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Recent corporate scandals and the passage of the Sarbanes-Oxley Act of 2002 have dramatically elevated the priority of compliance functions for all public corporations. A robust compliance program is necessary to identify and control risks that have the potential to involve violations of law. Once such a risk is identified, a company's response cannot only mitigate any financial or reputational harm but can substantially impact the ultimate outcome of

and conclusions of an internal investigation can become a potential roadmap for third-party litigants, particular care is required to guard against the release of that information. Typically, an internal investigation is led by in-house or outside counsel so as to obtain the protections afforded by the attorney-client privilege and work product doctrine. However, when a corporation chooses to cooperate with regulatory or law enforcement officials, its ability to keep an

regional or national basis face particular challenges because they are licensed by each state in which they operate and are subject to a regulatory scheme that generally provides uncertain assurance that these issues can be handled in a uniform, consistent manner. A more thorough discussion of recent issues involving attorney-client privilege can be found in the *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*.¹

Attorney-Client Privilege and Confidentiality Issues in Internal and External Investigations

potential actions taken by law enforcement or regulatory officials. As a result, the proper conduct of internal inquiries and investigations has become increasingly important.

In the current environment, a corporation presented with credible evidence of wrongdoing is expected to conduct a thorough internal investigation and cooperate willingly with any external investigation. Because the findings

internal investigation confidential or assert the attorney-client privilege may be jeopardized.

This article provides an overview of certain attorney-client privilege issues as they relate to internal and external investigations or examinations and confidentiality issues that arise in the context of such examinations of insurance companies. Insurance companies that operate on a

The Attorney-Client Privilege and Work Product Doctrine

The attorney-client privilege is an evidentiary rule that protects against discovery of confidential communications between a lawyer and a client.² The widely accepted parameters of the privilege were specifically set forth in *United States v. United Shoe Machinery Corp.*³

The privilege applies only if (1) the asserted holder of the privi-

lege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.⁴

Its purpose is to facilitate the rendering of legal advice by encouraging “full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice.”⁵

The attorney-client privilege includes the work product doctrine, which protects against the disclosure of the mental impressions, conclusions, opinions, and legal theories of an attorney created in anticipation of litigation.⁶ Its purpose is to allow attorneys to properly prepare their client’s case with the reasonable expectation that such work will not be produced to opposing counsel.⁷

It is important to note that the attorney-client privilege only protects against the disclosure of “communications” and not against the disclosure of underlying facts.⁸ In addition, courts distinguish between “factual” and “opinion” work product. While factual work product may be disclosed upon a showing of sub-

stantial need and inability to obtain the equivalent without undue hardship, opinion work product is afforded additional protection.⁹

Extending the privilege to nonlawyers. When representing public corporations, lawyers often—and sometimes are compelled to—involve the service of other professionals, such as accountants, investment bankers, and public relations firms when conducting internal investigations or managing external investigations. It appears to be well settled that agents and subordinates working under the direct supervision and control of the lawyer can be included within the scope of the privilege. Similarly, where other experts are retained to assist the lawyer, statements made to and from them may be privileged if their services “are a necessary aid to the rendering of effective legal services to the client.”¹⁰

The reasoning supporting these principles was established in *United States v. Kovel*.¹¹ In *Kovel*, the court recognized that “the complexities of modern existence prevent attorneys from effectively handling clients’ affairs without the help of others”¹² and declined to limit the application of the privilege to “others” with only menial or ministerial responsibilities relating communications to an attorney. Instead, the court analogized the use of an accountant to explain accounting concepts to that of the use of an interpreter to translate a foreign language, emphasizing that “[w]hat is vital to the privilege is that the communications be made in confidence for the purpose of obtaining legal advice from the lawyer.”¹³

Other cases have extended the principle articulated in *Kovel* to permit the privilege to apply to

communications with other third parties, including investment bankers and public relations firms. These decisions generally turn on whether the third party was acting under the direction of counsel and the extent to which the services performed aided in the rendering of legal advice.¹⁴

Distinguishing legal from business advice. Corporate internal investigations, whether led by in-house or outside counsel, will generally result in advice that has legal and business aspects to it. In general, the basic rule is that for a particular communication to be privileged, it “must be primarily or predominantly of a legal character.”¹⁵ This issue can be particularly confusing, especially for in-house counsel who routinely give business advice and frequently serve on business teams. Some courts have required corporations to prove, with regard to a particular communication, that the corporation sought “predominantly” legal advice, services, or assistance.¹⁶

Protecting the Privilege in Internal Investigations

Due to the high standard required for production of attorney work product, taking advantage of the protection it affords is important. This requires that the attorney not just act as a fact gatherer. When facts are obtained and documented, the attorney must include his or her mental impressions and opinion in order to protect the documents from disclosure. All documents prepared during the investigation should be clearly marked as “privileged and confidential/attorney work product” and, to the extent possible, clearly reflect that they contain the attorney’s thought processes and legal theories.

Employee interviews. Corporate internal investigations will almost certainly involve interviews of current or former employees. These interviews present particular challenges to the attorney who is representing the company and *not* the employee-witness, and which, if not conducted properly, may result in a loss of the protections afforded by the attorney-client privilege or work product doctrine. In addition, these interviews raise certain ethical obligations that also must be addressed.

When counsel interviews an employee he or she does not represent, that employee should be told that the lawyer represents the company, not the employee-witness. Without this warning, an employee could later contend that he or she believed that the company's counsel was acting as his or her individual lawyer. This could lead to a conclusion that the employee's communications with counsel were subject to a claim of privilege that the employee, and not the company, controls.¹⁷

To safeguard the privilege, the lawyer should make it clear that the interview is being conducted to gather factual information so that counsel can provide legal advice to the company in anticipation of litigation. The employee should also be advised that the interview is subject to the company's attorney-client privilege, that this privilege may be waived only by the company, and that the employee should therefore keep the substance of the interview confidential.¹⁸

The Model Rules of Professional Conduct impose certain ethical obligations upon corporate counsel in these instances, to clarify counsel's role and eliminate potential confusion. Model Rule 1.13 specifically provides that a lawyer must

explain the identity of his or her client to the company's directors, officers, employees, shareholders, and the like "when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

Corporate counsel also has an ethical obligation to avoid misrepresenting his or her loyalties. Model Rule 4.3 imposes an affirmative obligation on counsel to make reasonable efforts to correct any misimpressions that might be formed by an unrepresented person who counsel knows, or reasonably should know, misunderstands the lawyer's role.

also provides that sharing the results of such internal review is important in demonstrating a commitment to cooperation.

However, when corporations elect to cooperate with government investigations by sharing privileged material or information, the corporation's continuing ability to assert its attorney-client and work product privileges may be irreversibly compromised. This is particularly true with regard to private litigants who seek discovery of the shared material, arguing that the corporation should not be permitted to make a selective waiver

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The impact of government investigations. As previously stated, government officials have come to expect that corporations will conduct prompt and thorough internal investigations when wrongdoing is detected. The Securities and Exchange Commission (SEC), the Department of Justice, and New York Stock Exchange have issued guidance regarding the importance of compliance programs and internal reviews in determining whether or not, and the extent to which, regulatory action or criminal prosecution is required.¹⁹ This guidance

solely as to the government without effecting the same waiver as to all other parties. A different matter altogether arises when the government argues that a corporation's limited or partial waiver with regard to certain privileged information forfeits the corporation's ability to assert privilege over all other communications concerning the same subject matter. The ultimate ability of the corporation to control the scope of its waiver when subjected to these types of challenges is uncertain at best, and subject to change depending upon

the circumstances.

Selective waivers and the enforceability of confidentiality agreements. Courts have generally taken one of three different positions on selective waiver where corporations have voluntarily disclosed privileged materials to government agencies. A few courts have agreed that a waiver as to the government will not constitute a waiver as to other parties.²⁰ Other courts have rejected selective waiver and have taken the position that a waiver as to the government will virtually always constitute a waiver as to other parties.²¹

These two extremes point out the importance of seeking confidentiality agreements when possible. These agreements not only clearly evidence the parties' intentions with regard to shared material but also raise fairness issues to be considered when determining the relative expectations and harm to the producing party. In this regard, some courts have adopted a position that a waiver as to the government will sometimes not constitute a waiver as to other parties as long as the materials were provided to the government pursuant to a confidentiality agreement. These courts also often differentiate between materials protected by the attorney-client and work product privileges, commonly finding that only the work product protections can be selectively waived.²²

The growing trend toward coordinated enforcement has resulted in confidentiality agreements negotiated with federal agencies commonly providing for sharing of produced material with other governmental law enforcement agencies. For example, the SEC, the New York Stock Exchange, the National Association of Securities

Dealers, and other self-regulators currently operate under a memorandum of understanding through which they share information, coordinate examinations, and identify regulatory priorities. This type of coordinated effort includes cooperation with parallel or subsequent state investigations. The SEC's Division of Enforcement has routinely granted requests from state and local government entities for access to SEC investigative files. State insurance departments have also increasingly moved toward targeted, collaborative examinations, not only sharing information with each other but, in some cases, with state attorney generals as well. Once the corporation's privileged materials have been disclosed to state investigators, there is added risk that the corporation may have even more difficulty preventing further dissemination to other governmental and private civil litigants due to the variability of state laws.

Limited or partial disclosures and subject matter waivers. When a corporation seeks to disclose only certain privileged information or material without making a full disclosure of related privileged communications, it is subject to challenges of a broader subject matter waiver. In the judicial setting, courts have commonly found that when a party seeks to use such a limited or partial waiver affirmatively to benefit its case at trial, it will be deemed to forfeit its right to assert privilege over other privileged communications on the same subject matter.²³

However, at least some courts have concluded that corporations that cooperate with government investigations by sharing or referring to privileged material or information in an extrajudicial context

may not trigger a broader subject matter waiver.²⁴ Corporations should take certain precautions by attaching an explicit reservation of privilege to any production of privileged material, as well as carefully evaluating, before disclosure, whether the government could be deemed to have been unfairly prejudiced in any way, either by the particular material or information that is shared or by the particular context in which the sharing occurs.

Insurance Regulatory Matters

Generally, state insurance regulators are statutorily granted access to all of the books and records of regulated entities. This access is intended to encourage the flow of information between the regulator and the regulated entity and to help regulators perform their responsibilities. Recently, there has been increased regulatory activity concerning the market conduct of insurance companies due, in part, to efforts by the National Association of Insurance Commissioners to improve states' oversight of the insurance industry. Increasingly, insurance departments are making requests for sensitive, proprietary, and even privileged information. Whether an insurance department can keep such information confidential is of increasing importance to insurance companies and the answer is not the same in every state.

Insurance department inquiries. There are four general types of inquiries an insurance department will make, exclusive of financial examinations. The most common inquiry is an insurance department's request for a written response to a complaint filed by a consumer. The second type is an investigation into a particular matter, generally involving the com-

pany's market practices or the activities of an insurance agent or other licensee. The third is a market conduct examination. The fourth is a data call or survey, sometimes referred to as market analysis.

No consistency exists from state to state, so each state's laws on confidentiality must be examined when faced with a request for sensitive information. But, regardless of the state, before responding to any type of insurance department inquiry that seeks sensitive information, one must make several determinations. First, determine the origin of the inquiry within the insurance department, that is, ascertain which division issued the request and the general functions of that division. This will help to clarify whether the department is merely handling a consumer complaint in the ordinary course of business or has begun an investigation of your client. Second, identify the legal authority under which the request is made. Some inquiry letters may contain the statutory authority for requesting the information, but many will not. Whether there is confidentiality for the company's response may depend upon the legal authority for the request. Third, once the legal authority is known, determine whether any specific or general confidentiality laws apply to the particular matter to protect the requested information.

The greatest challenge in making these determinations is that the laws in each state vary tremendously with respect to the regulator's power to demand information and to keep information confidential. These differences can be significant and exist despite recent efforts to promote uniformity in insurance regulation. Knowing and understanding the rel-

Excerpt from the Report of the ABA Task Force on the Attorney-Client Privilege

[T]he ABA Task Force on the Attorney-Client Privilege, established in September 2004, submitted a proposed resolution last year to the ABA House of Delegates, known as "Recommendation 111," which expresses support for the privilege and work product doctrine and opposition to governmental policies that erode these protections. The resolution, which the ABA House of Delegates approved unanimously in August 2005, states as follows:

RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work-product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and

FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.

FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the grant or denial of any benefit or advantage.

www.abanet.org/buslaw/attorneyclient/home.shtml

evant insurance laws, ascertaining how the insurance department is structured, and being familiar with the state's public records or freedom of information laws are critical. The latter will generally apply to an insurance department's operations unless there is a specific law that controls. When there is no clear guidance in the law, a frank discussion with insurance department staff may be necessary to clarify the department's position on whether the information is confidential, to gauge the department's willingness to defend its position, and to ascer-

tain the legal support for the department's position.

The following discussion illustrates how different the laws on similar topics can be from state to state. Its focus is on confidentiality laws that apply to insurance department investigations, market conduct examinations, and consumer complaints, but other confidentiality laws apply to specific matters such as insurance fraud investigations, producer terminations, viatical settlement transactions, financial examinations, certain specialized health insurance issues, criminal

background records, and workers' compensation insurance.

Consumer complaints that are filed with insurance departments are the most common trigger for examinations and investigations of insurance companies' business practices. Although a single complaint may appear relatively minor, in the aggregate complaints can present problems for insurance companies. Care must be taken in responding to these complaints because the files are often considered to be public records. In Ohio,

consumer complaint files involving external reviews of health care decisions and certain complaints involving automobile insurance cancellations are confidential.²⁷ In other states, the insurance laws do not specifically address consumer complaint files.

The confidentiality of investigative files varies considerably among states. In many states, there is no express confidentiality for investigations conducted by the insurance department. Regulators and companies must rely on excep-

investigative files are confidential and privileged until deemed closed by the commissioner or referred to and made subject to disclosure by any law enforcement authority.²⁸ The standard in Oklahoma is whether the investigation is open and ongoing or completed.²⁹ The level of confidentiality can be more subjective in states like New Mexico, where investigative files are confidential "for so long as the commissioner deems reasonably necessary to complete the investigation, to protect the person investigated from unwarranted injury, or to be in the public interest."³⁰ In Missouri, Section 374.070 of the Missouri Statutes protects "work papers of investigations of companies, agents, brokers and insurance agencies and confidential communications to the department of insurance."

Recently, some regulators have started to request market data and other information as part of their market analysis activities.

Sometimes, but not always, this is done under their market conduct examination authority. A few states, like Oregon, Ohio, North Carolina and Texas, have recently enacted confidentiality laws that expressly apply to market analysis data and activities. In North Carolina, most documents and information related to market analysis are "confidential, are not open for public inspection, and are not discoverable or admissible in evidence in a civil action brought by a party other than the Department against a person regulated by the Department."³¹ Oregon protects all information and documents that are produced or obtained by or disclosed to the department in the course of market analysis.³² Data calls are often used in market analysis, and Missouri has a specific statute that provides confidentiality for information provided pursuant

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consumer complaint files are not covered by any specific confidentiality provision in the insurance code and are considered to be public records, except that certain information, such as medical information and Social Security numbers, are redacted before the files are made public. In a few states, including Maine, Missouri, New Jersey, Oklahoma and Oregon, specific confidentiality laws protect consumer complaint files to varying degrees.²⁵ In other states, only certain complaint files may be protected. Claim files are confidential under Arizona law when provided to the department of insurance, which has the effect of making most of the contents of most complaint files confidential.²⁶ In Iowa,

tions to and interpretations of the state's public records laws or freedom of information laws to keep records confidential. A discussion of the issues relating to protections afforded by state freedom of information laws is beyond the scope of this article. Suffice it to say that the challenges involved in these situations are real and can be complicated by state attorneys general and their positions in public records requests, particularly if their positions differ from those of the insurance departments they generally are charged to represent.

Whether investigative records are considered confidential under a state's insurance laws may depend upon whether the investigation is deemed open or active. In Arkansas, active

to department data calls.³³

Market conduct examinations of insurance companies offer another area of concern. The work papers and information produced during the course of a market conduct examination, by their very nature, contain a great deal of information about a company's business and operations. By law, work papers are confidential in most states and are generally not subject to subpoena. However, the definition of work papers can vary, and it should not be assumed that work papers are confidential in every state. Washington enacted legislation that became effective in July 2006 protecting examination work papers.³⁴ In New Hampshire, market conduct examination work papers are "privileged and confidential" and not subject to the public records law.³⁵ The law in Oregon provides that "all work papers, recorded information, documents and copies thereof" that are produced in a market conduct examination of an insurance company are confidential and exempt from public inspection.³⁶ In Ohio, work papers are "confidential and privileged and are not a public record," and they are not subject to subpoena.³⁷

Additional issues must be considered when faced with an insurance department request for sensitive information. Some confidentiality laws found in the insurance codes of many states contain a provision that protects department staff from subpoenas and from testifying in civil actions about matters that are confidential. This may be helpful if the matter is in litigation concurrently with the department's investigation or examination, or if litigation is anticipated. In New Mexico, department investigators are protected from subpoenas issued in civil actions only during "uncompleted"

investigations or examinations.³⁸

Another consideration is whether the regulator will provide the company with notice upon receiving a public records request or subpoena for confidential or sensitive information. Sometimes a regulator may agree informally to do so, and this arrangement will provide a company with an opportunity to intervene and argue against the release of the information. In some states, depending on the particular confidentiality law, the insurance department may be required to provide notice.³⁹

Despite confidentiality laws that protect sensitive information from public disclosure, in many states the regulator has the statutory authority to use confidential information in any regulatory or legal action brought by the commissioner in furtherance of his or her duties.⁴⁰ In most cases, such information will be part of the public record of the proceeding. What is less clear, and should be a consideration, is whether information disclosed during an administrative hearing can be sealed or whether the hearing officer or administrative law judge has the power to issue protective orders. Again, the laws of each state, including the state's administrative procedures act, have to be examined.

The lack of consistency among state laws can be a serious problem when faced with a multistate investigation, examination, or even a multistate settlement, where individual regulators want to share confidential information. Information that is confidential in state A may not be considered confidential in state B. In these cases, a state-by-state analysis is needed. The problem of inconsistent laws has been ameliorated to some degree by the passage of information-sharing laws

in most, if not all, states. These information-sharing laws empower a state insurance regulator who receives information that is confidential in the state that provides the information to keep that information confidential in the receiving state. The information-sharing laws also authorize insurance regulators to share information with other regulators and with law enforcement officials.

Insurance compliance self-evaluative privilege. Recently, in an effort to promote compliance and provide an incentive for insurance companies to conduct audits of their own compliance programs, eight jurisdictions have enacted laws that provide an evidentiary privilege for insurance compliance self-evaluative audit documents.⁴¹ The majority of the laws are based on a model law developed by the National Conference of Insurance Legislators. The following discussion contains general statements about this type of privilege, but particular state laws may vary.

The self-evaluative privilege applies to documents that are prepared as a result of, or in connection with, an insurance compliance audit. These audits include voluntary internal evaluations, reviews, assessments, audits, and investigations that are for the purpose of identifying or preventing noncompliance with laws or industry standards. The documents are neither discoverable nor admissible in evidence, and the privilege applies in civil, criminal, and administrative proceedings. In all states that have enacted such a law, disclosure of these documents to the regulator or pursuant to court order does not constitute a waiver of other applicable privileges, such as the attorney-client privilege, work product

doctrine, or the subsequent remedial measures exclusion. The privilege also prevents any person who was involved with the audit from being compelled to testify.

Most of the state laws do not provide the insurance commissioner with the express power to compel disclosure of the audit documents but instead rely on the possibility that other insurance laws provide that power. In two states, Illinois and Vermont, it appears that the commissioner cannot compel disclosure.

Most states provide a process for in camera review of the documents when an insurer asserts the privilege after receiving a written request for such documents from the insurance commissioner, attorney general, or state attorney. The court may find the privilege does not apply if asserted for a fraudulent purpose, the materials contain evidence of a crime, the state has a compelling need for the information, or the information is not otherwise available.

In some states, the commissioner is permitted to share the information with other regulators subject to the recipient being able to maintain confidentiality. However, the National Conference of Insurance Legislators model and the majority of the state laws provide that the commissioner cannot share that information. Most of the laws expressly provide that the documents remain the property of the insurance company.

Finally, in most states, the insurance commissioner is limited as to how he or she may use the privileged information. Generally, the commissioner may use the information to determine whether defects in an insurer's policies and procedures were corrected and to determine

whether inappropriate treatment of customers was remedied. In New Jersey, however, the commissioner may use such information in an enforcement proceeding, although the statute suggests that the documents would be under seal and not subject to public disclosure.

Conclusion

The preservation of the attorney-client privilege in internal and external investigations can be tricky. Even after taking all of the actions necessary to maintain the right to assert it, circumstances may dictate that a waiver is necessary or strategically beneficial.

Maintaining confidentiality in insurance investigations and examinations also presents a number of issues, many of which remain to be addressed by the courts. As state regulators and attorneys general become increasingly active, these issues will challenge attorneys and regulators alike. ■

Notes

1. 60 BUS. LAW. 1029 (May 2005).
2. See *United States v. Stepney*, 246 F. Supp. 2d 1069, 1073 (N.D. Cal. 2003); see also *United States v. Rogers*, 751 F.2d 1074, 1077 (7th Cir. 1985).
3. 89 F. Supp. 357 (D. Mass. 1950).
4. *Id.* at 358–59. See also *Montgomery v. Leftwich, Moore & Douglas*, 161 F.R.D. 224, 226 (D.D.C. 1995).
5. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
6. FED. R. CIV. PROC. 26(b)(3).
7. See *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (“Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.”).
8. See *Upjohn* at 395–96 (citing *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa.

1962)).

9. *Id.* at 400–01.
10. *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972).

11. 296 F.2d 918 (2d Cir. 1961).

12. *Id.* at 921.

13. *Id.* at 922.

14. See, e.g., *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000) (holding that the privilege extended to an investment banker); *In re Copper Market Antitrust Litig. (Viacom, Inc. v. Sumitomo Corp.)*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001) (holding that the privilege extended to a public relations firm).

15. *Spectrum Sys. Int'l Corp v. Chem. Bank*, 78 N.Y.2d 371, 378, 575 N.Y.S.2d 809, 814 (1991); see also *Espana v. Am. Bureau of Shipping*, No. 03 Civ. 3573, 2005 U.S. Dist. LEXIS 33334, at *7 (S.D.N.Y. Dec. 14, 2005) (holding that communications are not protected if legal issues do not predominate the communications); *Neuder v. Battelle Pac. N.W. Nat'l Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000) (“legal advice must predominate for the communication to be protected”).

16. See, e.g., *Allendale Mut. Ins. Co. v. Bull Data Sys. Inc.*, 152 F.R.D. 132, 137 (N.D. Ill. 1993); *United States v. Daris*, 132 F.R.D. 12, 16 (S.D.N.Y. 1990).

17. See *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1505–06 (9th Cir. 1993) (holding that warnings defeat corporate officer's claim of an attorney-client relationship); see also *United States v. Hart*, 1992 U.S. Dist. LEXIS 17796 (E.D. La. Nov. 16, 1992) (holding that all communications between the investigating corporate counsel and the employees were protected when the employee-witnesses testified that the lawyer never identified herself as solely representing the company and the court viewed the witnesses' belief that their conversations were confidential and

privileged as reasonable).

18. See generally Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS (Brian & McNeil eds. 2003).

19. See Report of Investigations, Securities Exchange Act Release No. 44,969, Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001), www.sec.gov/litigation/investreport/34-44969.htm; Memorandum from Larry Thompson, U.S. Deputy Att’y Genl., to Heads of Dep’t Components and U.S. Attys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), www.usdoj/dag/cftf/corporate_guidelines.htm; NYSE Information Memo No. 05-65 (Sept. 14, 2005), <http://overregd.lindquist.com/archives/NYSE%20Information%20Memo%205-65.pdf>.

20. See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (finding that voluntary disclosure of privileged materials to the SEC as part of a nonpublic investigation did not constitute a waiver as to other parties).

21. See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002) (finding in context of voluntary disclosure of privileged audits during a Department of Justice investigation that “we reject the concept of selective waiver, in any of its various forms”); *Westinghouse Elec. Corp. v. Republic of*

the Phil., 951 F.2d 1414, 1426, 1429 (3d Cir. 1991) (rejecting selective waiver because protection of privileged information was not required to encourage corporations to make disclosures to the government).

22. See, e.g., *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (suggesting that work product protection might be preserved where “the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials”). See also *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (finding that voluntary disclosure of privileged documents to the SEC pursuant to a confidentiality agreement resulted in general waiver as to the attorney-client privilege but only selective waiver as to the work product privilege).

23. See, e.g., *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (finding that defendant was not permitted to use “the attorney-client privilege . . . as a shield and sword” by testifying at trial that he believed he had not violated the law while simultaneously refusing to describe the legal advice he had received).

24. See, e.g., *In re Grand Jury Proceedings*, 350 F.3d 299 (2d Cir. 2003) (holding that representations made to the government outside of a litigation context did not trigger a broader subject

matter waiver); *In re Keeper of the Records*, 548 F.3d 16 (1st Cir. 2003) (holding that extrajudicial disclosures did not trigger a broader subject matter waiver).

25. ME. REV. STAT. ANN. tit. 24-A, § 216; MO. REV. STAT. § 374.071; N.J. STAT. ANN. § 17:29E-12; OKLA. STAT. ANN. tit. 36, § 306; OR. REV. STAT. § 731.264.

26. ARIZ. REV. STAT. § 20-157.01.

27. IOWA CODE ANN. § 507B.3.

28. ARK. CODE ANN. § 23-61-103.

29. OKLA. ST. ANN., tit. 36, § 306.

30. N.M. STAT. ANN. § 59A-4-2.

31. N.C. GEN. STAT. ANN. § 58-2-240.

32. OR. REV. STAT. § 731.312.

33. MO. REV. STAT. § 374.071.

34. WASH. REV. CODE § 48.02.065.

35. N.H. REV. STAT. ANN. § 400-B:11.

36. OR. REV. STAT. § 731.312.

37. OHIO REV. CODE ANN. § 3901.48.

38. N.M. STAT. ANN. § 59A-4-2.

39. See, e.g., WASH. REV. CODE § 48.02.065.

40. See, e.g., TEX. INS. CODE ANN. § 751.207; OR. REV. STAT. § 731.264.

41. District of Columbia, D.C. CODE §§ 31-851 to -857; Illinois, 215 ILL. COMP. STAT. 5/155.35.; Kansas, H.B. 2357 (2005); Michigan, MICH. COMP. LAWS SERV. § 500.221; New Jersey, N.J. STAT. ANN. §§ 17:23C-1 to -14; North Dakota, N.D. CENT. CODE §§ 26.1-51-01 to -09; Oregon, OR. REV. STAT. §§ 731.760–770; and TEX. INS. CODE § 751.20.