

Protecting Privilege, Work-Product During Investigations

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Law360, New York (May 8, 2017, 12:14 PM EDT) -- When companies conduct investigations that remain strictly internal, maintaining confidentiality is straightforward. But many investigations are conducted in cooperation with U.S. government regulators, which expect companies to share information learned during those investigations. In such situations, maintaining the attorney-client privilege and attorney work-product protection — especially against possible third-party litigants pursuing individual claims — can be challenging.



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The likelihood of maintaining the privilege and work-product protection over investigation materials increases if companies take certain precautions. Ultimately, however, cooperating companies must carefully balance the benefits of sharing certain types of information with the government against the risks — including the risk that privileged communications and attorney work product could fall into the hands of plaintiffs suing the company.

Attorney-Client Privilege, Work-Product Protection and Waiver

The attorney-client privilege protects confidential communications between lawyer and client against disclosure to third parties. The attorney work-product doctrine protects materials prepared in anticipation of litigation by a company or its representatives, including attorneys and consultants, from disclosure to adversaries. (Courts have held that internal investigations conducted in anticipation of government enforcement actions generally qualify as “in anticipation of litigation.”) Work product falls into two categories: opinion work product (counsel’s mental impressions and strategies) and fact work product (e.g., counsel’s summaries of facts). Opinion work product is carefully protected by the courts; fact work product also is protected, although it can be discovered if the facts contained therein are relevant, not available from other sources, and the party seeking access shows a substantial need.

Once established, privilege and work-product protections apply until they are waived. Disclosing privileged materials to a third party, absent a common interest arrangement, generally waives the privilege. Work product is somewhat different: In general, disclosing work product to a third party only waives the protection if the disclosure is to an adversary or increases the likelihood that an adversary can access the materials.

DOJ and SEC Cooperation Policies

Whereas the privilege and work-product doctrine generally require confidentiality,

cooperation with the government often necessitates disclosure. The U.S. Department of Justice and the U.S. Securities and Exchange Commission instruct cooperating companies to disclose facts learned in investigations but do not require waiver of privilege or work-product protection. Case law has long recognized a distinction between facts (not protected) and communications or attorney documents discussing facts (protected). Thus, to the extent cooperating companies can share only facts with the government, that should not imperil their privilege or work-product protection.

Things often become more complicated, however. That is in part because the government's articulation of cooperation requirements arguably disregards legal protections for fact work product. Whereas the DOJ and SEC expressly disclaim any interest in opinion work product, there is no similar acknowledgement that fact work product is protected. Specifically, the DOJ and SEC state in their enforcement manuals that, in requesting facts, they do not seek "non-factual or 'core' attorney-client communications or work product," which they describe as "for example, an attorney's mental impressions or legal theories." Courts categorize such material as opinion work product. Investigating companies therefore have a strong basis to withhold opinion work product when cooperating with the government.

But the work-product doctrine also shields fact work product, which the government does not expressly address in its policies. (If anything, the DOJ and SEC manuals imply that fact work product is not "core" work product, and thus is not subject to restrictions on government requests.) Complicating matters further, the SEC reserves the right to ask cooperating companies for items such as chronologies, which under certain circumstances could qualify as fact work product. Thus, between the facts the government says it wants and the so-called "core" privilege and work product it says it will not request lies the significant, largely unaddressed area of fact work product.

Court Rulings Addressing Privilege and Work Product Over Information Shared with the Government

As noted above, parties waive work-product protection when sharing protected materials with an adversary, and they waive attorney-client privilege when disclosing a privileged communication to a third party. Such waivers may provide third-party litigants with an avenue to access otherwise protected materials. Certain courts have held that these principles also apply to disclosures made when cooperating in government investigations.

The U.S. District Court for the Northern District of California's recent discovery order in the *Wadler v. Bio-Rad Labs* case illustrates the risk of sharing investigation materials with the government. The plaintiff, Bio-Rad's former general counsel, sued to challenge his termination, claiming he had been dismissed in retaliation for raising issues under the Foreign Corrupt Practices Act. He argued that the company had waived any privilege or work-product protection over its investigation files by, *inter alia*, disclosing them to the government as part of its cooperation during an internal investigation. The district court agreed, ruling that the company's disclosures to the DOJ and SEC amounted to a waiver.

Bio-Rad reflects a majority — but not universal — view that privileged communications cannot be shared selectively without waiving the privilege generally. The legal divide over the issue, known as the selective waiver doctrine, creates uncertainty and risk for cooperating companies that share privileged communications or attorney work product with the government.

In 1978, the U.S. Court of Appeals for the Eighth Circuit was the first to apply the doctrine, in *Diversified Industries Inc. v. Meredith*. Reasoning that the government occupies a different role than private litigants, that court held that disclosing privileged materials to the government during an internal investigation does not waive the privilege as to other parties. Since then, however, six other courts of appeals have rejected the doctrine and

ruled that disclosing privileged communications to the government waives the privilege as to all parties. One court of appeals adopted a fact-specific approach, reasoning that courts should consider confidentiality agreements and any common interest before determining the scope of waiver. Three courts of appeals considering the issue ruled based on the particular facts at hand rather than categorically accepting or rejecting the doctrine. Still others have not addressed selective waiver directly or have issued what appear to be conflicting statements about it.

Regardless of how any particular cooperating company balances the respective benefits and risks of government disclosure against potential waiver, taking certain steps may help minimize risks of waiving privilege and work-product protection.

1. Enter Into a Confidentiality Agreement

The first thing cooperating companies can do to help protect information they provide to the government — whether privileged or not — is to enter into confidentiality agreements with the respective government agencies. Such agreements often (1) limit the government’s discretion to disclose materials produced by the company; (2) include nonwaiver provisions in which the government agrees that the production of any privileged communication or attorney work product does not result in a waiver; (3) provide that the government will not assert a broader subject-matter waiver based on such disclosures; and (4) include clawback provisions to address any inadvertent disclosures.

Courts are split over whether confidentiality agreements with the government are effective in preserving privilege or work product vis-a-vis third parties: some enforce them, while others do not. But even if a court were to hold that a confidentiality agreement did not negate a waiver, these agreements remain important for other reasons, including to protect against and remedy inadvertent waivers.

2. Where Possible, Share Facts Without Disclosing Protected Communications or Materials

As explained above, the government generally asserts that it wants cooperating companies to disclose facts and does not require them to waive privilege or work-product protection. Cooperating companies can utilize the government’s distinction between facts, on one side, and privileged communications and attorney work product, on the other, to their possible benefit. Sharing facts without revealing privileged communications or attorney work product should present the least risk to a company’s legal protections. As the U.S. Supreme Court noted in *Upjohn Co. v. United States*, facts, standing alone, generally are not privileged; moreover, they are not protected work product, so disclosing them should not threaten those protections.

As noted above, however, the government’s expectations for cooperating companies may not fully account for, or protect, fact work product.

3. Define the Scope of Any Intended Waiver

Cooperating companies sometimes decide to share privileged material or attorney work product with the government. Before doing so, they should (1) make certain that producing the material in question advances an important interest that cannot be attained by sharing only the facts that the government expressly says it wants; and (2) ensure that the benefit of providing such material outweighs both the risk that the disclosure will be deemed a waiver and the consequences of more widespread disclosure, if a waiver is found.

If protected materials must be shared with the government — for instance, because the company asserts an advice-of-counsel defense — the company should carefully consider

how the waiver can be defined and contained along legally defensible lines in order to avoid a broader waiver. For instance, in cases involving an advice-of-counsel defense, the DOJ and the SEC reserve the right to seek underlying attorney-client communications and related work product to evaluate the merits of the defense. In light of the attendant waiver such a defense likely will entail, companies should first consider whether the defense is worth asserting and whether it is likely to be effective. Moreover, if a company decides to waive privilege or work product protection (either because of an advice-of-counsel defense or for some other reason), setting forth the precise scope of the intended waiver — e.g., the subject matter and date range of the privilege or work product to be waived — in a statement to or an agreement with the government can help avoid or at least limit a potential future dispute with the government over the extent (and intent) of the waiver. It also may help establish a clear, defensible limit to the waiver if another party later tries to expand it.

4. If Possible, if Work Product is Shared, Limit It to Fact Work Product and Assert a Common Interest with the Government

To the extent companies share attorney work product with the government, it is generally safer to share fact — as opposed to opinion — work product. Opinion work product is subject to greater protection under the law.

It also can be helpful to articulate a common interest between the company and the government that may help preserve the work-product protection with regard to other parties. Again, however, the case law is mixed. In certain circumstances, attorney work product may be shared with other parties without waiving the protection if doing so advances a common goal. Certain courts, for instance, have recognized a common interest between investigating companies and the government in ensuring that sound financial and accounting practices are utilized, and in uncovering improper management of a fund. Other possible common interests include holding individual wrongdoers/executives accountable and identifying, remediating, punishing and deterring cyberattacks.

Common interest arguments may be less likely to succeed, however, if the company itself is the target of the government's investigation. In such a case, it is more difficult to argue that the company and the agency share a common interest and are not adversaries. Even if the company is not a target, courts sometimes find that the company could become one and thus deem the work-product protection waived.

Conclusion

Taking the steps outlined above may help a company reduce the risk of a waiver but will not necessarily eliminate it. Accordingly, companies should calibrate their cooperation efforts with the government to comply with enforcement requirements while taking any available steps to avoid, or at least limit the scope of, any waiver.

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