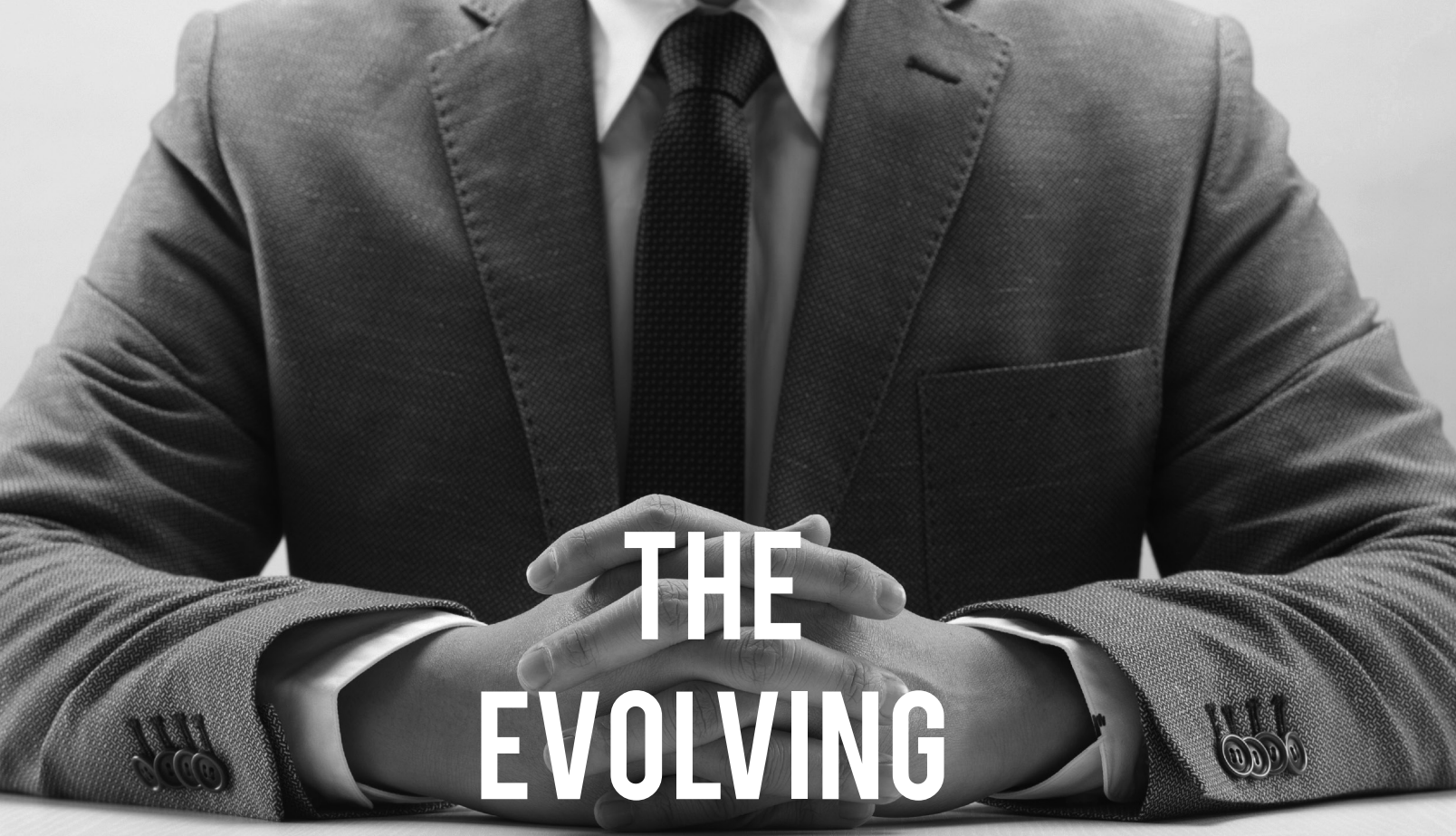

THE EVOLVING LANDSCAPE OF LEGAL PRIVILEGE IN Internal Investigations

BY JANET LEVINE, GAIL ZIRKELBACH, DEREK HAHN, AND DANIELLE ROWAN

A series of high-profile disputes erupted recently over the application of legal privilege in the context of internal investigations. The Supreme Court of Delaware ordered Wal-Mart to turn over privileged investigation material to a shareholder. A federal district court slapped down KBR's assertion of privilege over internal investigation files from its legal department. Bank of China learned that some of its in-house counsel in China were not entitled to assert privilege—ever. And Penn State found itself in the middle of a privilege waiver dispute after publicly releasing an investigative report on the Jerry Sandusky scandal.

These cases highlight some of the limits of the protections offered by the attorney-client privilege and work product doctrine. They also provide helpful reminders of common pitfalls associated with asserting those privileges—and how to avoid them.

Published in *Criminal Justice*, Volume 30, Number 2, Summer 2015.

KBR's Code of Business Conduct Investigation Reports

On March 6, 2014, a federal district court sent a shockwave across the legal community and regulated industries when it ordered Kellogg Brown and Root (KBR), a government contractor, to disclose a series of documents related to an internal investigation conducted by its legal department. (United States *ex rel.* Barko v. Halliburton Co., 37 F. Supp. 3d 1 (D.D.C. 2014).) The district court determined that because KBR was required to conduct that type of internal investigation as part of its compliance obligations as a government contractor, the investigation was not protected by attorney-client privilege or the work product doctrine.

Less than four months later the D.C. Circuit vacated the district court's order, finding that the district court misconstrued the applicable legal test and had "generated substantial uncertainty about the scope of the attorney-client privilege in the business setting." (*In re* Kellogg Brown & Root, Inc. (*KBR*), 756 F.3d 754, 756 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1163 (2015).)

The district court's infamous decision. The privilege dispute at issue arose in a False Claims Act (FCA) suit brought by whistleblower Harry Barko alleging misconduct under a government contract in Iraq. KBR's legal department had previously investigated the same misconduct in response to "tips" received through its ethics and compliance hotline pursuant to its code of business conduct (COBC). As part of that investigation, KBR's legal department sent a nonattorney investigator to interview employees and prepare summary reports.

KBR produced some of the tips during discovery in the FCA case. However, KBR withheld materials related to the COBC investigation, claiming they were protected by attorney-client privilege and the work product doctrine. Barko countered that the COBC investigation was not privileged because its primary purpose was not to provide legal advice. Rather, Barko asserted that KBR performed the investigation as a "business necessity" because it was required by law as a government contractor to undertake such investigations.

To resolve this privilege dispute, the district court applied a novel "but for" test to ascertain the primary purpose of the investigation and found that the documents were not privileged. The court reasoned that the primary purpose of a communication is to obtain or provide legal advice *only if* that communication would not have been made *but for* the fact that legal advice was sought. Because KBR would have conducted the investigation to satisfy its regulatory obligations, the district court concluded that its primary purpose was not to provide legal advice. Therefore, it was not privileged. (*Halliburton*, 37 F. Supp. 3d at 5–6.)

KBR petitioned the D.C. Circuit to issue a writ of mandamus vacating the district court's ruling. It was soon supported by several business and trade associations that signed on to a US Chamber of Commerce amicus curiae brief. (Brief for the Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Petitioner, *KBR*, 756 F.3d 754 (D.C. Cir. Mar. 19, 2014), ECF No. 1484411.)

The D.C. Circuit court steps in. The D.C. Circuit granted KBR's petition. The circuit court found that the district court's decision rested on a "false dichotomy" by concluding that KBR conducted its investigation to comply with regulations rather than to provide legal advice. The "but for" test articulated by the district court would preclude application of the attorney-client privilege unless the *sole* purpose of a communication was to obtain or provide legal advice. This, the circuit court emphasized, would "eradicate" the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which now represent "a significant swath of American industry." (*KBR*, 756 F.3d at 759.)

Instead, the circuit court held that the attorney-client privilege applies so long as "*one* of the significant purposes of the [communication] was to obtain or provide legal advice." (*Id.* at 760 (emphasis added).) KBR's internal investigation was protected by privilege under this broader formulation of the primary purpose test.

The circuit court's opinion also explained that the district court inappropriately distinguished *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The fact that KBR used only in-house counsel to conduct its investigation, whereas outside counsel were consulted in *Upjohn*, was immaterial; a lawyer's status as in-house counsel "does not dilute the privilege." And although attorneys conducted the witness interviews in *Upjohn*, KBR's nonattorney investigators were acting as agents of KBR's attorneys, such that the witness interviews they conducted were shielded by the attorney-client privilege. (*KBR*, 756 F.3d at 758.) Finally, while KBR failed to advise employees who were interviewed that the purpose of the investigation was to provide legal advice, the employees knew the legal department was conducting the investigation and that it was confidential. *Upjohn*, the circuit court reasoned, does not require the use of "magic words."

In essence, *Upjohn* was "materially indistinguishable" given that both cases involved an internal investigation managed by attorneys to gather facts and ensure compliance with the law after being informed of potential misconduct.

The aftermath: Barko strikes back. On remand, the D.C. Circuit allowed the district court to consider Barko's other arguments as to why the documents were not protected by attorney-client privilege or the work product doctrine. (*KBR*, 756 F.3d at 764.) The district court subsequently issued two orders finding the privilege was inapplicable on three different grounds, and again ordered production of some of the same COBC materials considered by the D.C. Circuit.

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Published in *Criminal Justice*, Volume 30, Number 2, Summer 2015.

First, the district court found that KBR used the privileged COBC materials as a "sword" by making certain arguments that implicated their content, and thereby waived privilege. (United States *ex rel.* Barko v. Halliburton Co., No. 1:05-CV-1276, slip op. at 8 (D.D.C. Nov. 20, 2014), ECF No. 205.) The district court focused on KBR's argument during the litigation that KBR (1) always investigates alleged misconduct, (2) always makes reports to the government if the investigation provides reasonable grounds to believe a violation occurred, and (3) made no such report after the COBC investigation at issue—thereby suggesting that no violation occurred. KBR advanced this argument in a Rule 30(b)(6) deposition, in seeking summary judgment, and in opposing one of Barko's motions to compel. The district court found that KBR had "actively sought a positive inference in its favor based on what KBR claims the documents show" and thereby waived privilege. (*Halliburton*, No. 1:05-CV-1276, slip op. at 23.)

Second, the district court found that KBR waived privilege over the COBC reports when it allowed its own 30(b)(6) witness to review them before his deposition. Under Federal Rule of Evidence 612, an opposing party may examine the writings that a party uses to refresh the recollection of its witness "if the court decides that justice requires" it. (*Halliburton*, No. 1:05-CV-1276, slip op. at 23–24.) The district court concluded that the standard was satisfied here because (1) most of the statements in the report were not attorney opinions, (2) major discrepancies existed between the testimony and the documents, and (3) the witness heavily relied on the documents. (*Id.* at 25.)

Third, in a separate order, the district court found that certain parts of the investigative reports were only entitled to fact work product protection. (United States *ex rel.* Barko v. Halliburton Co., No. 1:05-CV-1276, 2014 WL 7212881 (D.D.C. Dec. 17, 2014).) KBR's reports were comprised of two parts: (1) employee witness statements and (2) summaries prepared by the investigator. The district court held that attorney-client privilege protected the employee witness statements made to the investigator because he was acting as an agent of KBR's in-house attorneys. (*Id.* at *7–8.) The privilege also protected the investigator's summaries to the extent they revealed confidential employee communications.

However, attorney-client privilege did not apply to the investigator's summaries of contracts and related contract performance because the privilege does not protect "communications only between lawyers, or their agents, alone." (*Id.* at *14–15.) Instead, those summaries were only entitled to fact work product protection and had to be produced under the "substantial need" exception. The court noted that the investigator's reports "do not give opinion[s] on witness credibility, demeanor, or evasiveness." (*Id.* at *21.) The reports "do not label certain documents as relevant or irrelevant, and do not state that certain statements or records are prima facie indicators of fraud." (*Id.*) Thus, the court concluded the reports were "far removed from the core of the work product protection for attorney strategy or opinions." (*Id.*) Moreover, Barko demonstrated the substantial need necessary to overcome work product protection because of several factors, including the length of time that had passed since the events of the case, the inability to pursue discovery during the sealed qui tam action, and KBR's false inference that the documents did not contain harmful evidence. (*Id.* at *21–22.)

An uncertain future for KBR's privilege. As it did with the district court's initial order, KBR is seeking review of these recent decisions. The D.C. Circuit heard oral argument on May 11, 2015. Although it is not clear how the court will ultimately rule, the forthcoming opinion will likely provide additional guidance to practitioners hoping to avoid similar disputes.

Wal-Mart's Internal Investigation Files

Wal-Mart's compliance issues in Mexico were splashed across headlines in April 2012 in a *New York Times* article titled "Vast Mexico Bribery Case Hushed Up by Wal-Mart after Top-Level Struggle." Wal-Mart made headlines again when the Delaware Supreme Court granted shareholders access to privileged documents from a related internal investigation. (Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW, 95 A.3d 1264 (Del. 2014).)

A shareholder seeks privileged documents. Responding to the provocative allegations published in the *New York Times*, a Wal-Mart shareholder, Indiana Electrical Workers Pension Trust Fund (IBEW), sought access to internal investigation documents during a derivative action. Specifically, IBEW requested documents pertaining to Wal-Mart's allegedly insufficient investigation of reports that Walmex, its Mexican subsidiary, bribed public officials.

According to the *Times* article, Wal-Mart's senior leadership rejected a proposal for a thorough investigation by outside counsel in favor of a more limited internal two-week "preliminary inquiry." The preliminary inquiry concluded there was "reasonable suspicion to believe that Mexican and USA laws [had] been violated." (*Wal-Mart*, 95 A.3d at 1268.) A Wal-Mart director suspiciously responded to this conclusion by ordering the prompt development of a "modified protocol" for internal investigations. As a result, control of the Walmex investigation transferred to one of its earliest targets, Walmex's general counsel—who then conducted another inquiry and cleared himself and his fellow executives of any wrongdoing. (*Id.*)

The Delaware Court of Chancery ordered Wal-Mart to produce the privileged materials related to this investigation. Wal-Mart appealed this ruling to the Delaware Supreme Court.

Delaware court upholds disclosure of privileged materials under the *Garner* exception. The Delaware Supreme Court upheld the order compelling disclosure of Wal-Mart's privileged documents to its shareholder, citing a shareholder exception recognized in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). Under *Garner*, shareholders can access a corporation's attorney-client privileged documents for good cause. (*Wal-Mart*, 95 A.3d at 1276 (quoting *Garner*, 430 F.2d at 1103–04).) Whether "good cause" exists under *Garner* is based on a number of factors, including (1) the number of shareholders and the percentage of stock they

represent, (2) the bona fides of the shareholders, (3) the nature of the shareholders' claim and whether it is obviously colorable, (4) the apparent necessity or desirability of the shareholders having the information and its availability from other sources, (5) whether the shareholders' claim is of criminal or illegal action, (6) whether the communication is of advice concerning the litigation itself, (7) the extent to which the shareholders are "blindly fishing," and (8) the risk of revealing trade secrets or other confidential information. (*Id.* at 1276 n.32 (quoting *Garner*, 430 F.2d at 1104).)

IBEW easily satisfied most of these factors as a bona fide shareholder asserting a colorable claim of potentially criminal conduct. The real dispute centered on whether the privileged information was necessary to IBEW's claim or available from other sources. The court reasoned that because the allegations related to the conduct of the *investigation itself*, the privileged investigation documents were necessary to explore those allegations and it would be "very difficult" to obtain this information by other means. (*Id.* at 1278–80.) The court concluded there was good cause for Wal-Mart to produce the documents under *Garner*.

Additionally, the court found that although the *Garner* doctrine specifically applies to attorney-client privilege, some of the *Garner* factors may overlap with a work-product analysis. (*Id.* at 1281–82.) The court held the same reasons that demonstrated "good cause" under *Garner* also satisfied the burden of showing "substantial need" to overcome Wal-Mart's work product protection. Notably, the *Wal-Mart* court did not appear to distinguish between fact and opinion work product in its decision.

The implications of *Wal-Mart*. Although the *Garner* fiduciary exception is now firmly available to shareholders under Delaware law, it is unclear whether *Wal-Mart* signals a broadening of its application. The alleged facts in *Wal-Mart* were egregious and focused on the adequacy of the very investigation to which the privileged materials pertained. Whether future litigants will be able to expand the application of *Garner* to pierce the privilege over internal investigations in less provocative circumstances remains to be seen.

Bank of China's In-House "Counsel"

After a suicide bombing caused the death of Daniel Wultz and injuries to Yekutial Wultz, the Wultz family sued the Bank of China (BOC) under the Antiterrorism Act for allegedly providing material support and resources to a terrorist organization. (Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479, 483–84 (S.D.N.Y. 2013), *on recons. in part*, No. 11 Civ. 1266 (SAS), 2013 WL 6098484 (S.D.N.Y. Nov. 20, 2013).) Through a series of discovery disputes, the Wultz family sought to obtain BOC documents pertaining to anti-money laundering compliance procedures and investigations. BOC resisted production of these documents claiming, among other privileges, the attorney-client privilege and work product protection. (*Id.*)

Choice of law for legal privilege: China vs. US. Before addressing attorney-client privilege, the district court first had to resolve which country's privilege laws would apply. Using the "touch base" analysis, the court sought to determine the country with the most direct and compelling interest in whether the communications should remain confidential. The court explained that the country with the "predominant interest" is either the place where the privileged relationship was entered into, or the place where the relationship was "centered at the time the communication was sent." The court concluded that Chinese law applied to some documents and US law applied to others. (*Id.* at 489.)

Unlicensed Chinese in-house counsel not entitled to privilege. Because Chinese law did not recognize attorney-client privilege or the work product doctrine, the court found that BOC had to produce documents governed by Chinese law. As to the documents governed by US law, the court found that BOC was not entitled to assert attorney-client privilege over communications between BOC employees and certain Chinese in-house counsel who did not have a license to practice law. (*Id.* at 493–94.) Rejecting the "functional equivalency" test, the court held that attorney-client privilege only applies "where a lawyer—whose authority derives from [his or] her position as a member of the bar—is engaged to provide legal advice." (*Id.* at 495.) Because it was not essential for the in-house counsel in China to be members of a bar or have some form of legal credentials, the court found that their communications with BOC did not amount to attorney-client communications. (*Id.*)

Uncertainty abroad. The court rejected the argument that foreign employees who act as the "functional equivalent" of lawyers are entitled to attorney-client privilege and work product protection under US law if they are not licensed members of a bar. This raises questions about the scope of privilege for attorneys of various degrees of credentialing in different legal systems across the globe. In addition, *Bank of China* reminds practitioners that choice of law issues pertaining to legal privilege can have substantial consequences.

Penn State's Investigation of the Jerry Sandusky Scandal

In the wake of accusations against former Pennsylvania State University football coach Jerry Sandusky, Penn State retained a law firm to perform an independent investigation of his misconduct and the school's response. When the law firm completed the report, Penn State disclosed it publicly.

A Pennsylvania court recently held that under these circumstances Penn State had not retained the law firm to provide "legal services." Thus, communications between Penn State and the law firm were not subject to the attorney-client privilege. The court also held that the public disclosure of the report created a subject matter waiver over certain other privileged documents. (Paterno v. NCAA, No. 2013-2082 (Pa. Ct. Com. Pl. Jan. 7, 2014) [hereinafter Paterno Jan. 2014 Order], *available at* http://tinyurl.com/pm4ek2t.)

The Freeh firm's investigation. The Penn State Board of Trustees hired the firm Freeh Sporkin and Sullivan, LLP (Freeh firm) to investigate any failures by Penn State

officials and employees to take action related to the Jerry Sandusky sexual abuse scandal. The Freeh firm then retained Freeh Group International Solutions (Freeh group), a separate investigative and consulting group for the "purpose of providing legal services." (Paterno v. NCAA, No. 2013-2082, slip op. at 20 (Pa. Ct. Com. Pl. Sept. 11, 2014) [hereinafter Paterno Sept. 2014 Order], *available at* http://tinyurl.com/nqeb87h.)

During the investigation, the Freeh firm provided periodic updates to the NCAA and the Big Ten at the direction of Penn State. (Paterno Jan. 2014 Order, *supra*, at 3.) Upon completion of this investigation, the firm created the *Freeh Report*, which Penn State publicly disclosed on July 12, 2012. (*Id.* at 4.) In subsequent civil litigation, the Estate of Joseph Paterno sought investigative documents related to the creation of the *Freeh Report*, and Penn State objected.

The Freeh firm was not retained to provide legal advice. To assess whether Penn State could successfully claim attorney-client privilege over its communications with the Freeh firm, the court focused heavily on the "Scope of Engagement" section of the firm's engagement letter. This section states that the Freeh firm was engaged to serve as "independent, external legal counsel" to perform a "full and complete investigation" and to "provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again." (Paterno Sept. 2014 Order, *supra*, at 20.) The "Scope of Engagement" section also states that the results of the investigation would be provided to Penn State "and other parties as so directed by the Task Force." The court noted that this section failed to state that the purpose of the engagement was to secure an opinion of law, legal services, or assistance in a legal matter—although the court failed to analyze the statement that the Freeh firm was retained as "external legal counsel." (*Id.*)

The court contrasted this language from the engagement letter related to the Freeh firm with the section pertaining to the Freeh group. The latter section expressly stated that the Freeh group was retained "for the purpose of providing legal services." The court concluded that the Freeh firm was not retained to provide legal services, and therefore, the attorney-client privilege did not apply to any communications between the firm and Penn State.

Penn State is appealing this decision with the support of an amicus brief from the Association of Corporate Counsel. In its brief, the Association of Corporate Counsel stressed that the lower court's ruling created uncertainty over legal privilege that would significantly impair counsel's ability to conduct internal investigations if it is allowed to stand.

Subject matter waiver. The court also found that Penn State waived attorney-client privilege over the publicly disclosed *Freeh Report*, as well as documents shared with the Big Ten Conference and the NCAA. Further, Penn State waived privilege over all documents addressing the same subject matter because the intentional disclosure was seen as an attempt to use privilege as both a shield and a sword. The court agreed with plaintiffs' argument that "Penn State has done *precisely* that—by authorizing disclosure of the contents of the Report at a national press conference in an effort to demonstrate that Penn State addressed the problems that supposedly resulted in the Sandusky crimes, but denying access to the information underlying [the] Report's conclusions." (Paterno v. NCAA, No. 2013-2082, slip op. at 4 (Pa. Ct. Com. Pl. Nov. 20, 2014), *available at* http://tinyurl.com/prfwrqm.) Thus, the court concluded that subject matter waiver was appropriate.

Recommendations

While each case above involves unique and sometimes extraordinary facts, together they still serve as important reminders of some of the pitfalls surrounding legal privilege. Here are some practical steps attorneys and their clients can take to avoid similar disputes:

Attorneys should carefully manage and staff investigations. Internal investigations should be coordinated and closely managed by attorneys to ensure the full application of potential legal privileges. The legal purpose of any internal investigation should be documented, especially if there are other purposes at play. Recognize that some courts may still apply a stricter version of the "primary purpose" test and find communications are not protected by privilege where they have other, nonlegal purposes.

Careful consideration should go into the staffing and structure of any investigation involving nonattorney agents. Attorneys may use agents to assist with an investigation, although such agents should be monitored by counsel and the legal purpose of their work documented. Communications between attorney-agents and other company employees can be protected by the attorney-client privilege. However, consider that communications between attorneys and their agents alone may be protected only by the work product doctrine, not attorney-client privilege. (United States *ex rel.* Barko v. Halliburton Co., No. 1:05-CV-1276, 2014 WL 7212881, at *5 (D.D.C. Dec. 17, 2014).) The roles and responsibilities of any nonattorneys should be carefully delineated with future privilege assertions in mind.

Know the privilege law of the jurisdictions involved—especially foreign jurisdictions. In cases involving foreign activities and documents, counsel should carefully analyze choice of law issues, as well as the discovery and privilege rules of the foreign jurisdiction. Not all "attorneys" are created equal, and not every country grants attorneys the same legal privileges.

The court in *Bank of China* held that Chinese law did not even recognize an attorney-client privilege. Only when applying US law did the court reach the question of whether the unbarred Chinese "in-house counsel" could assert privilege (they could not). Recall that a few years ago, the European Court of Justice held that communications between in-house counsel and their corporate clients are not privileged in certain cases involving investigations by the European Commission. (Case C-550/07P, Akzo Nobel Chems. Ltd. v. Comm'n, 2010 E.C.R. I-8301.)

Even within the United States there are significant

differences in how privileges are applied by courts. For a look at a particularly aggressive approach to privilege, peruse the decision in *United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*, No. 6:09-cv-1002-Orl-31TBS, 2013 WL 1233699 (M.D. Fla. Mar. 27, 2013). There, the court held that the attorney-client privilege did not apply to e-mails if they had a business purpose in addition to a legal purpose, or if any nonattorney was included in the "to" line.

Companies should understand the variations in potentially applicable privilege laws and take them into account when deciding how to staff internal investigations and other sensitive matters. For attorneys working in jurisdictions with strict privilege protocols, such as those the court adopted in *Halifax*, special care should be taken to conform privilege communications to those standards.

Take care not to use the privilege as a sword. Keep the potential for at-issue waiver in mind when developing defense strategies and arguments. Remember that KBR waived privilege by arguing an *inference* that implicated privileged material—even where it did not disclose the privileged contents. Avoid directly or indirectly relying on privileged material to make your case.

That said, there are often important reasons for attorneys to present the findings from an internal investigation to a third party, such as when attempting to dissuade a regulator from bringing an enforcement action or imposing a certain penalty, or when trying to help quell a public relations uproar. In these situations, try to limit disclosures to the facts uncovered in the investigation and avoid disclosing or putting at issue any privileged opinions or conclusions in the process. (*Cf.* U.S. Dep't of Justice, United States Attorneys' Manual (USAM) § 9-28.720 (Aug. 2008) ("Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct."), *available at* http://tinyurl.com/psgxwfq.)

If possible, do not commit yourself to making public disclosures at the outset of an investigation. This approach militates against future arguments that the investigation was not intended to remain confidential, or was not conducted for a legal purpose.

Of course, any actual disclosures of privileged material to third parties carries the risk not just of privilege waiver over the disclosed material, but also of subject matter waiver over related documents. Counsel should carefully assess the often uncertain scope of subject matter waiver and factor that risk into any decision to waive privilege.

Beware the limits of the work product doctrine. The attorney-client privilege, when properly established, is virtually impenetrable save for a few limited exceptions such as the *Garner* doctrine. By contrast, the protection offered by the work product doctrine is less absolute. While opinion work product enjoys heightened protection, fact work product can generally be obtained by an opponent who demonstrates substantial need for the material and undue hardship to obtain its equivalent. To complicate matters, the line between fact and opinion work product is not easily drawn, and sometimes courts fail to draw it at all.

Moreover, the protection available to fact work product is difficult to assess when it is being created. The protection depends on the "substantial need" and "undue hardship" of an unknown adversary in the future. These factors, in turn, depend on the nature of the claims made by the future opponent, and the availability of other evidence on the same issue after the passage of an unknown amount of time.

In light of the uncertain protection afforded to fact work product, attorneys and their agents should make every attempt to prepare work product in a manner that lends itself to characterization as opinions, mental impressions, or legal analysis. Any material that may later be characterized as fact work product—even when intertwined with opinion work product—should be prepared with an eye toward the potential for its discovery by a future opponent.

Don't make the investigation a subject of investigation. Before *Wal-Mart*, companies already had plenty of reasons to perform thorough internal investigations of suspected misconduct and implement appropriate remedial measures. Not the least of these reasons are the factors considered by the Department of Justice when deciding whether to charge a company criminally, which include the condoning of wrongdoing by corporate management, the effectiveness of the company's compliance program, and remedial measures taken. (USAM, *supra*, § 9-28.300(A)(2), (5), (6); *see also* U.S. Sentencing Guidelines Manual § 8B2.1 (2014), *available at* http://tinyurl.com/p74rpuo.) Companies also have an inherent economic incentive to root out and prevent illegal activities to uphold their reputation and avoid costly enforcement actions and related litigation.

The *Wal-Mart* case provides yet another reason. A comprehensive response to reports of misconduct will help prevent shareholders from making a "colorable claim" of wrongdoing by a corporate board regarding the conduct of the investigation itself, and help preserve privilege over the investigation.

Conclusion

The attorney-client privilege has a noble and simple purpose: to allow attorneys and their clients to speak freely in pursuit of sound legal advice. It is a powerful shield. However, the protection offered by the privilege—and the frank communications it encourages—makes discovery of those same communications all the more alluring to one's adversaries.

These competing interests ensure that a war over the scope of legal privilege will rage on indefinitely. Battles over the privilege continue to erupt across practice areas, industries, and countries, providing an endless variety of cautionary tales. The only guarantee in this war is that all attorneys and clients will benefit by closely studying it. ■