14. ATTORNEY-CLIENT PRIVILEGE

Lawyers are pervasive in the world of corporate regulation, primarily in two capacities: (1) as advisors who participate contemporaneously in activities that may later be subject to legal scrutiny, criminal or otherwise (*i.e.*, deal lawyers); and (2) as representatives of firms and persons subject to ex post enforcement action (*i.e.*, litigators).

The attorney-client privilege and the related work product doctrine have much to say about the activities of both types of lawyers. These areas of law are almost entirely a matter of federal common law. The case law is voluminous and the issues tend to be fact-intensive. Most questions or problems in this area will require careful research. The materials in this chapter provide a sense of some, but not all, of the legal issues relating to the privilege that commonly arise in the corporate enforcement setting.

A. The Privilege: An Overview

As you may have learned in other contexts, the attorney-client privilege has spawned an enormous amount of case law and it is a doctrine you are likely to encounter in litigation practice of all types. It is also taught in several other law school courses. Because we are interested in the privilege's relevance to corporate crime, it makes sense to use the following treatise excerpt to see an overview of the elements of the privilege and how the doctrinal issues are organized. The chapter then moves to court decisions specific to the area of corporate crime.

PRINCIPLES OF EVIDENCE

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§ 10.3 The Attorney-Client Privilege

The privilege protecting communications between attorney and client is recognized in every American jurisdiction. It is firmly rooted and unqualified-that is, once it attaches, it is not subject to a judicial override. Furthermore, it can be claimed, even after the client's death, by her personal representative. The privilege rests both on privacy concerns and, more importantly, on a utilitarian rationale. The privilege encourages frank and full disclosure by the client, thus improving the quality of legal representation. And because the existence of the privilege is widely known, it may encourage persons in need of legal advice to seek it. That said, it is still not easy to craft the proper bounds of the attorney-client privilege.

Here are some of the difficulties. The client may wish to conceal physical evidence, or hide his identity. Note that the protection of information like this is only tenuously connected to the purpose of the privilege-full and frank communications between client and lawyer. Thus the privilege is generally inapplicable in situations like these. Another difficulty arises because, in the course of legal representation, lawyers and clients necessarily interact with a wide range of third parties, such as investigators, paralegals,

accountants, physicians, and consulting attorneys. Thorny problems emerge in determining whether communications with and among these secondary actors fall within the boundaries of the attorney-client privilege. And numbers alone magnify the difficulty of marking the appropriate bounds of this privilege, especially when the holder is a business enterprise, such as a corporation, partnership, or other business association. Wide disclosure of "privileged" communications may suggest that the communications were not intended to be confidential or that even if the privilege initially attached, it has been waived. Special problems also exist when shareholders in a corporation sue management on behalf of the corporation-an increasingly common practice in American business life. Other problems arise when a lawyer represents several clients on a common matter and they subsequently become adversaries, or when separately represented clients cooperate and pool their resources.

In resolving these and other problems, it is important to keep in mind the core objective of the attorney-client privilege: to promote full and candid confidential communications between client and attorney so as to facilitate the rendition of legal services. While the development of the attorney-client privilege generally proceeds by case law, courts have been guided by proposed Federal Rule 503. Even though neither this rule nor the other proposed privilege rules were adopted when Congress enacted the Federal Rules of Evidence in 1975, Congress made it clear that its decision to allow the law of privilege to evolve by judicial decision was not a disapproval of any of the proposed enumerated privileges. Proposed Rule 503 is a carefully crafted, detailed provision, covering many aspects of the attorney-client privilege. It has been an influential "standard" in both federal and state courts and its influence has prompted greater uniformity across jurisdictional lines. You should be aware, however, that some differences in the scope of the attorney-client privilege do exist among the jurisdictions and this is particularly true among the various states. Thus, the following textual materials should be viewed as representing the position of most courts and, in particular, of most federal courts.

Proposed Rule 503 broadly defines the attorney-client privilege. Subsection (b) states:

> **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representatives and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Proposed Rule 503 contemplates the protection of not only the direct communications between attorney and client, but also of communications between and among various representatives of each. Legal services often involve non-lawyer specialists such as

investigators, physicians, economists, investment bankers, accountants, scientists, and mathematicians. It is important to note, however, that for communications to these non-lawyers to be protected by the attorney-client privilege, these representatives must either be communicating to the lawyer (or his representative) or the client (or his representative) for the purpose of assisting the lawyer in delivering legal services. Proposed Rule 503(a)(3) affirms this observation by defining an attorney's "representative" as one who is engaged "to assist the lawyer in the rendition of professional legal services.". . .

The attorney-client privilege is available not only to individual clients, but also to partnerships, various business entities (such as associations and corporations), and to governmental officers and agencies. Proposed Rule 503(a)(1) defines "client" as a person or entity "who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." The availability of the privilege is not dependent on the payment of legal fees or on a formal contract between client and attorney. The language of Proposed Rule 503(a) ("[consulting] a lawyer with a view to obtaining profession legal services") confirms the well-established principle that the privilege applies to an initial attorney-client consultation even if the client (or the attorney) declines representation. . . .

> The privilege requires that the client must be seeking *legal advice* from the lawyer; that requirement emphasizes the obvious fact that not everything said to a lawyer, even in confidence, is privileged. (If that were the case, lawyers would be quite popular at bars and parties). That said, clients often seek lawyers for assistance on complex matters that involve a *mixture* of law, business, policy, and other subjects that are not strictly "legal." But if including any non-legal subject within a broader legal discussion would lose the privilege, then the attorney-client relationship would suffer. Accordingly, the courts have held that if the *dominant intent* of the client is to seek legal advice, the privilege is not lost if advice is also sought on related business, financial, or other not strictly legal matters. . . .

Although the attorney-client privilege was initially formulated to protect only the client's confidential communications, modern courts recognize that the privilege also applies to the attorney's confidential communications to the client. The client's statements and the attorney's statements often interlock. If the privilege did not attach to the attorney's statements, her disclosures could often be used to infer at least the general content of the client's confidential communications to the attorney. This is especially true when the attorney renders legal advice based on what the client has told her. Thus, considerations of both practicality and preserving confidentiality have prompted courts to apply the privilege to the confidential communications of both client and attorney. . . .

[T]he attorney-client privilege *does not apply* to letters, documents . . . or other inscribed items that were not prepared for the purpose of facilitating legal services. If the rule were otherwise, a client could place all "preexisting" documents beyond the reach of discovery by the simple expedient of turning them over to her attorney. The fact that

such documents end up being useful to the lawyer is beside the point-the question is whether the communications were *initially* made to the lawyer for the purpose of securing legal advice. Of course, if the client prepares a confidential letter to the attorney telling him, for example, how to interpret the documents or suggesting trends reflected in the data contained in them, this letter would be protected by the privilege. Furthermore, if an attorney gives confidential legal advice to a client that is based on the attorney's review or analysis of unprotected documents, the *communication from the attorney* to the client is protected by the privilege (while the underlying documents are not). . . .

Students of civil procedure may recall the so-called "work-product" doctrine, traceable to the Supreme Court's decision in *Hickman v. Taylor.* Although that decision concerned the recognition of the doctrine in federal courts, it is generally recognized among the states as well. In recent years, the central features of the doctrine have often been codified in a rule of court or statute. Federal Rule of Civil Procedure 26(b)(3) sets forth the basic rules of work-product; subsection (b)(4) extends the work-product doctrine (or at least its rationale) to experts engaged by a party to assist in trial preparation. Generally speaking, the work-product doctrine extends *conditional immunity* from discovery by an opponent to written materials prepared in "anticipation of litigation." Typically, the protected materials are prepared by the lawyer, but materials prepared by others—such as an investigator, agent, consultant, or the party himself—are also conditionally immune if prepared for litigation. Familiar examples of a lawyer's work-product would be his notes about a witness's statement or his investigator's recorded measurements of skid marks at the scene of an automobile accident. Like the attorney-client privilege, the work-product doctrine protects the *materials or communications* generated by the lawyer, or by a client who is a party to a suit, or by a representation of either. However, the work-product doctrine *does not protect the client's knowledge,* which includes facts known to his attorney who is his agent. In other words, the client would have to answer an interrogatory: "How far were you from the 'Hazard' sign when you first saw it?" Furthermore, the court may order discovery of work-product materials if the party seeking them shows a substantial need or, in the case of a *consulting* expert (who does not testify), exceptional need. The requisite showing of need varies with the particular context and is affected by the discovering party's ability to secure unprotected evidence that is the substantial equivalent of the materials sought. . . .

One qualifies as a lawyer's representative only if engaged "to assist the lawyer in the rendition of professional legal services." Courts have held that the non-lawyer must be *necessary to the legal representation* for communications to or from the non-lawyer to be privileged. . . . The mere preparation of an income tax return is not legal in nature; indeed most income tax preparers are not attorneys. On the other hand, tax lawyers routinely render legal services, creating many occasions on which communications from their clients (and their communications to their clients) are within the attorney-client privilege. . . .

Incidentally, a question sometimes arises as to whether the name of a client is protected

by the attorney-client privilege. For example, a grand jury or the IRS invokes a process such as a summons or subpoena addressed to a lawyer, demanding the identity of the lawyer's client. In most cases, the client has no intention to conceal her identity—disclosure of her identity to the lawyer is preliminary to and independent from any communications made to secure legal advice. Even if a client desired anonymity, sound public policy usually militates against granting it. Occasionally, however, protection of a client's identity is justified, as when a whistleblower seeks legal advice in connection with revealing wrongdoing or when revealing the client's name would disclose the general content of a confidential communication. . . .

Suppose that the client is a corporation (or other business entity) and that the communication in question is made by a corporate agent to the corporation's attorney. Because the corporation can speak only through individuals, the question is whether the corporation—the client and holder of the privilege—is the communicant. Depending on the context and a particular court's view of the proper scope of the attorney-client privilege, the statements of the agent could be either, (1) communications from the corporate client and within the corporation's privilege or, (2) statements of a person who is speaking as an individual witness and whose communications are not within the corporation's privilege.

Note that if the privilege extends far down into the corporate personnel structure—to middle management or even below—the reach of the privilege may unjustifiably hinder the efforts of an opponent to support his claim or defense. It also makes it difficult to discover discrepancies between what a corporate employee says (in a deposition, for example) to the opponent and what he told the corporate attorney.

The application of attorney-client protection in the corporate setting often strains some of the basic doctrines of privilege law, rooted as they are in the context of the individual client. The requirement of confidentiality, for example, meshes poorly with the layered structure of the large corporation, where statements may be passed through many hands before reaching counsel or counsel's advice may be widely shared within the corporation. In addition, the often-indistinct boundary between legal and business advice is likely to be perplexingly blurred in the corporate context, and this is especially true as to communications between a corporate spokesman and in-house counsel. On the other hand, the modern corporation could not realize the full potential of legal advice without some application of the privilege. It, like the individual client, needs to communicate freely and fully with its attorneys, preferably through the corporate agents with the most knowledge. The problem, therefore, is one of drawing a line that sensibly balances the corporation's need for an attorney-client privilege and the opponent's need for fair access to evidence generated within the corporate structure. The extremes are easily recognized and managed. Clearly protected is a confidential communication from the CEO to the attorney, made for the purpose of receiving legal advice for the corporation. Clearly unprotected is a routinely prepared statement by a lower-level employee, made in the normal course of business, but subsequently sent to the corporate attorney. The difficulties lie in the shadowy area between these polarities. For communications to

corporate counsel, two general tests have been devised.

Some states still adhere to the "control-group test" for determining which corporate agents are considered part of the client when communicating to the corporation's attorney. Under this test, the privilege attaches only if the corporate officer speaking with the attorney is vested with authority both to seek legal advice for the corporation and to participate significantly in the corporation's response to the attorney's recommendations. The analogy is to the individual client, who can obtain legal advice and then, if he wishes, tailor his conduct consistently with that advice. The problem with this approach in the corporate context is its heavy reliance on the formal delegation of corporate authority. If the person who speaks with the attorney is an officer within the upper tiers of management, he probably "speaks for the corporation." Often, however, the high-level corporate spokesperson is not the individual who is fully informed about the matter in question. The attorney will nearly always want to speak with corporate agents who are the most knowledgeable, yet these persons may be outside the circle of upper level personnel empowered to "speak for" the corporation. Although their statements to the attorney may gain qualified protection through the application of the work-product rule (if litigation is anticipated), the unqualified protection of the attorney-client privilege is not available. Thus, from a functional standpoint, the rigidity of the control-group test can have a distorting effect on the choice of corporate spokespersons.

The second approach to the corporate attorney-client privilege is often referred to as the "subject-matter test." It was adopted for the federal courts in *Upjohn Co. v. United States*, and is the prevailing approach in most states. . . . In brief, the *Upjohn* approach would allow the privilege when the facts showed that: (1) the communication in question was pursuant to a corporate purpose to obtain legal advice, (2) the communication "concerned matters within the scope of the employee's corporate duties," (3) the employee knew that he was making a confidential statement and was doing so as part of his employer's efforts to secure legal advice or services, and (4) the statements were kept confidential or disclosed on a limited basis consistent with maintaining the privilege.

The last requirement—limited disclosure—can apply in two contexts: disclosure *within* or *outside* the corporate firm. Because corporations depend heavily upon information, there is a practical need that corporate records be accessible to those individuals or groups who need access. Yet, there is always a risk that information collected under the umbrella of the attorney-client privilege may be so widely shared that the privilege is lost. Generally, privileged communications should be disclosed only to persons who need access—to those who "need to know" the confidential information in order to do their jobs—and care should be taken to ensure that these persons understand the need to maintain confidentiality. If privileged documents are kept in a general filing system, access should be restricted.

Voluntary disclosures outside the company pose an even greater risk of losing the

privilege. Here, it is important to ensure the disclosure is made only to those who are "necessary to the legal representation"—a concept discussed above. Common sense dictates the importance of signaling the confidential nature of the disclosure through the use of labels, cover letters, or other precautionary measures.

Because litigation often deals with events that occurred several or more years before suit was filed, some of the employees or officers who gave privileged communications on the corporation's behalf may have died or left the company. Their departure from the corporate staff does not affect the availability of the privilege for communications made at the time of their employment. A closer question attends *post-employment* statements by a former employee to corporate counsel. In his concurring opinion in *Upjohn,* Chief Justice Burger suggested that the privilege did embrace these statements because a former employee, like a current employee, may have information that is necessary for the lawyer to give sound legal advice-and lower courts have so held.

Several other issues surrounding the corporate attorney-client privilege warrant brief mention. As we have seen, the holder of the privilege is the corporation. The privilege can be waived only by management; sometimes the board of directors will reserve for itself the right to claim or waive the privilege. The power to waive resides with the current board, regardless of when the privileged communications were made.

Note the anomaly that arises when a corporate agent speaks to the corporate lawyer about a matter that would incriminate him personally. Those communications are privileged, but it is the *corporation* that holds the privilege. If the corporation decides to waive its privilege as to those communications—most commonly to cooperate with the government in order to avoid fines or other penalties—the agent is unprotected, and his own statements can be admitted against him at his trial. This is because there is no personal attorney-client relationship with the corporate lawyer—nor can there be, because a lawyer representing both the corporation and the agent in circumstances of possible corporate/agent wrongdoing would be operating under a conflict of interest, for the very reason that the corporation may find it beneficial to waive its privilege and cooperate with the government, leaving its agent unprotected. . . .

The attorney-client privilege protects *communications,* not factual information that was the subject of a communication between the lawyer and the client—as shown in the following Illustration.

Clyde, whose expensive luxury car is only two years old, has just been told by his mechanic that the car will soon need costly repairs. Doubtful that the mechanic is correct, Clyde (who is mechanically inclined) verifies for himself the imminent repairs. Because the manufacturer's warranty on the car has expired, Clyde decides to sell it without disclosing its defects.

Subsequently, the buyer sues Clyde and Clyde retains a defense lawyer. He tells his attorney about the mechanic's report and about his own confirmation of the impending mechanical failures. During discovery, the plaintiff's lawyer takes Clyde's deposition.

He asks Clyde the following series of questions.

> Q: "Did you know this car had these [named] serious mechanical defects?"
>
> Q: "Did your mechanic, at Bosch Bros. Luxury Cars, inform you on June 3, 2008, that the car had these [named] defects?"
>
> Q: "Do you have mechanical skills?"
>
> Q: "Isn't it true that on or about June 5, 2008, you personally verified that the car you sold to the plaintiff had precisely the defects and problems identified by the Bosch Bros. mechanic?"

Clyde's attorney objects to these questions on the ground that they call for responses that are protected by the attorney-client privilege. How should the judge rule? None of these questions is improper, and Clyde must provide answers to each. The attorney-client privilege does not apply to facts or events that are the subject of, or described in, a confidential communication. If it did, there would be little or no evidence for the jury to consider. A client could simply relate all the relevant facts to his attorney and thereby insulate the client's knowledge of the underlying events from discovery. Of course, the attorney-client privilege does protect Clyde's *communications* to his lawyer. If it did not, these statements would be admissible as party admissions.

It sometimes happens that several clients with a common problem retain a single lawyer or firm to represent them. For example, one lawyer may represent both *A* and *B* in a matter of joint or common interest, such as their purchase of real estate or their common dispute with an insurance company. The rule in such situations provides that the statements of both clients and those of the lawyer are privileged if made for purposes of seeking legal advice on the common objective. It seems plain enough that, as against outsiders, *each client* is entitled to claim the privilege as to statements *she has made*, as well as to the attorney's responsive statements. But can client *A* invoke the privilege (as against outsiders) so as to prevent disclosure of *B*'s statements to the attorney as well as the attorney's responsive statements to *B*? The issue usually does not arise because *A* and *B* have a common objective and thus each is likely to claim the privilege or agree to waive it. However, should they disagree, most courts hold that all clients remain bound by the common interest arrangement—that is, *A* will not be permitted to disclose any communications made by either party in pursuit of the common interest. (Note that the parties can contract in their common interest arrangement either to bind all parties or to allow parties to waive the protection as to their own communications—but the default rule is that all parties are bound and the privilege is retained.)

In subsequent litigation in which *A* and *B*, having fallen out, become adversaries, the rule is that privilege is lost as to all of their statements. (Here, no "outsider" is involved.) First, when they were joint clients, neither client intended that his communications would be shielded from the other. Second, even if, say, *A* "secretly" communicated with

the attorney, the communication would not be privileged as to *B* because the attorney would have an ethical duty to share it with her other joint client. Proposed Rule 503(d)(5) states that in an action between persons who were formally joint clients, there is no privilege as to communications "made by any [of the joint clients] . . . to a lawyer retained or consulted in common . . . ." (Again, though, the parties can contract with each other to protect against disclosure in a subsequent litigation between them).

The rule protecting joint-client discussions has also been extended to protect confidential communications where two or more clients, *each with his own attorney*, agree to pool or share information in order to conserve resources and mount a more effective case-either a defensive or an offensive one. These allied clients have both a mutual and an individual interest: they are sharing information (and perhaps resources) with respect to their common interests, yet each participating client is represented by his own lawyer or firm. These sharing arrangements would seldom materialize if outsiders could successfully argue that confidential disclosures within the group lost the protection of the attorney-client privilege because dissemination went beyond the individual attorney-client units that comprise the pool. Thus, it is not surprising that courts protect the confidential communications of separately represented parties who pursue a common legal objective. Protection under the common-interest doctrine applies, however, only if the parties claiming the attorney-client privilege can show that they have agreed (orally or in writing) to assume an allied position. It is thus advisable for the parties to a pooling arrangement who wish to protect the attorney-client privilege—and most parties do—to enter into a formal, preferably written, agreement. Again, however, if the parties pursuing a common interest later end up suing each other, the communications previously made can be freely used by the parties in that subsequent litigation—this is because there was no expectation of confidentiality vis-a-vis the member of the common interest "unit" at the time the statements were made. (But the parties can, by contract, provide for protection against use of the statements in a subsequent litigation between or among them.) . . .

While a confidential communication between a client and a lawyer on a legal matter is protected by the privilege, that privilege can be waived in a number of circumstances. The basic question of waiver is whether the client has—by some statement or action subsequent to the making of the privileged communication—explicitly or implicitly acted in such a way that justifies a finding that the party no longer wishes to, or should, retain the privilege.

The most obvious form of waiver is a knowing and voluntary disclosure of the privileged information. That waiver-by-disclosure most often occurs when the client determines that the benefits of the disclosure outweigh the risks that the privileged information will be used against the client. A common example is a corporation that is being investigated by a government regulator or prosecutor for possible internal corporate misconduct (e.g., accounting violations). Assume that the corporation had previously hired a law firm to conduct an internal investigation, and the law firm prepared a report. That report is confidential. But the corporation may decide to voluntarily disclose it to the government

investigator. The benefits of disclosure—cooperating with the government and thereby avoiding or ameliorating fines and penalties—often outweigh the risk that the report, now waived, will be used against the corporation in some litigation.

Other situations arise in which waiver is *implied* from the client's conduct. Implied waiver is likely to be found when the client acts in such a way that it would be unfair to the adversary to uphold the privilege. When a client sues her lawyer for malpractice, for example, the lawyer can use relevant confidential statements made during the representation to defend herself—it would be unfair for the client to attack the lawyer's performance and yet leave the lawyer unable to rebut the charges by showing that, for example, he was instructed by the client to do the act for which he is now criticized. Similarly, if a client refuses to pay his attorney, the attorney can support her claim for fees with confidential information. In other words, the privilege is suspended as to any "communication relevant to an issue of breach of duty by the lawyer to . . . [her] client or by the client to his lawyer." This is because it would be unfair for the client to contest the value of the lawyer's services, and yet not allow the lawyer to defend by offering communications by the client that affected those services.

In a related context, a client waives his privilege if he asserts an affirmative defense of "reliance on advice of counsel." It would be unfair for the client to raise the attorney-client discussions as a defense, but then to prevent the adversary from inquiring into just what was said between the client and the attorney on the matter.

Recall that corporations often find it useful to cooperate with government investigations by turning over privileged information. While that is a waiver, should it extend to allowing private parties to use the information? Here is an example: a corporation is being investigated by the SEC for securities fraud. It turns over a confidential report to the SEC. Then private parties sue the corporation, and argue that they are entitled to the report, because the corporation waived the privilege by disclosing it to the SEC. The question in such a case is whether the waiver is *selective* or general. The policy argument for finding the waiver to be selective is that it would encourage corporations to cooperate with the government, because it would limit the costs of that cooperation; and the protection of selective waiver could also limit the costs of government investigations into potential corporate misconduct, because the government would be able to rely on the report instead of having to do its own investigation from square one.

But almost all courts have rejected the notion of selective waiver—meaning that a voluntary disclosure to anyone operates as a waiver to everyone. The courts reason that corporations are *already*—in the absence of selective waiver—cooperating with the government by turning over confidential reports. This is because the benefits of cooperation in avoiding criminal fines and penalties generally outweigh the costs, even including the cost that the privileged material can be used by private parties. Thus, selective waiver is not necessary to encourage cooperation (except, perhaps, for corporations at the margin, but the consequence of establishing selective waiver would be that *all* corporations would be protected, even those who would cooperate anyway.)

Moreover, the courts frown upon strategic activity in the use of the privilege; it seems to be gaming the privilege for a client to say, "I will waive to you, but not to you-it depends on how advantageous the waiver will be to me."

In litigation, it is often the case that a party will mistakenly disclose privileged information during discovery. This is especially true in electronic discovery cases, where the explosion of information raises substantial challenges for an accurate "privilege review" of documents subject to discovery. In recent years, the costs of electronic discovery have skyrocketed, and most of those costs have been attributed to the resources necessary to make sure that no email, spreadsheet, metadata, etc. contains privileged information. The consequences of mistaken disclosure of privileged information, at least in some common law courts, was to find a waiver no matter how careful the privilege review. And some courts even found a *subject matter* waiver in these circumstances—meaning that all privileged documents related to the subject matter of the mistakenly disclosed documents would also have to be disclosed to the adversary. Federal Rule 502, enacted by Congress in 2008, seeks to reduce the costs of privilege review by providing some measure of protection against a finding of waiver after a mistaken disclosure. Three provisions of the Rule are especially important:

1) Rule 502(a) precludes the court from finding a subject matter waiver unless the disclosure of the privileged information was *intentional* and results in unfairness to the adversary. Thus, a mistaken disclosure in discovery will never result in a subject matter waiver.

2) Rule 502(b) provides that a mistaken disclosure in a federal proceeding will not be a waiver at all if the party took "reasonable steps" to prevent the disclosure and acted reasonably promptly to retrieve the information once the party learns about the mistaken disclosure. Thus, while a party cannot be careless, it need not undertake herculean efforts to protect against mistaken disclosures in discovery.

3) Rule 502(d) provides that if a federal court enters an order that disclosure of privileged information in a proceeding is not a waiver, then that order is binding on all subsequent courts, state and federal. So getting a court order allows parties on each side to limit the costs of preproduction privilege review, because there will not be a waiver if privileged material is disclosed in the litigation.

B. Federal Rules of Evidence

The Federal Rules of Evidence mostly delegate privilege questions to the courts. The relevant Rules are printed below. Note that Rule 502 is a fairly recent rule on waiver, but it only covers some waiver issues, not nearly all of them. Additionally, Proposed Rule 503 was not enacted, though it is frequently cited as persuasive authority.

Rule 501. Privilege in General

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) The waiver is intentional;

(2) The disclosed and undisclosed communications or information concern the same subject matter; and

(3) They ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) The disclosure is inadvertent;

(2) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) The holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial

Proposed Rule 503. Lawyer-Client Privilege [not enacted, in favor of common law; see Rule 501]

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of

professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

C. The Corporate Privilege

Upjohn is *the* case on the attorney-client privilege of corporations and the application of the work product doctrine to companies' lawyers. It is very important and helpful to understand the policy considerations that apply to the attorney-client privilege and work product doctrine. Doctrinal problems will be resolved with reference to what result will

further those policy objectives (or not). That said, it's not obvious how the policy arguments play out when the client is a firm. How might the Court's policy analysis in *Upjohn* be subject to criticism?

UPJOHN CO. v. UNITED STATES, 449 U.S. 383 (1981)

Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U.S. 925, 100 S. Ct. 1310, 63 L. Ed. 2d 758. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants, so informed petitioner, Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U.S.C. § 7602 demanding production of:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period."
>
> "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries."

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U.S.C. §§ 7402(b) and 7604(a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F.2d 1223, 1227, n.12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" *Id.*, at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U.S.C. § 7602." *Id.,* at 1228, n.13.

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is

the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 913, 63 L. Ed. 2d 186 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 1577, 48 L. Ed. 2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, *see Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S. Ct. 125, 127, 32 L. Ed. 488 (1888) (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"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole." 600 F.2d at 1226. The first case to articulate the so-called "control group test" adopted by the court below, *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa.), petition for mandamus and prohibition denied *sub nom. General Electric Co. v. Kirkpatrick*, 312 F.2d 742 (CA3 1962), cert. denied, 372 U.S. 943, 83 S. Ct. 937, 9 L. Ed. 2d 969 (1963), reflected a similar conceptual approach:

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, *he is (or personifies) the corporation* when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the

resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. *See* ABA Code of Professional Responsibility, Ethical Consideration 4-1:

> "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—"officers and agents . . . responsible for directing [the company's] actions in response to legal advice"—who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (CA8 1978) (en banc):

> "In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem 'is thus faced with a "Hobson's choice." If he interviews employees not having "the very highest authority," their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with the "very highest authority," he may find it extremely difficult, if not impossible, to determine what happened.'" *Id.*, at 608–09 (quoting Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. IND. & COM. L. REV. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. *See, e.g., Duplan Corp. v. Deering Milliken, Inc.*, 397 F.

Supp. 1146, 1164 (D.S.C. 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it").

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, *see, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 440-441, 98 S. Ct. 2864, 2875–76, 57 L. Ed. 2d 854 (1978) ("the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct"). The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. *Compare, e.g., Hogan v. Zletz*, 43 F.R.D. 308, 315–16 (N.D. Okl. 1967), aff'd in part *sub nom. Natta v. Hogan*, 392 F.2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), *with Congoleum Industries, Inc. v. GAF Corp.*, 49 F.R.D. 82, 83–85 (E.D. Pa. 1969), aff'd, 478 F.2d 1398 (CA3 1973) (control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research).

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments*." (Emphasis supplied.) Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned

in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, and have been kept confidential by the company. Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (q2.7).

See also Diversified Industries, 572 F.2d., at 611; *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 580, 150 N.W.2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client

privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329 U.S., at 516, 67 S. Ct., at 396: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S. Rep. No. 93-1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"). While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals, in this case cannot, consistent with "the principles of the common law as . . . interpreted . . . in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U.S.C. § 7602.

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. This doctrine was announced by the Court over 30 years ago in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id.*, at 510, 67 S. Ct., at 393. The Court noted that "it is essential that a lawyer work with a certain degree of privacy" and reasoned that if discovery of the material sought were permitted

> "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511, 67 S. Ct., at 393–94.

The "strong public policy" underlying the work-product doctrine was reaffirmed recently in *United States v. Nobles*, 422 U.S. 225, 236–40, 95 S. Ct. 2160, 2169–71, 45

L. Ed. 2d 141 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).

As we stated last Term, the obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." *United States v. Euge*, 444 U.S. 707, 714 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26(b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable to summons enforcement proceedings by Rule 81(a)(3). *See Donaldson v. United States*, 400 U.S. 517, 528 (1971). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found. The Government relies on the following language in *Hickman*:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.... And production might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S., at 511.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman*, however, did not apply to "oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." *Id.*, at 512. As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters petitioner's case is not of that type." *Id.*, at 512–13. Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U.S., at 513 ("what he saw fit to write down regarding witnesses' remarks"); *id.*, at 516–17 ("the statement would be his [the attorney's] language, permeated with his inferences") (Jackson, J., concurring).

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate. Rule 26 goes on, however, to state that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman*

court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. *See* Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C. App., p. 442 ("The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . .").

Based on the foregoing, some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses. . . .

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26(b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings. . . .

Problem 14-1

(a) What are the major rationales for the attorney-client privilege? Be as specific as possible.

(b) Contra *Upjohn*'s reasoning, critique the application of those rationales to corporations.

The following two decisions, stemming from the same civil litigation, further illustrate *Upjohn*'s application and deal with some issues relating to waiver of the privilege. Notice how the fact pattern here mirrors so many of the corporate cases discussed in previous chapters. And especially pay attention to the dangers of potential privilege waiver highlighted by the second decision.

In re KELLOGG BROWN & ROOT, INC., 756 F.3d 754 (D.C. Cir. 2014) (KBR I)

KAVANAUGH, Circuit Judge:

More than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers. *See Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). In this case, the District Court denied the protection of the privilege to a company that had conducted just such an internal investigation. The District Court's decision has generated substantial uncertainty about the scope of the attorney-client privilege in the business setting. We conclude that the District Court's decision is irreconcilable with *Upjohn*. We therefore grant KBR's petition for a writ of mandamus and vacate the District Court's March 6 document production order.

Harry Barko worked for KBR, a defense contractor. In 2005, he filed a False Claims Act complaint against KBR and KBR-related corporate entities, whom we will collectively refer to as KBR. In essence, Barko alleged that KBR and certain subcontractors defrauded the U.S. Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. During discovery, Barko sought documents related to KBR's prior internal investigation into the alleged fraud. KBR had conducted that internal investigation pursuant to its Code of Business Conduct, which is overseen by the company's Law Department.

KBR argued that the internal investigation had been conducted for the purpose of obtaining legal advice and that the internal investigation documents therefore were protected by the attorney-client privilege. Barko responded that the internal investigation documents were unprivileged business records that he was entitled to discover. *See generally* Fed. R. Civ. P. 26(b)(1).

After reviewing the disputed documents in camera, the District Court determined that the attorney-client privilege protection did not apply because, among other reasons, KBR had not shown that "the communication would not have been made 'but for' the fact that

legal advice was sought." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, — F.3d —, —, 2014 WL 1016784, at *2 (D.D.C. Mar. 6, 2014) (quoting *United States v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012)). KBR's internal investigation, the court concluded, was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at —, 2014 WL 1016784, at *3. . . .

Federal Rule of Evidence 501 provides that claims of privilege in federal courts are governed by the "common law—as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). As relevant here, the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client. . . .

KBR's assertion of the privilege in this case is materially indistinguishable from Upjohn's assertion of the privilege in that case. As in *Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct. And as in *Upjohn*, KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity. The same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here.

The District Court in this case initially distinguished *Upjohn* on a variety of grounds. But none of those purported distinctions takes this case out from under *Upjohn*'s umbrella.

First, the District Court stated that in *Upjohn* the internal investigation began after in-house counsel conferred with outside counsel, whereas here the investigation was conducted in-house without consultation with outside lawyers. But *Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel "does not dilute the privilege." *In re Sealed Case*, 737 F.2d at 99. As the Restatement's commentary points out, "Inside legal counsel to a corporation or similar organization . . . is fully empowered to engage in privileged communications." 1 RESTATEMENT § 72, cmt. c, at 551.

Second, the District Court noted that in *Upjohn* the interviews were conducted by attorneys, whereas here many of the interviews in KBR's investigation were conducted by non-attorneys. But the investigation here was conducted at the direction of the attorneys in KBR's Law Department. And communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. *See FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 7:18, at 1230–31 (2013) ("If internal investigations are conducted

by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted."). So that fact, too, is not a basis on which to distinguish *Upjohn*.

Third, the District Court pointed out that in *Upjohn* the interviewed employees were expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, whereas here they were not. The District Court further stated that the confidentiality agreements signed by KBR employees did not mention that the purpose of KBR's investigation was to obtain legal advice. Yet nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in *Upjohn* employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. *Cf. Upjohn*, 449 U.S. at 387, 101 S. Ct. 677 (Upjohn's managers were "instructed to treat the investigation as 'highly confidential' "). KBR employees were also told not to discuss their interviews "without the specific advance authorization of KBR General Counsel." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, — F.3d —, — n.33, 2014 WL 1016784, at *3 n.33 (D.D.C. Mar. 6, 2014).

In short, none of those three distinctions of *Upjohn* holds water as a basis for denying KBR's privilege claim.

More broadly and more importantly, the District Court also distinguished *Upjohn* on the ground that KBR's internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The District Court therefore concluded that the purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice. In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.

The District Court began its analysis by reciting the "primary purpose" test, which many courts (including this one) have used to resolve privilege disputes when attorney-client communications may have had both legal and business purposes. *See id.* at *2; *see also In re Sealed Case*, 737 F.2d at 98–99. But in a key move, the District Court then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made "but for" the fact that legal advice was sought. 2014 WL 1016784, at *2. In other words, if there was any other purpose behind the communication, the attorney-client privilege apparently does not apply. The District Court went on to conclude that KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal

advice." *Id.* at *3; *see id.* at *3 n.28 (citing federal contracting regulations). Therefore, in the District Court's view, "the primary purpose of" the internal investigation "was to comply with federal defense contractor regulations, not to secure legal advice." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, — F.3d —, —, 2014 WL 929430, at *2 (D.D.C. Mar. 11, 2014); *see id.* ("Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense.").

The District Court erred because it employed the wrong legal test. The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Under the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. We are aware of no Supreme Court or court of appeals decision that has adopted a test of this kind in this context. The District Court's novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392, 101 S. Ct. 677. We reject the District Court's but-for test as inconsistent with the principle of Upjohn and longstanding attorney-client privilege law.

Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find the one primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication? As the Reporter's Note to the Restatement says, "In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." 1 RESTATEMENT § 72, Reporter's Note, at 554. We agree with and adopt that formulation—"one of the significant purposes"—as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes

of the attorney-client communication.

In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy. . . .

In this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR's privilege claim on the ground that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to obtain or provide legal advice, the District Court applied the wrong legal test and clearly erred. . . .

In re KELLOGG BROWN & ROOT, INC., 796 F.3d 137 (D.C. Cir. 2015) (KBR II)

WILKINS, Circuit Judge:

In a prior petition for writ of mandamus on this case, we noted that "[m]ore than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756 (D.C. Cir. 2014) ("*In re KBR*") (citing *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). Accordingly, we granted the writ and vacated the District Court's order to produce key documents from such an investigation. We allowed, however, that the District Court might consider "timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection."

In a series of orders on which Petitioner Kellogg Brown & Root ("KBR") now seeks a second writ of mandamus, the District Court found that the same contested documents should be turned over in discovery. We agree that these challenged decisions suffer from the same fundamental flaw: They run contrary to precedent by injecting uncertainty into application of attorney-client privilege and work product protection to internal investigations. *See Swidler & Berlin v. United States*, 524 U.S. 399, 409, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998); *Upjohn*, 449 U.S. at 393; *In re KBR*, 756 F.3d at 763. Because we find the District Court's orders irreconcilable with binding precedent, we grant the writ and vacate the orders. KBR now seeks our intervention on the District Court's determinations that the attorney-client privilege and work product protection were impliedly waived for these same documents. . . .

KBR's purported implied waiver runs to a February 2014 deposition of Christopher Heinrich, KBR Vice President (Legal), on behalf of KBR. *See* Fed. R. Civ. P. 30(b)(6) (requiring a corporation to "designate one or more officers" or other persons to testify "about information known or reasonably available to the organization."). Among the

subjects that Barko directed KBR to produce a representative to testify on was "Topic Q," defined as:

> Any investigation or inquiry, internal or external, formal or informal, of [the KBR employee and subcontractor at the center of the alleged fraud] or any of the matters identified in [above-listed topics]. The scope shall include knowledge of everyone who participated in the investigation.

KBR's litigation counsel offered a "preliminary statement" at the outset of the deposition that KBR was producing Heinrich as the company's representative on four noticed topics, including Topic Q, but was doing so "subject to the company's claims of attorney-client privilege" and work product protection. In answer to a question from Barko's attorney, Heinrich testified he had in preparation for the deposition reviewed the now-disputed documents related to KBR's internal investigation (the Code of Business Conduct documents or "COBC documents"). Throughout the examination, KBR's attorney instructed Heinrich not to answer questions about the contents of the internal investigation on the basis of attorney-client privilege and work product protection.

After Barko's lawyer completed his examination of Heinrich, KBR's litigation counsel conducted a cross-examination. He explained that Heinrich had been asked "several questions designed to try to determine whether or not the Code of Business Conduct investigation is privileged, and I am going to ask questions establishing that they are." Responding to the questions that followed, Heinrich testified that KBR had a contractual reporting duty pursuant to the Anti-Kickback Act to notify the Department of Defense if it had reason to believe that a violation of the Act had occurred. Heinrich testified that KBR adhered to that obligation and had made disclosures pursuant to the same duty in other instances. And Heinrich explained that even when KBR has made a notification to the Department as required by a contract, it has never provided an internal investigation itself to the Department because it has always treated the investigation as subject to attorney-client privilege. . . .

First, the District Court concluded that the COBC documents must be produced under Federal Rule of Evidence 612 on the theory that KBR waived attorney-client privilege and work product protection when Heinrich reviewed the documents in preparation for his deposition.

Second, the District Court concluded that KBR waived attorney-client privilege and work product protection for the COBC documents under the doctrine of "at issue" waiver.

Both rulings were in error for the reasons that follow. . . .

At Heinrich's deposition, he stated that he had reviewed the COBC documents in preparation for his testimony. Barko thereafter sought disclosure of the COBC documents under Federal Rule of Evidence 612, which provides that where a witness

has used a writing to refresh memory before testifying, the adverse party is entitled to have it produced and to introduce into evidence any portion that relates to the witness's testimony, "if the court decides that justice requires the party to have those options." Fed. R. Evid. 612(a)(2).

To make its decision, the District Court engaged in a balancing test. It identified several factors supporting disclosure and several factors running against disclosure. And it concluded that "fairness considerations support disclosure" based on this "context-specific determination about the fairness of the proceedings and whether withholding the documents is consistent with the purposes of attorney-client privilege."

The balancing test was inappropriate in the first instance. Rule 612 applies only where a witness "uses a writing to refresh memory." Fed. R. Evid. 612(a). Thus, "even if the witness consults a writing while testifying, the adverse party is not entitled to see it unless the writing influenced the witness's testimony." 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 612.04(2)(b)(i) (2d ed. 1997) (emphasis added); *see, e.g.*, *Sporck. v. Peil*, 759 F.2d 312, 318–19 (3d Cir. 1985) (granting mandamus to vacate a Rule 612(a)(2) production order where there had been no witness admission that his answers to "specific areas of questioning were informed by documents he had reviewed"). It cannot be the case that just stating the documents were privileged constitutes a testimonial reliance on their contents; else, attorney-client privilege and work product production would mean nothing at all in that their mere invocation would entitle an adversary to production of the privileged or protected materials.

Further, even if the balancing test had been appropriate, the District Court's conclusions were precluded by *Upjohn*. Courts have divided on how to reconcile Rule 612 balancing with attorney-client privilege and work product protection. *See generally Barrer v. Women's Nat'l Bank*, 96 F.R.D. 202, 204 (D.D.C. 1982) (describing conflicting authority on interaction of Rule 612 and claims of attorney-client privilege or work product protection); *cf.* H.R. Rep. No. 93-650, at 13 (1973) ("The Committee intends that nothing in [Rule 612] be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory."). But the District Court's balancing would allow the attorney-client privilege and work product protection covering internal investigations to be defeated routinely by a counter-party noticing a deposition on the topic of the privileged nature of the internal investigation. *Upjohn* teaches that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all." 449 U.S. at 393. The District Court's ruling, therefore, runs counter to *Upjohn*.

In this case, Barko noticed the deposition to cover the topic of the COBC investigation itself, as distinguished from the events that were the subject of the investigation. Both parties told us that their understanding at the time of the deposition was that Barko intended to examine whether and to what extent the COBC investigation was privileged. To prepare adequately for the deposition, Heinrich had no choice but to review

documents related to the COBC investigation.

At oral argument on this Petition, Barko took the absurd position that KBR's mistake was having Heinrich personally review the COBC documents rather than having someone give him a summary. Barko asserted that in order to avoid privilege waiver KBR should have produced a Rule 30(b)(6) representative with only second- or third-hand knowledge of the investigation rather than first-hand knowledge. This makes no sense. Such a rule would encourage entities to provide less knowledgeable corporate representatives for deposition, thus defeating the purpose of civil discovery to establish "the fullest possible knowledge of the issues and facts before trial." *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Brownell*, 225 F.2d 532, 541 (D.C. Cir. 1955) (internal quotation marks omitted).

Barko cannot "overcome the privilege by putting [the COBC investigation] in issue" at the deposition, Koch v. Cox, 489 F.3d 384, 391 (D.C. Cir. 2007), and then demanding under Rule 612 to see the investigatory documents the witness used to prepare. Allowing privilege and protection to be so easily defeated would defy "reason and experience," Fed. R. Evid. 501, and "potentially upend certain settled understandings and practices" about the protections for such investigations, *In re KBR*, 756 F.3d at 762.

In sum, the District Court's Rule 612 ground for its production order was clear error because there was no basis for the fairness balancing test it conducted and, even had there been, the test failed to give due weight to the privilege and protection attached to the internal investigation materials.

The District Court also found that KBR had waived attorney-client privilege and work product protection by placing the COBC documents "at issue." Such waivers are certainly possible: "Under the common-law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy." *Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997) (citing 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.49(5) (3d ed.1997)). . . .

We have explained—and the District Court noted our precedent—that a party may not use privilege "as a tool for manipulation of the truth-seeking process." *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982) ("*Sealed Case* (general counsel's files)"). As such, a party asserting attorney-client privilege "'cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.'" *Id.* (quoting 8 JOHN H. WIGMORE & JOHN T. MCNAUGHTON, EVIDENCE IN TRIALS AT COMMON LAW § 2327 (1961); *see also Clark v. United States*, 289 U.S. 1, 13, 53 S. Ct. 465, 77 L. Ed. 993 (1933) ("The privilege takes flight if the relation is abused."); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("[T]he attorney-client privilege cannot at once be used as a shield and a sword."). At the same time, we have held that a "general assertion lacking substantive content that one's attorney has examined a certain matter is not sufficient to waive the attorney-client privilege." *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989).

The District Court found that "KBR injected the COBC contents into the litigation by itself soliciting Heinrich's Rule 30(b)(6) testimony." It noted that excerpts from this testimony disclosing the fact of the COBC investigations and KBR's reporting duties under Defense Department contracts were attached to KBR's motion for summary judgment and that KBR referenced deposition language in its Statement of Material Facts as to Which There Is No Genuine Dispute, required by Local Civil Rule of Procedure 7(h)(1). And, KBR discussed the COBC "investigative mechanism" in its memorandum in support of summary judgment (in a footnote quoted in full in Part I of the body of this Opinion). All this, in the view of the District Court, added up to a "message" that the COBC reports "contain no reasonable grounds to believe a kickback occurred." Thus, it concluded that KBR created an implied waiver by "actively" seeking "a positive inference in its favor based on what KBR claims the documents show." The District Court also denied KBR leave to amend its pleadings to strike the sections that the District Court interpreted as waiving the privilege and protection.

To the extent the District Court relied on Heinrich's deposition testimony or the statement of undisputed material facts, we think that—as a matter of logic—neither could possibly give rise to an inference that places the contents of the deposition at issue. The deposition transcript is simply a record of what was said, not itself an argument. The Rule 7(h)(1) statement is a required companion filing to a summary judgment motion submitting "material facts as to which the moving party contends there is no genuine issue." Local Civ. R. 7(h)(1). The opposing party has the opportunity to respond to each asserted fact with a contention that there is a "genuine issue necessary to be litigated," but there are no inferences to be made and none to be contested in these statements alone. *Id.* This is not to say that deposition testimony or a Rule 7(h)(1) statement can never create a waiver of attorney-client privilege or work product protection. By making partial disclosures of privileged information, they surely can. But the deposition transcript and Rule 7(h)(1) statements cannot themselves give rise to inferences that place privileged materials "at issue." *See In re Sims*, 534 F.3d 117, 137 (2d Cir. 2008) (holding that privilege waiver analysis based on deposition testimony in civil action must recognize that the testimony "might never come to the attention of any decisionmaker").

The reference to the COBC investigation in the memorandum in support of summary judgment presents what is at first glance a more difficult question. By stating that KBR performed a COBC investigation and that, afterward, KBR did not report any wrongdoing to the Department of Defense, a factfinder could infer that the investigation found no wrongdoing. The District Court concluded that KBR had asked it to draw an "unavoidable" inference by placing the footnote at the end of a sentence calling Barko's claims "baseless." We disagree that such an inference was unavoidable, because an alternative inference—presumably, the one Barko would ask a fact-finder to draw—is that the investigation showed wrongdoing but KBR nonetheless made no report to the government.

Pursuant to the acquisition regulations under which it contracted, KBR was required to "have in place and follow reasonable procedures designed to prevent and detect possible

violations [of the Anti-Kickback statute]," to make a written report when it "ha[d] reasonable grounds to believe that a violation . . . may have occurred," and to "cooperate fully with any Federal agency investigating a possible violation." 48 CFR § 52.2037(c)(1)–(3). KBR has represented without dispute that it was expressly permitted to retain privilege as to the contents of its investigations, which is not unusual in federal government compliance programs. Department of Justice policy, for instance, provides that "waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative," U.S. Attorney's Manual § 9–28.710, and that, with respect to internal investigations, "[a] corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation's eligibility to receive cooperation credit," *id.* § 9–28.720(b). Under such compliance programs, companies know that their disclosures may receive greater credence if they choose to buttress them with otherwise-privileged information. But companies and the government can, and often do, structure legitimate compliance and reporting programs that do not involve waiving privilege. Where companies choose not to waive privilege, "[t]hey will, of course, bear the risk that their reports will not be accepted as full disclosures." *Sealed Case* (general counsel's files), 676 F.2d at 823.

Read in this context, footnote 5 in KBR's summary judgment motion is essentially a recitation of the terms of its deal with the government, including the express reservation of attorney-client privilege and work product protection. There was certainly no actual disclosure of opinion work product (the conclusions of the COBC investigation) in the footnote. Instead, the District Court found that KBR impliedly disclosed opinion work product, that is, "the substantive conclusion of its COBC investigations." In *Sealed Case* (general counsel's files), we found implied waiver primarily because waiver was consistent with holding the company to the terms of its bargain. Here, holding KBR to the terms of its bargain would mean deciding that "[KBR's] reports will not be accepted as full disclosures," 676 F.2d at 823, rather than inferring that KBR was intending to say that its non-report to the government should be given weight and credibility as a finding of no wrongdoing.

There's the rub: Where KBR neither directly stated that the COBC investigation had revealed no wrongdoing nor sought any specific relief because of the results of the investigation, KBR has not "based a claim or defense upon the attorney's advice." *Koch*, 489 F.3d at 390; *see also White*, 887 F.2d at 271. As we explained in *Sealed Case* (general counsel's files):

> Corporations may protect their privileges without manipulation simply by being forthright with their regulators and identifying material as to which they claim privilege at the time they submit their voluntary disclosure reports. They will, of course, bear the risk that their reports will not be accepted as full disclosures. But if they choose to make a pretense of unconditional disclosure, they bear another risk—that we will imply a waiver of privilege with respect to any material necessary

> for a fair evaluation of their disclosures.

676 F.2d at 823 (emphasis added). Here, there was no pretense of unconditional disclosure.

Notwithstanding all this, KBR's summary judgment motion footnote said not only that it conducted a COBC investigation relating to Barko's claims and did not report any wrongdoing to the government, but also that when it discovers wrongdoing during investigations, "KBR makes such disclosures." KBR Defendants' Motion for Summary Judgment at 4 n.5, ECF No. 136. The District Court's order turned on this point and it is undoubtedly the highest hurdle to our conclusion that KBR did not waive the privilege.

But we think the context of the whole passage is essential to our clear error conclusion. First, the footnote constitutes a recitation of facts that appears only in the motion's introduction, not in an argument or claim concerning the privileged documents' contents. We previously have rejected the idea that we must treat recitations of facts as making arguments, and KBR benefits from the application of that principle here. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) (explaining that appellant forfeited argument by explaining only its underlying facts in "the statement of the facts section of its opening brief."). Second, and in any event, "[i]t is not our practice ... to indulge cursory arguments made only in a footnote," *C.I.R. v. Simmons*, 646 F.3d 6, 12 (D.C. Cir. 2011) (internal quotation marks omitted); *see also Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (en banc) (same). Furthermore, even though KBR did not affirmatively argue that the court should find no wrongdoing because KBR's investigation had found no wrongdoing, the District Court reasoned that such an "argument" could be inferred from the footnote. But KBR was the movant for summary judgment, and it is beyond peradventure that all inferences were to be drawn against KBR at this stage of the litigation, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and "it was error for the district court not to view [KBR]'s statements in the light most favorable to [Barko]," *Carr v. District of Columbia*, 587 F.3d 401, 414 (D.C. Cir. 2009). In sum, the District Court may not, in resolving the motion for summary judgment, make any inference in KBR's favor based on the contents of the privileged documents. . . . [The court's discussions of work product doctrine and standards of review are omitted.]

Who controls the privilege in the dual representation context: As will be further discussed in Chapter 15, it can be permissible in some circumstances for an attorney to simultaneously represent a corporation and the corporation's employee. The question can arise in that context who controls waiver with respect to particular communications in the course of the representation: the corporation or the individual. There is substantial case law on how to conduct waiver analysis in this context. For present purposes, one only need to see the contours of the issue, as illustrated in this recent decision in the pretrial litigation connected to the prosecution of Theranos founder Elizabeth Holmes.

UNITED STATES v. HOLMES, 2021 WL 2309980 (N.D. Cal. June 3, 2021)

NATHANAEL M. COUSINS, United States Magistrate Judge:

The government seeks to have certain Theranos corporate documents deemed admissible for trial against Defendant Elizabeth A. Holmes….

In 2011, Boies Schiller Flexner LLP ("BSF") began representing Holmes and Theranos in an intellectual property dispute. After the representation began, BSF continued to offer Holmes and Theranos a variety of legal services in relation to Theranos' patent portfolio, press interactions, and inquiries from government agencies and departments. Despite the breadth and duration of BSF's involvement, Holmes and BSF did not sign an engagement letter or establish any formal guidelines describing the scope of BSF's legal representation. Holmes believed that BSF and BSF partner, David Boies, were her attorneys up to the point when she retained separate counsel to represent her in the Securities and Exchange Commission and Department of Justice investigations into Theranos in 2016.

In June 2020, the government served Holmes with its Exhibit List for trial, which included thirteen documents that Holmes claims implicate her attorney client privilege. The government worked with the Theranos Assignee, "the controller of any remaining Theranos corporate privilege," to handle the documents. Holmes' claim for attorney client privilege is predicated on her understanding that Boies and BSF jointly represented Theranos and Holmes as an individual, not as a representative of the company. The government contests this assertion, insisting that there was no joint representation, so the documents are subject only to corporate privilege….

Attorney-client privilege is the oldest common law privilege for confidential communications. Upjohn Co. v. U.S., 449 U.S. 383, 390 (1981). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. Information is covered by attorney-client privilege: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself of by the legal adviser, (8) unless the protection be waived.

Holmes opposes the government's motion on the grounds that Boies and BSF jointly represented her and Theranos. The parties disagree on whether the Court should apply a subjective belief test or the Graf test. Following Ninth Circuit case law, the Court applies the *Graf* test. At the December 16, 2020 hearing, Holmes argued that the Court should not use the *Graf* test because it does not apply to this case. The Court disagrees for three reasons.

First, contrary to Holmes' assertion, the Ninth Circuit's discussion of two joint representation tests in the *Graf* opinion does not limit the *Graf* test's application to

specific cases. The *Graf* opinion describes the two possible tests for joint representation—the *Bevill* test and the subjective belief test—but after extensive discussion of policy and the case law in other circuits, the Ninth Circuit unambiguously chose to adopt the *Bevill/Graf* test. U.S. v. Graf, 610 F.3d 1148, 1161 (9th Cir. 2010).

Second, the facts of *Graf* are analogous to this case. Like Holmes, Graf was indicted for his involvement in the fraudulent operation of a company. Graf, 610 F.3d at 1152. Like Holmes, Graf was the founder of the company, and he sought to exclude the testimony of attorneys who represented the company by asserting his individual attorney-client privilege. Although Graf was not listed as an employee of the company, the Ninth Circuit determined that this classification was an effort to circumvent several cease-and-desist orders against him so it treated Graf as a "functional employee, not an independent outside consultant." These factual parallels reinforce that even if the Graf test did not apply to all joint representation disputes, this case would fall within its purview.

Finally, Holmes argues that *Graf* does not apply here because *Graf* addresses the question of formation while In re Teleglobe Communications Corp., 493 F.3d 345, 378 (3rd Cir. 2007), addresses the question of scope. The Court disagrees with this characterization of the cases. To demonstrate: envision a Venn diagram with one circle for "company legal matters," another circle for "individual legal matters," and a small area of overlap for "common interests." The *Graf* test establishes that communications with corporate counsel about "individual legal matters" are controlled by the individual's privilege. *Teleglobe* states that communications in the overlapping "common interests" area are controlled by the individual's privilege and the company's privilege. Because the two tests govern different parts of the diagram, they are not conflicting tests that apply at different times; rather they work together to define who holds the privilege for what at any moment. Aside from the fact that the *Teleglobe* decision is not binding on this Court, it does not apply to this case because Holmes asserts that the documents at issue regard her individual legal matters, not "common interests." Therefore, the Court must apply the Ninth Circuit's *Graf* test.

Graf requires the person seeking to assert individual privilege to satisfy all of the following factors to establish a joint representation:

> First, they must show they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

Before analyzing admissibility of the exhibits, the Court must first apply *Graf* to

determine if Holmes has an individual privilege to assert.

The Court finds that Holmes fails to establish a joint representation because she cannot satisfy the second, fourth, and fifth elements of the *Graf* test. To satisfy the *Graf* test, Holmes must show that when she approached Boies and BSF for legal advice, she made it clear that she was seeking legal advice in her personal capacity. Holmes fails to make this showing. In her opposition, Holmes insists that "Boies Schiller's representation of Ms. Holmes (in addition to Theranos) is a matter of public record and thus there is no relationship to be implied," but she is unable to point to any documents supporting this allegedly obvious joint representation. Holmes admits that "there was no engagement letter relating to Mr. Boies' or his firm's representation of Ms. Holmes and/or Theranos." And Holmes does not point to any financial records showing that she paid Boies or BSF from her own accounts, not Theranos'. Holmes heavily relies on her belief that Boies and BSF jointly represented her and Theranos, however, Holmes' subjective belief is not the standard. The standard is a "clear" communication that the individual sought legal advice as an individual, not as a representative of the company; and on that Holmes falls short.

Holmes also cannot show that her conversations with Boies and BSF were confidential. None of the contested documents include conversations exclusively between Holmes and Boies or BSF. Holmes argues that "with one exception, the communications are between Ms. Holmes or other senior Theranos employees, Theranos in-house attorneys, and Boies Schiller attorneys." However, if Holmes is arguing that she sought individual legal advice, the presence of Theranos employees and attorneys destroys the privilege.

Lastly, Holmes fails to show that that the substance of her conversations with Boies and BSF did not concern matters within the general affairs of the company. None of the contest exhibits discuss Holmes' individual legal interests. All thirteen documents related to her "official duties" or the "general affairs" of the company like conversations with investors, billing, and media strategy.

In sum, the Court finds that Boies and BSF did not jointly represent Holmes and Theranos because Holmes does not satisfy the second, fourth, and fifth factors of the Graf test. Therefore, the holder of attorney-client privilege over the contested documents Theranos' Assignee, and admissibility of the documents hinges on their waiver of corporate privilege. See Commodity Futures Trading Com v. Weintraub, 471 U.S. 343, 349 (1985) (finding that "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well.").

For the foregoing reasons, the Court GRANTS the government's motion and finds that the thirteen disputed documents, labeled as Exhibits 1-13 in ECF 559-12, are not subject to Holmes' individual privilege. The documents are only subject to the Theranos Assignee's corporate privilege, which the Assignee has waived….

D. Joint Defense Agreements

Joint defense agreements (JDAs) are routine in the investigation and defense of corporate crime cases. Parties to such agreements typically include the corporation and the various employees whose conduct may be within the scope of the matter under investigation who are represented by their own counsel. The ability to share costs and information among those under government investigation can make a JDA essential to conducting an effective defense.

In the following case, the court explains the important relationship between JDAs and the attorney-client privilege. The essential and logically necessary principle about this relationship is this: A joint defense agreement cannot create or expand an attorney-client privilege; it can only limit the circumstances that will result in a *waiver* of the privilege. In other words, the so-called "common interest doctrine" is an exception to the general principles governing waiver of the attorney-client privilege. The difficulty in the joint defense situation is the avoidance of thorny conflicts of interest among the various counsel as a result of information-sharing. (Conflict of interest principles are further explored in Chapter 15.) When representing either a corporation or its individual employees, it is important to thoroughly explain the potential benefits and drawbacks of entering into a JDA, as well as the obligations a JDA does and does not impose on the parties.

UNITED STATES v. STEPNEY, 246 F. Supp. 2d 1069 (N.D. Cal. 2003)

PATEL, Chief Judge:

. . . Defendants are charged with participation in the criminal enterprises of a street gang in the Hunter's Point area of San Francisco. In a series of three indictments, the government has charged a total of nearly thirty defendants with over seventy substantive counts relating to the operation of the gang over a period of several years. The number of defendants and the separate crimes charged render this case extraordinarily factually complex. Defense counsel report that they have already received discovery of over 20,000 pages of police reports, FBI memos, and other law enforcement materials.

In an effort to prepare coherent defenses efficiently, various defense counsel have sought to enter into joint defense agreements that would allow defendants to share factual investigations and legal work product. Out of concern for the Sixth Amendment rights of the defendants and the integrity of the proceedings, at the parties' initial appearance on October 15, 2001, the court ordered that any joint defense agreements be committed to writing and provided to the court for in camera review. No joint defense agreements were ever filed with the court pursuant to this order.

More than a year after the court's initial order, the attorney for one defendant moved to withdraw his representation on the grounds that he had entered into a joint defense agreement with another defendant who he had since come to believe was cooperating with the prosecution. Although the attorney seeking to withdraw did not believe that he

had obtained confidential information from the cooperating defendant, he did believe that the joint defense agreement had created an implied attorney-client relationship that included a duty of loyalty. The attorney maintained that this duty of loyalty would prevent him from cross-examining the cooperating defendant, should he testify at trial.

The court denied the motion to withdraw after conducting a colloquy in which the cooperating defendant waived any attorney-client privilege with respect to information received by the moving attorney. The court also ruled that joint defense agreements do not create in one attorney a duty of loyalty toward the defendant with whom he collaborates. In an order dated November 22, 2002, the court set forth requirements that future joint defense agreements: (1) be in writing; (2) contain a full description of the extent of the privilege shared; (3) contain workable withdrawal provisions; and (4) be signed not only by the attorneys but also by the clients who hold the privileges at issue.

The joint defense privilege is commonly described as an extension of the attorney-client privilege. Scholarly commentators have uniformly argued that the joint defense privilege differs sufficiently from the attorney-client privilege in both purpose and scope that the two should be viewed as entirely separate doctrines. To inform the analysis of the proposed joint defense agreements, the court must first examine in detail the nature of the joint defense privilege.

"The attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer." The purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."

The attorney-client privilege limits only the power of a court to compel disclosure of attorney-client communications or otherwise admit the communications themselves into evidence. Outside the courtroom, the privilege does not provide grounds for sanctioning an attorney's voluntary disclosure of confidential communications to third parties. This is not to say that attorneys may freely reveal their clients' confidences should they so desire.

The ethical duty of confidentiality may be enforced by more than just sanctions against an offending attorney. In a criminal case, where an attorney violates this ethical duty by revealing a client's confidences to the government, a court may suppress the resulting evidence. Prosecutors may also be subject to sanctions where they have induced an attorney to violate her duty of confidentiality.

In criminal cases, the Constitution also protects confidential attorney-client communications from the eyes and ears of the government. An intrusion by the government into an attorney-client relationship in order to obtain confidential information may be deemed a violation of a defendant's Sixth Amendment right to effective assistance of counsel or Fifth Amendment due process rights. In such a situation, a court may suppress evidence gathered as a result of the communication or,

in egregious cases where the prejudice cannot otherwise be cured, dismiss the indictment. . . .

The joint defense privilege initially arose as an extension of the attorney-client privilege against court-ordered disclosure against confidential communications. Ordinarily, the attorney-client privilege will be deemed waived where a client discloses the contents of an otherwise privileged communication to a third party or where the communication occurs in the presence of third parties. The joint defense privilege was adopted as an exception to this waiver rule, under which communications between a client and his own lawyer remain protected by the attorney-client privilege when disclosed to co-defendants or their counsel for purposes of a common defense.

Although established as an evidentiary rule which bound courts from compelling disclosure of certain evidence, the joint defense privilege was soon applied as an ethical doctrine which imposed on counsel a limited duty of confidentiality toward their client's co-defendants regarding information obtained in furtherance of a common defense. In particular, courts have ruled that an attorney may be disqualified if her client's interests require that she cross-examine (or oppose in a subsequent action) another member of a joint defense agreement about whom she has learned confidential information. . . .

"Under their supervisory power, courts have substantial authority to oversee their own affairs to ensure that justice is done." A court may exercise its supervisory powers to implement a remedy for the violation of a recognized statutory or constitutional right, or may take preemptive steps to avoid such violations by imposing procedural rules not specifically required by the Constitution or Congress.

These supervisory powers unquestionably allow courts to require disclosure of the precise nature of a criminal defendant's representation to ensure that no conflict of interest exists that would deprive a defendant of his Sixth Amendment right to effective assistance of counsel. Courts have routinely intervened—prior to any controversy arising—where the circumstances of a criminal defendant's representation raises the potential for conflict of interest during the course of the proceedings, even before intervention is required by statutory or constitutional rule. . . .

[J]oint defense agreements impose an ethical duty of confidentiality on participating attorneys, presenting the potential for conflicts of interest that might lead to the withdrawal or disqualification of a defense attorney late in the proceedings or the reversal of conviction on appeal. When a party to a joint defense agreement decides to cooperate with the government, the potential for disclosure of confidential information also threatens other defendants' Sixth Amendment rights. "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." . . . Given the high potential for mischief, courts are well justified in inquiring into joint defense agreements before problems arise. . . .

The threat that these agreements might pose to defendants' Sixth Amendment rights—and to the integrity of the proceedings—warrants the minimal disclosures that the court has thus far required and the restrictions imposed by this court. The court appreciates defendants' concern that disclosing who among them have signed a joint defense agreement might give the government insight into the trial strategies of various defendants. Defendants have not, however, asserted any legal grounds to prevent disclosure of joint defense agreements to the court. To the extent that joint defense agreements simply set forth the existence of attorney-client relationships—implied or otherwise—between various attorneys and defendants, the contents of such agreements do not fall within the attorney-client privilege. . . .

The proposed agreement submitted by defendants is problematic in at least two material respects. First, the proposed agreement purports to create a duty of loyalty on the part of signing attorneys that extends to all signing defendants. The proposed defense agreement also does not contain workable withdrawal provisions that adequately avoid the possibility of disqualification on the eve of trial, or even during trial.

The proposed joint defense agreement explicitly imposes on signing attorneys not only a duty of confidentiality, but a separate general duty of loyalty to all signing defendants. Such a duty has no foundation in law and, if recognized, would offer little chance of a trial unmarred by conflict of interest and disqualification.

Joint defense agreements are not contracts which create whatever rights the signatories chose, but are written notice of defendants' invocation of privileges set forth in common law. Joint defense agreements therefore cannot extend greater protections than the legal privileges on which they rest. A joint defense agreement which purports to do so does not accurately set forth the protections which would be given to defendants who sign. . . .

Courts have consistently viewed the obligations created by joint defense agreements as distinct from those created by actual attorney-client relationships. . . . [C]ourts have also consistently ruled that where an attorney represents a client whose interests diverge from a party with whom the attorney has previously participated in a joint defense agreement, no conflict of interest arises unless the attorney actually obtained relevant confidential information. This position is inconsistent with a general duty of loyalty owed to former clients, which would automatically preclude an attorney from subsequently representing a client with an adverse interest. . . .

Admittedly, there is a significant difference between the disclosure of confidential information and the use of confidential information without disclosure. Both the common law doctrine of attorney-client privilege and the ethical duty of confidentiality address only the disclosure of confidential information and not the use of confidential information, without disclosure, in a manner adverse to the client's interests. Any obligation on the part of an attorney not to use confidential information against a client arises from separate duties. An attorney might use information gained in confidence to structure an investigation for facts with which she could discredit the cooperating

witness without ever disclosing the information and running afoul of either the attorney-client privilege or the duty of confidentiality. . . .

The court finds no cases recognizing joint defense agreements as creating either a true attorney-client relationship or a general duty of loyalty. . . .

There is good reason for the law to refrain from imposing on attorneys a duty of loyalty to their clients' co-defendants. A duty of loyalty between parties to a joint defense agreement would create a minefield of potential conflicts. Should any defendant that signed the agreement decide to cooperate with the government and testify in the prosecution's case-in-chief, an attorney for a non-cooperating defendant would be put in the position of cross-examining a witness to whom she owed a duty of loyalty on behalf of her own client, to whom she also would owe a duty of loyalty. This would create a conflict of interest which would require withdrawal. Thus, the existence of a duty of loyalty would require that the attorneys for all non-cooperating defendants withdraw from the case in the event that any one participating defendant decided to testify for the government.

A duty of loyalty would even require withdrawal where a defendant sought to put on a defense that in any way conflicted with the defenses of the other defendants participating in a joint defense agreement. An attorney with a duty of loyalty to defendants other than her client could not shift blame to other defendants or introduce any evidence which undercut their defenses. Nor could an attorney cross-examine a defendant who testified on his own behalf.

As these scenarios illustrate, a joint defense agreement that imposes a duty of loyalty to all members of the joint defense agreement eliminates the utility of employing separate counsel for each defendant and (for purposes of conflict analysis) effectively creates a situation in which all signing defendants are represented jointly by a team of all signing attorneys. . . .

Disqualification of attorneys late in the proceedings benefits no one—it deprives defendants of counsel whom they know and trust and perhaps even chose; it forces delays while new counsel become acquainted with the case, which harm defendants, the prosecution, and the court. . . .

Because neither precedent nor sound policy supports imposing on attorneys who sign a joint defense agreement a general duty of loyalty to all participating defendants, the court finds the provisions of the proposed Joint Defense Agreement that purport to create a duty of loyalty unacceptable. . . .

The proposed joint defense agreement provides that any member may withdraw from the agreement by giving notice to all other members. At the hearing on the proposed agreements, defense counsel suggested that signing defendants were willing accept the risk of conflict created by a withdrawing defendant by accepting the risk that counsel might be disqualified. Ordinarily, defendants seeking to enter into representation which

holds potential conflicts of interest accept risks by waiving their rights to assert the conflict, rather than by steeling themselves to assert it as defense counsel suggests. The situation created by the joint defense agreement is no exception.

A first question arising as to the nature of an appropriate waiver is at what point in the proceedings defendants should waive their rights in order to avoid conflicts. Given the highly divergent interests of defendants in the present case, the court is entitled to require that waiver provisions be included in the joint defense agreement, so that defendants who participate are fully apprised of the potential for conflict and understand the consequences both of entering into the joint defense agreement and of withdrawing from it. The alternative—deferring action on waiver until one defendant decides to testify—fails to avoid the danger of disqualification entirely.

A second and more complicated question is what sort of waiver provisions would avoid the threat of conflict while adequately protecting defendants' right to cooperate on a joint defense. . . . One court has allowed defendants to waive potential conflict by agreeing in advance that no attorney will use any information obtained by reason of the confidentiality in cross-examining defendants. This method of waiving conflict, however, stands in tension with the general principle that where an attorney has actually obtained confidential information relevant to her representation of a client, the law presumes that she cannot avoid relying on the information—however indirectly or unintentionally—in forming legal advice and trial strategy. Because the cross-examining attorney still holds relevant confidences of the witness, it is not clear that she can truly operate free from conflict. The solution also compromises one defendant's right to a fully zealous attorney for another defendant's decision to testify. The waiver is less informed, as each defendant must waive the right to use the others' confidences before knowing what those confidences are.

The better form of waiver is suggested by the American Law Institute–American Bar Association in their model joint defense agreement, which provides:

> Nothing contained herein shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney and the fact that any attorney has entered this Agreement shall not be used as a basis for seeking to disqualify any counsel from representing any other party in this or any other proceeding; and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such attorney's participation in this Agreement; and the signatories and their clients further agree that a signatory attorney examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any Defense Material or other information contributed by such client during the joint defense; and it is herein represented that each undersigned counsel to this

> Agreement has specifically advised his or her respective client of this clause and that such client has agreed to its provisions.

Joint Defense Agreement, Am. Law Institute–Am. Bar Ass'n, Trial Evidence in the Federal Courts: Problems and Solutions, at 35 (1999). Under this regime, all defendants have waived any duty of confidentiality for purposes of cross-examining testifying defendants, and generally an attorney can cross-examine using any and all materials, free from any conflicts of interest. This form of waiver also places the loss of the benefits of the joint defense agreement only on the defendant who makes the choice to testify. Defendants who testify for the government under a grant of immunity lose nothing by this waiver. Those that testify on their own behalf have already made the decision to waive their Fifth Amendment right against self-incrimination and to admit evidence through their cross-examination that would otherwise be inadmissible.

The conditional waiver of confidentiality also provides notice to defendants that their confidences may be used in cross-examination, so that each defendant can choose with suitable caution what to reveal to the joint defense group. Although a limitation on confidentiality between a defendant and his own attorney would pose a severe threat to the true attorney-client relationship, making each defendant somewhat more guarded about the disclosures he makes to the joint defense effort does not significantly intrude on the function of joint defense agreements. . . . Joint defense agreements, . . . serve a different purpose. Each defendant entering a joint defense agreement already has a representative, fully and confidentially informed of the client's situation. The joint defense privilege allows defendants to share information so as to avoid unnecessarily inconsistent defenses that undermine the credibility of the defense as a whole. In criminal cases where discovery is limited, such collaboration is necessary to assure a fair trial in the face of the prosecution's informational advantage gained through the power to gather evidence by searches and seizures. Co-defendants may eliminate inconsistent defenses without the same degree of disclosure that would be required for an attorney to adequately represent her client. The legitimate value of joint defense agreements will not be significantly diminished by including a limited waiver of confidentiality by testifying defendants for purposes of cross-examination only.

For the foregoing reasons, the Court rules as follows:

(1) Any joint defense agreement entered into by defendants must be committed to writing, signed by defendants and their attorneys, and submitted in camera to the court for review prior to going into effect.

(2) Each joint defense agreement submitted must explicitly state that it does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney. No joint defense agreement may purport to create a duty of loyalty.

(3) Each joint defense agreement must contain provisions conditionally waiving confidentiality by providing that a signatory attorney cross-examining any defendant

who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any material or other information contributed by such client during the joint defense.

(4) Each joint defense agreement must explicitly allow withdrawal upon notice to the other defendants.

The following is a sample joint defense agreement (envisioning a civil matter; however, the terms of such an agreement in a criminal matter would be highly similar). JDAs are contracts and should be read accordingly. What would be the pluses and minuses of this form of agreement if one were representing an individual in a corporate crime investigation?

JOINT DEFENSE AGREEMENT

This Joint Defense (the "Agreement") is made and entered into as of {DATE} by and among the undersigned counsel, for themselves and on behalf of their respective clients {LIST PARTIES} (each individually a "Party," and collectively, "Parties").

RECITALS

WHEREAS, the Parties {have been named as defendants/may be potential subjects of investigation} in {DESCRIPTION OF MATTER}.

WHEREAS, for purposes of this Agreement, the term "Counsel" means and includes any attorney representing any Party, including in-house attorneys, any and all paralegals, law clerks, and any outside vendors of the Parties' respective outside counsel acting at the direction of outside counsel, and any other persons expressly agreed to in writing by the Parties. The term "Outside Counsel" means and includes any attorney representing any Party at an outside law firm, as well as paralegals and law clerks working for such attorneys. The term "Joint Defense Group" means and includes the Parties and Counsel.

WHEREAS, the Parties possess common legal interests in the analysis and defense of certain assertions and claims relating to {MATTER}, including any and all potential affirmative defenses and counterclaims. The Parties wish to ensure that their attorneys are free to share and exchange information that may be useful in the representation of each Party, without waiving the confidentiality of communications and documents protected by the attorney-client privilege, the attorney-work product doctrine, or any other applicable privilege. The undersigned attorneys consider disclosure of matters of common concern to the Parties to be conducive to the effective representation of the Parties. Accordingly, the Parties are in agreement that all disclosures between and among the Parties and their counsel for purposes of a common defense shall be and are confidential, covered by the attorney-client privilege, the work-product doctrine, and any other applicable privileges, and that the Parties intend to preserve and extend the applicability of any applicable privilege or immunity to all information shared or exchanged pursuant to this Joint Defense Agreement in preparation for, during the defense of, and after the resolution of {MATTER}.

Notwithstanding the foregoing, nothing in this Joint Defense Agreement obligates the Parties to pursue joint defenses during the course of {MATTER}.

NOW, **THEREFORE**, the Parties and the Parties' Counsel agree as follows:

1. **Sharing Joint Defense Materials.**

a. Members of the Joint Defense Group are entitled to communicate and share information with each other as they see fit, both orally and in writing, in connection with {MATTER}. To that end, the Joint Defense Group (i) may share with each other information protected by the attorney-client privilege and the attorney work-product doctrine in order to assert common or joint defenses to the claims that are or may be asserted in {MATTER}, and (ii) may exchange with each other privileged and work-product information, whether oral, written, or electronic in form, including without limitation factual and/or legal analyses, mental impressions, legal memoranda, legal research, reports of witness interviews, expert reports, draft briefs and pleadings, and other information (once exchanged, the "Joint Defense Materials"). The Joint Defense Materials include, but are not limited to, the following: (a) any information or documents relating or referring to {MATTER} provided by or on behalf of any Party, (b) all copies, memoranda, summaries, analyses, and notes prepared by any Party or their respective counsel, experts or consultants relating to {MATTER}; (c) any portion, communication, or transmission of any information or documents described in this paragraph (d) information regarding the identification and description of documents relating to {MATTER}; (e) information regarding the transactions and events that are the subject of {MATTER}; (f) information and documents obtained from interviews with, and investigations of, clients, whether joint or individual; (g) information and documents obtained from interviews with, and investigations of, witnesses and potential witnesses; (h) information and documents obtained from interviews with experts or consultants; (i) drafts of pleadings and other papers; and (j) research, analyses, strategies, theories, mental impressions and other attorney work product.

b. To the extent the Parties and/or Counsel already have communicated and shared with each other confidential attorney-client communications and/or attorney work product or other information concerning {MATTER} that come within the definition of Joint Defense Materials under this Agreement, all such communications and information previously shared are subject to the terms of this Agreement.

2. **Preservation of All Privileges.**

a. Except as set forth below, unless expressly stated in writing to the contrary, any communications among the Joint Defense Group concerning Joint Defense Materials are confidential and remain protected from disclosure to any third party by the attorney-client privilege, work product protection and the joint defense doctrine, and any other applicable privileges, to the maximum extent permitted by law. Any inadvertent or purposeful disclosure of information exchanged pursuant to this Agreement, including

by one member of the Joint Defense Group to another, shall not constitute a waiver of any privilege or protection.

b. No member of the Joint Defense Group may waive, intentionally or otherwise, any privilege possessed by any other member of the Joint Defense Group. In the event any Party or Counsel purports to waive any privilege of another member of the Joint Defense Group, intentionally or otherwise, that waiver shall not be considered a waiver of the privilege by the Party or Counsel possessing the privilege and cannot be construed against the Party or Counsel possessing the privilege.

3. **No Disclosure to Third Parties.** Each member of the Joint Defense Group shall take reasonable steps to preserve the confidentiality of the Joint Defense Materials. Except as set forth in this Agreement, the Joint Defense Group members shall not disclose Joint Defense Materials to third parties without the consent of the member of the Joint Defense Group who provided the Joint Defense Materials pursuant to this Agreement. The Joint Defense Group members are not third parties, and disclosure to any other member of the Joint Defense Group conforms to this Agreement and is not a waiver of the attorney-client privilege, work product protection or the joint defense privilege. All persons permitted access to any Joint Defense Information shall be informed in writing that such information is confidential and privileged and subject to the terms of this Agreement, and shall agree to comply with the terms of this Agreement with respect to the confidentiality of such information by signing Exhibit A.

4. **No Agency or Fiduciary Relationship.** The existence of this Agreement or of a joint defense effort in connection with the Lawsuit shall not be deemed to create any new attorney-client relationship between any attorney and any Party, nor any new fiduciary or agency relationships between any attorney and any Party. Any attorney-client or fiduciary relationships shall be determined without reference to this Agreement. This Agreement shall not be used offensively or defensively in any dispute between the signatories to this Agreement involving any issues relating to or deriving from {MATTER}. Nothing in this Agreement is intended to affect, waive or otherwise modify any agreement to defend or indemnify, or any reservation of rights in connection with same, between any Parties to this Agreement.

5. **No Conflict of Interest**. No Party to this Agreement will claim that counsel for any other Party is now or will be in the future disqualified from representing any Party in any proceeding by reason of this Agreement or the joint defense effort. Nothing in this Agreement shall create a conflict of interest requiring disqualification of counsel, and the Parties to this Agreement hereby knowingly and willingly waive any such conflict of interest. Each attorney represents that he or she has informed his or her client of the general nature of the conflicts that might arise, and that his or her client has knowingly and intelligently waived any conflict of interest that may arise on account of the Agreement, including, specifically from an attorney member of this Agreement (other than his or her own attorney) examining him or her at trial or any other proceeding relating to the Lawsuit. Therefore, the attorneys, for themselves and on behalf of their

clients, hereby waive any right to seek the disqualification of counsel for the other Party based on a communication of joint defense privileged information made in accordance with this Agreement.

6. **Withdrawal.** Any Party may withdraw from this Agreement upon prior written notice to all other members of the Joint Defense Group, in which case this Agreement shall no longer apply to the withdrawing Party prospectively, but shall continue to protect all Joint Defense Materials communicated or exchanged prior to such withdrawal. Notwithstanding the termination of or withdrawal from this Agreement, the confidentiality obligations set forth herein shall survive as binding obligations of the Joint Defense Group and shall remain in full force and effect without regard to whether {MATTER} is terminated by final judgment, settlement or otherwise. In the event any Party withdraws from the Agreement, the remaining members of the Joint Defense Group are free to use the Joint Defense Materials and make derivative use of any privileged information, including information that they obtained from the withdrawing member, in {MATTER} pursuant to the terms of this Agreement.

7. **Compliance With Discovery Obligations.** Nothing in this Agreement shall be interpreted as requiring or suggesting that any Party has agreed to withhold any materials properly discoverable under applicable law. This Agreement is not intended to and should not be construed to evidence any agreement to prevent disclosure of all properly discoverable information, documents and materials.

8. **Notice of Discovery Demands or Disclosure.** The Joint Defense Group, and each of them, shall claim, assert and defend the joint defense privilege and any other applicable privilege for the Joint Defense Materials. Should any member of the Joint Defense Group become aware of a request for, or actual, disclosure to a third party of any materials or information protected by this Agreement, whether pursuant to subpoena or otherwise, the member will immediately notify the Joint Defense Group of such request or disclosure, and take all reasonable steps necessary or appropriate to permit the assertion of applicable rights with respect to such Joint Defense Information. In the event of any efforts by a third party to compel disclosure of information obtained solely as a result of this Agreement, the target of the subpoena or other form of compulsory process shall promptly notify the Joint Defense Group so as to afford the Joint Defense Group the opportunity to seek protection from the disclosure of such information.

9. **No Waiver of Defenses.** By entering into this Agreement, none of the members is waiving any claim or defense in connection with {MATTER} or otherwise.

10. **Return of Joint Defense Information.** At the resolution of {MATTER}, the Parties and Counsel shall within thirty (30) business days, return to the producing Party, or destroy, all Joint Defense Materials provided to that Party by the other Parties and shall provide written confirmation of the same.

11. **Modifications.** No amendment or modification of this Agreement shall be effective unless it is in writing and signed by the other members of the Joint Defense Group.

12. **Governing Law.** This Agreement is governed by the laws of {JURISDICTION} and may be enforced by any of the parties to this Agreement in any court of appropriate jurisdiction. The Joint Defense Group members agree that the rights, privileges and interests protected by this Agreement are unique and that any violation of this Agreement will result in irreparable harm and injury to the other members. Therefore, the Joint Defense Group agrees that the terms of this Agreement may be enforced by appropriate injunctive or other equitable relief. The Joint Defense Group further agrees that this paragraph is not intended to limit the rights or remedies of the parties to this Agreement in any manner.

13. **Actions Between Members of the Joint Defense Group.** For avoidance of doubt, the Joint Defense Group's community of interest shall not include any claims, actions, proceedings or suits by any member of the Joint Defense Group against any other member of the Joint Defense Group.

14. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, and all counterparts taken together shall constitute one agreement. A telefax or PDF signature on a copy of this Agreement shall be deemed as effective and binding as if it were an original signature.

15. **Entire Agreement.** This Agreement constitutes the complete agreement of the Parties with respect to the subject matter hereto, and memorializes and supersedes any prior or written agreements, and applies to all prior and future communications and exchanges of Joint Defense Materials.

16. **Confidentiality of Agreement.** This Agreement and its terms are confidential and may not be produced or disclosed in discovery or offered in evidence in any proceedings, for any purpose, except to prove its existence and the agreement of the Parties hereto.

IN WITNESS THEREOF, the parties hereto have executed this Agreement as of the date and year first written above.

Problem 14-2
Explain joint defense agreements to your client Shirley and advise her on whether she should consent to enter into a JDA in her matter.

E. Waiver and Prosecutorial Discretion

There was a major controversy over prosecutors' handling of the corporate attorney-client privilege between roughly 2002 and 2008—specifically, a DOJ practice of requesting or expecting waiver as part of credit for cooperation. The controversy has

since quieted but has not disappeared. The following two cases provide examples of the possible issues that attorneys may face when balancing the need to protect privileged information with the benefits of cooperation with enforcement authorities. The first case, which involved an individual prosecution following an FCPA investigation, also includes a helpful restatement of privilege law. Bear in mind that these are both decisions of magistrate judges in district court. The specific waiver issues they raise have not yet been addressed in detail by a federal appellate court and the D.C. Circuit's decision in the *KBR* decisions above indicate at least that court's support for a strong corporate privilege.

UNITED STATES v. COBURN, 2022 WL 357217 (D. N.J.)

McNULTY, United States District Court Judge:

… A [] limit on what may be obtained by [a pretrial subpoena under Rule 17] is a legitimate claim of privilege that is not waived. Here, the relevant privileges are the attorney-client privilege and the work product doctrine.

The Third Circuit has stated that the attorney-client privilege applies only if

> (1) the asserted holder of the privilege 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.

In re Grand Jury Investigation, 599 F.2d 1224, 1233 (3d Cir. 1979).

The party asserting the attorney-client privilege bears the burden to show that it applies. *See In re Grand Jury Empaneled Feb. 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979). "Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly" and "protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423–24 (3d Cir. 1991) (internal quotation marks and citations omitted); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("[S]ince the privilege has the effect of withholding relevant information from the fact-finder, ... it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege"). Moreover, the privilege guards only against the disclosure of the protected communication, not against disclosure of facts underlying those communications. *See Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

The attorney-client privilege unquestionably applies to both corporations and individuals. *See Upjohn*, 449 U.S. 390; *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1986). However, because "a corporation must act through its agents," adjudicating claims of privilege "in the case of corporations ... presents special problems." *Id.* (quoting *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985)). The privilege will extend to the communications of a corporation's management and employees when doing so would give effect to the purposes of the privilege, *see Upjohn*, 449 U.S. at 391, 394-95, and is "equally available to a corporation's in-house counsel." *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990) (citing *Hasso v. Retail Credit Company*, 58 F.R.D. 425, 427 (E.D. Pa. 1973) and *International Telephone and Telegraph Corporation v. United Telephone Company of Florida*, 60 F.R.D. 177, 185 (M.D. Fla. 1973)). However, the privilege's protections vanish where the communication is not in furtherance of the securing of *legal* advice. Advice that is predominantly concerned with corporate business, technical issues, or public relations is not protected. *See e.g.*, *Dejewski v. Nat'l Beverage Corp.*, No. 19-CV-14532-ES-ESK, 2021 WL 118929, at *1-2 (D.N.J. Jan. 12, 2021); *Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 305-06 (D.N.J. 2008).

The work product doctrine safeguards documents from discovery where such documents are "materials prepared or collected by an attorney 'in the course of preparation for possible litigation.'" *In re Grand Jury Investigation*, 599 F.2d at 1228 (quoting *Hickman v. Taylor*, 329 U.S. 495, 505 (1947)); *see also* Fed. R. Civ. P. 26(b)(3) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative"). The party asserting work product protection bears the burden of showing that the doctrine applies. *See Conoco, Inc. v. U.S. Dep't of Justice*, 687 F.2d 724, 730 (3d Cir. 1982). Courts in this Circuit have generally applied a two-pronged inquiry for determining whether a document should be protected under the work-product doctrine—first, looking to whether "litigation could reasonably have been anticipated" at the time the document was made, and second, looking to whether the document was "prepared or obtained because of the prospect of litigation." *In re Gabapentin Patent Litig.*, 214 F.R.D. 178, 183-84 (D.N.J. 2003) (citations omitted). Documents created in the ordinary course of business are not protected by the work-product doctrine. *Id.* at 184. Since, like other privileges, work product protections may "obstruct the search for truth," both it and the attorney-client privilege "should be recognized only when necessary to achieve their respective purposes." *In re Chevron Corp.*, 633 F.3d 153, 165 (3d Cir. 2011).

Although disclosure of ostensibly privileged communications to a third party "has long been considered inconsistent with an assertion of the privilege," a waiver of attorney-client privilege does not necessarily constitute a waiver of work product protection, or vice versa. *See Westinghouse*, 951 F.2d at 1424, 1428. Generally, the attorney-client privilege aims to promote frank, honest communication between client and lawyer, and it is thus waived when a client discloses otherwise privileged communications to a third party. Such third-party disclosures usually imply that the clients "would also have divulged [the information] to their attorneys, even without the protection of the

privilege," and thus that "the basic justification for the privilege no longer applies." *Id.* at 1424 (internal quotation marks and citation omitted). On the other hand, however, where such "disclosure to a third party is necessary for the client to obtain informed legal advice," such disclosure will not trigger a waiver of the privilege. *Id.*

For work product protections to be waived, disclosure to a third party must be such as would "enable an adversary to gain access to the information." *Id.* at 1428. Such disclosure inherently negates the secrecy rationale of these protections, i.e., to guard "the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation" and "enabl[e] attorneys to prepare cases without fear that their work product will be used against their clients." *Id.* (citing *Hickman*, 329 U.S. at 510-11). . . .

If there is a waiver, the court must determine its scope. "When a disclosure waives privilege or work-product protection, that waiver will extend to undisclosed documents or communications if: 1) the waiver is intentional; 2) the disclosed and undisclosed communications or information concern the same subject matter; and 3) they ought in fairness be considered together." *Shire LLC v. Amneal Pharms.*, LLC, No. 2:11-CV-03781, 2014 WL 1509238, at *6 (D.N.J. Jan. 10, 2014) (citing Fed. R. Evid. 502(a) (providing for subject matter waiver "[w]hen the disclosure is made ... to a federal office or agency")). This "subject matter waiver" is most often found by courts in this District "when the privilege-holder has attempted to use the privilege as both 'a sword' and 'a shield' or when the party attacking the privilege will be prejudiced at trial." *Id.* (quoting *Koch Materials Company v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 120 (D.N.J. 2002)); *see also Westinghouse*, 951 F.2d at 1426 n.12 (noting that where a partial waiver disadvantages the disclosing party's adversary "by, for example, allowing the disclosing party to present a one-sided story to the court, the privilege will be waived as to all communications on the same subject"). . . .

Defendants argue that Cognizant [the corporation] has improperly withheld or redacted documents, including those concerning conversations in which Schwartz allegedly authorized the payment of bribes, claiming attorney-client privilege. Such documents, according to Defendants, "may contain facts or material unrelated to the provision of legal advice," and in any event, any privilege was waived by Cognizant's disclosure of these documents to the Government. Indeed, they claim that Cognizant has waived any privilege regarding the entire subject of Cognizant's internal investigation and must also disclose documents revealing all statements made by Cognizant employees describing conversations with Schwartz related to this investigation. Cognizant maintains that it properly asserted attorney-client privilege over documents containing legal advice or otherwise within the permissible ambit of the privilege. Moreover, it urges that it did not effectuate a subject matter waiver of attorney client privilege over the entire internal investigation simply by cooperating with DOJ or disclosing portions of investigative documents.

The first category in dispute consists of Cognizant's draft press releases and public disclosures. I agree with Defendants that these materials were not created for the

predominant purpose of obtaining legal advice, or in order to prepare for litigation. *See In re Grand Jury Investigation*, 599 F.2d at 1233. Instead, they fall squarely within the type of non-legal, business or public relations advice that are not privileged. *See Fisher*, 425 U.S. at 403; *Westinghouse*, 951 F.2d at 1423–24. Similarly, Cognizant's communications with public relations firms Finsbury and CLS Strategies concerning "public disclosure, communications, potential litigation and related legal strategy" relevant to Cognizant's internal investigation are not protected by either privilege because they bear too tenuous a connection to the provision of legal advice or confidential preparations for litigation. *See e.g.*, *Dejewski*, No. 19-CV-14532-ES-ESK, 2021 WL 118929, at *1-2; *Louisiana Mun. Police Emps. Ret. Sys.*, 253 F.R.D. at 305-06.

A second disputed category of documents consists of Cognizant's records pertaining to document retention and collection policies. Documents relating to legal advice concerning the formulation of such policies are facially privileged and will not be produced. More generally, Cognizant represents that certain records were made when Cognizant was facing criminal and civil liability in connection with the allegations against Defendants. According to Cognizant, they include (1) communications among Cognizant's executives, in-house counsel, and outside counsel; and (2) litigation hold memoranda and other documents that relate to the areas to be investigated and the custodians and document sources to be searched. Such records clearly pertain to litigation strategy and the provision of legal advice in advance of litigation, and were created at a time when litigation was reasonably anticipated. Thus, Cognizant's assertion of attorney client and work product privilege over them is proper. *See Upjohn*, 449 U.S. at 391, 394-95; *Leonen*, 135 F.R.D. at 98; *In re Gabapentin Patent Litig.*, 214 F.R.D. at 183-84.

A caveat: I will require that the document retention policies themselves, and the dates of their promulgation, be produced, as they do not bear the earmarks of privilege and are relevant to understanding the document production itself.

A third disputed category consists of Cognizant's communications with the accounting firm E&Y concerning Cognizant's internal investigation and related updates given to the Board of Directors, DOJ, and SEC are closely related to the provision of legal advice. Indeed, the nature of the allegations against Defendants and the scope of Cognizant's internal investigation would understandably make accounting expertise vital to any law firm representing Cognizant. *See United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (holding that a client's communications to an accountant employed by the client's attorney were reasonably related to the legal representation and remained privileged). As to those communications, the privilege is appropriately asserted.

A fourth, more general category consists of Cognizant's internal investigation. As to the existence of the privilege as such, this category is less controversial; by its nature it consists of attorneys' fact gathering for the purpose of rendering legal advice. Here, the real issue is the scope of any waiver of the privilege.

I next turn to Defendants' argument that Cognizant effected a subject matter waiver over broad categories of documents—namely, any communications regarding conduct alleged in the indictment and any materials related to Cognizant's internal investigation—by disclosing a summary of its investigation's findings to DOJ. While Defendants characterize this waiver too expansively, I agree that there was a significant waiver here.

To begin with, Cognizant may not now claim privilege over materials that it furnished to the Government. These disclosures, referred to as the "DLA Downloads" in the parties' briefing, consist of "detailed accounts of 42 interviews of 19 Cognizant employees, including Defendants." By disclosing this information to the Government while under threat of prosecution, Cognizant handed these materials to a potential adversary and destroyed any confidentiality they may have had, undermining the purpose of both attorney-client and work-product privileges. *See Chevron*, 633 F.3d at 165 (holding that "purposeful disclosure of [ ] purportedly privileged material to a third-party" may waive attorney-client and work product privileges "if that disclosure undermines the purpose behind each privilege").

The next question concerns the breadth of the waiver. Cognizant's voluntary turnover of materials or revelation of the fruits of its investigation to the DOJ also entailed a waiver of the privilege as to communications that "concern the same subject matter" and "ought in fairness be considered together" with the actual disclosures to DOJ. *Shire LLC v. Amneal Pharms.*, LLC, No. 2:11-CV-03781, 2014 WL 1509238, at *6 (D.N.J. Jan. 10, 2014) (citing Fed. R. Evid. 502(a)).

First, to the extent that summaries of interviews were conveyed to the government, whether orally or in writing, the privilege is waived as to all memoranda, notes, summaries, or other records of the interviews themselves. Second, to the extent the summaries directly conveyed the contents of documents or communications, those underlying documents or communications themselves are within the scope of the waiver. Third, the waiver extends to documents and communications that were reviewed and formed any part of the basis of any presentation, oral or written, to the DOJ in connection with this investigation. . . .

SEC v. HERRERA, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017)

GOODMAN, United States Magistrate Judge:

. . . This Order concerns the legal consequences, if any, which arise when a major law firm conducting an internal corporate investigation into its client's financial and business activities produces what the parties here call "oral downloads" of witness interview notes and memoranda to the regulatory agency investigating its client. To be more specific, the primary issue addressed here (but there are other issues, as well) is whether that law firm waived work product protection when it voluntarily gave the Securities and Exchange Commission oral summaries of the work product notes and memoranda its attorneys prepared about interviews of its client's executives and employees. The

memoranda and notes summarize the relevant portions of the witness interviews (or at least what the attorney participating in the interview deemed to be relevant enough to include in these materials).

Because there is little or no substantive distinction for waiver purposes between the actual physical delivery of the work product notes and memoranda and reading or orally summarizing the same written material's meaningful substance to one's legal adversary, the Undersigned concludes that the Morgan Lewis & Bockius LLP law firm ("ML") waived work product protection and must provide to Defendants the interview notes and memoranda that were orally downloaded. To that extent, the Undersigned grants Defendants' motion to compel against ML. The waiver, however, is *limited* to only the witnesses whose interview notes and memoranda were orally provided, which is far less than all the witnesses ML interviewed.

In addition, the Undersigned rejects Defendants' additional argument that ML should produce to them *all* the witness-interview notes and memoranda on the ground that ML also provided all witness-interview notes and memoranda to its client's auditor, Deloitte & Touche ("Deloitte"). The Undersigned finds persuasive those cases holding that disclosure of work product information to an auditor does not generate a waiver.

Unlike the SEC, Deloitte is not the adversary of ML's client, General Cable Corp. ("GCC"), the publicly-traded company being investigated. As such, the Undersigned is not persuaded by Defendants' argument that the accounting firm is actually an adversary (based on the theory that Deloitte was worried that the SEC was also investigating its auditing services, and therefore had motive to suggest that GCC did not timely and fully provide accurate information for the financial statements that needed to be restated and which led to a hefty fine against GCC by the SEC). So the Undersigned denies that portion of the motion to compel.

Finally, the Undersigned also rejects the defense argument that additional work product material should be provided because Defendants have a substantial need for it. Under the present circumstances, that is an inadequate ground to compel production of additional work-product information, especially attorney work-product memoranda. The Undersigned therefore denies that portion of the motion to compel as well.

The SEC filed its lawsuit against Mathias Francisco Sandoval Herrera, Maria D. Cidre, and another defendant who entered into a consent judgment with the SEC shortly after the lawsuit was filed. Herrera was the CEO and Cidre was the CFO of GCC's Latin American operation. The Complaint is based on allegations that Herrera and Cidre concealed the manipulation of accounting systems at the Brazilian operations of GCC, a global manufacturer of wire and cable products. The lawsuit alleges that Defendants hid from GCC's executive management material inventory accounting errors at GCC's Brazilian subsidiary, including the overstatement of inventory. . . .

The origins of the specific discovery dispute date back to late 2012, when GCC retained ML to provide legal advice concerning accounting errors at the Brazilian subsidiary. ML

conducted an internal investigation, which included interviewing dozens of GCC personnel. ML attorneys then prepared notes and memoranda about those interviews. According to Defendants, "many" of the witnesses were interviewed "live" in Brazil.

After ML disclosed in November 2012 to the SEC that it was conducting an investigation of GCC's accounting errors, the SEC began its own investigation of the company. In doing so, it issued several requests to GCC. In response, GCC produced documents, including e-mail communications to and from Defendants and the persons who ML interviewed.

The SEC also asked for the investigative findings, and ML provided the SEC with information about its findings, including a presentation prepared for the SEC and information about specific witness interviews, which were provided orally. An April 15, 2013 PowerPoint presentation that ML made to the SEC contained, among other things, an events timeline, the names of witnesses whom ML had already interviewed, a breakdown of the transactions deemed to be at the heart of the accounting discrepancy, and the results of its investigation. This 28-page PowerPoint presentation is now in the public record of this lawsuit, as Defendants filed it as an exhibit to their motion. The cover page of the ML-produced PowerPoint says "FOIA Confidential Treatment Request," however.

On October 29, 2013, ML attorneys met with SEC staff and provided oral downloads of 12 witness interviews.

In addition, during the investigation, Deloitte asked for information from ML about its investigative steps and findings, including information obtained through ML-conducted witness interviews. ML provided Deloitte with the information and says that it did so because it believed "Deloitte would keep it confidential, consistent with Deloitte's professional obligations to its client [GCC]." Although ML provided the SEC with oral downloads of only 12 witness interviews, it provided Deloitte with information about all the interviews notes and memoranda. It appears as though this was accomplished through the reading (by an ML attorney) of memoranda and interview notes to Deloitte and generalized "access" to review interview notes selected by Deloitte's investigative team. . . .

The party claiming work product immunity (which is ML in this dispute) has the burden to establish the claimed protection. *Hinchee*, 741 F.3d at 1189. There is no dispute here that the notes and memoranda prepared by ML attorneys are in fact work product material. Rather, the dispute is over the *waiver* of the work-product doctrine protection.

Although the party seeking work-product protection bears the initial burden for establishing that the documents are entitled to such protection, after that initial burden is met, the burden shifts to the party asserting waiver to show that the party claiming the privilege has waived its right to do so. *Mitsui Sumitomo Ins. Co. v. Carbel, LLC*, No. 09-21208-CIV, 2011 WL 2682958, at *3 (S.D. Fla. July 11, 2011). In the context of work product, the question is not, as in the case of the attorney-client privilege, *whether*

confidential communications are disclosed, but *to whom* the disclosure is made—because the protection is designed to protect an attorney's mental processes from discovery by *adverse* parties. *See generally Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978). . . .

The SEC was the adversary of ML's client, GCC. The SEC was investigating GCC for alleged misstatements in its financial reports submitted as a public company and eventually imposed a $6.5 million civil penalty against it. And it does not appear as though ML takes the position that the SEC was not an adversary, as it explains in its response that "Morgan Lewis does not contend that [GCC] and the SEC shared a common interest[.]"

So the Undersigned easily concludes that the disclosure to the SEC was one made to an adversary. . . .

ML contends that no waiver occurred, however, because it never actually produced the notes and memoranda of the witness interviews to the SEC. ML argues that there is a meaningful distinction between the actual production of a witness interview note or memo and providing the same or similar information *orally*. The Undersigned is not convinced. *See S.E.C. v. Vitesse Semiconductor Corp.*, No. 10 CIV. 9239 JSR, 2011 WL 2899082, at *3 (S.D.N.Y. July 14, 2011) ("While it is undisputed that NuHo did not actually produce the notes themselves to the SEC, after reviewing the SEC's notes the Court found that NuHo effectively produced these notes to the SEC through its oral summaries."); *S.E.C. v. Berry*, No. C07-04431 RMW HRL, 2011 WL 825742, at *5–6 (N.D. Cal. Mar. 7, 2011) (finding waiver of privilege in interview memoranda for five witnesses where attorneys orally disclosed to the SEC facts contained in the interviews); *S.E.C. v. Roberts*, 254 F.R.D. 371, 377 (N.D. Cal. 2008) ("to the extent that Howrey orally disclosed to the government factual information contained in any of the written material identified by Roberts, Howrey has waived the attorney-client and work product privileges with respect to that information.").

ML does not contend that it provided only vague references of the witness notes and memoranda to the SEC, nor does it argue that only detail-free conclusions or general impressions were orally provided. To the contrary, it factually concedes that its attorneys provided oral downloads of the substance of the 12 witness interview notes. . . .

ML also argues that Defendants' claim—that they seek to "level the playing field"—is an argument which "rings hollow" because "the SEC does not have what the Defendants are seeking." But that is an incomplete argument. Yes, it is true that the SEC does not have the *actual* witness notes and memoranda—but it has the functional equivalent of them by receiving the oral summaries of the interview materials. The cases discussed above reject this crabbed theory. *See, e.g., Vitesse Semiconductor*, 2011 WL 2899082, at *3. . . .

After describing Defendants' motion concerning the purported waiver by production to Deloitte as based on "scant facts," ML then explains that it does not contest that it read

interviews notes and memoranda to Deloitte for purposes of this motion. According to its response memorandum, 38 witnesses were interviewed. ML's argument here is different from the argument it made for the materials provided to the SEC; it contends that even the actual physical production of work product to a company's auditors does not waive work-product protection because an independent or outside auditor typically shares a common interest with the corporation for purpose of the work product and waiver doctrines.

The Undersigned agrees with ML that documents shared with Deloitte are protected from disclosure. *See United States v. Deloitte LLP*, 610 F.3d 129, 142 (D.C. Cir. 2010) (holding that documents disclosed to Deloitte by client did not waive work product protection); *In re Weatherford Int'l Sec. Litig.*, No. 11CIV1646LAKJCF, 2013 WL 12185082, at *5 (S.D.N.Y. Nov. 19, 2013) ("Ernst & Young functioned as Weatherford's outside auditor. In this circuit, disclosure to an outside auditor does not generally waive work product protection."); *see also Regions Fin. Corp. v. United States*, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *8 (N.D. Ala. May 8, 2008) (finding same, because "E & Y was an independent auditor [and] not a potential adversary of Regions."); *Gutter v. E.I. Dupont de Nemours & Co.*, No. 95-CV-2152, 1998 WL 2017926, at *5 (S.D. Fla. May 18, 1998) ("Transmittal of documents to a company's outside auditors does not waive the work product privilege because such a disclosure cannot be said to have posed a substantial danger at the time that the document would be disclosed to plaintiffs.") (internal quotations omitted).

In their motion, Defendants say that there is a "split" on the legal consequences arising from disclosures to a corporation's accountants or auditors but then concede that "the majority" of courts hold that auditing and accounting firms typically do share a common interest. Nevertheless, they have crafted a theory to distinguish the precedent adopting the common-interest approach: they say that Deloitte "itself was on the SEC's radar and entered into a tolling agreement with the SEC regarding its own conduct." Therefore, Defendants argue, Deloitte was a "*potential* adversary" to GCC "because Deloitte was motivated to claim that GCC personnel had misled Deloitte regarding the accounting practices at GCC." (emphasis added)

The Undersigned is not persuaded by this effort to treat Deloitte differently from those cases that hold that an outside auditor has a common interest with the corporation for work-product waiver issues. First, the SEC never brought an enforcement action against Deloitte concerning this investigation.

Second, the SEC's request for a tolling agreement with Deloitte occurred ten months after ML shared the results of its interviews with Deloitte.

Third, Defendants have not adequately established that ML or GCC knew at the time the witness interview materials were shared with Deloitte that the SEC was interested in a tolling agreement with Deloitte.

Fourth, Defendants have not cited any legal authority, binding or otherwise, to support

the notion that a common interest disappears under factually analogous scenarios.

And fifth, even if Deloitte was a potential adversary on *that* issue, it still had a common interest for *other* purposes. *See generally Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So.2d 437, 441, 443 (Fla. 3d DCA 1987) (noting that "common interests exception applies where the parties, although nominally aligned on the same side of the case, are antagonistic as to some issues, but united as to others" and holding that both attorney-client privileged and work product-protected information exchanged between parties retained status under common interest doctrine even though the parties "in another respect" were "adversaries in the litigation and aligned as plaintiff and defendant respectively"). . . .

Although this Order compels ML to produce to Defendants the witness interview notes and memoranda for the 12 witnesses flagged in Defendants' motion, Defendants also argue that they are entitled to *all* of the material because they have a substantial need for it.

According to Defendants' motion, ML has pledged to continue to assist *only* the SEC—but not Defendants—by making witnesses, including current and former GCC employees whom ML represents, available for further interviews and testimony in the United States, without regard for territorial limits. And Defendants similarly contend that, armed with ML's prior disclosures and ongoing cooperation, the SEC can cherry-pick which witnesses to call and which to avoid and ML's counsel can prepare those witnesses to testify with the benefit of a panoramic view of what all witnesses previously stated.

In the same vein, Defendants also say that the SEC is similarly advantaged with regard to the Deloitte witnesses by having access to the ML interviews, and therefore, having knowledge of what all witnesses previously stated. They note that many of the witnesses are in Brazil, which means that they have no workable alternative to interview them other than letters rogatory, which they say is time-consuming and likely to be unhelpful (because, for example, they must submit the questions in advance and be only observers in a judge-conducted questioning procedure). And they express concern over the fact that the witnesses' memories have faded—and that the interview notes and memoranda from a few years ago would be more accurate and helpful.

The Undersigned is not persuaded.

First, ML points out that Defendants have all of the 400,000–plus documents which GCC produced to the SEC, including contemporaneous e-mail communications among the witnesses at issue, which can be used to refresh recollections. Second, if the letters-rogatory process does in fact take longer than a traditional deposition, then Defendants can seek appropriate extensions of time. Third, and perhaps most importantly, Defendants are seeking the additional disclosure of attorney work product, which is entitled to heightened protection.

An attorney's notes and memoranda of interviews performed in the course of an internal investigation are "classic attorney work product." *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 512, 67 S. Ct. 385, 91 L. Ed. 451 (1947) ("the privacy of an attorney's course of preparation is . . . essential to an orderly working of our system of legal procedure[.]"). Therefore, as the Supreme Court has explained, "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes[.]" *Upjohn Co. v. United States*, 449 U.S. 383, 399, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

"Substantial need cannot be overcome simply with an argument that documents are relevant and will assist in bolstering a party's affirmative defenses." *Beaubrun v. GEICO Gen. Ins. Co.*, No. 16-24205-CIV, 2017 WL 1738117, at *5 (S.D. Fla. May 4, 2017). And courts must not allow parties to claim substantial need as a means to "short-cut" preparation of cases. *See Stern*, 253 F.R.D. at 686.

ML waived work-product protection for the witnesses whose interview notes and memoranda its attorneys disclosed to the SEC in the so-called "oral downloads." Defendants advise that "at least twelve" interview memos were orally relayed, so the Undersigned is using that number, as well. If it turns out that ML provided information to the SEC about other witness interviews besides the 12 already identified, then it shall disclose to Defendants the additional notes and memoranda. ML shall provide the notes and memoranda within 7 days of this Order. . . .

Bottom line for now, alas: it is not entirely clear how much a company can disclose in the name of cooperation before the privilege is waived. DOJ used to routinely request waivers of the privilege in corporate criminal investigations. Now it doesn't ask anymore, at least not explicitly. Defense counsel sometimes complain that waiver is still expected and rewarded. What are the legitimate interests here of both firms and the government? How should they be balanced? Consider what DOJ's policy on waiver, which is set out in the Justice Manual excerpt below, means in light of the law of attorney-client privilege and waiver as detailed in this Chapter.

U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL, SECTION 9-28.000. PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (Excerpts)

9-28.700. The Value of Cooperation

Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (*e.g.*, suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing

of charges with respect to a corporation any more than with respect to an individual.

A. General Principle: In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved, its cooperation will not be considered a mitigating factor under this section. Nor, if a company is prosecuted, will the Department support a cooperation-related reduction at sentencing. *See* U.S.S.G. § 8C2.5(g), cmt. (n.13) ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient . . . to identify . . . the individual(s) responsible for the criminal conduct."). If a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. To be clear, a company is not required to waive its attorney-client privilege and attorney work product protection in order satisfy this threshold. *See* USAM 9-28.720. The extent of the cooperation credit earned will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation).

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor may encounter several obstacles resulting from the nature of the corporation itself. It may be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.

This dynamic—*i.e.*, the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions—can have negative consequences for both the government and the corporation that is the subject or target of a government investigation. More specifically, because of corporate attribution principles concerning actions of corporate officers and employees, *see* USAM 9.28-210, uncertainty about who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation. For example, it may not matter under the law which of several possible executives or leaders in a chain of command approved of or authorized criminal conduct; however, that information if known might bear on the propriety of a particular disposition short of indictment of the corporation. It may not be in the interest of a corporation or the government for a charging decision to be made in the absence of such information, which might occur if, for example, a statute

of limitations were relevant and authorization by any one of the officials were enough to justify a charge under the law. Moreover, a protracted government investigation of such an issue could disrupt the corporation's business operations or even depress its stock price.

For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation—and ultimately shareholders, employees, and other often blameless victims—by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business operations. In addition, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

The requirement that companies cooperate completely as to individuals does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process—before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. In addition, the company's continued cooperation with respect to individuals may be necessary post-resolution. If so, the corporate resolution agreement should include a provision that requires the company to provide information about all individuals involved and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach. . . .

9-28.710. Attorney-Client and Work Product Protections

The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1981). As the Supreme Court has stated, "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and

regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.

For these reasons, waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative. Nonetheless, a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so; indeed, such waivers occur routinely when corporations are victimized by their employees or others, conduct an internal investigation, and then disclose the details of the investigation to law enforcement officials in an effort to seek prosecution of the offenders. However, the contention, from a broad array of voices, is that the Department's position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all.

The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so. The critical factor is whether the corporation has provided the facts about the events, as explained further herein.

9-28.720. Cooperation: Disclosing the Relevant Facts

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. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures. If a corporation wishes to receive

credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must disclose the relevant facts of which it has knowledge.

(a) Disclosing the Relevant Facts—Facts Gathered Through Internal Investigation

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others' misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected. On this point the Report of the House Judiciary Committee, submitted in connection with the attorney-client privilege bill passed by the House of Representatives (H.R. 3013), comports with the approach required here:

> [A]n . . . attorney of the United States may base cooperation credit on the facts that are disclosed, but is prohibited from basing cooperation credit upon whether or not the materials are protected by attorney-client privilege or attorney work product. As a result, an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (*i.e.*, neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.
>
> H.R. Rep. No. 110-445 at 4 (2007).

In short, the company may be eligible for cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it provides all

relevant facts about the individuals who were involved in the misconduct. But if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation.

Two final and related points bear noting about the disclosure of facts, although they should be obvious. First, the government cannot compel, and the corporation has no obligation to make, such disclosures (although the government can obviously compel the disclosure of certain records and witness testimony through subpoenas). Second, a corporation's failure to provide relevant information about individual misconduct alone does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for that cooperation. Whether the corporation faces charges will turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in USAM 9-28.300. If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, or if the other factors weigh against indictment, then the corporation should not be indicted, irrespective of whether it has earned cooperation credit. The converse is also true: The government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a potential mitigating factor, but it alone is not dispositive.

(b) Legal Advice and Attorney Work Product

Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege. Such communications can naturally have a salutary effect on corporate behavior—facilitating, for example, a corporation's effort to comply with complex and evolving legal and regulatory regimes. Except as noted in subparagraphs (b)(i) and (b)(ii) below, a corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit.

Likewise, non-factual or core attorney work product—for example, an attorney's mental impressions or legal theories—lies at the core of the attorney work product doctrine. A corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation's eligibility to receive cooperation credit.

(i) Advice of Counsel Defense in the Instant Context

Occasionally a corporation or one of its employees may assert an advice-of-counsel defense, based upon communications with in-house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue. In such situations, the defendant must tender a legitimate factual basis to support the assertion of the advice-of-counsel defense. *See*, *e.g.*, *Pitt v. Dist. of Columbia*, 491 F.3d 494, 504–05 (D.C. Cir. 2007); *United States v. Wenger*, 427 F.3d 840, 853–54 (10th Cir. 2005); *United States v. Cheek*, 3 F.3d 1057, 1061–62 (7th Cir. 1993). The Department cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would otherwise be the appropriate course of prosecutive action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices. Accordingly, where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.

(ii) Communications in Furtherance of a Crime or Fraud

Communications between a corporation (through its officers, employees, directors, or agents) and corporate counsel that are made in furtherance of a crime or fraud are, under settled precedent, outside the scope and protection of the attorney-client privilege. *See United States v. Zolin*, 491 U.S. 554, 563 (1989); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007). As a result, the Department may properly request such communications if they in fact exist.

9-28.730. Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation has engaged in conduct intended to impede the investigation. Examples of such conduct could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.

In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law. Neither is it intended to limit the otherwise applicable reach of criminal obstruction of justice statutes such as 18 U.S.C. § 1503. If the payment of attorney fees were used in a manner that would otherwise constitute criminal obstruction of justice—for example, if fees were advanced on the condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false—these Principles would not (and could not) render inapplicable such criminal prohibitions.

Similarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate.

Finally, it may on occasion be appropriate for the government to consider whether the corporation has shared with others sensitive information about the investigation that the government provided to the corporation. In appropriate situations, as it does with individuals, the government may properly request that, if a corporation wishes to receive credit for cooperation, the information provided by the government to the corporation not be transmitted to others—for example, where the disclosure of such information could lead to flight by individual subjects, destruction of evidence, or dissipation or concealment of assets.

For a thorough summary of the controversy over waiver of attorney-client privilege in corporate investigations, see Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No,"* 45 AM. CRIM. L. REV. 1237 (2008). O'Sullivan argues that corporations have pushed hard against the DOJ's treatment of the privilege because Fourth and Fifth Amendment law leaves corporations, unlike individuals, legally unprotected in criminal investigations. Thus, the attorney-client privilege is the only doctrine remaining to afford some measure of informational protection or advantage in this high-stakes adversarial setting. It is also undeniable that the privilege is particularly important, including economically, to the corporate bar.

Problem 14-3

(a) You work as an associate at the firm of BigLaw2. BigLaw2 has been retained by BigPharma to represent all of its employees in their initial contacts with the Department of Justice and the SEC, which have commenced an investigation of BigPharma for potential Foreign Corrupt Practices Act violations in connection with its operations in Vietnam. The BigLaw2 partner who landed the assignment for the firm has chosen you to handle the representation of Wally, a plant manager at BigPharma's main facility in Vietnam. The firm BigLaw1 represents BigPharma as a corporation and recommended that BigLaw2 be retained to represent the employees.

An initial interview of Wally with the SEC and DOJ is scheduled to take place in Washington at the DOJ offices. You accompany a jet-lagged Wally to the interview room that morning, in which—unusually, to say the least—you find three government lawyers, two FBI agents, and two lawyers from BigLaw1.

Wally turns to you and asks to speak to you in the hallway. You go outside and he says, "What is going on here? I'm totally confused about who is here and why, what my rights are, whom I should talk to, and what I should say. Please straighten me out!" Advise Wally and determine how to proceed. (You may have to ask everyone else at the meeting to go get a cup of coffee or two.)

(b) Under English law, there are two privileges relevant to corporate investigations. One is the "legal advice privilege," which protects communications between corporate personnel and attorneys for the corporation for purposes of providing legal advice; it applies only to communications between counsel and those corporate personnel who can control the work of counsel (*i.e.*, it follows something akin to the "control test" rejected in *Upjohn*). The second is the "litigation privilege," which covers all communications between lawyers and corporate personnel for the purposes of preparing for litigation and similar proceedings; it applies only when it is "reasonably likely" that an action will be brought against the corporation. How might the scope of these privileges affect the investigation of corporate crime in the United Kingdom?

(c) If you were representing a corporation before the DOJ in a major criminal investigation, how would you strategically advise the corporation to, on balance, (i) conduct a full and effective internal investigation, (ii) protect its attorney-client privilege to the maximum extent possible, and (iii) position itself to obtain the greatest possible credit for cooperation from the DOJ.