



CLE: Attorney-Client Privilege Considerations in Corporate Internal Investigations and Audits

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Foundational Considerations

01

Attorney-Client Privilege Basics

Elements

1

A communication

2

**Made for the purpose
of obtaining or
providing legal advice**

3

**Between client and
counsel**

4

**Intended to be and in
fact kept confidential**

History and Purpose

Purpose to encourage “full and frank communication” between attorneys and clients.

Scope

- Applies with equal force when the client is a corporation.
- Includes written and oral communications.
- Does **not** protect business advice.
- Does **not** protect facts.
- Is not absolute and can be lost or waived.

Work Product Basics

Elements

1

Document or tangible thing

2

Prepared in anticipation of litigation

3

By or for the party or for the party's representative

History and Purpose

Purpose to preserve the adversarial system by preventing opposing counsel from “borrow[ing]” the work done by their adversary.

Scope

- May cover factual information, but that information is generally accorded lower protection by courts.
- May be overcome by a showing of substantial need and hardship.
- May be waived in limited circumstances, as dictated by a fact-intensive analysis of applicable principles of confidentiality and fairness.

Global Perspectives: Privilege Regimes in Europe

- Legal privilege is **not uniform across Europe**—regimes differ markedly in their foundations, and scope, so protection in one jurisdiction cannot be assumed to hold in another.
- **Conceptually, there is one key difference** to the U.S. regime that most Continental European jurisdictions share: while the US treats privilege as a *right held by the client*—an evidentiary protection the client can assert or waive—Continental European regimes rest on the *lawyer's professional-secrecy duty*, a confidentiality obligation imposed on the lawyer and often backed by criminal sanction.
- The difference stems largely from **discovery**: U.S. privilege developed as a strong client-held shield precisely because broad pre-trial discovery forces parties to produce their own documents, whereas continental systems—**lacking any comparable obligation to disclose adverse material**—had less need for such a right and instead protect confidentiality through the lawyer's professional-secrecy duty.
- The **English law stands apart**: the English common law regime is **closer to the US model**—privilege as a client's right—than to the professional-secrecy approach common across continental Europe.

Global Perspectives: English Law Privilege (1)

- **Legal advice privilege**

- Applies to **confidential communications** between lawyer (including in-house lawyer) and client, made for the purpose of **giving or obtaining legal advice**.
- “*Client*” is limited to individuals authorised to seek or receive legal advice on the company’s behalf (*Three Rivers District Council and others v Bank of England* [2003] EWCA Civ 474).

- **Litigation privilege**

- Applies to **confidential communications** between client and lawyer (or client or lawyer and a third party) created for the **dominant purpose of conducting adversarial proceedings** that are pending, reasonably contemplated or existing at the time (*Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006).
- Adversarial proceedings can include litigation, arbitration, and external investigations.
- Litigation privilege does not apply to proceedings that are merely inquisitorial or for the purpose of fact-finding. An external investigation into the client will be sufficiently adversarial when it can be characterized as being “*confrontational*”, such as where criminal prosecution or regulatory enforcement action is reasonably contemplated.

Global Perspectives: English Law Privilege (2)

- **Common interest privilege**

- **Preserves privilege** in a document which a person has shared with a third party. The third party must have a **common interest** in the subject matter of the privileged document, or the litigation in connection with which the document was created. The document remains privileged in the hands of the recipient.
- Can apply, for example, to parent companies and subsidiaries.

- **Looking ahead**

- A recent High Court decision **purports to expand the scope of legal advice privilege for “intra-client documents”**, i.e., documents sent between or created by members of the “*client group*” for the dominant purpose of legal advice (*Aabar Holding SARL v Glencore plc* [2026] EWHC 877 (Comm)).
- According to the decision, privilege may apply to intra-client documents that **identify the issues on which legal advice will be sought**.
- However, this is a first-instance decision, and it remains to be seen if this wider interpretation of legal advice privilege will be followed in subsequent decisions.

Attorney-Client Privilege in Investigations, Audits, and AI Use

02

Privileged Investigations and Communications: Legal Purpose

Investigations are **not privileged by default**. Privilege can attach when **counsel directs the work** and at least one purpose is **legal advice**.

Legal advice includes

- 1 Applying law to facts (civil, criminal, or regulatory exposure)
- 2 Advising on compliance with legal obligations
- 3 Advice on litigation and enforcement

Not legal advice: business advice a non-lawyer could give.

E.g., a performance review vs. a misconduct investigation.

Which communications are covered?

Can be privileged

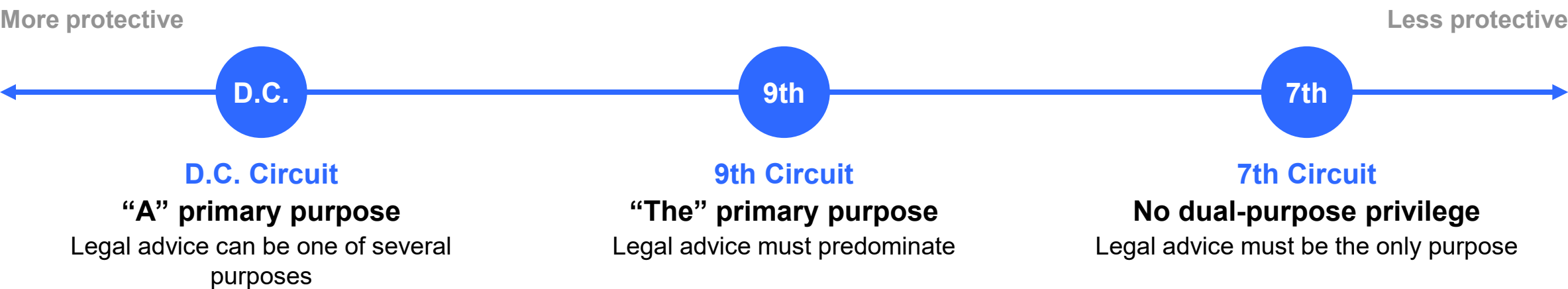
Seeking or giving legal advice, including interviews by counsel or agents at counsel's direction.

Generally not privileged

- Fact documents
- Administrative communications
- Counsel merely copied
- Business minutes and reports
- Summaries without legal analysis

Privileged Communications: Dual Purpose – In Practice

Investigation communications often serve **both legal and business purposes**. Federal circuit courts split on the test.



***In re FirstEnergy Corp.* (6th Cir. 2025)**

Production ordered because the company later used investigation findings for business decisions; **Sixth Circuit granted mandamus.**

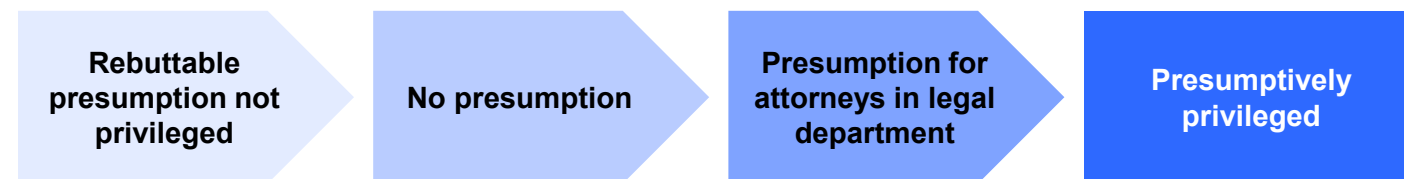
“What matters . . . is whether a company seeks legal advice . . . not what it later does with that advice.”

In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014); *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2021); *United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999); *In re FirstEnergy Corp.*, 154 F.4th 431 (6th Cir. 2025).

Privileged Communications: The “Attorney” – Counsel

In the United States, communications with **in-house** counsel can be privileged to the same extent as communications with **outside** counsel, but only if counsel is acting in a professional legal—not business—capacity.

- The **burden of proof** of establishing that privilege applies falls on the party asserting the privilege, and the burden is generally “stricter” or “heightened” when the lawyer is in-house counsel because these lawyers almost always wear two hats (business and legal).
- Courts take different approaches to whether any presumption applies to communications with *either* outside or in-house counsel, but courts are more likely to apply a presumption favoring privilege to communications with outside counsel – e.g., *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996).
- For in-house counsel, there are a spectrum of positions on whether the communication is presumptively privileged:



Less protective → more protective

International practice

Outside the U.S., protection for in-house counsel varies widely:

- **England & Wales:** position is similar to the U.S. as in-house lawyers are generally treated in the same way as external lawyers.
- **EU competition investigations:** communications with in-house counsel are not protected (*Akzo Nobel*, CJEU 2010).
- **Germany and Italy:** in-house counsel communications have traditionally received limited or no protection, particularly against seizure by authorities.

The “Attorney” – Non-Lawyer Investigators / Auditors

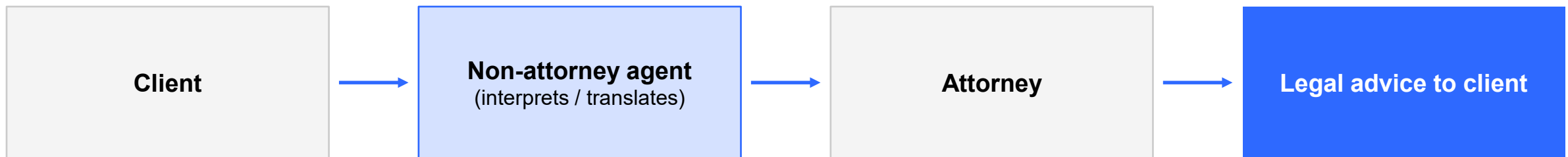
In re Kellogg Brown & Root (D.C. Cir. 2014)

- In *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (Kavanaugh, J.) (“*KBR*”), the D.C. Circuit held that the privilege extends to non-attorneys serving as agents of attorneys in internal investigations.
- No other circuit has gone as far, but there is a strong body of law founded in *KBR* and *Kovel* supporting that non-attorney third parties may be cloaked in the attorney-client privilege when acting as agents of lawyers.

United States v. Kovel (2d Cir. 1961)

- *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (Friendly, J.), extended privilege to an accountant necessary to interpret complicated tax information for an attorney.
- Since adopted or cited approvingly by every circuit, and extended to third parties beyond accountants.

General test: Whether the third party is necessary to **interpret or translate** information coming from the client to the attorney.



Privileged Communications: An English Law Perspective

- **Interviews and internal reporting**

- Careful thought must be given to how **interviews** and **internal reporting** are conducted and recorded, bearing in mind that they may generate disclosable material, if the tests outlined earlier do not apply. Involving a lawyer will not automatically make communications privileged.
- Where employees have both **compliance and legal responsibilities**, be clear about the capacity in which they are acting to help preserve privilege.

- **Determine the basis for privilege**

- Determine whether legal advice privilege or litigation privilege is being relied on. In either case, care must be taken to **preserve the confidentiality** of the documents.
- Documents which contain or evidence legal advice may attract **legal advice privilege**.
- Communications with third parties outside the client group, including interviewees, will be protected by **litigation privilege** if they meet the **dominant purpose test**.

Maintaining Privilege with AI: Pathways and Recognized Pitfalls

- **General rule:** Used by in-house counsel in an enterprise environment and within a legal-advice workflow, AI output—and the advice built on it—is privileged.
- **More likely privileged:**
 - By or at direction of **counsel**.
 - Part of a **legal-advice** workflow.
 - **Confidential**; need-to-know access only.
 - Reflects **legal** analysis.
- **Less likely privileged:**
 - Positioned as **compliance or business** enablement.
 - Business use, **without counsel** involvement.
 - Output is **broadly distributed**.
 - Framed as **“automatic determinations”**.

Generative AI and Privilege: *United States v. Heppner*

The Facts

A criminal defendant, on his own, used Claude to analyze his defense, including information from his lawyers.

He then sent the outputs to counsel and claimed privilege.

United States v. Heppner, 820 F. Supp. 3d 292 (S.D.N.Y. 2026).

No attorney-client privilege

1 No lawyer

An AI tool is not an attorney.

2 No confidentiality

Provider's terms allow data use.

3 No legal-advice purpose

Not used at counsel's direction.

No work product

His own work, not counsel's strategy.

Open question: counsel-directed use may differ (*Kovel*).

See *Tremblay v. OpenAI* (N.D. Cal. 2024): counsel's prompts were **opinion work product**.

Generative AI and Work Product: Warner and Morgan

Warner v. Gilbarco (E.D. Mich. 2026)

- A pro se plaintiff's use of ChatGPT to prepare her case was protected work product.
- Using ChatGPT was not a waiver, because it was not a disclosure to an adversary.

Morgan v. V2X (D. Colo. 2026)

- The AI provider's collection of user data did not automatically waive work product protection.

Taken together: outcomes turn on who used the tool, why, and which protection applies.

Practical recommendations

1 Counsel-directed

Use AI tools by or at the direction of counsel, and label outputs privileged.

2 Avoid unsecured tools

Unsecured, publicly available AI tools should never be used for business purposes.

3 Keep legal tools separate

If business teams use Legal's AI tool, outputs become dual-purpose and privilege is at risk.

4 Don't record legal advice

Don't record or transcribe verbal legal advice; AI tools, including enterprise tools, may store meeting content.

Generative AI and Privilege: An English Law Perspective

- ***UK v Secretary of State for the Home Department* [2026] UKUT 81 (IAC)**
 - The **impact of AI use on privileged documents** has recently been considered in a decision of the Upper Tribunal, a superior court that, among other things, decides professional conduct cases.
 - In relation to immigration proceedings, M, an accredited immigration advisor, admitted to putting draft emails into ChatGPT to improve them. M also admitted to uploading Home Office decision letters to ChatGPT to summarize them for clients.
 - The Tribunal held that uploading confidential documents into **“open-source” AI tools** such as ChatGPT could **waive client confidentiality and legal privilege**. The Tribunal also held that such conduct might itself warrant a **referral to the practitioner’s regulatory body and the Information Commissioner’s Office**. However, the Tribunal noted that “closed source” tools do not carry these risks.
- **Importance of professional duties**
 - The Tribunal’s decision has attracted attention from professional bodies including the **Solicitors Regulation Authority** (SRA), which has since issued a warning notice to lawyers advising that misuse of AI in this way could amount to a **breach of professional duties** under the SRA’s Code of Conduct.

Maintaining Privilege with AI: Practical Recommendations

Using the tool within Legal

- **Label** outputs privileged.
- **Incorporate** outputs into legal advice – not raw outputs.
- **Share** only with other in-house counsel and those other employees with a need to know in connection with legal advice.

Sharing a Legal tool with business teams → dual-purpose & waiver risk

- **Restrict** business team access to Legal AI tool.
- **Separate**, “non-privileged” instance for business use.
- **Route** business legal questions to in-house counsel.

Key reminders for counsel

1 Never use unsecured AI tools for business

Publicly available AI systems that anyone can access for free or a small fee on public consumer terms (e.g., ChatGPT, DeepSeek, Perplexity, Gemini).

2 Don't record or transcribe verbal legal advice

AI tools (including enterprise tools) may summarize and store meeting content, creating risks of privilege waiver and inaccurate transcriptions.

3 No self-service legal advice for non-Legal personnel

If a business team has a legal question where an AI tool might be useful, advise them to bring it to in-house counsel first.

Waiver Considerations: Attorney-Client Privilege

03

Waiver Overview

Attorney-client privilege can be waived either **intentionally or unintentionally** by almost any disclosure to a party – **inside or outside an organization** – who does not have a need to know the contents of the communication.

Key concepts

1

Scope of Privilege

Who falls within the circle of protected communications, and when disclosure outside that circle operates as a waiver.

2

Intentional Waiver

Impact of intentional disclosures.

3

Inadvertent Disclosure

Impact of inadvertent disclosure of privileged information to an adversary and risk of unintentional waiver.

4

Implied Waiver

Impact of using privileged material in a way that is “inconsistent with maintaining the confidential nature” of the privilege, and considerations for mitigating the risks associated with waiver.

“Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege.”

United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982).

Scope of Privilege – *Upjohn Co. v. United States*

Before *Upjohn*: “control group” test

Many courts extended privilege only to upper-level management with organizational control.



Upjohn (1981): “subject matter” test

Recognizes that low- and mid-level employees may possess information relevant to a legal issue.

Attorney communications with lower-level employees at issue in *Upjohn* were privileged because:

- 1 The communications were made “at the direction of corporate superiors in order to secure legal advice from counsel”;
- 2 The information was “needed to supply a basis for legal advice concerning” corporate compliance and potential litigation;
- 3 The communications “concerned matters within the scope of the employees’ corporate duties”; and
- 4 The employees were “aware that they were being questioned in order that the corporation could obtain legal advice.”

After *Upjohn*

The vast majority, but **not all**, of federal and state courts extend the scope of privilege coverage beyond the “control group” to:

- Persons “whose general management and supervisory responsibilities include wide areas of organizational activities”; and
- “[L]ower-echelon agents of the organization whose area of activity is relevant to the legal advice or service rendered.”

Upjohn Co. v. United States, 449 U.S. 383, 394 (1981).

Inadvertent Disclosures

Inadvertent disclosures of privileged communications to adversaries **do not typically result in waiver** of the privilege where the privilege holder took **reasonable steps** to prevent such disclosures and, once he/she identified the error, **took reasonable steps to remedy it**.

Federal Rule of Evidence 502(b)

Inadvertent disclosures in federal courts or to a federal office/agency will not operate as a waiver in a federal or state proceeding if:

- 1 the disclosure is inadvertent;
- 2 the holder took *reasonable steps* to prevent disclosure; and
- 3 the holder *promptly* took *reasonable steps* to rectify the error.

Federal Rule of Evidence 502(c)

An inadvertent disclosure in a state court or proceeding will not constitute a waiver in a subsequent federal proceeding if the disclosure either:

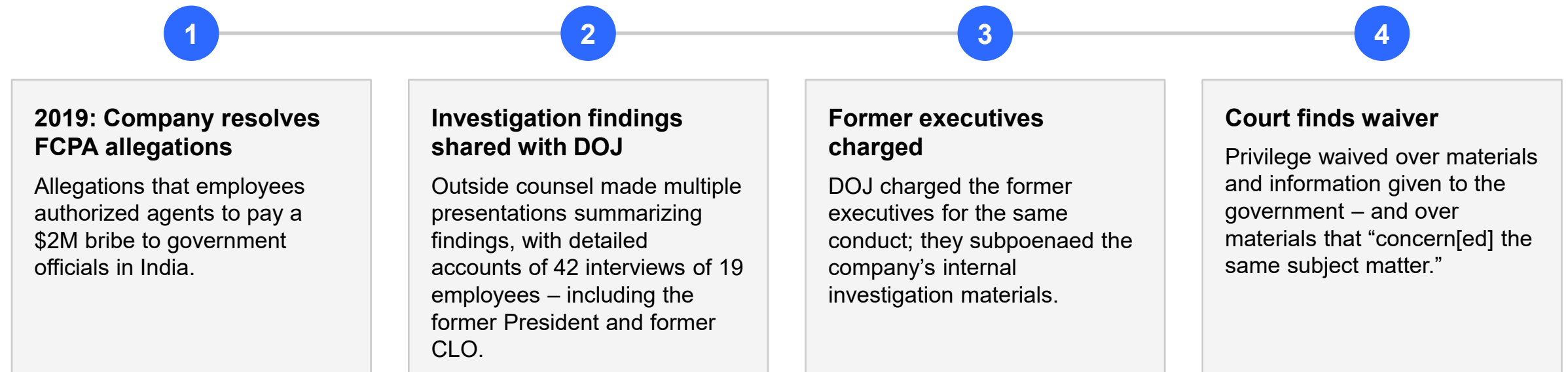
- 1 meets the requirements for non-waiver under Rule 502(b), **or**
- 2 does not qualify as a waiver under the law of the state where the disclosure took place.

However, the accidental release of privileged information to a large number of people or failure to sufficiently protect privileged information from third-party access can result in an **unintentional waiver**.

Intentional Waiver

Intentional waivers of privilege risk waiving privilege: (1) as to the **entire world** and (2) over **related communications on the same subject**, even if they have not yet been disclosed.

The cautionary tale of *United States v. Coburn*



Result: Defendants gained access to extensive investigative documents that would have otherwise been privileged.

Implied Waiver

Implied waiver of privilege over attorney-client communications may also be found “**where the privilege holder ‘asserts a claim that in fairness requires examination of protected communications.’**”

The “fairness” concern: using the privilege tactically, as both “a shield and a sword”

Sword

Seeking to further its case by disclosing otherwise privileged material on the one hand...

Shield

...but then seeking to withhold that same information (or related information) in other circumstances.

Common scenarios

1 “At issue” waiver

When a party places the content of a privileged communication “at issue” in litigation but then seeks to assert privilege over that communication.

2 “Subject matter” waiver

When a party’s **express disclosure** requires waiver of privilege over undisclosed materials that should in fairness be considered together.

Implied Waiver – Subject Matter Waiver

Subject matter waiver is when a “voluntary disclosure of privileged attorney-client communication constitutes waiver of the privilege as to **all other communications on the same subject.**”

In addition, “disclosure of any **significant portion** of a confidential communication waives the privilege as to the whole.”

For disclosures made in federal court or to a federal office or agency, **Federal Rule of Evidence 502(a)** provides that voluntary disclosure **will trigger** a subject matter waiver as to other non-disclosed communications on the same subject if:

1 Intentional

The waiver is *intentional*;

+

2 Same subject

The disclosed and undisclosed communications or information concern the *same subject* matter; and

+

3 Fairness

They ought in *fairness* to be considered together.

Implied Waiver – Spotlight on Government Enforcement

Subject matter waiver concerns often arise during **government investigations**, in which companies under investigation may be incentivized to tactically disclose information learned during their own internal investigations, in an effort to secure more lenient treatment.

1 Any voluntary disclosure risks waiver

Any voluntary disclosure of information subject to attorney-client privilege or work product protection risks waiver.

2 The form of the request doesn't matter

It makes no difference whether production is made in response to a voluntary request, formal subpoena duces tecum, or civil investigative demand; none compel production of privileged information, all risk waiver.

3 Assume waiver as to all third parties

Any such disclosures should be made with an expectation that the company may be found to have waived privilege over the disclosed communications **as to all third parties**.

4 Expect waiver to extend further

Companies should also anticipate that deemed waiver may extend beyond the disclosed communications to related and referenced materials.

Considerations for Limiting Scope of Waiver

In cases where a company intends to affirmatively waive privilege as to another party, there are options for **potentially limiting the scope of any waiver**—as to the receiving party and world at large, and in terms of subject matter. These include:

Selective / limited waiver agreements

Can prevent the parties to the agreement from further disseminating disclosed privileged material or alleging subject matter waiver over disclosed materials, but in the vast majority of cases will be enforceable only against the parties. In limited jurisdictions, they may also document an enforceable intent of the privilege holder to not waive as to third parties.

- See *also* FRE 502(e): parties may enter into “[a]n agreement on the effect of disclosure in a federal proceeding,” but it is “binding only on the parties to the agreement, unless it is incorporated into a court order.”

Binds: the parties to the agreement only

Fed. R. Evid. 502(d) orders

This mechanism, available only in cases where the disclosure is made in connection with **active litigation**, allows parties to seek a court order expressly limiting the scope of any waiver (including as to third parties).

Binds: third parties too – in any federal or state proceeding

Considerations for Limiting Scope of Waiver – FRE 502(d)

In **federal litigation proceedings**, parties have the option of seeking a court order that the attorney-client privilege and work product protection are not waived by disclosures in connection with litigation pending before the court.

Rule 502(d): “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**.”

Effect

Can give effect to a nondisclosure or limited waiver agreement reached between two parties and limit further disclosure as to third parties.

When is litigation “pending”?

Courts typically require an issue for resolution before the court (e.g., a motion to suppress or quash a subpoena, or an ongoing grand jury investigation). Merely responding to a subpoena will likely not qualify.

Practice point: when deciding to disclose information in federal court to an opposing party, sequence it **before** any disclosure

1 Reach an agreement with the opposing party

2 Seek a court order under Rule 502(d)

3 Then make the disclosure

Waiver: An English Law Perspective

- **Waiver of privilege**

- Privilege ceases to apply to a previously privileged document if the holder of the privilege has acted in a way that is **inconsistent with the communication remaining confidential**.
- Privilege in a document will generally be waived if it **is referred to during the course of litigation**. In particular, this applies to documents referred to in statements of case, witness statements and expert reports.

- **Limited waiver**

- A limited waiver allows documents to be shared with a third party on the express or implied understanding that they will only be **used for certain limited purposes** (*Berezovsky v Hine and others* [2011] EWCA Civ 1089).
- It is advisable to ensure that there are **express terms** that ensure that the privilege in a document is only waived for specified purposes.

Work Product Protection and Waiver

04

Work Product Overview

Work product shields from discovery “**documents and tangible things that are prepared in anticipation of litigation**” by a party or its representative.

Key questions to determine if a document was prepared in **anticipation of litigation:**



Would the document have been created in substantially the same form without the prospect of litigation?



Is there something beyond a “remote possibility” of litigation associated with a particular investigation?



Is the anticipated “litigation” a court proceeding or some other “adversarial” proceeding?

Work Product Overview

A proceeding must be “**adversarial**” to qualify as “litigation.” Adversarial proceedings include:

A civil or criminal judicial proceeding

Arbitration, mediation, or other alternative dispute resolution

Certain administrative proceedings

Grand jury proceedings

Investigative legislative hearings

Coroner’s inquiries

Government investigations

Investigations by a government agency do not in and of themselves constitute “litigation,” but “investigation by a governmental agency often represents ‘more than a remote possibility of future litigation and provides reasonable grounds for anticipating litigation,’” e.g., *In re Trasylol Prods. Liability Litig.*, 2009 WL 2575659, at *5 (S.D. Fla. Aug. 12, 2009).

Defining “In Anticipation of Litigation”

Although courts apply slightly different tests, all are highly fact-specific and focus on **what motivated the creation** of the work product.

“Because of” test

Asks whether the document was “prepared or obtained **because of** the prospect of litigation.” Applied by most federal Circuit courts.

“Primary purpose” test

Protected “as long as the **primary motivating purpose** behind the creation of the document was to aid in possible future litigation.” Generally stricter: a document can be created “because of” more than one purpose, but it can only have one “primary” purpose.

Key factor in both tests: whether the document would have been created in substantially the same form without the prospect of litigation (e.g., prepared pursuant to company policy or regulatory requirements or for some other business purpose).

Less likely protected

Courts have said “investigation[s] of corporate wrongdoing are **routine, expected and necessary** for many reasons” – and therefore not conducted in anticipation of litigation, e.g., *Electronic Data Sys. Corp. v. Steingraber*, 2003 WL 21653414, at *5 (E.D. Tex. July 9, 2003).

More likely protected

Internal investigations conducted in response to something that creates a **reasonable expectation of legal risk**, e.g., *In re: FirstEnergy Corp.*, 154 F.4th 431 (6th Cir. 2025).

Work Product Waiver

Work-product protection is **not as easily waived** as the attorney-client privilege.

Why it's harder to waive

Work-product protection is about **fairness**, not confidentiality. It is designed to protect the integrity of the adversarial process, as opposed to encouraging open communications between attorneys and their clients.

What can trigger waiver?

- Disclosure is made to a third-party **adversary**; or
- Disclosure has increased the likelihood that a **potential adversary** could obtain the protected information.

Scope and limits

- Waiver can extend to **undisclosed** work product if letting an adversary see only the disclosed materials would create unfairness.
- Even without waiver, adversaries can gain access by showing a **substantial need** for the information.

Example – *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988): disclosures to the government made “under promise of completeness to induce an adversary to settle” waived work product over the same subject matter, including internal investigation materials.

Questions?

Upcoming October Programs

2026/2027 White Collar Webcast Series

Date and Time	Program	Registration Link
Thursday, October 22, 2026 9:00 AM – 10:00 AM PT 12:00 PM – 1:00 PM ET	Protecting Your Executives Speakers: Reed Brodsky, Sarah Eddy, Douglas Fuchs, Patrick Stokes	Event Details
Wednesday, November 4, 2026 10:30 AM – 11:30 AM PT 1:30 PM – 2:30 PM ET	Export Controls Speakers: Matthew Axelrod, Melissa Farrar, Chris Timura, Adam Smith	Event Details
Tuesday, November 10, 2026 9:00 AM – 11:00 AM PT 12:00 PM – 2:00 PM ET	Board Oversight of Enforcement Investigations Speakers: John Chesley, Monica Loseman, Bill Savitt, Joe Warin	Event Details



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