The FCPA REPORT

www.fcpareport.com Volume 6, Number 2 February 1, 2017

Protecting Attorney-Client Privilege and Attorney Work Product While Cooperating With the Government: Establishing Privilege and Work Product in an Investigation (Part One of Three)

By Eric J. Gorman and Brooke A. Winterhalter
Skadden, Arps, Slate, Meagher & Flom LLP

Attorney-client privileged communications and attorney work product arise in the course of most if not all corporate internal investigations involving lawyers. Guarding the privilege and work-product protection are often important objectives for investigating companies as investigations proceed. This is particularly true for companies that conduct investigations while cooperating with the government on issues related to the FCPA. The privilege, and to a lesser extent the work-product doctrine, generally require confidentiality. Cooperation with the government, by contrast, often necessitates disclosure. This conundrum can be confounding.

This three-part series seeks to unwind that conundrum by closely examining the interplay between the attorney-client privilege and attorney-work-product protection, on the one hand, and cooperation with the government on the other. It provides an overview of factors for investigating companies and their counsel to consider as they navigate and balance the (sometimes) competing requirements of privilege/work product and cooperation in an FCPA investigation.

This first part in the series addresses how and when the attorney-client privilege and attorney-work-product protection are created during internal investigations, and steps that can be taken to establish and maintain those protections. The second part will analyze what types of investigation materials can be shared with the government in an internal investigation without implicating the privilege or attorney-work-product protections, and what steps can be taken to protect privileged materials and attorney work product if they are shared with the government. The third and final part will provide an overview of when and how investigation materials that are privileged or protected by the work-product doctrine, and have been shared with the government, can sometimes be protected from discovery in collateral litigation.

DOJ and SEC Cooperation Policies

To understand the privilege and work-product protections in the context of internal investigations, it helps to start with the regulatory environment. The DOJ and SEC, which are responsible for enforcing the FCPA, offer powerful cooperation incentives to companies that internally investigate and remediate alleged violations of the FCPA and share the facts they learn with the government.

In furtherance of their enforcement efforts, which have significantly increased in recent years, the DOJ and SEC offer cooperation credit – in the form of deferred or declined prosecution and reduced financial penalties, among other things – to companies that work with the government to report and remediate violations of the FCPA. Under the DOJ's FCPA Pilot Program, for instance, a company may receive a declination of prosecution, up to a 50 percent reduction in criminal fines and the avoidance of an appointed compliance monitor, in exchange for self-disclosure, cooperation and remediation as defined by the Pilot Program.

For more on the DOJ's 2016 Pilot Program, see "*Going Deep on the Fraud Section's FCPA Pilot Program*" (Apr. 20, 2016); "*How Will the Fraud Section's Pilot Program Change Voluntary Self-Reporting?*" (May 4, 2016); and "*Earning Cooperation Credit Under the Fraud Section's FCPA Pilot Program*" (May 18, 2016).

To obtain cooperation credit, a company generally must self-report to the government that it has potential issues under the FCPA, and disclose the facts and circumstances underlying the potential violations. According to the U.S. Attorney's Manual and the SEC's Enforcement Manual, that includes providing the government with information obtained from relevant witnesses, the identities of potential individual wrongdoers, and documents related to the conduct at issue. Information a company is required to provide while cooperating could include, inter alia, (1) summaries or explanations of particular transactions, fact patterns, and issues; (2) summaries of witness statements and answers; and (3) original source documents relating to the conduct at issue.

Notably absent from the list of what the government expects, however, is a waiver of the attorney-client privilege or work-product protection. Indeed, the government expressly declines to require that companies disclose privileged or work product investigation materials as a condition of gaining cooperation credit.

The government's stated rule of not requiring a waiver charts the beginning of a course for cooperating companies to follow as they engage with the government, while still maintaining the attorney-client privilege and attorney-work-product protections. Following that course, however, can at times require significant nuance: for instance, there may be questions about whether a communication or document is in fact protected – e.g., because of ambiguities or disputes about the provenance or nature of the document or communication. Indeed, when a claim of privilege or work-product protection is more gray than black or white, the practical issues of how to cooperate with the government while still maintaining the privilege or protection (to the extent they apply) can be challenging.

Defining the Attorney-Client Privilege and Work-Product Protection in Internal Investigations

To establish and guard the attorney-client privilege and work-product doctrine in an internal investigation, it is important first to understand what communications and materials are covered. In general, once a company decides to investigate a potential FCPA matter, counsel will begin to gather relevant source documents (some of which may be privileged) and to create documents such as summaries and analyses (many of which may be protected by the privilege and/or attorney-work-product doctrine, provided the company takes the necessary steps to obtain such protections).

The Attorney-Client Privilege

In general, the attorney-client privilege applies to confidential communications between the company and its attorneys in connection with seeking or providing legal advice. Legal advice lies at the heart of the attorney-client privilege.

As a rule, communications or documents that convey or describe legal advice or that request or provide information, such as factual background, necessary to render legal advice are protected by the attorney-client privilege. By contrast, communications — even between an attorney and client — that do not convey or contribute to the provision of legal advice are unlikely to be privileged. Moreover, the attorney-client privilege typically does not protect the facts at issue in an investigation, although it often will protect communications with counsel about those facts.

Privileged investigation materials may include, among other things, confidential communications with attorneys regarding the facts, circumstances and nature of alleged misconduct; confidential interviews with company employees (subject to *Upjohn* procedures, described further below); and confidential communications with experts retained to assist the attorneys, such as forensic accountants.

The Attorney-Work-Product Doctrine

The attorney-work-product doctrine protects documents and other materials prepared in anticipation of litigation by the company or its representatives, including attorneys and consultants. Various courts have held that an internal investigation conducted in anticipation of a government enforcement action, including a potential FCPA action, satisfies the "in anticipation of litigation" requirement. Thus, many investigation files created during an FCPA investigation by counsel, or at counsel's direction, are likely to constitute work product.

Work product is divided into two categories: opinion work product and fact work product. Opinion work product consists of materials reflecting an attorney's mental impressions, opinions and strategies, and is subject to a high level of protection.[1] Fact work product includes materials such as an attorney's compilation of facts learned during an internal investigation and is also protected by the work-product doctrine, although the protection of fact work product is subject to certain exceptions that do not apply to opinion work product.[2] Whether an attorney's work product constitutes fact or opinion depends on the content of the work product and requires a document-specific analysis.[3]

For example, according to the Clemens case, which considered witness interview memoranda created during an investigation, the nature of work product turns on whether it contains either (1) relevant and non-privileged facts, such as statements that could properly be called a witness's own words, or (2) an attorney's mental impressions, conclusions, opinions, or legal theories – statements that are attributable to the attorney, rather than a witness. Interview memoranda generally constitute opinion work product when the questions are prepared by an attorney and the memoranda contain the attorney's mental impressions from the interview. However, interview memoranda that reflect mere transcripts of an interview and are reviewed and signed by the witness are more likely to be considered fact work product.

Establishing the Privilege and Work-Product Protection in Internal Investigations

Engage Counsel

To ensure the attorney-client privilege and attorney-work-product protection apply to the maximum extent possible, investigating companies should consider engaging counsel early in the investigation process – ideally, at the point of determining whether to investigate. Indeed, it may be important for an investigating company to protect deliberations about whether, and how, to investigate; such protections may not be readily available if the deliberations do not involve legal counsel and legal advice. By ensuring that attorneys at least guide and oversee, and if possible conduct, the investigation, companies can maximize the privilege and work-product protections available under the law.

To that end, the company and its counsel can memorialize that legal advice and representation is being sought and provided, for instance by documenting this point in an engagement letter if outside counsel is involved. But, as noted above, the privilege only attaches to communications that convey legal advice; if the lawyer is engaged in a non-legal activity, such as providing advice without a legal component, then such advice may not be deemed privileged.

In-House Counsel in Non-U.S. Jurisdictions

In the United States, both in-house and external counsel may be the "attorney" for purposes of the attorney-client privilege and attorney-work-product protection. Certain other countries, however, appear to limit the availability of these protections to outside, as opposed to in-house, counsel. (Still other countries do not appear to recognize the attorney-client privilege or work-product protection at all.) Questions regarding the applicability of the attorney-client privilege and work-product doctrine in foreign countries is jurisdiction-specific and should be evaluated by locally-licensed attorneys.

Non-Attorney Investigators

To the extent that non-legal professionals, such as forensic accountants or other specialists, are needed to conduct a thorough investigation, the privilege and work-product protection can in certain circumstances be extended to cover them. It can be helpful (though not necessarily required) in extending the privilege and work-product protection to such non-legal professionals if investigating counsel, rather than the company itself, engages them. Such professionals are often directed by counsel, and at a minimum should coordinate closely with counsel, to remain within the privilege and work-product protections.

Non-attorney investigators who act without the involvement of legal counsel may find that their work is at risk of exposure. Non-lawyers – such as business people, accountants, auditors, compliance professionals, human resources personnel, and others – who undertake an investigation without the involvement and advice of legal counsel generally will have fewer, and weaker, grounds to protect their processes, deliberations, and findings.

Such a situation can arise when, for example, audit, compliance, or human resources personnel identify a potential issue in the course of their work and try to assess it. The need for legal advice and involvement may not be immediately apparent, but if they neglect to involve legal counsel early on their work may later be deemed outside the scope of the privilege and work-product protection. Privilege and work product shield legal advice and legal strategy. If attorneys are engaged later, they might be able to argue retroactively to apply the privilege and work-product doctrine to the earlier work of the non-lawyers, but such an argument could be challenging. As such, scenarios like these can present risks that could be avoided by simply engaging and involving counsel straightaway.

For more on extensions of the attorney-client privilege, see "*Attorney-Consultant Privilege? Key Considerations for Using the Kovel Doctrine (Part One of Two)*" (Dec. 21, 2016); *Part Two* (Jan. 18, 2017).

Establishing and Maintaining Confidentiality

People involved in an investigation should be made to understand that the investigation – and especially communications with counsel, and counsel's deliberations and work product – are confidential. There are a number of steps that can be taken to ensure that confidentiality is protected. These steps can help a company establish, in the face of a challenge, that the work and communications of investigating counsel and other professionals are protected to the maximum extent under the law.

Limit Disclosure to Necessary Personnel

To establish and maintain the privilege, investigating companies should ensure that privileged communications are shared, and intended to be shared, only among appropriate personnel at the company, the company's counsel, and consultants retained to assist counsel in providing legal advice. Some courts deem documents that are intended to be shared with the government, or another third party, as not privileged.[4]

Clearly Mark Documents as Privileged and/or Attorney Work Product

Appropriate documents and communications should be marked as attorney-client privileged and/or attorney work product. Marking a document as such may help identify it and thus avoid an inadvertent production if it is in fact privileged or work product material. However, the mere marking of a document or communication as "attorney-client privileged" or "attorney work product" does not make it so. Application of the privilege or protection depends on the content of the communication or document, and the related facts and circumstances.

Assert the Privilege Early and Consistently

The privilege and work-product protection should be asserted when applicable, including in response to government requests or other inquiries, and these assertions should be documented.

Give Upjohn Warnings

Investigating companies and their attorneys should deliver *Upjohn* warnings to witnesses during investigation interviews, including explaining that

1. witness interviews are confidential and subject to the attorney-client privilege – which is held by the company rather than the interviewee;
2. the investigating attorneys represent the company and not the interviewee; and
3. the company may waive the privilege if it chooses, without notice to or consent of the witness, and disclose some or all of the contents of the interview to others, including the government.

In *Upjohn*, the Supreme Court held that the attorney-client privilege extends not only to communications between attorneys and senior corporate decision-makers, but also to interviews between attorneys and corporate employees where such communications are "at the direction of corporate superiors in order to secure legal advice from counsel."[5] Certain states have rejected the *Upjohn* approach, however, and subscribe to other standards for defining the extent of the privilege, such as the control-group test.[6]

For more information on international investigations, see "*Handling the Challenges of Overseas Anti-Corruption Investigations: Forensic Accountants, Government Expectations, Translators, Upjohn Warnings, Privilege Issues and Recording Interviews*" (May 1, 2013).

Waiver Principles

Once established, the attorney-client privilege and work-product protections apply unless and until they are waived. As a general matter, waivers may be intentional, implied, or inadvertent. In addition to waiver, courts may order the discovery of fact work product if the facts at issue are not available from another source, the party seeking discovery of the fact work product shows a substantial need for it, and the fact work product is relevant to the party's claims.[7]

Intentional Waivers

An intentional waiver can occur, at least in a limited way, if a company voluntarily decides to waive the privilege or work-product protection over particular communications, documents, and/or issues, and deliberately discloses such material to others who are outside the scope of the privilege. Intentional waivers should be carefully considered in advance and, if possible, the scope of any such waiver should be clearly defined and agreed to beforehand with the receiving party to limit the risk of a broader subject matter waiver. Subject matter waivers will be addressed in more detail in a subsequent installment of this series.

Implied Waivers

An implied waiver can occur if, for example, a privilege holder asserts a claim, such as an advice of counsel defense, that in fairness requires examination of a protected communication. In U.S. v. Bilzerian, for instance, the Second Circuit ruled that a good faith defense, if based on conversations with counsel, constitutes an implied waiver of privilege over such conversations.[8] In In re Leslie Fay Cos. Sec. Litig., the Southern District of New York similarly held that a company's use of an attorney's report to support a dismissal motion constituted an implied waiver as to documents underlying that report.[9]

Inadvertent Waivers

Inadvertent waivers may occur if, for example, privileged communications or work product are unintentionally produced to a third party, without adequate procedures to limit accidental production, and are not promptly recovered after the producing

party becomes aware of the error. Under Federal Rule of Evidence 502(b), an inadvertent disclosure of privileged or protected materials generally does not constitute a waiver if (1) the disclosure was inadvertent, (2) the company took reasonable steps to prevent the disclosure, and (3) the company took reasonable steps to rectify the error. A clawback agreement, which can be included in a confidentiality agreement, is often deemed a reasonable step in preventing and rectifying inadvertent disclosures.

Waiver of Attorney-Client Versus Work-Product Privilege

How these waiver principles apply differs between privileged materials and attorney work product. In general, disclosure of privileged materials to a third party (absent a common interest arrangement or agreement) may result in a waiver of the attorney-client privilege as to those materials. Attorney work product is different, however. As a general matter, disclosing attorney work product to a third party only waives the work-product protection if that disclosure increases the ability of an adversary to gain access to the work product.[10]

The differing waiver principles governing privilege and work product reflect the distinct purpose that each doctrine serves. The attorney-client privilege encourages full and frank discussion between attorneys and their clients, whereas the attorney-work-product doctrine protects an attorney's mental impressions and legal strategies from adversaries. Because disclosing work product to a third party, particularly one that is not an adversary, is not necessarily contrary to the doctrine's purpose, such disclosures do not always result in a waiver of the work-product protection.

For more information on privilege and international investigations, see "*Preserving the Attorney-Client Privilege in Cross-Border Internal Investigations*" (Jun. 26, 2013).

Eric J. Gorman is a litigation partner based in Skadden's Chicago office.[11] He has conducted a substantial number of corporate internal investigations and represented companies and their boards in government investigations involving the SEC and DOJ. Gorman has handled investigations in the U.S. and abroad, and has advised boards of directors and senior executive teams in connection with U.S. criminal and regulatory issues. His litigation experience also includes defending against large-scale class actions, and prosecuting and defending transaction-related litigation and other high-value claims.

Brooke A. Winterhalter is a litigation associate based in Skadden's Chicago office.

[1] Fed. R. Civ. P. 26 (b)(3)(B) ("[The court] must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.").
[2] Fed. R. Civ. P. 26 (b)(3)(A) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation . . . [b]ut . . . those materials may be discovered if: (i) [they are relevant and non-privileged] and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.").
[3] See, e.g., United States v. Clemens, 793 F. Supp. 2d 236, 253 (D.D.C. 2011).
[4] See In re Syncor ERISA Litig., 229 F.R.D. 636, 645 (C.D. Cal. 2005) ("[N]either the attorney-client privilege nor the work-product doctrine applies to [documents] . . . created with the intent to disclose them to the Government.")
[5] Upjohn Co. v. United States, 449 U.S. 383, 394 (1981).
[6] See, e.g., Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982).
[7] Fed. R. Civ. P. 26 (b)(3)(A).
[8] 926 F.2d 1285, 1292 (2d Cir. 1991).
[9] 161 F.R.D. 274, 283 (S.D.N.Y. 1995).
[10] See, e.g., United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).
[11] This article contains the views of the authors, and does not necessarily represent the views of Skadden, Arps or any one or more of its clients.