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**THE FEDERALIST SOCIETY NATIONAL
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**THE AVAILABILITY OF COMMON LAW PRIVILEGES
FOR WITNESSES IN CONGRESSIONAL
INVESTIGATIONS**

MICHAEL D. BOPP* & DELISA LAY**

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INTRODUCTION

The Chairman gaveled the hearing to order. Executives from four companies were set to testify, their lawyers whispering last-minute advice in their ears. Reporters, spectators, and lobbyists filled the hearing room as the Chairman began his opening remarks.

Noting that the Department of Justice (DOJ) also was investigating the alleged misconduct, the Chairman announced that the hearing would bring to light “an immoral practice” and a business culture that valued profit over human safety.

Under investigation by the congressional investigative committee were four companies that sold allegedly defective products to the government, resulting in injuries to government employees. These companies contracted with the government to produce the product and sold it exclusively to government agencies.

News reports suggested the companies might have known about problems with the product before delivery, meaning these injuries might have been preventable. The news reports also indicated that some injured employees planned to sue at least one, and possibly all, of the companies.

For six months, congressional investigators had been preparing for this hearing. For more than a year the companies had been under DOJ investigation. During this time, both the DOJ and the committee had requested tens of thousands of documents, some of which were privileged.

The companies' lawyers all agreed that privileged documents should be withheld from the DOJ. The DOJ in response requested a privilege log detailing which documents had been withheld and the reasons for withholding them but went no further in its request for the documents.

The lawyers for the targeted companies, who had been communicating amongst themselves regarding the investigations, were split when it came to providing privileged documents to a congressional committee. Although some wanted to withhold the documents, others wanted to seek an agreement from the committee that any documents produced would be held by the committee in confidence. The congressional investigators also requested a privilege log.

Outside counsel for the companies had been sharing information relating to the congressional investigation. Subpoenas issued to the four companies by the committee were broad enough to encompass notes and other records of such communications. Although two of the companies wanted to release these documents, the others objected and noted that release by one company would constitute waiver of privilege by the others.

Three weeks after the companies gave the committee their privilege logs, they received a letter from the Chairman threatening contempt of Congress if the companies failed to produce the documents identified in the privilege logs. Noting that "Congress is not required to abide by evidentiary privileges that are part of the judicial system," the Chairman reminded the companies that punishment for contempt of Congress can include jail.

With executives fearing jail time and their lawyers finding little legal precedent to support claims of privilege before Congress, the companies again split over whether to release the documents.

The Chairman gave the companies a date by which he wanted an answer. That date came and went with the companies unable to agree on a course of action. The Chairman responded by scheduling a committee meeting for the purpose of

issuing subpoenas to the four companies. The days leading up to the hearing produced a series of newspaper articles and mentions on evening news programs about the investigation and the upcoming committee votes on subpoenas. Although the companies had their supporters among committee members, they knew that the Chairman had the votes to approve the subpoenas and that his support was bipartisan.

On the eve of the committee meeting, the general counsels of the four companies convened a conference call to decide whether to let the committee meeting proceed or produce privileged documents that could then be used against them in future litigation.

This Article examines the choices available to these companies and the consequences of those choices over the course of a high-profile congressional investigation. It is intended to serve as a practical guide to organizations and their attorneys who find themselves in similar situations.

More specifically, the Article first explores (1) the source and extent of congressional investigative authority and (2) the authority and relevant factors investigative committees consider in determining whether to recognize or deny common law privileges. Next, the Article discusses in greater detail the extent of protections available to entities investigated by Congress under (1) the attorney-client privilege, (2) the work product doctrine, and (3) the common interest doctrine. Finally, the Article examines the effect of producing privileged communications and material to congressional investigative committees and the interests companies such as the four introduced above should weigh when they consider how to comply with Congress while endeavoring to preserve confidential information.

I. CONGRESSIONAL INVESTIGATIVE AUTHORITY

The Constitution grants Congress an implied power of inquiry to inform itself as it makes laws and oversees their execution, and Congress may enforce this power through subpoenas and contempt proceedings.¹ The U.S. Senate and

1. See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975) ("The issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking; without it our recognition that the act 'of authorizing' is protected would be meaningless."); see also *Sinclair v. United States*, 279 U.S. 263

House of Representatives exercise the power of inquiry through standing committees and subcommittees, such as in the example above, or through committees authorized to investigate specific matters.²

A congressional investigation, properly understood, is not equivalent to a routine oversight hearing. An oversight hearing often involves a committee inquiry into the workings of a federal agency, office, or program, or into some other subject area related to existing or potential federal legislation. In such circumstances, as recognized by a 1955 report of the Senate Committee on Rules and Administration examining the rules and conduct of congressional investigations, the witness “is not being investigated. His personal activities and reputation are not directly involved. He does not regard himself as ‘on trial’ before the committee or the public. He has, in most instances, appeared voluntarily, and is not concerned with his ‘rights’ before the committee.”³ In contrast, a congressional investigation more closely resembles a trial. Witnesses often are sworn in at the beginning of the hearing, taking an oath with cameras recording the dramatic moment. In this setting, “[t]he witness may begin to think in terms of procedural rights, particularly if his testimony is publicized in the press”⁴

Regardless of how rights-conscious a witness may be, however, Congress remains conscious and confident that it may, but is not required to, recognize those witnesses’ common law

(1929) (upholding the witness’s conviction for contempt of Congress); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”); *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) (“[T]here can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.”).

2. An example of a committee established for the purpose of a particular investigation is the Senate Whitewater Committee. *See* S. Res. 120, 104th Cong. (1995) (“Establishing a special committee . . . to conduct an investigation involving Whitewater Development Corporation”). This type of committee can be contrasted to permanent committees with investigative authority, such as the Senate’s Permanent Subcommittee on Investigations.

3. S. REP. NO. 84-2, at 23 (1955).

4. *Id.*

legal privileges.⁵ The Supreme Court has not yet addressed this issue, leaving parties subject to congressional investigations without guidance as to the exact scope of protection afforded them under the attorney-client privilege and the work product doctrine. In this uncertain environment, companies and their attorneys must determine whether to acquiesce to committee requests for privileged communications and documents or to invoke privilege and risk contempt.

II. CONGRESSIONAL RECOGNITION OF PRIVILEGES

A. Enforcement Power in Investigations

Companies such as the four under investigation in our example should be aware that refusal to comply with the committee's requests for privileged information could have painful consequences. Congress may hold in contempt any witness who fails to comply with a congressional subpoena in the context of an investigation. Like Congress's power of inquiry, its contempt power "is not specifically granted by the Constitution, but it is considered necessary to investigate and legislate effectively."⁶ There are three forms of contempt available to Congress: inherent, criminal, and civil.⁷

The Supreme Court recognized inherent contempt as an inherent congressional power necessary for effective legislation and investigation.⁸ Inherent contempt proceedings involve a trial before the full House or Senate and may result in imprisonment, although Congress has not used inherent contempt proceedings since 1934.⁹ Congress created statutory criminal contempt in 1857.¹⁰ Statutory criminal contempt requires a full committee or subcommittee, followed by the full House or Sen-

5. *See, e.g.*, 149 CONG. REC. S2257 (statement of Sen. Patrick Leahy) ("[T]here is ample precedent that the attorney-client privilege does not apply to requests by Congress.").

6. MORTON ROSENBERG & TODD B. TATELMAN, CONG. RES. SERV., RL 34114, CONGRESS'S CONTEMPT POWER: A SKETCH 5 (2007).

7. *See id.* at 1.

8. *See, e.g.*, *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Anderson v. Dunn*, 19 U.S. 204 (1821).

9. ROSENBERG & TATELMAN, *supra* note 6, at 7.

10. *Id.* at 2.

Senate, to approve a contempt citation.¹¹ The Speaker of the House or the President of the Senate then will certify the citation and present it to the U.S. Attorney, who must bring the matter before a grand jury.¹² Civil contempt also is available in both the Senate and House, although using different procedures. In the Senate, 2 U.S.C. §§ 288b(b) and 288d authorize the Senate, through Senate Legal Counsel, to file suit in the U.S. District Court for the District of Columbia to enforce a subpoena.¹³ The House does not have a civil contempt statute but may pass a resolution creating a special investigatory panel with the power to seek judicial orders or granting such power to a standing committee.¹⁴

Historically, Congress has rarely exercised its contempt power. It has been more typical that an investigative committee and a witness claiming privilege will reach some form of compromise. As suggested by a Senate committee in 1955,

[t]he problem of determining what rights or privileges to extend to witnesses is simply one of fair play. Courtesy and understanding on the part of committee members and staff would obviate any need for elaborate procedural devices. The absence of these qualities could destroy the effectiveness of the most complex protective structure.¹⁵

In part, however, Congress might be reluctant to pursue contempt proceedings because then the judicial branch has the opportunity to set the boundaries of the congressional power of inquiry.¹⁶ Moreover, at least in the case of a criminal contempt

11. *See id.* at 8 (citing 2 U.S.C. § 194 (2000)).

12. *Id.*

13. *Id.* at 13–14.

14. *See id.* at 15.

15. S. REP. NO. 84-2, at 23 (1955).

16. An example of this reasoning was used by the minority in urging the Senate Committee on Banking, Housing, and Urban Affairs not to pursue a civil action to enforce a subpoena against a former Associate Counsel to President Clinton. It noted that, specifically in the context of a dispute between the executive and legislative branches:

It always should be borne in mind that when the Executive and Legislative Branches fail to resolve a dispute between them and instead submit their disagreement to the courts for resolution, an enormous power is vested in the Judicial Branch to write rules that will govern the relationship between the elected branches. In any particular case there may be an advantage gained for one or the other elected branches through a judicial ruling. However, there also are considerable risks in

holding, a witness would have the opportunity to contest the charge through a habeas petition to the courts.¹⁷ Finally, the contempt procedures, particularly the statutory criminal contempt procedures, are extensive and require the support of the entire House or Senate. Those procedures themselves might serve as a deterrent to their use.

Nevertheless, Congress has exercised its contempt authority, and contempt remains a readily available enforcement tool to a committee determined to gain access to privileged information.¹⁸

Media attention tends to encourage a committee to push for compliance rather than compromise and, in some cases, makes an actual contempt citation less likely. The process toward a contempt citation is a long and unpleasant one for the target of a committee's attention. A committee can take several steps, each in a public way if it so chooses, to attempt to persuade a recalcitrant target to produce documents or otherwise comply with a committee request. In the case of a document request to a corporation, the following is a sequence of actions a committee could take—and could publicize—before the House or Senate Counsel actually seeks a contempt citation in court:

- Send a letter to the CEO of the corporation requesting the documents;
- Send a follow-up letter to the CEO, reiterating the request and explaining why compliance is important for the committee to do its work and important to the CEO to avoid consequences of noncompliance;

calling on the courts to prescribe rules to govern the extent of the vital tool of congressional investigatory power.

Thus, while the Committee might prevail, every Senator who votes on this resolution must recognize that an adverse precedent could be established that would make it more difficult for all congressional committees to conduct important oversight and other investigatory functions. Since a mutually acceptable resolution is close at hand, we strongly urge the Senate not to precipitate unnecessary litigation by passing this resolution.

S. REP. NO. 104-191, at 21 (1995) [hereinafter WHITEWATER REPORT].

17. See, e.g., *In re Chapman*, 166 U.S. 661 (1897); *Ex parte Frankfeld*, 32 F. Supp. 915 (D.D.C. 1940); *United States v. Groves*, 18 F. Supp. 3 (W.D. Pa. 1937).

18. See, e.g., *Sinclair v. United States*, 279 U.S. 263 (1929); *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966); *United States v. Tobin*, 195 F. Supp. 588 (D.D.C. 1961).

- Require a CEO or other high-ranking corporate officer to submit to an interview or deposition in committee offices, focusing on the document requests but possibly ranging into other areas of inquiry;
- Send a final letter to the CEO setting a date certain for compliance and threatening a subpoena if the CEO does not comply;
- Notice a committee meeting for the purpose of voting to issue a subpoena to the CEO;
- Hold the committee meeting at which the Chairman publicly excoriates the CEO for noncompliance with a valid committee request;
- If the CEO does not comply with the subpoena, notice a meeting for the committee to vote on whether the CEO is in contempt and to request that the full House or Senate vote to instruct the chamber's legal counsel to file a contempt petition in federal court;
- Hold a vote of the full House and Senate to so instruct its legal counsel to seek a contempt order.

Of course, these actions are not exclusive as, among other things, they could be punctuated by press conferences and appearances by the Chairman on various television networks. The point is that the road to a contempt citation can be made so excruciating that few companies or individuals are willing to see it to the end.

B. Privileges

1. Common Law Privileges Are Not Constitutionally Protected and Thus Do Not Apply to Congress

Witnesses called to testify in connection with a congressional investigation do enjoy constitutional protections.¹⁹ Despite Congress's broad investigative authority and ability to set its

19. See *Watkins v. United States*, 354 U.S. 178, 188 (1957) ("The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.").

own rules,²⁰ witnesses in congressional investigations have the right to invoke constitutional privileges during a congressional investigation.²¹ Common law privileges such as the attorney-client privilege and the work product doctrine, on the other hand, are not among those specifically guaranteed by the Constitution.

In 1954, the Senate, amid the controversy of the McCarthy investigations conducted by the House Un-American Activities Committee, contemplated a bill to apply common law evidentiary privileges to congressional investigations.²² The legislation would have incorporated common law privileges into the Senate rules but only in the case of investigations.

The bill ultimately did not pass. As explained in the committee report:

With few exceptions, it has been committee practice to observe the testimonial privileges of witnesses with respect to communications between clergyman and parishioner, doctor and patient, lawyer and client, and husband and wife. Controversy does not appear to have arisen in this connection. While the policy behind the protection of confidential communications may be applicable to legislative investigations as well as to court proceedings, no rule appear [sic] to be necessary at this time.²³

Since this failed bill, Congress has left the question of testimonial privileges to tradition.

III. ATTORNEY-CLIENT CONFIDENTIALITY

A. *Although Not Required, Congressional Investigative Committees May Recognize a Legitimate Claim of Attorney-Client Privilege*

The attorney-client privilege “is the oldest of the privileges for confidential communications known to the common law.”²⁴

20. See U.S. CONST. art. I, § 5.

21. See *Quinn v. United States*, 349 U.S. 155, 161 (1955) (“[L]imitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights . . .”).

22. S. Res. 256, 83d Cong. (1954).

23. S. REP. NO. 84-2, at 27–28 (1955).

24. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (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."²⁵ The privilege extends to confidential communications between the client and his attorney.²⁶

Although Congress is not obligated to respect common law privileges in committee investigations, in practice it generally accommodates a witness's legitimate assertions of attorney-client privilege. In the congressional investigation of Bank of America, the bank's attorneys doubted "that a majority of the House would be willing to hold a witness in contempt for withholding information that is truly privileged under the attorney-client doctrine."²⁷ As many members of Congress are former attorneys or have some legal background, it is likely that they would take pause before voting to hold in contempt a witness who has a legitimate privilege claim. Nevertheless, protection of a legitimate privilege remains uncertain, and protection of a weaker claim is nonexistent. Moreover, assertion of such a claim could provoke political rancor and possibly contempt proceedings themselves. Thus, the lesson for the four companies in our example is not that they should rashly assert a claim and then hope that Congress will blink first in a privilege standoff. Rather, the companies should note that if they choose to forgo voluntary disclosure and assert privilege, their claim must first be legitimate, falling within the judicially recognized bounds of the attorney-client privilege. For example, as the attorney-client privilege typically is waived when confidential information is communicated to a third party, Congress would have a ready excuse to refuse a witness's privilege claim if there were third-party disclosure.

When confronted with a witness refusing to provide documents on the grounds of attorney-client privilege, Congress at times has suggested that the privilege is not waived when documents are provided to Congress under threat of contempt. For example, the Senate Whitewater Committee suggested that

25. *Id.*

26. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:13 (3d ed. 2007).

27. Michael Stern, *Congress Versus Bank of America's Attorney-Client Privilege*, POINT OF ORDER (Sept. 23, 2009, 5:49 AM), <http://www.pointoforder.com/2009/09/23/congress-versus-bank-of-americas-attorney-client-privilege/>.

"[a] court is likely to treat disclosure under compulsion of a congressional order as involuntary and, therefore, not effecting a waiver."²⁸ This position, as discussed in Section VI.A, is not fully consistent with existing jurisprudence.

B. *Third Parties*

The often media-driven environment of congressional investigations frequently demands that attorneys consult third parties. In high-profile cases, witnesses or their attorneys might hire public relations consultants or lobbyists to monitor and manage the press as well as interact with members of Congress. For example, our four companies may well have decided to hire a public relations firm ("PR firm" or "the firm") to mitigate the growing negative perception of their businesses. To better advise the companies on their media strategies throughout the investigation, the firm would need to participate in conferences with the companies and their attorneys. The attorneys might ask firm employees to opine on the likely repercussions on public opinion of a particular legal strategy. In fact, the attorneys and the PR firm might work so closely together that, practically, the companies' executives appear unable to separate legal counsel from public relations advice.

Some courts have recognized this modern reality and have attempted to reevaluate the parameters of the attorney-client privilege. The Second Circuit in *United States v. Kovel* extended the attorney-client privilege to communications with a third-party consultant because "the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others . . ."²⁹ Not all courts agree, however. The appellate courts are split over the circumstances under which the privilege remains intact.

Courts generally agree that the application of the attorney-client privilege to third-party disclosure is determined on a case-by-case basis.³⁰ First, as a blanket rule, courts require that a privileged communication be one in which the consultant assists the clients and attorneys in rendering *legal* services.³¹ Con-

28. WHITEWATER REPORT, *supra* note 16, at 10.

29. 296 F.2d 918, 921 (2d Cir. 1961) (Friendly, J.).

30. See *Coorstek, Inc. v. Reiber*, No. 08-cv-01133-KMT-CBS, 2010 WL 1332845, at *5 (D. Colo. Apr. 5, 2010).

31. See *Blumenthal v. Drudge*, 186 F.R.D. 236, 243 (D.D.C. 1999).

sultants do not render legal services when they merely collect information that is not directly obtainable from the plaintiff.³² Several courts, however, have upheld the privilege when business and legal advice are indistinguishable so long as the communications are predominantly legal.³³ As in the case of our four companies, their attorneys, and their PR firm, however, the distinction between legal services and other types of services might not always be clear. Furthermore, once a court has determined that the contested communication involved the use of legal services, it then must determine whether the communication should be privileged. To do so, courts often have employed at least one of two tests: the “functional equivalent” test, to determine how effectively integrated the consultant is with the company in question, or the “agency” test, to examine the nature of the consultant’s relationship to the lawyer and the rendering of legal services. There is significant overlap between the two tests.

1. *Functional Equivalent Test*

Borrowing from a decision based on an analogous set of facts in *McCaugherty v. Sifferman*,³⁴ the Eighth Circuit articulated the functional equivalent test in *In re Bieter Co.*³⁵ There, the court recognized that in the modern corporate world, “there will be potential information-givers who are not employees of the corporation but who are nonetheless . . . associated with the corporation in a way that makes it appropriate to consider them ‘insiders’ for purposes of the [attorney-client] privilege.”³⁶ Before this case, the consultant in *Bieter* had been involved intimately with the company for years and had frequent contact with the company’s outside counsel.³⁷ The court could not dis-

32. *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 437 (W.D.N.Y. 1997) (citing *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 161 (E.D.N.Y. 1994)).

33. See, e.g., *Note Funding Corp. v. Bobian Invs. Co.*, No. 93 CIV.7427 (DAB), 1995 WL 662402, at *2-3 (S.D.N.Y. Nov. 9, 1995); *Handgards, Inc. v. Johnson & Johnson*, 69 F.R.D. 451, 453-54 (N.D. Cal. 1975); *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792, 794 (D. Del. 1954).

34. 132 F.R.D. 234 (N.D. Cal. 1990).

35. 16 F.3d 929 (8th Cir. 1994).

36. *Id.* at 936 (quoting John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 498 (1982)).

37. See *id.* at 934.

tinguish his role “from that of an employee,” and, as he was “involve[d] in the subject of the litigation,” the consultant was “precisely the sort of person with whom a lawyer would wish to confer confidentially”³⁸

The functional equivalent test has been adopted and modified in different ways by courts in the Second, Ninth, Tenth, and Eleventh circuits.³⁹ In *Export-Import Bank of the U.S. v. Asia Pulp & Paper Co.*, the district court employed a three-part test to determine whether the consultant was fully integrated into the company hierarchy.⁴⁰ The court considered (1) “whether the consultant had primary responsibility for a key corporate job”; (2) “whether there was a continuous and close working relationship between the consultant and the company’s principals on matters critical to the company’s position in the litigation”; and (3) “whether the consultant is likely to possess information possessed by no one else at the company.”⁴¹ The court determined that the consultant did not pass the test because his work was not unique⁴² and his “schedule, the location of his head offices, and the success of his consulting business . . . contradict[ed] the picture of [the consultant] as so fully integrated into the APP hierarchy as to be a *de facto* employee of APP.”⁴³

Some courts have concluded that the *Asia Pulp & Paper* test’s “continuous relationship” prong does not require that the relationship span a minimum length of time. In *In re Copper Market Antitrust Litigation*, for example, the court upheld the attorney-client privilege for communications between a Japanese corporation and its American public relations consultant hired to manage the company’s media

38. *Id.* at 938.

39. *See, e.g.*, *United States v. Graf*, 610 F.3d 1148, 1159 (9th Cir. 2010) (consultants were integral members of the team who dealt with issues that were completely intertwined with the litigation and legal strategies); *Coorstek, Inc. v. Reiber*, No. 08-cv-01133-KMT-CBS, 2010 WL 1332845, at *6 (D. Colo. Apr. 5, 2010); *Hope for Families & Cmty. Servs. v. Warren*, No. 3:06-CV-1113-WKW, 2009 WL 1066525, at *6 (M.D. Ala. Apr. 21, 2009) (attorney/consultant was the functional equivalent of an in-house employee); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 220 (S.D.N.Y. 2001) (consultants were akin to independent employees of the company).

40. 232 F.R.D. 103, 113 (S.D.N.Y. 2005).

41. *Id.*

42. *Id.*

43. *Id.* at 114.

strategy in anticipation of the lawsuit.⁴⁴ The consultant's duties included helping the company "make . . . statements . . . within the necessary legal framework—all with the realization, indeed the expectation, that each statement might subsequently be used by [the company's] adversaries in litigation."⁴⁵ Although the consultants did not expect to work with the company on a long-term basis, the court found that, while the relationship existed, the consultants essentially were incorporated into the company's staff.⁴⁶ Key factors in *Copper Market* were the consultants' independence and ability to act with authority on behalf of the client.⁴⁷

The district court in the Northern District of Illinois refused to implement the "functional equivalent" test in *LG Electronics U.S.A. v. Whirlpool Corp.*⁴⁸ Rather, the court used its own criteria to determine that Whirlpool's consultants could not claim the attorney-client privilege. The court found that, despite the consultants' long-term relationship with Whirlpool, the consultants were not entitled to the privilege because Whirlpool exercised the "final say" in all of its advertisements, closely monitored the consultants' work, and retained the legal rights to the agency's work product.⁴⁹ Although the *Whirlpool* court distinguished *Asia Pulp & Paper*,⁵⁰ as a practical matter, both courts placed great weight on the independence and decision-making authority of the consultants.

The functional equivalent test may offer comparatively little protection to communications with consultants in the course of congressional investigations. Congressional investigations tend to be rare occurrences and companies often respond by hiring media and other consultants specifically to assist with the particular investigation. Moreover, the high-profile nature of such investigations tends to focus the attention of a target company's senior management, thus limiting the autonomy afforded to consultants. The result is that consultants in congress-

44. 200 F.R.D. at 219.

45. *Id.* at 216.

46. *See id.* at 219.

47. *See id.* at 216.

48. 661 F. Supp. 2d 958 (N.D. Ill. 2009), *mandamus denied* 597 F.3d 858 (7th Cir. 2010).

49. *Id.* at 965.

50. *See id.*

sional investigation matters can tend to serve less as part of the company staff and more as outside advisors.

2. Agency Test

Courts also have used the more stringent agency test to determine whether the presence of a third-party consultant waives attorney-client privilege. Rather than focusing on the authority and independence of the consultant with respect to the client, the agency test focuses on the relationship between the consultant and the lawyer and the nature of the advice, asking whether the consultant was hired for the purpose of assisting the attorney in rendering legal services.⁵¹ In its narrow approach of the test in *Dahl v. Bain*, the Massachusetts district court identified the limited circumstances under which attorney-client privilege is not waived by the presence of a third-party consultant.⁵² First, “th[e] involvement of the third party must be *nearly indispensable* or serve some *specialized purpose* in facilitating the attorney-client communications.”⁵³ Second, the exception applies only to communications in which the consultants serve as interpreters or translators.⁵⁴ Third, the communication “must be made for the purpose of rendering legal advice, rather than business advice.”⁵⁵

Consultants seeking the protection of the attorney-client privilege appear to fare far worse under the agency test than under the functional equivalent test. For example, the court in *Dahl* imposed rigorous requirements that render it nearly impossible for third parties other than language translators or highly specialized experts to claim protection. Similarly, in *Calvin Klein Trademark Trust v. Wachner*,⁵⁶ the district court for Southern New York held that communications between the attorneys, their clients, and the public relations consultants were not privileged, finding that (1) the communications were not

51. See, e.g., *Dahl v. Bain Capital Partners, LLC*, 714 F. Supp. 2d 225, 227 (D. Mass. 2010).

52. See *id.* at 227–28.

53. *Id.* at 227 (emphasis added) (quoting *Cavallaro v. United States*, 284 F.3d 236, 246–47 (1st Cir. 2002)).

54. *Id.* at 228.

55. *Id.* (citing *Cavallaro*, 284 F.3d at 248–49; *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *Export-Import Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 111 (S.D.N.Y. 2005)).

56. 198 F.R.D. 53 (S.D.N.Y. 2000).

made for the purposes of obtaining legal advice; (2) consultants did not serve as translators or interpreters, but merely “assist[ed] counsel in assessing the probable public reaction to various strategic alternatives;” and (3) ruling in favor of those asserting privilege would broaden the privilege beyond its intended purpose.⁵⁷ In another case, the same court acknowledged the usefulness of media campaigns but also refused to uphold the privilege because “[a] media campaign is not a litigation strategy,” and “coordination of a campaign” does not amount to “legal advice.”⁵⁸ Unlike the functional equivalent test, the agency test does not allow consultants to claim the attorney-client privilege in the course of ordinary public relations duties. The specificity and rigidity of the agency test imposes an uphill battle on consultants and their clients to demonstrate that their communications should be privileged.

3. In re *Grand Jury Subpoenas*

In perhaps the most publicized case involving attorney-client privilege and public relations consultants, the trial of Martha Stewart, the district court for the Southern New York district created a separate set of standards that was tailored to the particular circumstances surrounding that litigation.⁵⁹ The court distinguished *Copper Market* and *Calvin Klein* on the basis of Stewart’s claim that she employed a public relations consultants for an entirely different reason: to communicate with the media in a way that would reduce the risk that prosecutors and regulators would feel pressure to bring charges against her.⁶⁰ In stark contrast with its earlier ruling in *Haugh* that “a media campaign is not a litigation strategy,”⁶¹ in Stewart’s case the court found that:

- (1) confidential communications
- (2) between lawyers and public relations consultants
- (3) hired by the lawyers to assist them in dealing with the media in cases such as this
- (4) that are made for the purpose of giving or receiving advice
- (5)

57. *See id.* at 54–55.

58. *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No. 02 Civ.7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003).

59. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 324–25 (S.D.N.Y. 2003).

60. *See id.* at 323, 329.

61. *Haugh*, 2003 WL 21998674, at *3.

directed at handling the client's legal problems are protected by the attorney-client privilege.⁶²

Furthermore, the court shied away from its earlier assertion in *Calvin Klein* that the attorney-client privilege must be narrowly construed, instead placing great emphasis on the idea that "there has been a strong tendency to view the lawyer's role more broadly."⁶³ The court, however, noted that their inclination to protect communications that met the five requirements listed above would have been different had Stewart hired the public relations firm herself, instead of through her lawyers.⁶⁴ The court noted that the issue in *Kovel* was whether the lawyer, not the client, needed "'outside help."⁶⁵ Also in line with Judge Friendly's reasoning in *Kovel*, the court noted that the *persons* present at strategy meetings did not matter so much as the *focus* of those meetings, meaning that communications between Stewart and the public relations firm outside the presence of lawyers could still be protected as long as they "were directed at giving or obtaining legal advice."⁶⁶

For our four companies, *In re Grand Jury Subpoenas* offers some promise of protection for consultant communications. Congressional investigations not infrequently lead to criminal prosecutions or civil litigation. It would not be unreasonable for a company or individual to hire a media consultant to attempt (at least in part) to lessen the chance that an executive branch investigation or litigation will follow congressional attention. Of course, it might be a challenge to show that the consultant was hired for that purpose and not also or predominantly to control damage associated with the congressional investigation more generally. Knowing that this standard could apply, a company could take steps to engage a media consultant in such a way that complies with the *In re Grand Jury Subpoena* criteria. Stewart's case, however, is difficult to reconcile with the court's other cases on the attorney client privilege. Nevertheless, given the importance of media coverage in the context of congressional investigations, courts

62. *Grand Jury Subpoenas*, 265 F. Supp. 2d at 331.

63. *Id.* at 326-27.

64. *Id.* at 331.

65. *Id.* (quoting *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961)).

66. *Id.* (emphasis added).

should apply the attorney-client privilege permissively to situations in which media and other consultants are incorporated into the legal team.

4. Attorney-Consultants

In the same vein, meetings with attorneys where the purpose of the meeting is *not* to obtain legal advice or render legal services may not be privileged.⁶⁷ Attorneys who also work as consultants are subject to the same constraints as consultants without a legal background. “Lobbying conducted by attorneys,” stated the court in *U.S.P.S. v. Phelps Dodge Refining Corp.*, “does not necessarily constitute legal services for the purposes of the attorney-client privilege.”⁶⁸ Similarly, in *NXIVM Corp. v. O’Hara*, the court noted that “[t]he issue is not the client’s belief that a professional may be acting as an attorney but rather the issue is for what purpose the lawyer was retained. . . . [I]t is the nature of the communication that controls.”⁶⁹ The court, therefore, looked to the client’s purpose in retaining the attorney-consultant as evidenced by the “Professional Service Agreement” entered into by the parties at the start of the relationship.⁷⁰

Courts also have examined the nature of the tasks performed by the attorney-consultant, and whether those tasks are sufficiently nonlegal to have been performed by a nonattorney.⁷¹ Although the court in *Phelps Dodge* acknowledged that present-day attorneys have duties that are more varied than the traditional tasks performed by lawyers, it maintained that the attorney-client privilege attaches only to legal services.⁷² If the attorney-consultant is responsible for performing primarily nonlegal tasks, he should not expect privilege to apply.⁷³ Courts also have evaluated the motive of the attorney-consultant or client in initiating the contested

67. *See id.*

68. 852 F. Supp. 156, 164 (E.D.N.Y. 1994).

69. 241 F.R.D. 109, 129 (N.D.N.Y. 2007).

70. *Id.* at 130.

71. *See Phelps Dodge*, 852 F. Supp. at 160.

72. *Id.*

73. *See id.*

communication.⁷⁴ If, for example, the client would have communicated with the attorney-consultant on an issue even if the privilege did not exist or if a non-legal objective prompts communication with the attorney-consultant then a court may refuse to uphold the privilege.⁷⁵ The court in *Haugh*, for example, found it “crucial that the party asserting the privilege show that the communication is made so that the client may obtain *legal advice from her attorney*.”⁷⁶

IV. WORK PRODUCT DOCTRINE

A. *The Work Product Doctrine Protects Materials Prepared in Anticipation of Litigation*

The work product doctrine is “distinct from and broader than the attorney-client privilege.”⁷⁷ It protects documents and other materials prepared in anticipation of litigation by a party, the party’s attorney, or the party’s “representative” including its “consultant, surety, indemnitor, insurer, or agent.”⁷⁸ The attorney-client privilege protects confidential communications between a client and his attorney regardless of whether litigation occurs or is even expected. The work product doctrine is intended to protect the attorney’s privacy in preparing for litigation.⁷⁹ Any documents containing the “mental impressions, conclusions, opinions, or legal theories”⁸⁰ of the attorney or representative are only discoverable upon a showing of substantial need and undue hardship of obtaining the information in another manner.⁸¹

74. *NXVIM*, 241 F.R.D. at 144; *Haugh v. Schroder Inv. Mgmt.*, No. 02 Civ. 7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. 2000); *see also, e.g., Phelps Dodge*, 852 F. Supp. at 160.

75. *Phelps Dodge*, 852 F. Supp. at 160.

76. 2003 WL 21998674, at *3.

77. *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975).

78. FED. R. CIV. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511–12 (1947).

79. FED. R. CIV. P. 26(b)(3)(A).

80. FED. R. CIV. P. 26(b)(3)(B).

81. *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981).

B. *Several Courts Do Not Consider Congressional Investigations To Be Litigation for Purposes of the Work Product Doctrine*

This issue is further complicated by the uncertainty surrounding whether congressional investigations qualify as “litigation” for purposes of the work product doctrine. As discussed in Part I, investigations often unfold more like a trial than as oversight or an adjunct to legislative efforts. The consequences of the congressional investigation for our four companies, for example, can be equal to, if not worse than, the consequences of civil litigation. A congressional investigation can affect stock prices as well as public perception of the targeted company, and a company often is best served by approaching a congressional investigation in ways similar to how one would respond to an executive branch investigation.

However, there is both judicial and legislative support for the proposition that congressional investigations are not adversarial proceedings and that witnesses thus should not be entitled to the same degree of privilege protection as defendants at trial.⁸² Adversarial proceedings determine culpability; they exact remuneration or punishment, perhaps in the form of a defendant’s property or even his liberty. In contrast, congressional investigations do not judge guilt or fault as a matter of law. Rather, they are intended to inform the legislative body in its decisionmaking.

Of course, as our four companies would argue, a committee’s extremely public process of informing itself through investigations still has potent consequences. In our example, the companies have just been accused, in a public manner, by a committee, of not only fraudulent but “immoral” practices. Much like in a courtroom, the four CEOs sit at a witness table accompanied by their attorneys and opposite the committee, which is now the arbiter of whether the companies have engaged in wrongdoing. Moreover, a congress-

82. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997) (finding that the impending congressional investigation was not an adversarial proceeding for the purposes of the work product doctrine); see also HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON ENERGY AND COMMERCE, 98TH CONG., ATTORNEY-CLIENT PRIVILEGE 16 (Comm. Print 1983) (“The necessity to protect the individual interest in the adversary process is far less compelling in an investigative setting where a legislative committee is not empowered to adjudicate the liberty or property interests of a witness.”).

sional investigation is often tied to related civil litigation or an executive branch investigation, and potential plaintiffs would have an interest in any testimony offered or documents produced in the course of the congressional inquiry. Hence, it would hardly be a stretch for the companies to view the investigation much as they would litigation.

Nevertheless, courts have tended to view congressional investigations as different from litigation. During the White-water scandal, the Eighth Circuit briefly addressed this issue in response to Hillary Clinton's claim that certain documents were privileged as attorney work product because they were prepared in anticipation of the congressional investigation.⁸³ In support of her claim, Clinton cited the Restatement of Law Governing Lawyers, which provides that litigation includes "an investigative legislative hearing."⁸⁴ In response, the court skeptically noted the Restatement's failure to cite "any authority for this proposition," adding that it too was unable to unearth a single supportive case.⁸⁵ The court then noted that an "essential element" for finding that a document was prepared in anticipation of litigation was that "the attorney was preparing for or anticipating some sort of adversarial proceeding"⁸⁶ In this and subsequent cases that address the issue, courts refuse to characterize congressional investigations as "adversarial," thus preventing such proceedings from falling under the category of "litigation."

The result is that a target of a congressional investigation cannot be certain that attorney work product will be protected from disclosure even if the congressional committee otherwise would recognize the work product doctrine as a valid reason for withholding documents or other information. Companies caught up in an investigation thus must be cognizant that the doctrine might not shield documents and information from disclosure to the committee and must act with appropriate caution.

83. See *In re Grand Jury Subpoena*, 112 F.3d at 924.

84. See *id.* (quoting Restatement (Third) of Law Governing Lawyers § 136 cmt. h (Proposed Final Draft No. 1, 1996); see also Restatement (Third) of Law Governing Lawyers § 87 cmt. h (2000).

85. *In re Grand Jury Subpoena*, 112 F.3d at 924.

86. *Id.*

V. COMMON INTEREST DOCTRINE

In our example, the congressional committee is seeking to gather information from the four companies in accordance with the general congressional practice of surveying different parties involved in the subject matter under investigation. The companies, at least for the purpose of the congressional inquiry and possibly beyond, clearly have interests in common and have been working together to prepare for and defend against this congressional investigation. The companies might, therefore, benefit by appealing to the “joint defense doctrine” or “common interest doctrine,” which provides an exemption to the rule that the attorney-client or work product doctrine is waived if the confidential information is disclosed to a third party.⁸⁷ Specifically, the doctrine protects communications “between two or more parties and/or their respective counsel . . . participating in a joint defense agreement. It permits a client to disclose information to her attorney in the presence of joint parties and their counsel without waiving the attorney-client privilege”⁸⁸ The common interest doctrine does not create an independent privilege, but rather is “an extension of the attorney-client privilege and of the work product doctrine.”⁸⁹

The D.C. district court requires a party seeking protection of privileged communications through the joint defense doctrine to demonstrate that “(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.”⁹⁰ Regarding the first prong, the proponent “must establish that ‘the parties had *agreed* to pursue a joint defense strategy.’”⁹¹ Such an agreement may

87. See *Katz v. AT&T Corp.*, 191 F.R.D. 433, 436 (E.D. Pa. 2000).

88. *United States v. Hsia*, 81 F. Supp. 2d 7, 16 (D.D.C. 2000) (internal citations omitted).

89. *Ferko v. NASCAR, Inc.*, 219 F.R.D. 396, 401 (E.D. Tex. 2003).

90. *Minebea Co. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005) (quoting *In re Beville, Bresler & Schulman Asset Mgmt.*, 805 F.2d 120, 126 (3d Cir. 1986)); see also *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007).

91. *Intex*, 471 F. Supp. 2d at 16 (quoting *Minebea*, 228 F.R.D. at 16) (emphasis added); see also *Minebea*, 228 F.R.D. at 17 (noting that intending or proposing to enter into an agreement is not sufficient to find that an agreement was reached).

be written or oral, although an agreement in writing is preferred.⁹² The exact requirements of such an agreement may vary by circuit, but important elements include: (1) evidence of the parties' common legal interests;⁹³ (2) a statement that the parties intend to seek legal counsel from each other's attorneys;⁹⁴ (3) the intended methods of preserving the confidentiality of shared information;⁹⁵ and (4) evidence that the date that the parties agreed to collaborate preceded the existence of any documents or information sought to be protected.⁹⁶ Given this latter point, parties employing a joint defense strategy should, as far as possible, form an agreement before sharing confidential information.

According to the second prong of the D.C. district court's test, parties must demonstrate that privileged statements were designed to further a common interest in a joint defense effort. The interests should be identical and legal.⁹⁷ As

92. See *Minebea*, 228 F.R.D. at 16 (explaining that "a written agreement is the most effective method of establishing the existence of a common interest agreement").

93. See *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 19 (E.D.N.Y. 1996) (emphasis added) (noting, as discussed below in this article, that "common legal interests" do not include "developing a *business* strategy one of whose components was to avoid litigation *if possible*").

94. See *Bank of America, N.A. v. Terra Nova Ins. Co.*, 211 F. Supp. 2d 493, 498 (S.D.N.Y. 2002) (noting that, not only were the parties' interests "not identical," but also that there was no "agreement that explicitly provided that the parties would be seeking advice from each other's counsel"). Note that in *Bank of America*, as in *Walsh*, the point is made about consulting the other party's attorney, not merely the other party.

95. See *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 309 (N.D. Cal. 1987) (noting that the party took "substantial steps" to protect the information that it disclosed in that case to the third party with whom it was claiming a common interest, including handing over "[o]nly two copies" of the material to the third party, "instruct[ing]" the third party "that no further copies were to be made," having the copies "returned to [the party's] counsel," and refraining from any further disclosure to additional parties).

96. See *Bank of America*, 211 F. Supp. 2d at 498 (noting that the joint defense agreement in question stated that the parties formed the agreement prior to the creation of the documents that the plaintiff sought to protect, "further highlight[ing]" a "lack of a common interest"); see also *Minebea*, 228 F.R.D. at 17 ("The Court agrees . . . that . . . a joint defense privilege begins on the date the agreement was executed.").

97. See *Bank of America*, 211 F. Supp. 2d at 498 (citing *United States v. United Techs.*, 979 F. Supp. 108 (D. Conn. 1997)) (The court distinguished *Bank of America* from *United Techs.*, where five companies entered into a "collaboration agreement" for the purpose of reducing their tax liability. See *id.* The entities' interest in respect to *that issue*—their tax liability—was identical, and legal in nature. In *Bank*

in the case of the attorney-client privilege, the communications at issue should “be designed to facilitate” those “legal interest[s].”⁹⁸ Consequently, parties seeking the protection through this doctrine should take care that agreements and related communications are predominantly legal in nature and that any commercial interests are merely incidental to their collaboration.

Although courts have not specifically addressed the availability of the joint defense doctrine in the context of congressional investigations, they generally agree with the D.C. district court that the doctrine should be available to parties with common legal interests.⁹⁹ But, parties facing congressional investigations should note that, even if they fulfill the three-pronged test adopted by the D.C. district court, a court might not recognize the doctrine in the context of agreements and related communications made between parties during or in anticipation of a congressional investigation. This is because many jurisdictions decline to characterize congressional investigations as “litigation.”¹⁰⁰ Also uncertain is whether Congress itself would recognize the privilege.

Because the common interest doctrine extends the work product doctrine and the attorney-client privilege, the party claiming privilege through the doctrine must show the communication meets the elements of the underlying privilege or doctrine, depending on which the party seeks to apply. Thus, if a party is attempting to extend the work product doctrine through the common interest doctrine, the party must show the shared document was made “in anticipation of litigation,” an

of America, on the other hand, the parties sought together to “embark on a commercial venture” in which their interests “were not identical.” *Id.*; see also *Hewlett-Packard*, 115 F.R.D. at 309 (citing *Union Carbide v. Dow Chemical*, 619 F. Supp. 1036 (D. Del. 1985)).

98. *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007); *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437 (E.D. Pa. 2000).

99. Note that the common interest must be *identical* and *legal*. See, e.g., *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007) (“[A] business or commercial interest will not suffice.” (citing *Minebea*, 228 F.R.D. at 16)); *Katz*, 191 F.R.D. at 437 (“The nature of the interest, however, must be ‘identical, not similar, and be legal, not solely commercial.’” (citations omitted)).

100. See *supra* Part IV.B.

element of the work product doctrine.¹⁰¹ In jurisdictions that do not consider congressional investigations to be “litigation,” courts likely would be unwilling to accept the common interest doctrine as an extension of the work product doctrine in the case of congressional investigations.¹⁰²

Although litigation is not an element of the attorney-client privilege, courts are nonetheless divided on whether parties must show that their “common legal interests” pertain to actual or anticipated litigation for the common interest doctrine to extend the attorney-client privilege. Again, because many courts decline to characterize congressional investigations as “litigation,” this question may be determinative for the application of the common interest doctrine to parties jointly subject to congressional investigations.

The cases discussing the requirement of litigation for application of the common interest doctrine to the attorney-client privilege are far from clear. Although not requiring actual litigation, the Fifth Circuit in *In re Santa Fe International Corp.* ruled that, in order to invoke the common interest doctrine, “there must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one’s questionable conduct might some day result in litigation”¹⁰³

The Seventh Circuit embraced an opposite view when it held that “communications need not be made in anticipation of litigation to fall within the common interest doctrine.”¹⁰⁴ The attorney-client privilege protection is broader than the work product doctrine, and the court noted that expanding the common interest doctrine “to the full range of communications otherwise protected by the attorney-client privilege encourages parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan

101. See *supra* Part IV.B.; see also *United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (finding that the common interest doctrine extends to the attorney work product doctrine where the parties claiming the common interest “anticipate litigation against a common adversary on the same issue or issues” and thus “have strong common interests in sharing the fruit of the trial preparation efforts”).

102. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 925–26 (8th Cir. 1997).

103. 272 F.3d 705, 711 (5th Cir. 2001).

104. *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007).

their conduct accordingly.”¹⁰⁵ Other circuits, including the Federal Circuit and Ninth Circuit, also have found no need to demonstrate imminent threat of litigation to assert a commonly protected attorney-client privilege.¹⁰⁶ Moreover, other circuits have agreed it is unnecessary that there be actual litigation in progress for the common interest doctrine to apply and have referred to common interests in protecting attorney-client privilege in broader terms than those applicable to the work product doctrine.¹⁰⁷

Notably, though, some of these courts have not explicitly stated that there also need not be a *threat* of litigation.¹⁰⁸ At the very least, the majority of courts seem to stress that it is sufficient for the asserting parties to demonstrate a “cognizable legal concern” in the context of litigation and showing a “palpable threat of litigation”¹⁰⁹ certainly would help demonstrate such a concern.¹¹⁰ In the context of congressional investigations, which pose palpable threats similar to and in many ways as daunting as litigation, the better view is that the common interest doctrine should be applicable.

105. *Id.* (internal quotation marks omitted).

106. *See, e.g., In re Regents of the Univ. of Ca.*, 101 F.3d 1386, 1390–91 (Fed. Cir. 1996) (noting, *inter alia*, that “[i]t is well established that the attorney-client privilege is not limited to actions taken and advice obtained in the shadow of litigation,” the court found that the “joint client doctrine” and “community of interest” doctrine applied to “legal advice and communications between” two parties seeking enforceable patents.); *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987) (finding the common interest rule is not limited to two people facing possible indictment but extends even “where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability . . .”).

107. *See, e.g., In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) (“Because the privilege sometimes may apply outside the context of actual litigation, what the parties call a ‘joint defense’ privilege is more aptly termed the ‘common interest’ rule.”); *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996) (“But it is unnecessary that there be actual litigation in progress for [the common interest rule] to apply.”); *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989) (“The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter, and it is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply.” (internal citations omitted)).

108. *See, e.g., Aramony*, 88 F.3d at 1392; *Grand Jury Subpoena*, 274 F.3d at 572; *Schwimmer*, 892 F.2d at 243–44.

109. *In re Santa Fe Int’l. Corp.*, 272 F.3d 705, 711 (5th Cir. 2001).

110. *See Gregory B. Mauldin, Invoking the Common Interest Privilege in Collaborative Business Ventures*, FED. LAW., Nov./Dec. 2009, at 54, 56.

Although the case law relating to the common interest doctrine does not clearly delineate the requirements for its invocation, what is clear is that reliance on the doctrine holds a degree of risk. Thus, communications among counsel for our four companies could be requested—indeed, demanded—by the congressional committee despite invocation of the defense. The companies should be advised accordingly.

VI. SELECTIVE WAIVER

Our four companies are faced with deciding whether to share privileged documents with the congressional committee. The companies likely will explore a number of options and, if the committee is sufficiently insistent, might try to find a way to share privileged information with the committee while avoiding waiver. For example, the companies might offer to show certain privileged documents to committee staff but not provide actual copies of the documents. The committee, in turn, might write a letter to the companies stating that sharing information with it does not constitute a waiver of the attorney-client privilege for other purposes. The problem is that although these steps would appear to help preserve the privilege, in the end, they might be unavailing. This is because the doctrine that the companies would seek to invoke to protect the privilege—selective waiver—generally is unavailable.

A. *Selective Waiver of the Attorney-Client Privilege and the Work Product Doctrine*

Typically the attorney-client privilege is waived when a client “voluntarily discloses the content of communications covered” by the privilege or “any significant part of the content”¹¹¹ Work product protection is waived when “the client, attorney, or authorized representative of the client voluntarily discloses the underlying material under circumstances substantially increasing the possibility that an opposing party will obtain the information.”¹¹² In theory, the doctrine of selective waiver provides protection for individuals

111. MUELLER & KIRKPATRICK, *supra* note 26, § 5:33.

112. *Id.* § 5:38.

or companies who voluntarily disclose privileged information to Congress. Under this doctrine, the disclosing parties would only waive privilege in the context of the congressional investigation, rather than lose all privilege as per the usual practice of voluntary disclosure to third parties. As a result, if the disclosing parties faced future litigation, the court could not compel the production of the same documents or information on the basis that the privilege was waived through disclosure to Congress. Because, as discussed below, most courts do not recognize the doctrine, attorneys and clients who choose to cooperate with a congressional subpoena should be aware that disclosure of the requested information—even without turning over the documents in question—likely will waive the privilege in all subsequent litigation.

By statute, Congress has granted selective waiver to banks and credit unions for disclosures they make to their regulators. Submission of “any information . . . for any purpose in the course of any supervisory or regulatory process” of a regulating agency “shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority.”¹¹³

Although there currently is a circuit split on the availability of the selective waiver doctrine as it applies to attorney-client privilege, most circuits do not recognize the doctrine. The First, Second, Third, Fourth, Sixth, Tenth and D.C. Circuits all have explicitly rejected the doctrine of selective waiver.¹¹⁴ In *Qwest*, perhaps the seminal case on selective waiver, the Tenth Circuit refused to recognize the doctrine and admonished *Qwest* for cooperating with the SEC and DOJ in the expectation that the confidentiality of its informa-

113. 12 U.S.C. § 1828(x)(1) (2011) (relating to banks); 12 U.S.C. § 1785(j)(1) (2011) (relating to credit unions).

114. See *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997); *In re Steinhardt Partners*, 9 F.3d 230, 236 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1418 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988); *In re Columbia HCA Healthcare Corp.*, 293 F.3d 289, 307 (6th Cir. 2002); *In re Qwest Commc’n Int’l, Inc.*, 450 F.3d 1179, 1201 (10th Cir. 2006); *Permian Corp. v. United States*, 665 F.2d 1214, 1220 (D.C. Cir. 1981).

tion would be maintained.¹¹⁵ In *Permian*, the D.C. Circuit also refused to recognize a party's request for selective waiver.¹¹⁶ Occidental Corp., a party to the litigation, voluntarily disclosed information to the SEC under the expectation that such information would be kept confidential.¹¹⁷ The court held that the party waived confidentiality when it disclosed documents that otherwise would have been protected by the attorney-client privilege and expressed skepticism about the value of the selective waiver doctrine in furthering the attorney-client relationship.¹¹⁸ Three years later, in *In re Subpoena Duces Tecum*, the court reiterated its position by denying another claim for selective waiver on the basis that such a doctrine would allow parties to gain a double advantage from the attorney-client privilege by receiving credit from the government for cooperation without risking vulnerability to subsequent litigation for their bad acts.¹¹⁹ According to the court, when a corporation discloses privileged information to the government, the corporation makes a calculated judgment that the advantages gained by disclosure outweigh the losses incurred by sacrificing the privilege in later private litigation.¹²⁰

Courts also have held that the existence of a confidentiality agreement does not require a finding of selective waiver. As the Sixth Circuit explained, "any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage."¹²¹ Similarly, in *Permian*, the Sixth Circuit refused to honor the confidentiality agreement entered into by the litigating corporation and the SEC, readily dismissing it as inconsequential.¹²²

115. See 450 F.3d at 1192–93.

116. See 665 F.2d at 1220.

117. See *id.* at 1215–16.

118. *Id.* at 1219–20.

119. 738 F.2d 1367, 1372 (D.C. Cir. 1984).

120. *Id.*

121. *In re Columbia HCA Healthcare Corp.*, 293 F.3d 289, 302 (6th Cir. 2002) (internal quotations omitted).

122. 665 F.2d at 1220.

The Eighth Circuit is alone in adopting the doctrine of selective waiver,¹²³ although the Seventh Circuit has reserved judgment on the issue.¹²⁴

Proponents of the privilege agree with the Eighth Circuit and argue that the current circuit majority has ignored “the harsh reality currently facing corporations” during federal investigations.¹²⁵ In those contexts companies accused of wrongdoing often are strongly encouraged to waive attorney-client privilege to avoid the harsh penalties that result from appearing noncompliant.¹²⁶

In 2006, Representative James Sensenbrenner, then the Chairman of the House Judiciary Committee, addressed this problem of privilege waiver in the context of cooperating with government agencies. Sensenbrenner asked the U.S. Judicial Conference to engage in rulemaking regarding the Federal Rules of Evidence to, *inter alia*, “allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.”¹²⁷ The rule passed in 2008 but does not codify selective waiver. Rather, it simply recognizes limited subject matter waiver in the case of intentional disclosure in federal proceedings.¹²⁸ It also gives full protection to non-waiver agreements, but arguably only when incorporated by a court order.¹²⁹ Further, whether congressional investigations are considered “federal proceedings” is unclear.

Proponents of selective waiver fear that its absence will have detrimental effects on the attorney-client relationship, resulting in

the erosion of the attorney-client privilege having a wholly negative impact: executives who would otherwise

123. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).

124. See *Burden Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003).

125. *E.g.*, Gretchen E. Eoff, *Losing the War on Attorney-Client Privilege: Viewing the Selective Waiver Quagmire Through the Tenth Circuit's In re Qwest Communications International*, 75 DEF. COUNSEL J. 79, 79 (2008).

126. *Id.* at 80.

127. Letter from F. James Sensenbrenner, Jr., Chairman, House Comm. on the Judiciary, to Leonidas Ralph Mecham, Director, Admin. Office of the U.S. Courts (Jan. 23, 2006), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2006-01-23-Sensenbrenner.pdf>.

128. FED. R. EVID. 502(a).

129. FED. R. EVID. 502(e).

consult with corporate counsel about sensitive issues become embroiled in confusion about whether the attorney-client privilege will apply to their conversations, thereby chilling communications; lawyers investigating allegations of wrongdoing become concerned about how their honest attempts to unearth and correct serious problems may be used against the company's interests in the future; and employees who lack sophistication may be left without rights normally guaranteed to any other person whose actions are under scrutiny as a result of a government investigation.¹³⁰

Despite these concerns, for the time being, selective waiver is not a clear option for witnesses in congressional investigations. Witnesses who are asked to disclose privileged information should seek to limit those disclosures as far as possible, but must in many cases choose between the benefits and drawbacks of cooperation through disclosure or withholding the information in order to assert the privilege in future proceedings. For many corporations or parties that have consistent dealings with the government, susceptibility to subsequent civil litigation may be a price worth paying to avoid a confrontation with Congress.

B. Practical Application of Waiver Principles to Congressional Investigations

The dilemma companies face when Congress subpoenas privileged documents was exemplified when numerous tobacco companies were sued by the state of Minnesota in 1997.¹³¹ When one of the defendants settled, it agreed to produce documents that the other defendants considered privileged.¹³² After a special master in Minnesota determined that 864 of these documents were not privileged, the House Commerce Committee Chairman, Thomas Bliley, requested in November 1997 that the companies produce the 864 documents to his committee.¹³³ Chairman Bliley wrote that he was considering legislation to provide immunity

130. Eoff, *supra* note 125, at 80.

131. *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 35 F. Supp. 2d 582, 586 (N.D. Ohio 1999).

132. *See id.*

133. *Id.* at 587.

from lawsuits to tobacco companies.¹³⁴ In December, Chairman Bliley issued a subpoena demanding the production of the documents by noon the following day. The companies complied.¹³⁵

In February of 1998, the special master determined that an additional 39,000 documents were not privileged.¹³⁶ Chairman Bliley issued subpoenas for these documents, but after discussions with the companies he agreed to defer his request until after they had appealed the special master's decision.¹³⁷ The companies exhausted their appeals on April 6, and Chairman Bliley requested the documents that day, stating that "unless the documents in question are produced immediately, I intend to proceed with a contempt resolution for enforcement of the subpoenas by the House of Representatives."¹³⁸ Chairman Bliley assured that he and the ranking member agreed to "conduct a confidential review of the documents . . ."¹³⁹

The companies produced the documents the same day.¹⁴⁰ In an accompanying letter, each asserted that production was only to avoid a citation for contempt.¹⁴¹ Despite Chairman Bliley's promise of a confidential review, on April 22 the committee placed the documents on the Internet.¹⁴² In subsequent litigation against the tobacco companies, plaintiffs asserted that the companies waived the privilege to these documents by producing them to the Commerce Committee.¹⁴³

Courts that found waiver pointed to the fact that the companies produced the documents without challenging the

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 588.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See, e.g.,* *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 77-78 (N.D.N.Y. 2000) (finding waiver); *Commonwealth v. Philip Morris Inc.*, No. 957378J, 1998 WL 1248003, at *1, *12 (Mass Super. Ct. July 30, 1998) (finding waiver).

congressional subpoena and risking contempt.¹⁴⁴ For example, the companies did not seek a hearing, protest Chairman Bliley's order, or make their case beyond a "perfunctory" cover letter accompanying the documents.¹⁴⁵ The tobacco companies also had an interest in obtaining goodwill from Chairman Bliley, who was working on a bill to provide them immunity.¹⁴⁶ Furthermore, the tobacco companies were "highly knowledgeable and experienced in dealing with Congress."¹⁴⁷

One court, finding that the privileges were not waived, stated that the companies "were not required to stand in contempt."¹⁴⁸ While this case was an outlier, its rationale is compelling. In the context of congressional investigations, it is often untenable to require a target or witness, which may be a publicly traded corporation, from holding out to the brink of contempt or until contempt has been found by a chamber of Congress. Such a requirement effectively could render the application of the selective waiver doctrine unattainable.

Other courts have grappled with these issues. In a 2007 decision on a waiver involving CBS, the New Mexico district court did not decide if a party must risk contempt but did find that an entity that routinely dealt with Congress and did not "protest or contest" a congressional request waived privilege by producing the documents.¹⁴⁹

Note that the tobacco companies turned the documents over after Chairman Bliley stated that he and the ranking member would conduct a "confidential review." Although this is not relevant for attorney-client privilege, it does weigh in the consideration of whether work product protec-

144. *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 35 F. Supp. 2d 582, 595 (N.D. Ohio 1999). The cases following this logic use as a guide the case *Sanders v. McClellan*, 463 F.2d 894 (D.C. Cir. 1972). The court in *Sanders* noted that traditionally, challenges to congressional requests were successful only after the challenger was convicted for contempt. See *id.* at 900-01.

145. *Iron Workers*, 35 F. Supp. 2d at 595.

146. *Id.* at 596.

147. *United States v. Philip Morris Inc.*, 212 F.R.D. 421, 426 (D.D.C. 2002).

148. *Int'l Union of Operating Eng'rs, Local No. 132, Health & Welfare Fund v. Philip Morris, Inc.*, No. 3:97-0708, 1999 U.S. Dist. LEXIS 21097, at *7 (S.D. W.Va. June 28, 1999).

149. See *Anaya v. CBS Broad. Inc.*, No. CIV 06-476 JB KBM, 2007 WL 2219394, at *11-12 (D.N.M. Apr. 30, 2007).

tion was waived if the companies were led to believe that their opponents in litigation would not have access to the documents.

As referenced above, the attorney-client privilege is waived upon disclosure to a third party, but work product is waived when the protected information is disclosed in a manner likely to reach the party's opponent. Congress could help ensure that work product is not waived in the future by securing the documents, limiting their access, destroying copies that are made, and taking other measures to ensure that the disclosing party's opponent in litigation will not obtain the information.

In fact, one court noted that "[o]nce documents are in congressional hands, 'courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of the affected parties.'"¹⁵⁰ Whether this presumption squares with congressional practice, as evidenced above by Chairman Bliley's release of the documents onto the Internet, may be questioned.

Chairman Bliley appeared content to await judicial determinations of privilege before subpoenaing the documents or threatening to enforce the subpoena with contempt. Although he would likely argue that he did not have to wait, his deference recognized the importance of privileges in the context of a congressional request for documents.

CONCLUSION

Companies are placed at an enormous disadvantage when faced with a request from Congress for the production of privileged information in conjunction with a congressional investigation. Currently, there is little consensus among legislators or the courts as to which, if any, common law privileges are available to witnesses in congressional investigations. Although our companies can tentatively assume that Congress will honor a valid assertion of attorney-client privilege, if they attempt to preserve the confidentiality of communications that include a third-party consultant, the process of convincing Congress to uphold the privilege might be slightly more

150. *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) (quoting *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978)).

complex. In these cases, the companies can strengthen their claims by treating the consultant as a functional equivalent of a full-time employee. They should also insist that an attorney be present to preserve the privilege in conversations with the consultant. Furthermore, the companies should be prepared to give the consultant a high degree of independence and authority to manage public relations. If the four companies in our example seek to forge a joint defense, then they should take specific steps, discussed above, to further the chances that the court will find a common legal interest among the parties. Finally, as witnesses in a congressional investigation, the companies should be aware of the consequences of cooperation through voluntary disclosure. If they voluntarily disclose documents to Congress, most courts will hold that any previously-existing attorney-client privilege has been waived. The four companies therefore may have to choose between benefitting from cooperation through disclosure or preserving confidentiality to thwart subsequent civil litigation that may arise over the same issues.

Potential congressional witnesses and their attorneys should be cognizant of the discrepancies between a defendant's rights in court and a witness's rights before Congress. Attorneys can look to past judicial opinions for guidance on the specific steps that can be taken to increase the chances that communications with a client will remain privileged. Nonetheless, parties who suspect that they might be called as witnesses in a congressional investigation should proceed with caution when communicating with attorneys, third-party consultants, and other co-parties. For the reasons set forth above, in the majority of cases that address the issue of common law privilege, courts have hesitated to expand the doctrine to protect communications made outside of the clearly delineated, traditional attorney-client relationship. Most importantly, because the courts cannot dictate the rules of Congress's proceedings, parties must realize that the discretion to compel production of privileged material lies with Congress. Until further direction from either Congress or the courts, witnesses in congressional investigations, such as our four companies, should be prepared to vigorously defend the confidentiality of their legal communications and work product.