjohn's general counsel, and he and outside counsel interviewed the recipients of the questionnaire and other corporate officers or employees as part of the investigation.

While *Upjohn* concluded that the communications between the company's counsel and employees were privileged, the court cautioned that privilege determinations are necessarily fact-sensitive. The facts surrounding the investigation at issue in *Barko* were sufficiently different from *Upjohn* to lead the Barko court to conclude that the communications in question were not privileged, because they were not made for the purpose of obtaining legal advice. As *Barko* indicated, the attorney-

client privilege attaches only to communications made for the primary purpose of securing either a legal opinion or legal services; in other words, the party seeking to invoke the privilege must show that “the communication would not have been made ‘but for’ the fact that legal advice was sought.”

The documents sought by qui tam plaintiffs in *Barako* related to the corporate defendants’ Code of Business Conduct (COBC), and investigations conducted pursuant to Department of Defense regulations requiring contractors to maintain certain internal control systems to “[f]acilitate timely discovery and disclosure of improper conduct in connection with Government contracts.” In contrast to Upjohn’s internal investigation, which *Barako* observed was “conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation,” the “COBC investigation was a routine corporate, and apparently ongoing, compliance investigation required by regulatory law and corporate policy.”

Additionally, although the COBC investigation culminated with the investigator drafting a report and submitting it to the general counsel’s office, the report neither requested legal advice, nor identified possible legal issues for further review, which the court concluded suggested the document was created to inform the company’s determination of whether it needed to report kickbacks or contractor fraud to the government. Similarly, none of the other documents created in the course of the investigation requested or provided legal advice. Significantly, the *Barako* interviews were conducted by non-lawyers and, unlike in *Upjohn*, the interviewed employees were advised only that the investigation was “sensitive,” not that the purpose of the interview was to facilitate the company’s obtaining legal advice. The court concluded that the “but for” test was not met: “[T]he primary purpose of the investigations was to comply with federal defense contractor regulations, not to secure legal advice.”<sup>3</sup>

## **Work Product Protection**

Whether interview notes, summaries, and other reports prepared during an internal investigation qualify as protected work product frequently is a companion question to the privilege question. The work product doctrine separately protects attorneys’ “mental impressions, conclusions, opinions, or legal theories” created in anticipation of litigation.<sup>4</sup> Work product status turns on whether materials were prepared in anticipation of litigation. It bears emphasis that the traditional “but for”

test used in *Barko* to evaluate whether privilege applies does not govern whether work product protection applies to investigative material.

In *Barko*, the court's work product assessment asked whether "the document[s] can fairly be said to have been prepared or obtained *because of* the prospect of litigation."<sup>5</sup> This "because of" test requires "a subjective belief that litigation was a real possibility" and a finding that such belief was "objectively reasonable," but unlike the "but for" test, it allows for the protection of material created for dual (or multiple) purposes, so long as it was prepared because of the prospect of litigation.

According to *Barko*, however, where a document has more than one purpose, the party seeking work product protection bears a heavier burden, since work product protection does not attach to documents prepared by lawyers "in the ordinary course of business or for other non-litigation purposes." The proponent of the work product protection must, therefore, demonstrate that "the prospect of litigation was an independent, legitimate, and genuine purpose for the document's creation."

Applying the work product "because of" test, *Barko* concluded that the investigation documents at issue were not entitled to work product protection. The court found that the corporate defendants conducted the internal investigation in the ordinary course of business—after all, any responsible company would investigate allegations of fraud or waste—and pursuant to government regulation.

Thus, the court concluded that the investigation documents were prepared irrespective of the prospect of litigation. The fact that the investigations were conducted by non-attorneys who did not consult with outside counsel bolstered this conclusion. While material prepared by non-lawyer consultants and agents may enjoy work product protection if their work assists an attorney's litigation preparation, "[m]inimal attorney involvement in an internal investigation represents a distinct difficulty for corporations claiming work-product privilege because it is the rare case in which a company genuinely anticipating litigation will leave its attorneys on the outside looking in."<sup>6</sup>

## **Disclosure to Government**

Even when a client conducts an internal investigation in a manner qualifying for attorney-client privilege and/or work product protection, the client and its counsel should be mindful of potential circumstances that could waive the privilege.

Waiver ordinarily will follow sharing investigative material with any entity outside the privileged relationship or who does not share a common legal interest. A recurring question that arises in the investigations context is whether voluntary disclosure of privileged or protected material to a government agency (typically as part of cooperation with the agency's related investigation) constitutes a waiver of the privilege as to third parties.

In the 1978 decision [\*Diversified Industries v. Meredith\*](#),<sup>7</sup> the U.S. Court of Appeals for the Eighth Circuit introduced the doctrine of "selective waiver" in the privilege context, ruling that a company's disclosure of outside counsel's memoranda of employee interviews to the Securities and Exchange Commission (SEC) in response to a subpoena resulted in only a limited waiver of privilege, thereby allowing the company to withhold the documents in a subsequent third-party lawsuit.

In the decades since *Diversified*, however, every federal circuit court to consider the issue has rejected the "selective waiver" doctrine in whole or in part. Most recently, the U.S. Court of Appeals for the Ninth Circuit in [\*In re Pacific Pictures\*](#)<sup>8</sup> held that "selective waiver" (even when disclosure is made pursuant to a confidentiality agreement) is incompatible with the rationale underpinning the attorney-client privilege—"selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose."

Similarly, the leading case in the U.S. Court of Appeals for the Second Circuit, [\*In re Steinhardt Partners\*](#), held that voluntary disclosure of attorney work product to government authorities waives the protection, because once a party allows its adversary access to counsel's mental impressions and opinions, the need for work product protection disappears. The Second Circuit, however, "decline[d] to adopt a per se rule that all voluntary disclosures to the government waived work product protection." Instead, in dicta, it expressly noted two circumstances where waiver may not occur: "situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed material."<sup>9</sup>

Because most courts have rejected the concept of "selective waiver," many parties have sought to retain attorney-client privilege and work product protection over

documents provided to an investigating government agency by entering into a confidentiality agreement with the agency that (a) restricts the agency's ability to disclose the protected material and (b) asserts the company's intention not to waive any applicable privilege as against third parties. This strategy has had a mixed reception in recent case law. Certain circuit courts have rejected the idea that a confidentiality agreement can preserve privilege and work product protection as to materials provided to a government agency, while others (such as the Second Circuit in *Steinhardt*) have left the question open.

New York federal courts are likewise divided on whether work product protection can be maintained through use of a confidentiality agreement with the government.<sup>10</sup> Though not settling the debate, two related opinions last year by Southern District of New York Judge Paul D. Gardephe in [Gruss v. Zwirn](#),<sup>11</sup> offer recent guidance.

There, the company's counsel signed a confidentiality agreement with the SEC's Enforcement Division and voluntarily produced interview notes and summaries created by lawyers during an internal investigation into potential financial irregularities at certain hedge funds. The agreement provided, in part, that the agency "will maintain the confidentiality of the Protected Materials...except to the extent that the Staff determines that disclosure is required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities."

A private plaintiff thereafter sought the factual portions of the lawyer-created interview notes and summaries. Judge Gardephe reversed as clearly erroneous a magistrate judge determination that defendants did not waive privilege and work product protection as to these materials voluntarily furnished to the SEC. Concluding that the SEC's investigation placed the disclosing parties in an adversarial posture with the SEC, the court held that under *Steinhardt* and its progeny, voluntary provision of documents to a government adversary ordinarily waives both privilege and work product protection as to those documents.

The court acknowledged *Steinhardt's* observation that under certain circumstances, a confidentiality agreement might affect the waiver analysis, but cautioned that *Steinhardt* itself had no occasion to explicate those circumstances. In *Gruss*, Gardephe determined that the "unfettered discretion" the agreement afforded the SEC to disclose the protected materials created an "illusory" commitment to maintain confidentiality. The court added that "*Steinhardt* is now nearly twenty

years old, and more recent circuit court decisions have not permitted parties who produce documents to an adverse government agency to assert attorney-client privilege and work product protection as to those same documents when demanded by a third party in an unrelated litigation.”

### **Practical Takeaways**

While these recent decisions do not upend familiar principles of privilege and work product protection available in the internal investigation context, they remind clients and practitioners that immunity from disclosure will not attach or be preserved without careful attention to the structure and conduct of internal investigations. Create a record that will support the assertion of privilege. Interview notes, summaries, and memoranda generated in the investigation are far more likely to be protected if, from inception attorneys are contemplated to be and in fact are meaningfully involved in the investigation. Specifically, having counsel conduct witness interviews, review documentary evidence, and provide ongoing legal advice with respect to the investigation will help demonstrate that the resulting materials were produced for the purpose of obtaining legal advice.

Moreover, attorneys conducting interviews should make sure to provide Upjohn warnings to employees, informing them that the attorneys represent the company, that the purpose of the interview is to enable the company to obtain legal advice, that the conversation is privileged, and that the privilege belongs to the company. Any non-attorneys conducting interviews should similarly be instructed to notify witnesses about the legal purpose and privileged nature of the investigation.

Attorney interview notes and other documents generated during the investigation should have a “confidential, attorney-client privileged/attorney work product” legend, and be drafted and maintained in a manner consistent with those designations. Any written reports arising from the investigation should be directed to the client and company counsel, bear the same designations, and recite that they contain legal advice.

Counsel should be mindful at every turn of conduct that may result in waiver of privilege and work product protection. Multiple constituencies will likely be looking to obtain access to investigative materials. It may be reasonable for the client to decide that voluntarily providing investigative materials to the government is in its best interests.

A negotiated confidentiality agreement with the government agency is an essential protective measure, but there is no guarantee that the agreement will preserve privilege or work product protection as against third parties. If possible, it is also preferable to negotiate disclosure to the government that is limited to factual information. Under current law, a disclosing party can better resist an assertion that waiver arose from disclosure to the government if the confidentiality agreement expressly limits the government's ability to disclose the documents it receives.

**Endnotes:**

1. 2014 WL 1016784 (D.D.C. March 6, 2014); 2014 WL 929430 (D.D.C. March 11, 2014).
2. 449 U.S. 383 (1981).
3. 2014 WL 929430, at \*2.
4. Fed. R. Civ. P. 26(b)(3)(B).
5. 905 F.Supp.2d 121, 133-34 (D.D.C. 2012) (internal citations and quotations omitted) (emphasis added).
6. *Id.* at 138.
7. 572 F.2d 596 (8th Cir. 1978).
8. 679 F.3d 1121 (9th Cir. 2012).
9. *In re Steinhardt Partners*, 9 F.3d 230, 236 (2d Cir. 1993).
10. Compare *In re Natural Gas Commodity Litig.*, 2005 WL 1457666, at \*8 (S.D.N.Y. June 21, 2005) (“[E]xplicit written confidentiality and non-waiver agreements with the government agencies...go[ ] a long way to a finding of non-waiver....”) with *In re Initial Public Offering Sec. Litig.*, 249 F.R.D. 457, 466 (S.D.N.Y. 2008) (“Voluntary disclosure of attorney work product, regardless of the existence of a confidentiality agreement, will waive work product privilege absent special circumstances.”).
11. 296 F.R.D. 224 (S.D.N.Y. 2013); see also 2013 WL 3481350 (S.D.N.Y. July 10, 2013).

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