Can We Talk?

"Waiving Goodbye to Privilege?"

WAIVING GOODBYE TO PRIVILEGE? THE RISKS OF INTERNAL INVESTIGATIONS AND "COOPERATING" WITH THE GOVERNMENT AND EXTERNAL AUDITORS

CAROL POINDEXTER & LAURA FEY[1]

I. BACKGROUND

A. In this post-Enron/post-Sarbanes-Oxley Act era, shareholders, corporate management, auditors and government agencies have increased their scrutiny of corporate conduct. Companies are now expected to conduct internal investigations and audits and to regulate themselves. At the same time, corporations are expected to cooperate fully when government agencies investigate them. In fact, corporations that do fully cooperate with government agencies such as the DOJ and SEC are rewarded with leniency by the investigating agency.[2] Corporations must be cognizant, however, that while necessary, external auditing and cooperation with the government often means waiver of attorney-client and work product protected information.

In-house lawyers are pulled in more directions today than ever. In the spirit of compliance and promoting good faith practices among the company, counsel will need to conduct internal investigations that are protected by the attorney-client privilege. But pulling on the other side are the government and external auditors demanding the confidential information from the investigation. While the attorney is guided by her sense of confidentiality owed to the corporation, she also feels the government pressures and incentives to disclose confidential and potentially privileged information. In-house counsel also feels a pull to be loyal to the corporate management that, many times, controls her progression at the company. On the other hand, counsel owes her loyalty to the company, not management. Counsel must walk this minefield carefully and thoughtfully.

B. Therefore, when conducting internal investigations and providing confidential information to auditors and the government, counsel must consider the broad ramifications involved, since privileged documents disclosed to external auditors or investigating agencies may later become available to private civil litigants or other government agencies.

---

1 The authors acknowledge with thanks the assistance of Kimberly Gibbens, Of Counsel at Shook, Hardy and Bacon LLP and Eric Dirks, Associate at Shook, Hardy and Bacon LLP.

2 United States Sentencing Commission, Guidelines Manual §8C2.5(g) (November 1, 2004). *But see United States v. Booker*, 125 S.Ct. 738 (Jan 12, 2005) (ruling that federal sentencing guidelines are no longer mandatory, but are still persuasive).

II. **WHAT IS PRIVILEGED?** Two privileges arise during an investigation—the attorney-client privilege and work product doctrine.[3] The rationales and purposes behind the two differ significantly.

A. **Attorney-Client Privilege.** The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients.[4] The attorney-client privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[5]

Interviews conducted by in-house counsel of the company should be covered by the attorney-client privilege just like interviews conducted by an outside lawyer as long as the interview is conducted in order for the corporation to obtain legal advice, and the interview is with corporate representatives who are permitted engage in confidential communications with attorneys representing the corporation.[6] Two primary approaches are taken by courts in determining which corporate representatives can engage in such confidential communications with the company's attorneys: (1) the subject matter test;[7] and (2) the control group test.[8] Some states follow a modified version of the control group test.[9]

B. **Work Product Doctrine.** This privilege is a broader protection than the attorney-client privilege. It does not exist to protect a confidential relationship. Instead, it is "designed to balance the needs of the adversary system to promote an attorney's preparation in representing a client against society's general interest in revealing all true and material facts relevant to the resolution of a dispute."[10] Most, but not all, jurisdictions, protect two categories of attorney work product: "fact" work product, also described as "tangible" work product; and "opinion" work product,

---

3 A discussion of the viability of the "self-evaluative" privilege is beyond the scope of this discussion. This privilege has not been widely recognized, but may provide a corporation with significant protection in connection with its internal investigations. For a discussion of this privilege see, McLaughlin, Joseph T. and McCarthy, J. Kevin, *Corporate Internal Investigations – Boon or Bane?* Practising Law Institute, (Westlaw) 1438 PLI/Corp 245, July 2004.

4 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

5 *Id.* at 389 (citing *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

6 *See Id.* at 394.

7 The elements of the subject matter test are: 1) communication was made for purpose of obtaining legal advice; 2) employee making the communication did so at direction of employee's corporate supervisor ; 3) employee's superior made the request for communication in order for the corporation to obtain legal advice; 4) subject matter was within the scope of the employee's corporate duties; 5) communication was not disseminated beyond persons who needed to know. *Diversified Indus., Inc. v. Meredith* 572 F.2d 596 (8th Cir. 1977)

8 The control group test typically covers only corporate representatives having authority to obtain professional legal services or to act on the legal advice tendered on behalf of the corporation. *See In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1978).

9 The Illinois control group test, for example, includes persons whose advisory roles to top management are such that decisions would not typically be made without their advice, and whose opinions in fact form the basis of any final decision by those with actual authority. *Consolidated Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 120 (1982).

Subpoena Duces Tecum, 738 F.2d 1367, 1371 (D.C. Cir. 1984).

sometimes referred to as "intangible" work product. Tangible work product includes memoranda, notes, witness statements and similar documents. "Opinion" work product refers to an attorney's conclusions, legal theories, mental impressions or opinions. Some jurisdictions do not protect tangible work product.[11]

Attorney interview notes and memoranda typically are protected by the work product doctrine if such materials have been prepared by or for an attorney for the attorney's client "in anticipation of litigation." *United States v. Noble*, 422 U.S. 225, 237-38 (1975). Materials protected by the work product doctrine, however, may have to be produced upon a showing that the opponent has a "substantial need" of the documents and is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See* Fed. R. Civ. P. 26(b)(3). Most courts protect materials containing an attorney's mental impressions under work product doctrine, however, attorneys seeking to protect interview notes and memoranda from discovery should strive to establish that the materials also are covered by the attorney-client privilege.

C. **Business Versus Legal Advice**. In-house attorneys are often asked to perform duties on behalf of the company that could be characterized as business related. It is important to be mindful that communications and work product that are not truly legal communications or legal work product will not be protected.[12] Thus, if in-house counsel is conducting activities that are not related to legal advice, she should not expect her communications or documents to be privileged.

III. **DIFFERENT WAYS TO WAIVE PRIVILEGE.** Because the rationales vary, courts typically analyze them differently when determining whether a party has waived the attorney-client privilege or the work product privilege. Waiver of the attorney-client privilege does not automatically waive the work product doctrine. Waivers can be:

A. **Voluntary**: Privilege is not absolute. Attorney-client privilege can be waived by voluntary disclosure of private communications by a client, or an attorney with the consent of her client, to a third-party.[13] Work product can be voluntarily released to an adversary.[14]

---

11 *See, e.g., Mlynarski v. Rush Presbyterian-St. Luke's Medical Center*, 213 Ill. App. 3d 427, 432 (1991) (Illinois only protects 'opinion work product,' matter which discloses the theories, mental impressions or litigation plans of a party's attorney, from discovery).

12 *See, e.g., Western Resources, Inc. v. Union Pac. R.R. Co.*, 2002 U.S. Dist. LEXIS 1911, * 25 (D. Kan. 2002) (finding business advice not privileged); *In re Kidder Peabody Securities Litig.*, 168 F.R.D. 459 (S.D.N.Y. 1996) (holding interview notes from internal investigation by outside counsel were not protected because the interview notes were not created principally for the purpose of defense of litigation, and pieces of information from the notes were shared with third parties).

13 *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002).

14 *Id.* at 305.

B. **Selective**: Some jurisdictions allow a company to selectively waive privilege and disclose privileged or protected information to one party while continuing to assert the privilege with respect to others. (See further discussion below).

C. **Inadvertent**: Inadvertent waiver occurs when information protected by the attorney-client privilege or the work product doctrine is inadvertently disclosed to a third-party. Courts differ with how to deal with inadvertent waiver, generally taking one of three approaches:

1. Lenient Approach. Courts following this approach hold that an inadvertent waiver can never take place because the privilege must knowingly be waived.[15] Some criticize this test for creating little incentive for attorneys to maintain control over privileged material.[16]

2. Strict Approach. Other courts have held that the privilege is automatically waived once the documents are produced, whether the document production was inadvertent or not.[17] While this approach makes attorneys accountable for their carelessness, this test has been criticized for its lack of flexibility.[18]

3. Middle of the Road Approach. The majority approach is to consider several factors in an attempt to strike the right balance including: i) the reasonableness of precautions taken; (ii) the promptness of measures taken to rectify the error; (iii) the number of inadvertent disclosures; (iv) the extent of the disclosure; and (v) whether the overriding interests of fairness and justice would be serviced by absolving the party of its error.[19]

IV. REASONS FOR INVESTIGATIONS AND DISCLOSURE

A. Counsel Has Incentives to Conduct Investigations

Given internal, governmental and auditing pressures, in-house counsel has more incentive than ever to conduct investigations. Some of the reasons in-house counsel may conduct investigations are: (1) Counsel may wish to determine whether there is merit, and potential liability, to pending or imminent litigation; (2) Internal investigations can demonstrate good faith on the part of the company and may limit civil and criminal liability; (3) Internal investigations may also prove to be

---

15 *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954-55 (N.D. Ill. 1982) ("we are taught from the first year of law school that waiver imports the intentional relinquishment or abandonment of a known right"); *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996) (addressing attorney-client privilege but same analysis for the work product doctrine applies).

16 *Gray*, 86 F.3d at 1483.

17 *Id. See also* 8 Wigmore, Evidence § 2325 (McNaughton rev. ed. 1961); *International Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 449 (D. Mass. 1988); *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672, 675 (D.C. Cir. 1979) *cert. denied* 444 U.S. 915 (1979).

18 *Gray*, 86 F.3d at 1483-84.

19 *See e.g., Alldread v. City of Grenada*, 988 F.2d 1425, 1433 (5th Cir. 1993); *Lois Sportswear, U.S.A. Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985); *Gray*, 86 F.3d at 1484.

a beneficial public relations tools; and (4) Most importantly, internal investigations can assist a company in identifying and remedying existing problems within the company.

B. Recent Developments Increasing Incentives to Conduct and Share Confidential Information

1. Counsel has new duties under Sarbanes-Oxley to conduct internal investigations to sniff out corporate fraud.[20]

   Sarbanes-Oxley requires legal counsel of publicly traded corporations to "report up the ladder" to the company's chief legal officer, CEO, or the independent audit committee of the board of directors.[21] She must report any "evidence of a material violation of securities law, or breach of fiduciary duty or similar violation by the company."[22] Then counsel should ensure that the violation is properly handled. Although these actions may be protected by the attorney-client privilege or work product protections, a subsequent request by the government for these communications or materials could put counsel in a delicate situation.

2. Internal and external auditors scrutinize corporate information more carefully, and have higher duties in this post-Enron society.

   a. Auditors have begun to conduct their audits with higher scrutiny and attention in order to ferret-out corporate fraud. Indeed, auditors often request information that is privileged, including investigation materials such as interview notes and investigation conclusions, whistleblower information and information about illegal acts and how they were remedied.[23]

   b. Securities Exchange Act, §10A places increased pressure on auditors to dig deep into counsel's documentation of corporate activities. Section 10A requires an auditor to conduct audits in a manner that provides a "reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts."[24]

---

20 Sarbanes-Oxley Act of 2002, H.R. 3763 107th Cong. § 307 (2002); 17 C.F.R., part 205 (promulgating SEC rules that implement § 307 of the Sarbanes-Oxley Act).

21 *Id.*

22 *Id.*

23 Peter S. Lowry & Alan Gutierrez, *The Case for Limiting Waiver of Attorney Client Privilege to Encourage Disclosure of Tax Opinions to Independent Auditors,* No. 236 BNA Daily Tax Report J-1 (Dec. 13, 2004); *The Auditor's Need for its Client's Detailed Information vs. The Client's Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems, and Proposed Solutions,* Latham & Watkins Presentation, (Oct. 07, 2004) available at: http://www.abanet.org/buslaw/attorneyclient/materials/018/018.pdf.

24 15 U.S.C. § 78j-1.

3. As a result of the new laws and additional public scrutiny, corporate executives are undoubtedly holding themselves to higher standards.

C. **Government Agencies, Including the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), Emphasize the Importance of a Company's Cooperation During a Government Investigation Including the Waiver of Privilege.**

1. For example, in 2003, the DOJ issued a memo from Larry Thompson entitled the "Principles of Federal Prosecution of Business Organizations." ("Thompson Memo").[25] It revised the 1999 "Holder memo"[26] which outlined guidelines for prosecutors in the DOJ to follow when determining whether to charge a company in a particular case including the company's voluntary cooperation.

   a. While the Thompson Memo tracks the Holder memo at great length, it puts greater emphasis on the need for voluntary cooperation by companies if they wish to avoid indictment. In fact, in the cover letter that accompanied the Thompson Memo, Thompson stated that "the main focus of the revisions is increased emphasis on scrutiny of the authenticity of a corporation's cooperation."

   b. The Thompson Memo states that "[o]ne factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigations and with respect to communications between specific officers, directors and employees and counsel."

2. The Department of Justice ("DOJ") released an interview with United States Deputy Attorney General, James B. Comey that discussed the DOJ's policy to request the waiver of attorney-client privilege and work product protection.[27] Comey's comments, including those noted below, clearly articulate the importance the government places on a corporation's full cooperation, including waiver:

---

25 Larry Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations*, available at: http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (Jan. 20, 2003).

26 Eric Holder, Jr., Deputy Attorney General, *Bringing Criminal Charges Against Corporations*, available at: http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html (Jun. 16, 1999).

27 *Interview with United States Attorney James B. Comey Regarding the Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waiver the Attorney Client Privilege and Work Product Protection,* 51 U.S. Atty. Bull. 1 (Nov. 2003), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf.

a. "In my view, for a corporation to get credit for cooperation, it must help the Government catch the crooks. Sometimes a corporation can provide cooperation without waiving any privileges. Sometimes, in order to fully cooperate and disclose all the facts, a corporation will have to make some waiver because it has gathered the facts through privileged interviews and the protected work product of counsel."

b. "Prosecutors are not generally seeking legal advice or opinion work product; they are just seeking the facts, including factual attorney work product. Of course, disclosure of interview notes or the facts contained in the notes reflects the questions asked by the attorney, which may result from prior research, as well as the attorney's focus during the interview. The disclosure, however, involves a minimal intrusion on the privilege and may be necessary if the corporation chooses to earn leniency through cooperation."

c. "If defense counsel mean that prosecutors routinely ask corporations to cooperate and to furnish the Government with all the information known to them about the criminal activity, I certainly hope that is going on . . . I hate to sound like a broken record—telling the Government what the corporation knows about what happened, who did it, and how they did it. In short, we expect cooperating corporations to help us catch the bad guys."

V. DISCLOSURES WILL LIKELY RESULT IN WAIVER

A. Cooperating With Governmental Agencies:

1. If a company discloses information gathered by counsel in the course of an internal investigation to the government, the company could later be deemed to have waived the privilege in civil litigation or other government investigations.

2. Courts are split over whether waiver in one government investigation also constitutes waiver in another government investigation or subsequent private actions. Cases concerning selective waiver of the attorney-client and/or work product privilege fall into one of three categories:

   a. **Selective Waiver Permitted.** A small number of courts have held that sharing privileged information with the government only waives the information on a limited basis.[28] The Eighth Circuit

[28] *Diversified Industries v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (*en banc*); *In re Grand Jury Subpoena*, 478 F. Supp. 368 (E.D. Wis. 1979) (following the rationale of *Meredith* and noting that it is good policy to encourage the sharing of information with government agencies); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 689 (S.D.N.Y. 1980).

held that a report voluntarily produced to the SEC pursuant to an agency subpoena, was only a limited waiver, reasoning that "to hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them."[29]

b. **Selective Waiver NEVER Permitted.** Most courts have rejected the selective waiver doctrine.[30]

The D.C. Circuit held that disclosure of documents to the SEC waived the attorney-client privilege.[31] A few years later, it held that voluntary disclosure to the SEC also waived work product protections,[32] finding that when a company elects to disclose information to the government, it necessarily "foregoes some of the traditional protections" of privileges in order to avoid the "traditional burdens that accompany adversary resolution of disputes."[33]

Other circuits have even held that, despite the terms of a confidentiality agreement between the parties, by disclosing confidential reports to the government years earlier, the company waived its privileges as to all litigation adversaries.[34] The Sixth Circuit found that, although a selective waiver exception could encourage the company to cooperate with the government and thus further the "truth-finding process," the company cannot pick and choose with respect to waivers.[35] A waiver to one is a waiver to all.

c. **Selective Waiver Permitted With Confidentiality Agreement.** A handful of courts have acknowledged that under the right circumstances, a voluntary waiver pursuant to an express confidentiality agreement may avoid waiver of privilege.[36] Others

---

29 *Meredith,* 572 F.2d at 611.

30 *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (ruling that the attorney-client privilege was not designed for the tactical advantage of selective waiver); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988) (finding a waiver of attorney-client privilege and non-opinion work product privilege but not opinion work product); *Bank of America v. Terra Nova Ins. Co.,* 212 F.R.D. 166, 172 (S.D.N.Y. 2002) ("when materials are disclosed to a governmental authority to forestall prosecution or to obtain lenient treatment, the purpose of such a disclosure is foreign to the objectives underlying the work product doctrine").

31 *Permian Corp.*, 655 F.2d. at 1215.

32 *In re Subpoena Duces Tecum*, 738 F.2d at 1371-72.

33 *Id.* at 1372.

34 *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-27, 1429-30 (3d Cir. 1991) (rejecting both attorney-client privilege and work product doctrine); *see also, In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 302.

35 *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 303-07.

36 *See, e.g., In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2nd Cir. 1993) (ruling that privilege was waived, but declining to adopt a *per se* rule and indicating some disclosures pursuant to a confidentiality agreement may

have allowed the use of a confidentiality agreement to preserve work product protection but rejected its application as to attorney-client privilege.[37]

B. **Disclosures During Government Audits**: Corporations in regulated industries, such as health care organizations, must also be aware of the risk that information disclosed to a regulatory agency during the agency's periodic audit may also risk a general waiver of privileges respecting that information.[38]

C. **Cooperating With External Auditors**: As external auditors are requesting an increasing amount of privileged materials, the potential for waiver of the privilege is increasing. In most states, there is no black letter answer to whether these disclosures are protected by attorney-client or work product protections. This is because some courts have found that disclosure to external auditors constitutes a waiver. Thus, attorney-client privilege and work product protections can not be assumed or expected.[39]

1. **Courts Find Disclosures to Auditors Are <u>Not Protected</u>:**

   a. Attorney-Client Privilege: Since disclosure to an auditor is disclosure to a third party for a purpose other than legal advice, courts usually find waiver.[40]

   b. Work Product Protection: Some courts have held that information given to auditors is not work product (materials prepared in anticipation or defense of litigation), but rather it is business material.[41]

2. **Courts Find Disclosures to Auditors Are <u>Protected</u>:**

   a. Attorney-Client Privilege: Some states have added statutory protection of disclosures to auditors.[42]

---

remain privileged); *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997) (government did not waive privilege by sharing incriminating audiotape with third parties); *Maruzen Co. v. HSBC USA Inc.*, 2002 WL 1628782 (S.D.N.Y. July 23, 2002) (capitalizing on *Steinhardt's* dicta and ruling that disclosure pursuant to a confidentiality agreement prevented waiver).

37 *Permian Corp.*, 665 F.2d at 1219 (confidentiality agreement prohibited waiver of work product protection but not attorney client privilege); *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ch. Nov. 13, 2002) ("disclosure to one adversary does not prejudice a subsequent adversary").

38 *See, e.g., U.S. v. Massachusetts Institute of Technology*, 129 F.3d 681.

39 For a comprehensive discussion about disclosures to auditors, *see The Auditor's Need for its Client's Detailed Information vs. The Client's Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems, and Proposed Solutions*, Latham & Watkins Presentation, Oct. 07, 2004, available at http://www.abanet.org/buslaw/attorneyclient/materials/018/018.pdf.

40 *See Gutter v. E.I. duPont de Nemours & Company*, 1998 WL 2017926, at *3 (S.D. Fla. May 18, 1998); *In re Pfizer Inc. Securities Litig.*, 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993).

41 *See Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 292, 298 (D.D.C. 1987).

42 *See e.g.*, 225 Ill. Comp. Stat. 450/27.

b. Work Product Protection: Many courts have recently ruled that disclosure of work product to an auditor might waive the protection as to the auditor, but not as to adverse parties in litigation.[43]

3. Because of the inconsistent approaches taken by various courts, counsel must assume that disclosure of privileged or protected information to an auditor may result in waiver.

VI. POINTS TO CONSIDER WHEN DECIDING WHETHER TO SHARE PRIVILEGED INFORMATION

A. A tension exists between investigations and cooperating with governmental agencies and auditors. In-house counsel will often face tough choices.

B. Always proceed with the understanding that disclosing privileged information to the government could waive privilege as to all parties, including other government agencies and private litigants.

C. Don't lay down on your sword too quickly. While every circumstance is different, don't dismiss the possibility of vigorously opposing an unreasonable demand for early waiver, even in the face of a prosecutor asserting the corporation will not be seen as "cooperating" if it does so. Remember that there is no guarantee that the government will refrain from bringing charges even if the company waives privilege.

D. After weighing all of the risks and benefits, if the corporation elects to disclose privileged materials, there are several steps that should be taken to try to minimize the risk of waiver:

1. Enter into a confidentiality agreement with the government or auditor **before** disclosing any privileged information. The confidentiality agreement should include protections for the company, such as:

a. Providing that the corporation is disclosing information **in reliance** on the confidentiality agreement;

b. Specifically prohibiting the government or auditor from disclosing the information to any third party without the express consent of the company; and

c. Expressly reserving the company's rights to assert all applicable privileges with respect to any third party.

---

43 *See Gutter*, 1998 WL 2017926, at *5; *Southern Scrap Materials Co. v. Fleming*, 2003 WL 21474516, at *9 (E.D. La. June 18, 2003).

2. Carefully consider what to disclose. For example, rather than disclosing the actual internal report of an investigation, consider disclosing only the underlying, non-privileged information forming the basis for a privilege report, being particularly careful not to disclose attorney-client privileged communication whenever possible. Similarly, when faced with the choice of disclosing work product that analyzes a group of documents, consider disclosing the underlying document instead.

3. Because of the potentially devastating consequences that may arise from disclosure of privileged materials to the government or an auditor, it is important to take steps to make sure that such parties do not inadvertently produce the privileged documents to other third parties. To avoid an inadvertent disclosure, the company should clearly mark all privileged documents and instruct anyone involved in an internal investigation or audit that the privilege belongs to the company and, therefore, the government or the auditor must maintain the confidentiality of all privileged information.