NOVEMBER 19, 2024

Privilege in Investigations: Perils, Pitfalls, and Protections

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William is a Partner at Willkie and Co-Chair of both the firm's White Collar Defense and Investigations & Enforcement Practice Groups, where he leads one of the premier compliance, investigations, and enforcement defense practices in the United States. He is a distinguished former federal prosecutor and regulator, and previously served as head of the Fraud Section of the U.S. Department of Justice's Criminal Division as well as in the Division of Enforcement at the Securities and Exchange Commission. Drawing on a unique range of experience, he regularly represents a broad range of companies, financial institutions and their executives in matters involving securities fraud, foreign bribery, sanctions, antitrust, cybersecurity, insider trading and money laundering. He also has extensive experience representing corporations and individuals outside the United States in responding to inquiries and investigations.

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Patricia O. Haynes is a partner in Willkie's Litigation Department. She focuses on complex commercial litigation, securities litigation, and white collar criminal defense. Patricia represents both corporate and individual clients, including large financial institutions, insurance companies, public companies, and private equity firms. She has represented clients in criminal investigations and enforcement actions involving the U.S. Department of Justice, the U.S. Securities and Exchange Commission, and FINRA.

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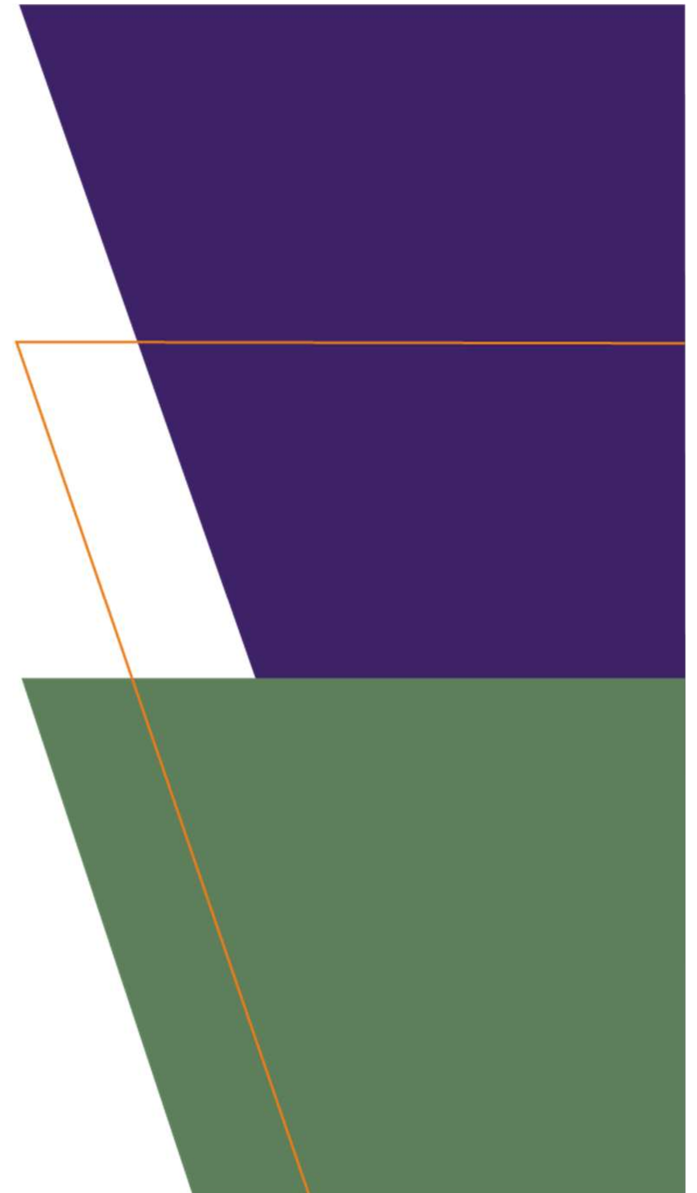
Andrew is a partner in the Investigations & Enforcement Group representing corporations and individuals in a variety of criminal and civil enforcement actions, including enforcement actions brought by the Department of Justice and the Securities and Exchange Commission. He has significant experience conducting worldwide internal and government-facing investigations, including global cross-border matters in China, Russia, Eastern Europe, Latin America, and the Middle East. Andrew has represented companies and individuals under investigation for alleged Foreign Corrupt Practices Act (FCPA), money laundering, False Claims Act, Anti-Kickback Statute, Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), and Securities Exchange Act violations. He also regularly counsels clients on the development of compliance programs, policies, and trainings.

Agenda

- Overview of Attorney-Client Privilege and Attorney Work Product Protections
- Privilege Pitfalls
  - Investigation is Non-Legal in Nature
  - Disclosures to the Government or Public Waive Privilege
  - Third Parties Engaged to Assist Lawyers and Non-Lawyers
- Best Practices for Protecting Privilege

Overview of Privilege



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Attorney-Client Privilege

- Communication;
- Between an attorney and his or her client (or their agents);
- Made to obtain or provide legal advice;
- Transmitted in confidence; and
- Maintained in confidence (*i.e.*, not waived)

Restatement (Third) of Law Governing Lawyers §§ 68–72, 79.

Attorney-Client Privilege: Corporations

- Attorney-client privilege for corporations is largely the same and covers:
  - Communication;
  - Between an employee/agent of the corporation and an attorney (or his/her agent);
  - Made to obtain or provide legal advice; and
  - Transmitted in confidence.
- Corporations must also maintain the confidence of the communication.
- But given that corporations consist of multiple individuals, this has a somewhat different meaning compared to an individual's privilege. Maintained in confidence for corporations means:
  - Not waived; and
  - **Disclosed only** to employees/agents of the corporation who **reasonably need to know** in order to act for the company.

Restatement (Third) of Law Governing Lawyers § 73.

Attorney-Client Privilege: Dual Purpose Communications

- If communication contains business and legal advice, is it privileged?
- Second, Fifth, and Sixth Circuits:
  - Was the "predominant purpose" or "primary purpose" of the communication to render or solicit legal advice?[1]
- DC Circuit:
  - "Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?"
- Ninth Circuit:
  - Left "open" whether "the primary purpose" or "a primary purpose" test applied.[3]
  - Supreme Court granted cert, but then dismissed as "improvidently granted."

[1] *Pritchard v. Cnty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007); *United States v. Robinson*, 121 F.3d 971, 974, (5th Cir. 1997); *Alomari v. Ohio Dep't of Pub. Safety*, 626 Fed. App'x. 558, 570 (6th Cir. 2015)

[2] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014)

[3] *In re Grand Jury*, 23 F.4th 1088, 1094 (9th Cir. 2022)

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Attorney-Client Privilege: Former Employees

- Many federal courts protect as privileged communications with former employees related to their conduct and knowledge during employment.[1]
  - But there are some contrary federal and state court decisions treating former employees as akin to a third party.[2]
- Attorney work product protections over interview memos and similar documents could still apply.

[1] *E.g., Better Gov't Bureau v. McGraw (In re Allen)*, 106 F.3d 582, 606 (4th Cir. 1997); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); *Amarin Plastics v. Maryland Cup Corp.*, 116 F.R.D. 36, 41 (D. Mass. 1987); *Krys v. Sugrue (In re Refco Inc. Sec. Litig.)*, No. 08 Civ. 3065 (JSR), 2012 U.S. Dist. LEXIS 27480, at *18–19 (S.D.N.Y. Feb. 27, 2012); *Cool v. BorgWarner Diversified Transmission Prods*., No. IP 02-960-C (B/S), 2003 U.S. Dist. LEXIS 20137, *6–7 (S.D. Ind. Oct. 29, 2003); *Cyphert v. Scotts Miracle-Gro Co. (In re Morning Song Bird Food Litig.)*, No. 17-CV-80820-MIDDLEBROOKS, 2017 U.S. Dist. LEXIS 198109, at *7 (S.D. Fla. Nov. 29, 2017).

[2] *Clark Equip. Co. v. Lift Parts Mfg. Co.*, No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457 (N.D. Ill. Sept. 30, 1985); *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000); *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1192–93 (Wa. Sup. Ct. 2016).

Attorney Work Product Protection

- Materials and information;
- Prepared by or for a party;
- In anticipation of or in connection with ongoing;
- Litigation or similar adversarial proceedings.

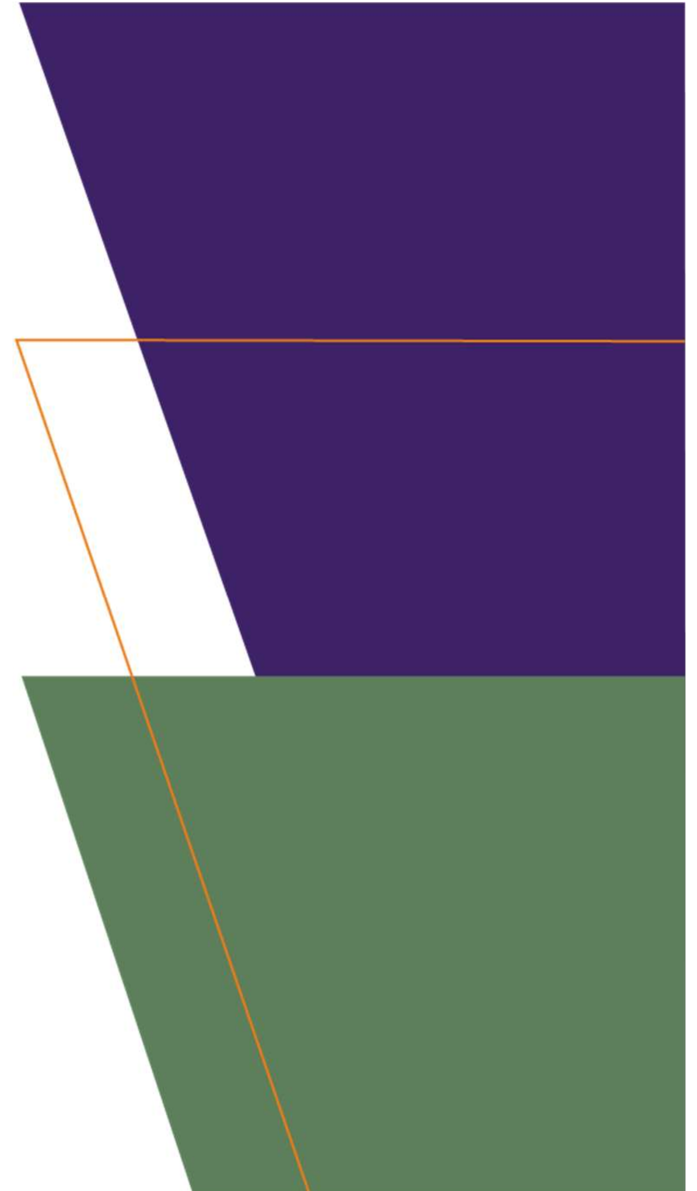
"[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." *Hickman v. Taylor*, 329 U.S. 495, 512 (1947)

Fed. R. Civ. P. 26(b)(3)(A); Restatement (Third) of Law Governing Lawyers § 87.

Attorney Client Privilege v. Attorney Work Product Protection

	Privilege	Work Product
Type of Document/ Communication	Narrower (Communications)	Broader (Any work product meeting other criteria)
(Anticipated) Litigation	N/A	Yes
Protection	Absolute absent waiver	Not Absolute for fact work product if demonstrated substantial need and undue hardship
		Absolute for opinion work product absent waiver
Disclosed to Third Party	Waived	Waived if disclosed to adversary

Privilege Pitfalls



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Define Scope and Purpose of Internal Investigations

Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC (2020):

- Outside counsel was hired by Buckley Sandler LLP to investigate allegations of sexual harassment and misconduct by a partner.
- In litigation with its insurer, Buckley sought to withhold communications with outside counsel concerning the investigation as privileged. Insurer moved to compel.
- The Court held that the investigation was required under Buckley's policies and thus was "initiated and pursued in the ordinary course of Buckley's business."
- The "fact that Buckley hired a prominent outside law firm to conduct the investigation [did] not change" the Court's analysis.
- Thus, the Court found that many of outside counsel's investigative materials and communications were **<u>not</u>** covered by the attorney-client privilege.

Buckley LLP v. Series 1 of Oxford Insurance Co. NC LLC, 2020 NCBC 81, 2020 NCBC LEXIS 136 (N.C. Super. Ct. Nov. 9, 2020), *aff'd* 876 S.E.2d 248 (N.C. Sup. Ct. 2022).

Define Scope and Purpose of Internal Investigations (cont'd)

Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC (2020):

- The Court also rejected Buckley's arguments that the documents were protected by the attorney work product protections:
  - "The evidence of record does not suggest that the Buckley Communications were made because of anticipated litigation arising from Sandler's misconduct. None of the [relevant documents] mentions or discusses the prospect of litigation."
- The North Carolina Supreme Court, in affirming, stated:
  - "In today's business world, investigations of alleged violations of company policy, including policies prohibiting sexual harassment or discrimination, are ordinary business activities and, accordingly, the communications made in such investigations are not necessarily made in the course of giving or seeking legal advice for a proper purpose."

Buckley LLP v. Series 1 of Oxford Insurance Co. NC LLC, 2020 NCBC 81, 2020 NCBC LEXIS 136 (N.C. Super. Ct. Nov. 9, 2020), *aff'd* 876 S.E.2d 248 (N.C. Sup. Ct. 2022).

Define Scope and Purpose of Internal Investigations (cont'd)

Sec. and Exch. Comm'n v. RPM Int'l, Inc. (2020):

- Outside counsel was hired by RPM's Audit Committee after:
  - The SEC initiated an investigation; and
  - RPM's auditor, EY, stated it would not sign the 10-K without an independent investigation.
- The Court concluded that outside counsel's investigation was conducted "because of" EY's position not "because of" the SEC investigation, meaning interview memos were not covered by the attorney-work product protection.
- The Court also found memos were not work product because they were "completely devoid of legal opinions, thoughts, or mental impressions."
- The Court also held that RPM waived the attorney-client privilege by sharing the contents of the interview memos with EY, who thereafter disclosed the substance to the SEC. Work product protection (to the extent it existed) was also waived by disclosure to the SEC.

Transcript of Status Conference, *Sec. and Exchange Comm'n v. RPM Int'l, Inc.,* No. 1:16-cv-01803-ABJ, (D.D.C. Feb. 14, 2020); *In re RPM Int'l Inc.*, No. 20-5052, Order Denying Mandamus (D.C. Cir. May 1, 2020).

Privilege for Board Minutes

- In making its privilege determinations in the *RPM* case, the Court heavily relied on its review of the company's board minutes.
- These minutes reflected that outside counsel was hired to investigate the timing of disclosures in filings with the SEC and whether appropriate accruals were taken, not to defend the company in the SEC investigation or any other litigation.
- Minutes should clearly reflect that legal advice is being provided/requested, not general business advice or other non-legal types of advice.
- Minutes should clearly reflect that no one is present who could waive privilege.
- Mere presence of attorneys at board/committee meetings is not enough to establish privilege.
- Drafts of the minutes may be protected if drafted with the help of counsel.

Pitfall! What Went Wrong in *Buckley* and *RPM*?

- Purposes of the investigation, providing legal advice and establishing legal defenses in anticipation of litigation, were not clearly defined.
- Aspects of the investigation establishing privilege were not documented:
  - To the extent the purpose was legal advice, that was not documented
  - Litigation or potential litigation not mentioned in work product
  - Work product “completely devoid” of legal opinions

Balancing Disclosure vs. Waiver in Disclosure to Auditors

Courts are Split

Deloitte.

- **Majority**: *United States v. Deloitte, LLP (2010):*
  - In litigation between IRS and Dow Chemical Company, IRS subpoenaed Dow's auditor, Deloitte, seeking various documents.
  - Court found <u>no wavier</u> of work product protection as auditors' duty of confidentiality precluded any significant risk of disclosure to an adversary.
- **Minority**: *Medinol v. Boston Sci. Corp. (2002)*:
  - Boston Scientific engaged counsel to perform an investigation.
  - Counsel reported to the Special Litigation Committee of the Board.
  - Minutes of the meetings where counsel presented were shared with company's outside auditors.
  - Court found disclosure to auditors <u>waived</u> work product protections.

U.S. v. Deloitte, LLP, 610 F.3d 129 (D.C.Cir. 2010); *Medinol v. Boston Sci. Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002)

Balancing Disclosure vs. Waiver in Government Investigations

- The Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy sets forth guidance for receiving cooperation credit.
- "[E]ligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection…."
- But, DOJ requires "[t]imely disclosure of all non-privileged facts relevant to the wrongdoing at issue, including:

    1) facts gathered during a company's independent internal investigation, if the company chooses to conduct one;

    2) attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts;

    3) timely updates on a company's internal investigation, if the company chooses to conduct one, including but not limited to rolling disclosures of information;

    4) identification of all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, … and all non-privileged information relating to the misconduct and involvement by those individuals."

Balancing Disclosure vs. Waiver in Government Investigations (cont'd)

Sec. and Exch. Comm'n v. Herrera (2017):

- GCC hired outside counsel to "provide legal advice concerning accounting errors" at GCC's Brazilian subsidiary.
- Outside counsel conducted an internal investigation and disclosed the investigation to SEC.
  - Outside counsel made a presentation on its factual findings to the SEC, and provided "oral downloads" of witness interviews.
- GCC settled with the SEC, which later brought an enforcement action against GCC LatAm executives.
- In discovery, the executives sought the presentation to the SEC and witness memos.
  - Presentation was not work product because it was prepared for the SEC meeting.
  - Work product protection and attorney-client privilege over the interviews memos orally disclosed to the SEC was waived.

Sec. and Exch. Comm'n v. Herrera, 324 F.R.D. 258 (S.D. Fla. 2017).

Balancing Disclosure vs. Waiver in Government Investigations (cont'd)

United States v. Coburn (2022):

- Cognizant hired outside counsel in connection with DOJ and SEC investigations of FCPA violations. Outside counsel provided "detailed accounts of 42 interviews" to DOJ.
- DOJ brought charges against two former Cognizant executives, who subpoenaed the interview memos and other investigative work product.
- The Court held that the interview "downloads" waived attorney-client and attorney work production protections over:
  - Interview memoranda, notes, summaries, or other records of the interviews;
  - Underlying documents discussed in any interview memoranda/summary;
  - Documents and communications reviewed that formed "any part of the basis of any presentation" to the DOJ.
- Trial set for March 2025.

United States v. Coburn, No. 2:19-cr-00129 (KM), 2022 WL 357217 (D.N.J. Feb. 1, 2022)

Balancing Disclosure vs. Waiver via Publicizing Findings

Doe v. Baylor Univ. (2020):

- Baylor University engaged a law firm "to conduct an independent and external review of Baylor University's institutional responses to Title IX and related compliance issues though the lens[] of specific cases."
- The law firm made presentations of findings to the Board of Regents.
- Subsequently, Baylor published a 13-page summary of the investigation and a list of 105 recommendations on the law firm's letterhead.
- Baylor later published a 755-page "External Report on the Completion of the 105 Recommendations," which was authored by outside counsel.
- Plaintiffs brought Title IX lawsuits against Baylor and sought documents from the law firm's investigation.

Doe v. Baylor Univ., 320 F.R.D. 430 (W.D. Tex. 2017); *Doe v. Baylor Univ.*, 335 F.R.D. 476 (W.D. Tex. 2020)

Balancing Disclosure vs. Waiver via Public Findings (cont'd)

Doe v. Baylor Univ. (2020):

- Court found Baylor was "clearly . . . seeking legal advice."
- BUT, the Court held that the publication of the factual findings "'reveal[ed]' what facts Baylor provided" to outside counsel, and thus effectively published Baylor's confidential communications, waiving privilege.
  - "[T]he thirteen pages of Findings of Fact and ten pages of Recommendations purport to summarize the entire investigation by [outside counsel]—both the information provided by Baylor and the factual and legal conclusions that resulted from it."
  - "In other words, the documents summarize the complete course of previously confidential communications between Baylor and [outside counsel]."
- Waiver was over the entire investigation and advice on implementation of recommendations.
- Attorney work product protection was also waived because Baylor's litigation defense relied on the investigation conducted and the reforms implemented by outside counsel.

Doe v. Baylor Univ., 320 F.R.D. 430 (W.D. Tex. 2017); *Doe v. Baylor Univ.*, 335 F.R.D. 476 (W.D. Tex. 2020)

Pitfall! What Went Wrong in *Baylor University*?

- The information made public covered the entire scope of the investigation
- Baylor disclosed all of the key factual findings <u>and</u> the legal conclusions/advice made in response to those findings
- Baylor tried to have its cake and eat it too:
  - Baylor's legal defense was based on the facts and advice it received from outside counsel
  - Baylor nonetheless tried to shield that information from plaintiffs

Third Parties Assisting Litigation

Capital One Consumer Data Security Breach Litigation (2020)

- Capital One entered into an MSA with Mandiant (Nov. 2015) and a subsequent SOW (Jan. 2019).
- In July 2019, Capital One experienced a data breach and retained outside counsel (July 2019).
- Capital One and outside counsel then signed a Letter Agreement with Mandiant, under which Mandiant would provide services "as directed by counsel."
- Plaintiffs brought suit against Capital One and sought Mandiant's report on the data breach.
- Court held that if a document may be used for both litigation and business purposes, the Court must determine the "driving force behind" the document's preparation.
- Court determined that the Mandiant report would have been created in essentially the same form in the absence of litigation. Court's analysis turned substantially on:
  - Letter Agreement and SOW had identical scopes of services.
  - Report distributed to ~50 employees, 4 regulators, the Board, and an outside accountant.

In re: Capital One Consumer Data Security Breach Litigation, No. 1:19md2915 (AJT/JFA), 2020 WL 3470261 (E.D. Va. June 25, 2020)

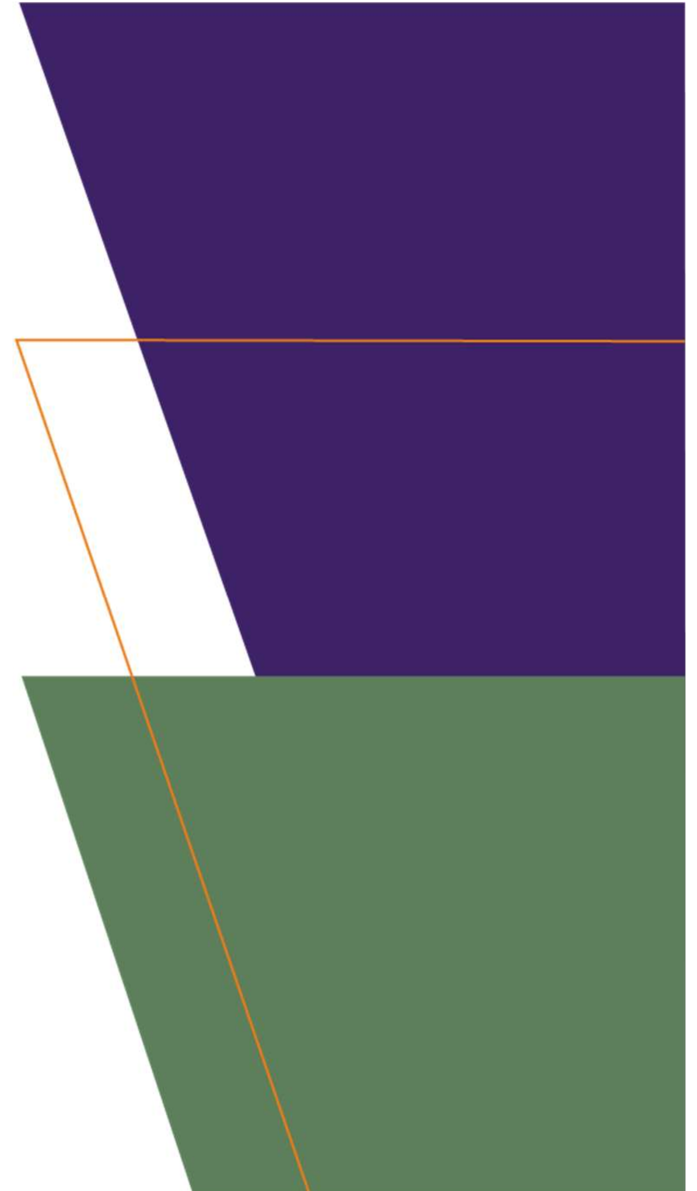
Pitfall! What Went Wrong in *Capital One*?

- Vendor engaged for business reasons years before the start of legal work
- Amendment to that engagement did not distinguish between work in support of litigation and in support of the business
- Work product had dual uses: legal and business

Sum-Up: Common Practices that Led to Privilege Pitfalls

- Initiating an investigation as a routine review to determine compliance with company policy.
- Initiating an investigation at the urging of an independent auditor.
- Sharing investigatory materials with third parties.
- Providing “read outs” or over-disclosing to government regulators or the public.
- Retaining non-lawyers who will help the investigation directly, instead of through an outside law firm.
- Mixing business and legal communications, work, and advice.

Best Practices



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General Best Practices

Clearly Identify and Define the Client

- *Particularly important in-house*
- *Corporate counsel represents the company*

Be Mindful in Crafting Documents

- *Be intentional in creating documents containing legal advice; for each document, weigh the pros and cons of oral versus written advice*

Distinguish "Legal Advice" from "Business Advice"

- *Ensure documents and communications reflect they are being performed by a lawyer or at the direction of a lawyer to obtain legal advice*
- *Apply proper legends to legal documents*
- *Separately store legal and business documents*
- *Avoid providing both types of advice in the same document*

General Best Practices (cont'd)

Use Proper Legends for Legal Documents

- *"Confidential – Attorney-Client Privileged"*
- *"Subject to Work Product Doctrine"*
- *"Covered by Legal Privilege"*
- *"Prepared at the Direction of Counsel"*
- *But – Do not overuse labels*

If Document is Intended to be Protected as Work Product, Consider if it Meets Criteria

- *Is there actual or potential litigation causing the document creation?*
- *Does the document contain legal analysis, legal strategy, attorney thoughts, or mental impressions?*

General Best Practices (cont'd)

Avoid Waiver

- *Copy or forward only on a need-to-know basis*
- *Do not discuss or disclose privileged information in a public place*
- *Avoid using personal communication platforms*
- *Clearly identify and mark with appropriate headers all privileged documents and communications*
- *Avoid communicating legal advice and business advice in the same document*

Consider Relevant Parties

- *Consider whether use of external lawyers bolster privilege*
- *Consider the actual role and duties of any in-house personnel working on the investigation*

General Best Practices (cont'd)

Clearly Define and Document the Scope and Purpose of the Investigation

- *Make it clear intent is to provide legal advice; work product must then reflect that*
- *Document the purpose of interviews at all stages*
- *Involve outside counsel early*
- *Investigation should be carried out with direct and ongoing involvement of lawyers*
- *Identify applicable jurisdictions and laws*

Government Disclosures

- *Provide presentations as factual as possible and as promptly as possible*
- *Rely on non-privileged documents for presentations as much as possible*
- *Create separate and clear presentations to be shared with government versus internal work product*
- *Avoid, if possible, full read-outs of interviews*

Questions?

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