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PRACTICAL TIPS FOR CONDUCTING AN INTERNAL INVESTIGATION

After determining that an internal investigation is necessary, the following steps should be taken to maximize the protections afforded by the attorney-client privilege and the work product doctrine.

Step 1: Receive Authorization for Investigation from Corporation

Receive explicit authorization from the corporation to conduct an internal investigation for the purpose of providing legal advice to the corporation. Such written authorization should come from the board of directors or senior personnel, and it should clearly state that the investigation is being done to secure legal advice and not merely to gather facts or obtain business advice.

Step 2: Identify the Managers of the Investigation

If both practical and feasible, obtain outside counsel at this juncture to conduct the internal investigation. Though the attorney-client privilege applies equally to in-house and outside counsel, the employment of outside counsel may reduce the risk that the investigation and subsequent advice will be considered to have been for business as opposed to legal reasons.

If the use of outside counsel is not practical and feasible, in-house counsel should specifically determine who will conduct the investigation. Once again, if both practical and feasible, only attorneys should conduct the investigation.

Step 3: Set Parameters for Investigative Team: Limit Use of Non-Lawyers.

If non-lawyers will be used to assist in the investigation, the following steps should be taken:

Before commencing the investigation, all non-lawyers should be instructed (preferably in writing) that they are working under the supervision of counsel for the purpose of obtaining information that counsel can rely upon to provide legal advice to the corporation.

All non-lawyers involved in the investigation should be under the direct control of counsel and should act only on the instruction of counsel. Essentially, counsel should maintain a very “short-leash” on the non-lawyer investigators to ensure that all actions are taken under the control and direction of counsel. If the non-lawyers are given too much control and discretion, there is a risk that the privilege may be waived.

After obtaining information, non-lawyers should communicate such information directly to counsel and should not provide the information to a third-party. By
communicating directly to counsel, the non-lawyers reduce the possibility that the attorney-client privilege will be waived.

Finally, any documents created or generated by non-lawyers should include language which states that the document has been produced at the direction of legal counsel and for the use of counsel to assist him/her in providing legal advice to the corporation.

Step 4: Create List of Personnel to Be Interviewed.

If both possible and feasible, counsel should seek to obtain information and gather facts from senior members of the corporation who may have knowledge of the relevant facts and circumstances pertaining to the investigation. If senior personnel lack such information, then counsel (or his/her agents), at that point, should seek information from other personnel.

Step 5: Maintain the Confidentiality of the Interviews: Beware of Waiver.

Each person who is interviewed should be informed, in writing, that the purpose of the investigation, in general, and the interview, in particular, is to provide counsel (or his/her agents) with information in order to provide legal advice to the corporation.

In addition, each interviewee should be instructed, in writing, that the subject matter of the interview is to remain confidential and not discussed with any other individual. To further ensure confidentiality, interviewees should sign a document acknowledging that the interview is intended to be confidential and for the purpose of securing legal advice for the corporation.

Each interviewee should be informed, in writing, that the attorney (or the agent) represents that corporation and not the interviewee. As such, the interviewee should be informed that the attorney-client privilege belongs only to the corporation and can only be waived by the corporation.

Step 6: Create Document Protocol for Investigation

In order to ensure that any document created or generated during the course of the internal investigation remains privileged and protected by the work product doctrine, it is recommended that the following actions be taken.

First, counsel should be copied on all documents that are produced in connection with the investigation. Though copying counsel does not guarantee that the privilege or the work product doctrine will attach to the document, it increases the chances that the document will be protected.
Second, all documents created or generated during the investigation should be clearly marked as “privileged and confidential/attorney work product”. Though the use of such a “privilege legend” does not guarantee that the document will be deemed privileged, it too increases the chances that the document will be protected from disclosure. In addition, to provide additional protection to documents created during the investigative process, counsel should include his/her mental impressions, thought processes, and legal theories in the documents. By including such information, the documents may be protected not only by the attorney-client privilege but by the work-product doctrine as well.

Finally, counsel should seek to reduce the amount of confidential documents that are in circulation. If large amounts of confidential documents are in wide circulation, counsel runs the risk that the document will be inadvertently disclosed, thereby undermining and waiving any privilege or work product protection that the document may have.

Step 7: Conclude the Investigation with Legal Advice

After conducting the investigation, appropriate attorneys for the corporation should review the findings and provide legal advice as how to proceed to the appropriate members of the corporation (i.e. the board of directors). The legal advice should be in writing, and it should be given to a limited number of individuals to prevent widespread circulation of such information.

Step 8: Determine Strategy for Future Disclosure to Third Parties

Before disclosing information to third parties, most notably, governmental agencies, corporate counsel should consider the possibility that disclosure (even voluntary disclosures) to governmental agencies may waive both the attorney-client privilege and work product protection to the information that is disclosed.

Counsel should determine whether the jurisdiction at issue either follows or rejects the selective waiver doctrine before making any disclosures. Counsel should consider both the content of the information as well as likelihood of future litigation before handing over such information to another party. If the information that is disclosed would be prejudicial to the corporation, corporate counsel should seriously consider whether the information must be disclosed. Though corporate counsel is not advised to violate the law, counsel must weigh both the benefits and drawbacks before making any disclosure.
The following is a brief synopsis of the current law on to the attorney-client privilege and the work product doctrine in the context of the internal corporate investigation.

A. FEDERAL LAW

1. GENERAL PRINCIPLES


2. SPECIFIC ISSUES

   a. Who should conduct an investigation?

      (i) Use of Attorneys

      In re Grand Jury Subpoena, 599 F.2d 504, 510 (2d Cir. 1979) ("to the extent that an internal corporate investigation is made by management itself, there is no attorney-client privilege").

      Guzzino v. Felterman, 174 F.R.D. 59, 61 (W.D. La. 1997) (holding that attorney-client privilege did not apply to internal investigation conducted by internal audit department because there was no evidence "that a single one of the withheld documents was authored by an attorney, received by an attorney, or prepared for the purpose of obtaining legal advice from an attorney").


      (ii) In-House v. Outside Counsel

      Ames v. Black Entertainment Television, No. 98 Civ 0226 (LMM) AJP, 1998 WL 812051 at *8 (S.D.N.Y. 1998) ("[b]ecause an in-house attorney, particularly one who holds an executive position in the company, often is involved in business matters, in order to demonstrate that the communication in question is privileged, the company bears the burden of ‘clearly showing’ that the in-house attorney gave advice in her legal capacity, not in her business capacity").
Rossi v. Blue Cross and Blue Shield of Greater N.Y., 540 N.E.2d 703, 705 (N.Y. 1989) (“the need to apply [the attorney-client privilege] cautiously and narrowly is heightened in the case of corporate staff counsel”).

(iii) Use of Non-Attorneys

Carter v. Cornell Univ., 173 F.R.D. 92, 94 (S.D.N.Y. 1997) (Associate Dean of Human Resources qualified as representative of attorney for attorney-client privilege purposes where she conducted interviews at the “request of counsel and for the exclusive use of counsel in rendering legal representation”).

United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979) (“[t]he investigator was an agent for . . . attorney, however, so it is as if the communication was [sic] to attorney himself”).

b. Necessity of Providing Legal Advice

United States v. Rockwell Int'l, 897 F.2d 1255, 1264 (3d Cir. 1990) (When a client's ultimate goal is not legal advice, but rather business advice, the attorney-client privilege is inapplicable).


Itoba Ltd. v. LEP Group PLC, 930 F. Supp. 36, 43 (D. Conn. 1996) (memorandum drafted by counsel for corporation not privileged because counsel drafted it as a business advisor and not a legal advisor).

c. Confidentiality of Documents

In re Grand Jury Proceedings, No. M-11-189, 2001 WL 1167497 at *10 (S.D.N.Y. 2001) (“[w]hile the determination of whether a document is privileged does not depend upon the technical requirement of a privilege legend, the existence of such a legend may provide circumstantial evidence that the parties intended certain communications to be privileged”).

d. Waiver

(i) Selective Waiver Jurisdictions

Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (adopting the selective waiver theory and finding that voluntary disclosure of privileged materials to the SEC as part of a non-public investigation did not constitute a waiver as to other parties).
**While several district courts have adopted the selective waiver theory, no other circuit courts have adopted the selective waiver theory as fully as the 8th Circuit.**

(ii) Non-Selective Waiver Jurisdictions


*In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988) (rejecting the selective waiver theory).


(iii) Mixed Jurisdictions

*In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (suggesting that work product protection must be preserved where “the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.”) (the Second Circuit appears to reject the theory as it relates to the attorney-client privilege).

*Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (finding that voluntary disclosure of privileged documents to the SEC pursuant to a confidentiality agreement resulted in a general waiver as to the attorney-client privilege but only selective waiver as to the work product privilege).

(iv) Unclear Jurisdictions

*Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (declining to answer the question whether the information disclosed would have been protected if there was a confidentiality agreement).

B. PENNSYLVANIA LAW

1. Attorney-Client Privilege

A search of Pennsylvania case law has not revealed any decisions in which Pennsylvania state courts have made any significant departures from the federal courts in their interpretation of the attorney-client privilege, most notably in the context of corporate internal investigations.
2. **Work Product Doctrine**

There is a possibility that Pennsylvania’s work product doctrine, as codified in the Pennsylvania Rules of Civil Procedure, may afford different protection than its federal counterpart.