You’d better check to make sure you’re wearing the right hat before you launch your investigation because you (and your client) have a lot to lose if you grab the wrong one. In fact, where the objectivity and independence of the investigation are crucial (e.g., where the results may be provided to a regulatory body), it may be wise to pass the hat to outside counsel.

A strong grasp on the basics of each potentially applicable privilege is essential in navigating the murky waters that often surround internal investigations. The attorney-client privilege, the work-product doctrine, and self-critical evaluation privilege may provide protection, but each has strict requirements and can be inadvertently waived. Understanding the implications of waiver and knowing what you can do to more carefully preserve these privileges may save your job — and your company’s reputation.

**The Attorney-Client Privilege**

Generally, communications between clients and their attorneys are privileged. One of the requirements for the privilege to apply, however, is that the client must have sought legal advice, service, or assistance, as opposed to mere business advice. Accordingly, the attorney-client privilege does not protect against discovery of business advice or underlying facts merely because those facts have been communicated to an attorney. Thus, while it has long been established that a corporation may assert the attorney-client privilege to protect its communications with counsel, if a communication sought to be protected by the privilege contains both legal and business advice, the privilege only applies to the legal opinions or advice. A close call may not fall in your favor. The burden will be on you, the party asserting the privilege, to demonstrate how each document satisfies all the elements of the privilege.

As a contemporary in-house counsel, you probably provide more than just legal advice to your client. You wear multiple hats; in fact, you’ve got a whole closet full. Sometimes you’re a legal advisor, sometimes a business counselor, sometimes a management consultant. Therein lies the problem when it is time to launch an internal investigation triggered by an employee complaint, a product concern, or threatened litigation. We think we know the basics: Communications between attorneys and their clients are privileged, and work prepared in anticipation of litigation is protected. Well, not so fast.

**In-House Counsel and the Internal Investigation: What Have You Got To Lose?**
You’d better check to make sure you’re wearing the right hat before you launch your investigation because you (and your client) have a lot to lose if you grab the wrong one. In fact, where the objectivity and independence of the investigation are crucial (e.g., where the results may be provided to a regulatory body), it may be wise to pass the hat to outside counsel.

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Waiver of the attorney-client privilege may occur when there is a breach of confidentiality, whether inadvertent or intentional. Accordingly, the presence of a third party lacking a common legal interest will result in a waiver of the attorney-client privilege. Moreover, some courts have held that even if confidential work product is produced to a potential adversary under a confidentiality agreement, confidentiality has been voluntarily breached. Even disclosure of privileged information directly to a client’s independent auditor, accountant, or tax analyst may destroy confidentiality. Simply put, the prevailing view is that once a client waives the privilege to one party, the privilege is waived to all.

Selective Waiver
Some courts, however, have recognized that a client may “selectively” waive the privilege under certain circumstances, most notably when disclosing to governmental entities.

Waiver of the attorney-client privilege may occur when there is a breach of confidentiality, whether inadvertent or intentional.

In one of the earliest reported decisions to address the issue, Discoverfield Indus., Inc. v. Meredith, the Eighth Circuit established the selective waiver doctrine, which provides that a party may disclose attorney-client privileged information to governmental agencies conducting an investigation without waiving the attorney-client privilege to other parties (i.e. later litigants). The Eighth Circuit reasoned that selective waiver is necessary because it encourages “corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders, and customers.”

After enjoying initial acceptance, the Diverfield decision has since been routinely criticized and eventually rejected by a majority of jurisdictions that have addressed the issue. The District of Columbia, First, Third, and Sixth Circuits have completely rejected the idea that the attorney-client privilege is not waived by virtue of the selective waiver doctrine by production to the government, even if the government and the company enter into a confidentiality agreement. The Federal, Second and Fourth Circuits have rejected the selective waiver doctrine but have not addressed it in a context in which the company and government entered into a confidentiality agreement. Indeed, “every other circuit to consider the matter has rejected the Eighth Circuit’s [selective waiver] approach.”

Thus, in the context of an intentional or voluntary waiver of attorney-client privilege, counsel should assume that “when the client voluntarily discloses a confidential communication, the waiver will extend not only to the disclosed communication, but also to whatever additional communications must be provided to the third party in order to give that party a fair chance to meet the advantages gained by the privilege holder through the disclosure.” Accordingly, courts refer to the waiver as extending to the subject matter of the disclosed communication. A client may not selectively waive only those communications that are favorable and thus resist disclosure of the remaining portions of related correspondence that may be unfavorable.

Work-Product Doctrine
The work-product doctrine “is distinct from and broader than the attorney-client privilege.” The work-product doctrine protects from discovery materials prepared in anticipation of litigation. In a majority of jurisdictions, the privilege can apply where litigation is not imminent, “as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.” Protection extends to documents and tangible things, including a lawyer’s research, analysis of legal theories, mental impressions, notes, and memoranda of witness statements.

Most courts have recognized that internal corporate investigations conducted in anticipation of litigation and thus enjoy work-product protection. The Supreme Court in Upjohn Co. v. U.S., while not expressly stating so, assumed that counsel’s notes of an internal investigation as to possibly illegal foreign payments were in anticipation of litigation. The U.S. v. Gulf Oil Corp. court held that documents concerning a declaratory judgment action and prepared by counsel at the request of the company’s accountants were not work product. The court reasoned that the documents were not created to assist in litigation but rather “for the business purpose of compiling financial statements which would satisfy the requirements of the federal securities laws” and thus were not entitled to the privilege.

Moreover, disclosure to the government or regulatory agencies such as the FDA may waive privileges related to the subject of the investigation. Waiver of work-product protection, however, is generally not construed as broadly as waiver of attorney-client privilege.

When evaluating the scope of work-product protection, or the implications of waiver, courts draw sharp distinction between “fact” work product and “opinion” work product. So-called “fact” work product, the “written or oral information transmitted to the attorney and recorded as conveyed by the client,” may be obtained upon a showing of substantial need and inability to otherwise obtain without material hardship. However, absent waiver, a party may not obtain the “opinion” work product of his adversary, i.e., “any material reflecting the attorney’s mental impressions, opinions, conclusions, judgments, or legal theories.”

Furthermore, many of the reasons for disallowing selective waiver in the attorney-client privilege context also apply to the work-product doctrine. Applying this logic to circumstances in which a corporation had disclosed work product to a governmental entity pursuant to a confidentiality agreement, the courts have held that the disclosure was still a waiver of work-product immunity. Similarly, courts have routinely rejected the argument that governmental entities merely investigating potential wrongdoing are not “adverse” for purposes of waiver.

In contrast to waiver of the attorney-client privilege, the waiver of work-product immunity will generally be limited to the materials actually disclosed. The case law related to waiver, particularly in the context of governmental investigations is rapidly evolving with conflicting cases throughout the nation. However, a number of district courts have held that a broader or subject matter waiver of work-product immunity occurs when:

It would be inconsistent with the purposes of the work-product privilege to limit the waiver to the actual documents disclosed [...] for example, when the facts relevant to a narrow issue are in dispute and have been disclosed in such a way that it would be unfair to deny the other party access to other facts relevant to the same subject matter.

As noted by one court, for instance, complete subject matter waiver of work product has been found where a party deliberately disclosed work product in order to gain a “tactical advantage.” Applying similar reasoning, other courts have found subject-matter waiver only if “facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny the other party an opportunity to discover other relevant facts with respect to that subject matter.”

Most courts have recognized that internal corporate investigations are conducted in anticipation of litigation and thus enjoy work-product protection.

Self-Critical Analysis Privilege
Less frequently, corporations seek protection by claiming a self-critical evaluation privilege. The self-critical analysis privilege is a relatively common law development, finding its origins approximately thirty years ago in a case involving medical peer review procedures. Although enjoying initial acceptance and limited expansion, currently the self-critical analysis privilege is not widely accepted and is not uniformly applied.

The development of this privilege has primarily remained at the federal level. Although some state courts recognize the self-critical analysis privilege, the majority have either refused to recognize the privilege or have not addressed the issue. While there remain a number of federal district courts which at least recognize the possible existence of the doctrine, today there are only a few circuits which have embraced the
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SELECTIVE WAIVER

Some courts, however, have recognized that a client may “selectively” waive the privilege under certain circumstances, most notably when disclosing to governmental entities. Unfortunately, “the case law addressing the issue of limited waiver [is] in a state of ‘hopeless confusion.’”

In one of the earliest reported decisions to address the issue, Diversified Indus., Inc. v. Meredith, the Eighth Circuit established the selective waiver doctrine, which provides that a party may disclose attorney-client privileged information to governmental agencies conducting an investigation without waiving the attorney-client privilege to other parties (i.e. later litigants). The Eighth Circuit reasoned that selective waiver is necessary because it encourages “corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders, and customers.”

After enjoying initial acceptance, the Diversified decision has since been routinely criticized and eventually rejected by a majority of jurisdictions that have addressed the issue. The District of Columbia, First, Third, and Sixth Circuits have completely rejected the idea that the attorney-client privilege is not waived by virtue of the selective waiver doctrine by production to the government, even if the government and the company enter into a confidentiality agreement. The Federal, Second and Fourth Circuits have rejected the selective waiver doctrine but have not addressed it in a context in which the company and government entered into a confidentiality agreement. Indeed, “every other circuit to consider the matter has rejected the Eighth Circuit’s [selective waiver] approach.”

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Most courts have recognized that internal corporate investigations are conducted in anticipation of litigation and thus enjoy work-product protection. The Supreme Court in Udall v. U.S., while not expressly stating so, assumed that counsel’s notes of an internal investigation as to possibly illegal foreign payments were in anticipation of litigation. The U.S. Supreme Court decision supports the treating internal investigations of corporate misconduct as having been done in anticipation of litigation, even when no action had as yet been filed or threatened. Documents prepared for business reasons, as opposed to anticipation of litigation, are not entitled to protection. Accordingly, in U.S. v. Gulf Oil Corp., the court held that documents concerning a declaratory judgment action and prepared by counsel at the request of the company’s accountants were not work-product. The court reasoned that the documents were not created to assist in litigation but rather “for the business purpose of compiling financial statements which would satisfy the requirements of the federal securities laws” and thus were not entitled to the privilege.

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SELF-CRITICAL ANALYSIS PRIVILEGE

Less frequently, corporations seek protection by claiming a self-critical evaluation privilege. The self-critical analysis privilege is a relatively recent common law development, finding its origins approximately thirty years ago in a case involving medical peer review procedures. Although enjoying initial acceptance and limited expansion, currently the self-critical analysis privilege is not widely accepted and is not uniformly applied. The development of this privilege has primarily remained at the federal level. Although some state courts recognize the self-critical analysis privilege, the majority have either refused to recognize the privilege or have not addressed the issue. While there remain a number of federal district courts which at least recognize the possible existence of the doctrine, today there are only a few circuits which have embraced the

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chilling the flow of information.41 Indeed, the court suggested that the work-product doctrine applies the appropriate framework.42

Whether asserting the privilege pursuant to statute or the common law privilege of self-critical evaluation, those documents which are prepared primarily for the purpose of in-house evaluation and compliance with regulatory programs stand the best chance of retaining privileged status. Any attempt by a corporation to characterize the fruits of an investigation as being motivated primarily by anything other than the anticipation of litigation, however, could have a negative impact on the ability to assert the work-product privilege, which is a broader and more established privilege.

**MINIMIZING RISK**

As the duties of in-house counsel expand, the risk associated with their sometimes amorphous role grows. Reducing any ambiguity related to protecting and preserving privileges, Investigations conducted purely by in-house counsel increase the waive risk of inadvertent waiver. In the case of potentially serious allegations or where objectivity is crucial, outside counsel working closely with corporate counsel may be the wiser choice. If outside counsel is retained, a well-drafted engagement letter should clearly identify the purpose of seeking legal advice relating to potential litigation. To further earmark investigations as privileged — and certainly in cases where outside counsel is involved — the board or high-ranking management should formally request legal advice from in-house counsel. Regardless, both in-house and outside counsel should separate legal advice from business advice wherever feasible. Attorney-client communications should be clearly identified and confidential exchanges should be labeled as such. Although the investigation may incorporate an internal team made up of non-lawyers, the team should be clearly identified and include only those necessary to complete a thorough investigation. All responsibilities and communications should be channeled through counsel. Furthermore, written communications and email should be minimized with strict instructions regarding distribution. Any communications gathered from or by third-parties for investigative purposes should be gathered at the request of counsel. Drafts should be kept at a minimum and should be clearly labeled. Inadvertent mistakes made early in the investigation, though innocent, may not be able to be undone. Taking the necessary steps at the inception of an investigation will go far in laying the groundwork for a successful assertion of privilege in the future.

**LEGAL PRINCIPLES**


**Self-Critical Evaluation Privilege**

The Ninth Circuit is among the minority which has continued to recognize the privilege and in Dowling v. American Hawaii Cruise, Inc., articulated the most often cited criteria that must be established by the party seeking protection.43 First, the information must result from a document produced as a result of the self-critical analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of information respecting the subject matter; third, the information must be of the type that the free flow would cease if the privilege is not recognized. Lastly, any document produced as a result of the self-critical analysis must be produced in the expectation of confidentiality, and it must actually have been kept confidential.44 Even within those limited courts which recognize the privilege, those criteria are strictly applied, and the scope has been consistently narrowed.45 For example, examining the first prong of this four part test, one district court has explained that ‘the touchstone of self-critical analysis is that it is an ‘in house’ review undertaken primarily, if not exclusively, for the purpose of internal quality control.’46 The same court explained that where documents had also been prepared in order to defend a lawsuit and pertain to the work-product doctrine in a manner of public policy. Proposed Federal Rule of Evidence 502, which was proposed by the Senate in February 2008, would limit judicial waiver to the event that a party discloses information covered by attorney-client privilege or attorney-work product doctrine, particularly if disclosure is inadvertent. While prior draft of Proposed Rule 502 provided for a waiver rule where communications or information is disclosed to governmental entities, that provision was taken out in the face of significant opposition. In re Grand Jury, 805 F.2d at 163, opening proceedings. 112 S. Ct. 2162, 2170 n. 11, 45 L.Ed.2d 141 (1975).


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