Association of Life Insurance Counsel  
CLE Webinar - July 29, 2020

**Legal Ethics in the Board Room**

**Slide 1 - The ABA Model Rules of Professional Conduct**

- ABA Model Rules Are in Eight Sections
  - Section 1 – Client-Lawyer Relationship
  - Section 2 – Counselor
  - Section 3 – Advocate
  - Section 4 – Transactions With Persons Other than Clients
  - Section 5 – Law Firms and Associations
  - Section 6 – Public Service
  - Section 7 – Information About Legal Services
  - Section 8 – Maintaining the Integrity of the Profession
- Important to Check Specific State’s Rules
- Choice of Law Issues

**Slide 2 - Who is Your Client?**

**ABA Model Rule 1.13 – Organization as Client**

1.13(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

1.13(g) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

- Frequent Board Room Issues
  - Subsidiaries and Affiliates
  - Joint Defense, Common Interest, and Joint Client Privileges
  - Special Committees

**Slide 3. How to Maintain Confidentiality and the Attorney Client Privilege?**

**ABA Model Rule 1.6 – Confidentiality of Information**

1.6(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is [permitted as a mandatory or discretionary disclosure].

- Confidentiality Versus Attorney Client Privilege
- Documents and Emails
- Client Meetings
- Auditors
- Lawyer Licensing
- Compliance vs. Legal
- Mandatory and Permissive Disclosures
Slide 4. Do the Ethics Rules Applicable to Outside Counsel Apply to In-House Lawyers?
A Reminder re Selected In-House Law Department Issues – Competence, Supervision, and Conflicts

ABA Rule 1.1 Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- Should you engage additional specialists?

ABA Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Attorneys
5.1(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
5.1(c) A lawyer shall be responsible for another for another lawyer’s violation of the Rules of Professional Conduct if: . . . (2) . . . the lawyer has direct supervisory authority over the other lawyer . . . and fails to take reasonable remedial action.

- See also ABA Rule 5.3 re Responsibilities Regarding Nonlawyer Assistance
- See also ABA Rules 1.7, 1.8, 1.9, and 1.10 re Conflicts of Interest and Disqualification

Slide 5. What About Competence and Technology?
- Understanding Technology
- Artificial Intelligence

Slide 6. How to Maintain the Privilege in Communications With Regulators?
- The Tension Between Earning Cooperation Credit and Maintaining Privilege
  - “Facts” v. Privileged Communications
  - SEC v. Herrera – The Risk of Oversharing
    - Work Product Versus Attorney Client Privilege
- Who Decides Whether to Waive Attorney/Client Privilege?

Slide 7. How to Structure Investigations?
- Structure Basics
- Upjohn Opinion and Upjohn Warnings
- Communications with Auditors
- Final Report

Slide 8. Rules for Attorneys Practicing Before the SEC
- Duty to Report to CLO
- Duty to Investigate
- Duty to Report to Audit Committee or Board

Slide 9. Are Professional Ethics and Privilege Issues the Same Outside the US?
- Jurisdiction Rules Vary
- Confidentiality of Client Information
- In-house Lawyer Legal Advice
**Program Resource Materials**

- Self Test
- ABA Model Rules Index
- 2015 DOJ Yates Memo
- 2018 SPB Client Alert re Policy Shifts at the Department of Justice
- A Closer Look at Confidentiality and Privilege Abroad
- Bio - Patricia R. Hatler Squire Patton Boggs
- Bio - Coates Lear Squire Patton Boggs
A Closer Look at Confidentiality and Privilege When Doing Business Abroad

By Mollie Roy, Kenneth C. Moore and Steve Delchin

30-SECOND SUMMARY

The scope of information to be held confidential is remarkably similar for all lawyers, no matter the country you practice in. The real differences are manifested in the exceptions to the duty of confidentiality and the applicability of the duty to in-house lawyers. The exceptions to confidentiality are generally (though not universally) broader in the United States. Do not always assume that US ethics law is the most protective. When it comes to confidential information relating to business crimes or fraud, for example, it often may not be. It is imperative to fully understand and properly analyze confidentiality and choice of law issues where foreign ethics law is involved.

If your company operates in multiple countries, the laws on the duty of confidentiality and the attorney-client privilege can pose challenging ethical and practical questions. What jurisdiction’s ethics laws govern your treatment of confidential matters when you are traveling abroad? Do lawyers with whom you are dealing have the same ethical duties as you? How do you preserve the attorney-client privilege when you are in a jurisdiction that may not recognize such a privilege? These are not merely academic questions; they are issues that arise whenever you are confronted with the necessity of sharing confidential information with lawyers in other nations. You need to be in a position to advise your management team and others in the company on whether foreign lawyers have a duty under their governing rules of professional conduct to preserve the confidentiality of your company’s information. This article will guide you onto the right path by highlighting the key issues that you need to consider. And it will do so in the context of a real-world scenario.
Comparing US confidentiality rules with the rest of the world

It should come as no surprise that the duty of confidentiality is a universally acknowledged feature of ethics codes around the world. Lawyer confidentiality rules generally have two parts:

- a broad scope of information that must be held confidential, and
- narrow exceptions to the duty of confidentiality.

There is a perception among some American lawyers that foreign ethics codes generally afford less protection to confidential client information than US ethics law. But, in fact, the scope of information to be held confidential is remarkably similar for all lawyers. The real differences are manifested in the exceptions to the duty of confidentiality and in the differences in the applicability of the duty to in-house lawyers. Although internal communications between in-house counsel and their company’s employees are afforded little or no protection in a number of foreign jurisdictions, what surprises many American lawyers is that the exceptions to confidentiality are generally (though not universally) broader in the United States. In other words, do not always assume that US ethics law is always the most protective. When it comes to confidential information relating to business crimes or fraud, for example, it often may not be.

To put these principles into sharper focus, it’s useful to consider US and foreign ethics law in the context of a real-life scenario involving the general counsel of an international company that has subsidiaries located around the world. The general counsel’s name is Geraldine Counsel. She is the general counsel of USA Manufacturing, Inc., a Delaware company headquartered in Virginia. USA Manufacturing wholly owns several subsidiaries around the world, including in England, the Czech Republic and Western Australia. The company’s chief financial officer advises Geraldine Counsel that illegal price fixing may have occurred, and still might be occurring, at several of the company’s subsidiaries. Accordingly, Geraldine Counsel needs to select legal counsel to conduct an investigation immediately, but she does not want the results of counsel’s investigation to become public.

Who should conduct the investigation into alleged price fixing at the company’s subs? Should it be lawyers from DC, Ohio or Virginia, or the Czech Republic, UK or Western Australia? Or a combination of lawyers from these jurisdictions?

Scope of the duty of confidentiality among foreign jurisdictions

Geraldine Counsel’s initial concern is whether foreign lawyers have the same duty of confidentiality as US lawyers. A comparison of US and foreign ethics law makes clear that the scope of protection for confidential information is similar.

Take, for example, the ABA Model Rules of Professional Conduct (that have been adopted, in some form, in nearly every US jurisdiction) and compare them with the Code of Conduct for European Lawyers (that applies to the cross-border practice of all lawyers from the European Economic Area, regardless of what Bar or Law Society they belong to).

Both of these codes have highly similar and astonishingly broad definitions of the scope of information protected by the ethical duty of confidentiality. Rule 1.6 of the ABA Model Rules, which addresses the duty of confidentiality, covers “information relating to the representation of a client.” In a similar fashion, Rule 2.3.2 of the European Code of Conduct covers “all information that becomes known to the lawyer in the course of his or her professional activity.” Note that the scope of the ethical duty of confidentiality under the ABA Model Rules is broader than the scope of the attorney-client privilege. The latter privilege only protects information given by a client to an attorney in the course of seeking legal advice, plus the advice given by the attorney in response. The ethical duty of confidentiality, by contrast, includes information outside the scope of that attorney-client privilege (as well as within it).

See Table 1 for another example of similarity between jurisdictions: the confidentiality rules in DC and the Czech Republic. Note how both rules from vastly differing legal traditions have the same four prohibitions for client confidential information.

Geraldine Counsel is convinced; the scope of the duty of confidentiality for foreign lawyers is generally just as broad as it is for American lawyers.

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Steve Delchin has expertise in general litigation matters, appellate advocacy, legal ethics and product liability. He has counseled Squire Sanders lawyers on professional ethics in 39 offices worldwide. steven.delchin@squiresanders.com
The majority of European Union countries, however, do not recognize a privilege for in-house counsel. Such countries include, among others, Austria, Greece, Hungary, Italy, France and the Czech Republic.

Exceptions to the duty of confidentiality.

The question remains, however, whether the exceptions to a lawyer’s duty of confidentiality in the relevant jurisdictions are similar or different. Geraldine Counsel needs to examine these before deciding which lawyers should conduct the investigations into alleged price fixing at the company’s subsidiaries. On the one hand, Geraldine Counsel is concerned that one or more of the foreign lawyers may disclose information that the company does not want disclosed. On the other hand, she questions (perhaps correctly) the premise that US ethics law will always be must protective of client confidences.

In analyzing this issue, consider that both the ABA Model Rules in the United States and the ethics rules of foreign jurisdictions have both mandatory and discretionary disclosure rules. Virginia, for example, is a mandatory disclosure jurisdiction. Rule 1.6(c)(1) of the Virginia Rules of Professional Conduct provides that a lawyer “shall” promptly reveal the client’s stated intent to commit a crime and the information necessary to prevent it if counseling of the client is ineffective. By contrast, in the People’s Republic of China, a lawyer generally has neither the discretion nor the mandatory duty to disclose his corporate client’s price-fixing activity, but instead is ethically required to remain silent. So here, we have an example where the foreign ethics rules (i.e., China) are more protective of client information than the rules in an American jurisdiction (i.e., Virginia).

The US and foreign ethics rules also differ when it comes to permissive disclosures (e.g., financial crimes). In Western Australia, disclosure “may” be made “for the purpose of avoiding the probable commission of a serious offence,” pursuant to Rule 9(3)(d) of the Western Australia Legal Profession Conduct Rules 2010. Similarly, in Ohio, under Rule 1.6(b)(2) of the Ohio Rules of Professional Conduct, disclosure “may” be made “to the extent the lawyer reasonably believes necessary … to prevent the commission of a crime by the client or other person.”

But the story is much different in California, where almost no disclosure may be made for any crime, including financial crime. Similarly, in the Slovak Republic, lawyers have a broad duty to keep the affairs of their clients confidential.

See Table 2 for the variation among US and foreign jurisdictions when it comes to exceptions to the duty of confidentiality.

In-house counsel and the attorney-client privilege

Armed with the information above, Geraldine Counsel is beginning to get a better handle on which lawyers in her company should conduct investigations into alleged price-fixing. She is leaning toward using her in-house counsel at the subsidiaries in question because these lawyers are licensed in jurisdictions without mandatory disclosure duties that likely would be applicable to price-fixing. That’s when her assistant raises the concern about potential limits to the attorney-client privilege when in-house counsel are involved. The concern may be well founded.

On the one hand, there are a number of foreign jurisdictions that recognize a privilege for inside counsel. In Australia, for example, the privilege applies to in-house counsel generally like outside lawyers. Similarly, in Hong Kong, in-house counsel have the same duties as outside counsel to maintain confidentiality and invoke privilege. Likewise, in the United Kingdom, communications with in-house counsel can be privileged if the attorney is a Solicitor with a practicing certificate from the Solicitors Regulation Authority (SRA), and if the communication meets all requirements for privilege applicable to outside counsel.

The majority of European Union countries, however, do not recognize a privilege for in-house counsel. Such countries include, among others, Austria, Greece, Hungary, Italy, France and the Czech Republic. In addition, the European Union has its own privilege standard for cases involving the European Commission. In its landmark decision in Akzo Nobel

<table>
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<tr>
<th>DISTRICT OF COLUMBIA⁴</th>
<th>CZECH REPUBLIC⁵</th>
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<tr>
<td>An attorney “shall not knowingly reveal” confidential client information.</td>
<td>An attorney “shall keep confidential” all facts learned in the representation.</td>
</tr>
<tr>
<td>Prohibits “use” of confidential information to the “disadvantage of the client.”</td>
<td>Prohibits “use” of confidential information to the “detriment of the client.”</td>
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<tr>
<td>Prohibits the “use” of confidential information for “the advantage of the lawyer.”</td>
<td>Prohibits the “use” of confidential information to “the attorney’s own benefit.”</td>
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<tr>
<td>Prohibits the “use” of confidential information for “the advantage of a” “third person.”</td>
<td>Prohibits the “use” of confidential information for the “benefit of third persons.”</td>
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Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission (Case C-550/07 P), the European Court of Justice held that internal communications between a company’s employees and in-house counsel (whether admitted to a member state Bar or not) are not privileged in European competition law cases on the reasoning that in-house counsel are not fully independent of their client. That means that in a jurisdiction such as the United Kingdom, which recognizes a privilege for SRA-certified in-house counsel, communications with in-house counsel may not be privileged if the EU Commission or other government authority is involved from a jurisdiction that does not recognize the attorney-client privilege for in-house counsel.

When considering corporate investigations in foreign jurisdictions, you (like Geraldine Counsel) need to be fully aware that the scope and application of the attorney-client privilege to in-house counsel vary significantly among foreign jurisdictions. In evaluating legal strategy, you need to consider not only what jurisdiction may be involved, but also the investigating authority involved.

**Choice of law rules: What ethics law applies?**

After considering all of the information about confidentiality and privilege, Geraldine Counsel’s next step is to consider what ethics law applies to lawyers conducting price-fixing investigations in foreign jurisdictions. Do the lawyers from “mandatory silence” jurisdictions have an independent ethical duty not to reveal information to:
- co-counsel in jurisdictions with mandatory disclosure duties, and
- co-counsel with the discretionary right to disclose?15

An important unresolved question that is fundamental to any choice of law analysis involving foreign ethics law is whether a foreign nation’s limitation of its ethical rules to lawyers who are members of the Bar in that country affects whether law-

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**TABLE 2**

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>FOR ANY CRIME?11</th>
<th>FOR CRIMINAL FRAUD?</th>
<th>FOR NON-CRIMINAL FRAUD?</th>
</tr>
</thead>
<tbody>
<tr>
<td>District of Columbia</td>
<td>Must Not 1.6(a)</td>
<td>May 1.6(b)(2), (b)(3)</td>
<td>May 1.6(b)(2), (b)(3)</td>
</tr>
<tr>
<td>California</td>
<td>Must Not § 6068(e) Business and Professions Code; California Rule 3-100(B)</td>
<td>Must Not § 6068(e) Business and Professions Code; California Rule 3-100(B)</td>
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</tr>
<tr>
<td>England and Wales</td>
<td>Must Not Solicitors Regulation Authority Code of Conduct O(4.1)</td>
<td>Must Not Solicitors Regulation Authority Code of Conduct O(4.1)</td>
<td>Must Not Solicitors Regulation Authority Code of Conduct O(4.1)</td>
</tr>
<tr>
<td>China</td>
<td>Must Not Law on Lawyers of the People’s Republic of China Article 38</td>
<td>May (if endangers security or safety) Article 38</td>
<td>Must Not Law on Lawyers of the People’s Republic of China Article 38</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Must Not Czech Act on Advocacy, Section 21(1)</td>
<td>Must if damage exceeds $250,000 Czech Act on Advocacy, Section 21(6)</td>
<td>N/A</td>
</tr>
<tr>
<td>New York</td>
<td>May 1.6(b)(2)</td>
<td>May 1.6(b)(2)</td>
<td>Must Not 1.6(a)</td>
</tr>
<tr>
<td>Ohio</td>
<td>May 1.6(b)(2)</td>
<td>May 1.6(b)(2)</td>
<td>Must Not 1.6(a)</td>
</tr>
<tr>
<td>Western Australia</td>
<td>May (serious offense) Legal Profession Conduct Rule 9(2)</td>
<td>May Legal Profession Conduct Rule 9(3)(d)</td>
<td>Must Not Legal Profession Conduct Rule 9(2)</td>
</tr>
<tr>
<td>Virginia</td>
<td>Must 1.6(c)(1)</td>
<td>Must (prospective) -1.6(c)(1) May (past) - 1.6(b)(3)</td>
<td>Must Not 1.6(a)</td>
</tr>
</tbody>
</table>
It is prudent to review the ethics law of a particular jurisdiction to determine whether it is applicable to lawyers who are not licensed to practice law in that particular jurisdiction.

In 1993, the ABA amended Model Rule 8.5 to add a detailed choice of law provision. Under the 1993 version, the law of the forum or tribunal applies in litigation. For transactions and everything else, the ethics law of the licensing jurisdiction applies. If the lawyer is licensed in multiple states, the state where the lawyer principally practices generally will control, provided, however, that “if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.” The 1993 version is followed in DC and New York.

The current version of ABA Model Rule 8.5 was revised in 2002, and some form of it is the law in a substantial majority of states. Under the 2002 version, the ethics law of the forum or tribunal applies in litigation. For transactions and everything else, the ethics law of the jurisdiction in which the lawyer's conduct occurred controls unless the “predominant effect” of the lawyer's conduct occurred in a different jurisdiction. In that case, the rules of that jurisdiction apply to the conduct.

It is not always clear how Rule 8.5 should be applied under a particular set of facts. For this reason, when the current version of Model Rule 8.5 was amended in 2002, a safe harbor provision was added, providing that a lawyer “shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.” Unfortunately, this safe harbor has not been adopted in many states. Further complicating matters is the fact that the meaning of “predominant effect” under the rule is largely undefined. Neither the earlier ABA 1993 choice of ethics law rule nor the current 2002 rule provide significant guidance for determining where the “predominant effect” of a lawyer's conduct occurs. Authorities are not setting forth meaningful interpretations of the term “predominant effect” under the ethics rules.

What is clear, though, is that foreign ethics law can apply when a US in-house or outside lawyer travels abroad or lives abroad. For example, foreign ethics law can apply to a business transaction, or an international arbitration or court litigation under the current 2002 version of Model Rule 8.5.

Consider how the choice of law analysis might play out in our factual scenario regarding possible price fixing at USA Manufacturing’s subsidiary. Even minor changes in the facts (including how they are reasonably perceived) can affect a lawyer's ethical duties in profound ways.

Alternative No. 1: Alleged price-fixing at company’s Western Australian subsidiary

Geraldine Counsel decides to send her assistant general counsel, Dis Klohsz, a Virginia-licensed attorney, to Western Australia to investigate alleged price fixing at the company's subsidiary in Perth, the capital city of the state of Western Australia. Dis Klohsz jointly investigates the Australian sub with Gude Mate, the sub's in-house lawyer. The two lawyers discover blatant price-fixing and subsequently meet in Perth. Dis Klohsz jointly investigates the Australian subsidiary with Geraldine Counsel at USA Manufacturing's headquarters in Alexandria, Virginia.

In 1993, the ABA amended Model Rule 8.5 to add a detailed choice of law provision. Thus, it is prudent to review the ethics law of a particular jurisdiction to determine whether it is applicable to lawyers who are not licensed to practice law in that particular jurisdiction. Some codes answer the question expressly; others are silent. For example, the Code of Conduct for European Lawyers explicitly applies to European lawyers in the many European nations that have adopted the European Code when they engage in cross-border practice. There is a modest trigger to be “cross-border,” and even a simple telephone call from a lawyer in one European nation to a lawyer in another European nation will suffice. (Note that lawyers from the United States are not covered by the European Code unless the choice of law of the American State governing the American lawyer is interpreted in the future to choose foreign ethics law that the foreign jurisdiction itself would not apply to an American lawyer.)

In the United States, determining which ethics law will apply to an American lawyer requires a choice of law analysis under ABA Model Rule 8.5. The problem is that there is a lack of uniformity among states regarding which version of Model Rule 8.5 each has adopted, coupled with a lack of authorities to analyze choice of law issues generally.

There are three versions of Model Rule 8.5. Under the oldest version of Model Rule 8.5 from 1983, the law of the lawyer's license would apply everywhere (including out of state and out of country), unless a conflict arose with the law of another jurisdiction in which the lawyer was deemed to be practicing, or in which the lawyer was also licensed. In that case, generally applicable rules for choice of law may govern. This rule is still followed in Alabama and Kansas.

In 1993, the ABA amended Model Rule 8.5 to add a detailed choice of law
Ohio. But does Ohio Rule 8.5 (which if the meeting with the DOJ was in Ohio) be required to disclose all he knows about the alleged price-fixing at USA Manufacturing’s distribution subsidiary located in Western Australia?20 So, like Gude Mate, Dis Klohsz could remain silent in response to the questions by the Western Australian government authorities even though he is licensed in Virginia, which is a mandatory disclosure jurisdiction.

Alternative No. 2: Alleged price-fixing at Ohio sub — meeting in Virginia
Assume that USA Manufacturing has a distribution subsidiary located in Cleveland, Ohio. Cy Lent, the assistant general counsel of the Ohio sub and an Ohio-licensed lawyer, discovers ongoing price-fixing in his investigation of the sub. Geraldine Counsel asks Cy Lent to come to USA Manufacturing’s headquarters in Virginia for a meeting with the Department of Justice (DOJ). During the meeting, the DOJ asks Cy Lent to disclose all that he knows about the alleged price-fixing at the Ohio sub. Is Cy Lent, an Ohio lawyer, required to disclose what he knows? Does it matter if enforcement is sought in the Ohio federal court?

As we learned above, Ohio is a discretionary disclosure jurisdiction, and thus, Cy Lent would not be required to disclose all he knows if the meeting with the DOJ was in Ohio. But does Ohio Rule 8.5 (which is substantively identical to ABA Model Rule 8.5) pick up Virginia ethics law, under which Cy Lent would have a mandatory duty of disclosure? Arguably, the predominant effect of his conduct was in Ohio, where he conducted the investigation and where the price-fixing occurred. Thus, to the extent this premise is accepted by a court or by Bar disciplinary authorities (and note that Ohio adopts the ABA’s “safe harbor” provision in Rule 8.5), Cy Lent would not be required to disclose any information. Of course, if the predominant effect were in Virginia, Cy Lent would be subject to Virginia’s mandatory disclosure rule through Ohio’s choice of ethics law. But, if the DOJ filed suit against the company in Ohio federal court, then Ohio ethics law would apply because the law of the place of the tribunal would control, if not the rules of the tribunal itself.

Alternative No. 3: Alleged price-fixing at USA Manufacturing and its subs — meeting in DC
Finally, consider a third alternative scenario (and this is where the outcome deterministic effect of differences in choice of ethics rules among jurisdictions really gets interesting). Assume that the meeting with the DOJ that was planned for USA Manufacturing’s headquarters in Virginia had to be rescheduled to the DOJ’s office on Pennsylvania Avenue in DC. Geraldine wants both Dis Klohsz and Cy Lent to handle the meeting. During the meeting, the DOJ asks the two assistant general counsel to disclose all they know about the price-fixing. Under Virginia’s choice of ethics law provision, is Dis Klohsz, a lawyer from Virginia (a mandatory disclosure jurisdiction), required to disclose what he knows at the meeting in DC (a mandatory silence jurisdiction)? Under Ohio’s choice of ethics law, is Cy Lent, a lawyer from Ohio (a discretionary disclosure jurisdiction), required to disclose what he knows on the basis that the predominant effect of the conduct at issue is at the company’s headquarters in Virginia (a mandatory disclosure jurisdiction)?

Let’s start with Dis Klohsz. Like many other jurisdictions, Virginia makes the jurisdiction in which the lawyer’s conduct occurred the controlling choice of law rule. But unlike other states, as noted above, Virginia does not have an exception when the

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**ACC Extras on... Privilege**

**ACC Docket**

**Form & Policy**

**QuickCounsel**

**Article**

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**Practice Resource**
ACC Alliance Partner WeComply’s “Attorney-Client Privilege for Employees” online training course was developed upon feedback from ACC members and explains the attorney-client privilege and attorney work product doctrine in simple, understandable terms. It includes news bulletins, pop quizzes and a final quiz highlighting real-world scenarios that illustrate the scope of the attorney-client privilege and how to avoid disclosure or waiver. http://bit.ly/17Q9x42

ACC has more material on this subject on our website. Visit www.acc.com, where you can browse our resources by practice area or search by keyword.
“predominant effect” is in a different jurisdiction. Thus, given that the conduct at issue is not “in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears,” under Virginia Rule 8.5(b)(1), the controlling rules will be “the rules of the jurisdiction in which the lawyer’s conduct occurred,” pursuant to Virginia Rule 8.5(b)(2). So even though Dis Klohsz is a lawyer from a mandatory disclosure jurisdiction, his conduct could be controlled (under Virginia’s own choice of ethics law rule) by the confidentiality rules of the jurisdiction where the meeting occurs — namely, in DC (a mandatory silence jurisdiction). In short, Dis Klohsz might have no duty to disclose. It’s not clear whether this is the most likely outcome (since arguably Klohsz’s conduct occurred in the jurisdiction where he conducted his investigation, not where disclosure is demanded), but it is a possible interpretation under the choice of law rules.

By contrast, Cy Lent, who is from a discretionary disclosure jurisdiction (Ohio) and who is meeting with DOJ officials in a mandatory silence jurisdiction (DC), ironically could be subject to a mandatory duty of disclosure if he reasonably believes that Virginia, where the company’s headquarters are located, is the jurisdiction of predominant effect. Unlike Virginia, Ohio Rule 8.5 is substantively identical to the latest version of ABA Model Rule 8.5, including its “predominant effect” clause and its “safe harbor” provision. Thus, to the extent that Cy Lent reasonably believes that the predominant effect of his conduct is in Virginia, then Ohio’s choice of ethics law would make Virginia ethics law apply, and Cy Lent would be required to respond to the DOJ’s questioning, assuming that all the other prerequisites of Virginia Rule 1.6 (including counseling of the client before disclosure) have been met. By contrast, if Cy Lent reasonably believes that either Ohio or DC is the place of predominant effect, then Cy Lent could remain silent in response to the DOJ’s questioning.

Takeaway checklist
As our factual scenarios demonstrate, it is imperative to fully understand and properly analyze confidentiality and choice of law issues where foreign ethics law is involved. The failure to do so will have real-world consequences for your ability to advise and counsel your management team. Without a doubt, the similarities and differences between US and foreign ethics and privilege law can be critically important to in-house lawyers of global companies.

Below is a useful “takeaway checklist” of points to keep in mind when dealing with legal protections for confidential information of your company, and in considering how choice of law issues may affect the analysis:

- Learn which of the foreign nations that your corporation operates in recognize privilege for attorney-client communications of in-house counsel and outside counsel (as in the United States).
- Note whether the information in the company’s files as client are protected as fully as the lawyer’s files.
- Determine whether in-house counsel in foreign nations have a professional duty as lawyers to maintain confidentiality. (If no such duty exists, consider putting specific confidentiality provisions in employment contracts.)
- Be aware of choice of law issues that will determine whether foreign or US ethics and privilege law will be selected.
- Become sensitive to which American states and foreign nations have mandatory disclosure requirements.
- Become sensitive to whether the governing ethics law provides for discretionary disclosure or mandatory silence.
- Recall that many foreign nations and some jurisdictions in the United States mandate silence regarding illegal activity of the client.
- Be familiar with ethics law and choice of law, both in the United States and in foreign nations.
- When resources allow, assign an attorney in the general counsel’s office with primary responsibility to become the “ethics guru” and serve as the “go-to” person for complex ethics questions.
- When in doubt, pick up the phone and call ethics counsel. ACC

Notes:
1. Rule 1.3.1 of the Code of Conduct for European Lawyers.
2. Professor Wigmore defined the privilege as follows: 1) Where legal advice of any kind is sought 2) from a professional legal adviser in his capacity as such, 3) the communications relating to that purpose, 4) made in confidence 5) by the client, 6) are at his instance permanently protected 7) from disclosure by himself or by the legal adviser, 8) except the protection be waived. 8 J. Wigmore, Evidence § 2292, at 554 (rev. ed. J. McNaughton 1961 & Supp. 1991) (footnote omitted) (emphasis deleted).
3. See Comment [3] to ABA Model Rule 1.6 (“The confidentiality rule … applies not only to matters communicated in confidence by the client but also...
to all information relating to the representation, whatever its source."); Edward J. Imwinkelried, “The New Wigmore: Evidentiary Privileges” § 1.3.1 (“[A]lthough the attorney-client privilege applies only to confidences obtained from the client, the lawyer’s ethical duty extends to secret information acquired from third parties during the course of representation.”).

4 See Rule 1.6(a) of the D.C. Rules of Professional Conduct.

5 See Section 21 of the Czech Act of Advocacy; Rules of Professional Conduct and the Rules of Competition of Lawyers of the Czech Republic (Code of Conduct), Section Two (Duties of an Attorney Vis-à-vis the Client), Article 6 (Basic Rules).

6 The Virginia rule requires disclosure of a client’s intent, “as stated by the client,” to commit a crime and the information necessary to prevent it. But prior to such disclosure, the lawyer must, where feasible, “advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.” Rule 1.6(c)(1) of the Virginia Rules of Professional Conduct.

7 See Article 38 of the Law on Lawyers of the People’s Republic of China.

8 In discussing the ethics law of different nations and states, this article addresses whether a lawyer can voluntarily initiate disclosure of past, present or future criminal activity, such as ongoing price-fixing in nations that make it illegal. This is different from the question of whether a lawyer can lawfully refuse to answer or produce documents at the demand of the state, which is a question not of ethics law but rather of privilege law. As noted above, a lawyer’s duty of confidentiality in the United States is much broader than the scope of the attorney-client privilege. Thus, US governmental authorities lawfully can demand that a lawyer turn over client confidential information that is not privileged. The distinction is particularly acute in China where the law does not recognize any right to refuse to answer questions of the state. Of course, this is not unique to China. For example, under the European Court of Justice’s landmark decision in Akzo Nobel Chemicals Ltd. and Akkros Chemicals Ltd. v. Commission (Case C-550/07 P), agents in a pre-dawn raid of a company who are from the European Competition Authority have the right to demand answers and documents with legal advice from in-house counsel right on the spot. Moreover, any state county prosecutor in the United States can demand information that is protected by the ethics law duty of confidentiality if it is not privileged.

9 The only exception is disclosure when the lawyer reasonably believes the crime is likely to result in death or serious bodily injury, as set forth under California Business and Professions Code § 6068(e)(2) and Rule 3-100(B) of the California Rules of Professional Conduct, and even then, the lawyer has discretion whether to disclosing. Moreover, before revealing confidential information to prevent a criminal act, the California rules specify various steps that the lawyer first must take: 1) Try to persuade the client not to do the criminal act or to pursue a course of conduct that will prevent death or substantial bodily harm; and 2) tell the client (“at an appropriate time”) of the lawyer’s ability or decision to reveal the confidential information. See Rule 3-100(C) of the California Rules of Professional Conduct. And after all that, in revealing confidential information, the disclosure must be no more than is necessary to prevent the criminal act. See Rule 3-100(D) of the California Rules of Professional Conduct. See Section 9(1) of the Slovak Rules of Professional Conduct for Lawyers. ("The lawyer is obliged to treat any information learnt in connection with the practice of law as strictly confidential (Sec. 23 of [Act No. 586/2003 Coll. on the Legal Profession and on amending Act No. 455/1991 Coll. on Business and Self-Employment Services, as amended]). He is obliged not to reveal any personal data which are protected under a separate law.")

10 The “any crime” exception to a lawyer’s duty of confidentiality is the most appropriate provision for analysis of the antitrust violation in our article. It must be read in the context of a state or nation’s law, which may have other provisions for particular crimes, such as criminal fraud, or crimes that used the lawyer’s services, or crimes where disclosure is reasonably necessary to prevent reasonably certain death or substantial bodily harm.

11 The privilege, however, may be denied if an SRA certified in-house lawyer combines pure legal advice with business or management advice in the same communication; in that case, the entire communication may be denied the privilege.

12 The decision by the European Court of Justice in Akzo Nobel could adversely affect your company’s ability to advise on competition law in confidence. It may be more prudent to have corporate investigations conducted by outside counsel in order to ensure that the advice of counsel during an investigation is protected by privilege. You also need to consider the fact that inconsistent privilege rules may apply if the European Commission and the Department of Justice are conducting parallel investigations.

13 It bears noting, of course, that additional factors must be considered in the selection of counsel in addition to the differences among nations and states regarding the duty of confidentiality and privilege law. These factors, among others, include: 1) expertise and experience in the legal subject matter; 2) skill in interviewing company witnesses while observing applicable ethical limitations such as “civil Miranda warnings” (which are designed generally to clarify to an employee that in-house counsel represents the corporation and not the individual employee, and to explain to the employee that while communications between counsel and the employee are covered by the attorney-client privilege, the privilege belongs to the corporation and not the individual employee); and 3) the capability of framing advice based on good judgment as well as on the facts and the law.

14 Rule 1.3.1 of the Code of Conduct for European Lawyers.


18 Virginia’s choice of law rule provides in relevant part as follows:

(b) Choice of Law. In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:
(1) for conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise;
(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred. ... Rule 8.5(b) of the Virginia Rules of Professional Conduct.
Upjohn Co. v. United States

Supreme Court of the United States

November 5, 1980, Argued; January 13, 1981, Decided

No. 79-886

Reporter

UPJOHN CO. ET AL. v. UNITED STATES ET AL.

Prior History: [****1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Disposition: 600 F.2d 1223, reversed and remanded.

Core Terms
communications, employees, attorney-client, interviews, attorney's, disclosure, work-product, law law law, court of appeals, legal advice, doctrine doctrine doctrine, questionnaire, questions, control group, privileged, discovery, witnesses, summons, advice, courts, responses, work product, corporation's, confidential, proceedings, company's, disclose, mental impressions, outside counsel, oral statement

Case Summary

Procedural Posture
The court granted certiorari on a judgment from the United States Court of Appeals for the Sixth Circuit, which held that the attorney-client privilege did not apply to communications made by petitioner corporation's mid-level and lower-level officers and agents, and that the work-product doctrine did not apply to the administrative tax summonses issued under 26 U.S.C.S. § 7602.

Overview
Responding to a claim that its foreign subsidiary made illegal payments to secure a government business, petitioner corporation initiated an investigation and sent out a questionnaire to all of its foreign general and area managers to determine the nature and magnitude of such payments. After petitioner disclosed such payments to the Securities and Exchange Commission, the Internal Revenue Service demanded a production of all the files relating to the investigation. Petitioner refused to produce the documents. The court rejected the "control group" test applied by the lower appellate court, concluding that even low-level and mid-level employees could have the information necessary to defend against the potential litigation, and that Fed. R. Evid. 501 protected any client information that aided the orderly administration of justice. The court rejected the lower appellate court's conclusion that the work-product doctrine did not apply to tax summonses, but remanded the issue because the work-product at issue was based on potentially privileged oral statements. The doctrine could only be overcome upon a strong showing of necessity for disclosure, and unavailability by other means.

Outcome
The judgment was reversed because petitioner's low- and mid-level employees' information was protected by the attorney-client privilege where it was necessary to defend against potential litigation, and the work-product doctrine applied to tax summonses. The court remanded the case for a
determination as to whether the work-product doctrine applied, and to allow respondent to show a necessity for the disclosure.

**LexisNexis® Headnotes**

**HN1** The work-product doctrine does apply in tax summons enforcement proceedings.

**HN2** Elements


**HN3** The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.

**HN4** The attorney-client privilege applies when the client is a corporation.

**HN5** Definition of Employees

In the corporate context, it will frequently be employees beyond the control group--officers and agents responsible for directing the company's actions in response to legal advice--who will possess the information needed by the corporation's lawyers. Middle-level and lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top...
executives.

Evidence > Privileges > Attorney-Client Privilege > General Overview

**HN6[↩]** The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Civil Procedure > ... > Discovery > General Overview

**HN7[↩]** See Fed. R. Civ. P. 26(b)(3).

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > General Overview

**HN8[↩]** The obligation imposed by a tax summons remains subject to the traditional privileges and limitations. The Federal Rules of Civil Procedure are made applicable to summons enforcement proceedings by Fed. R. Civ. P. 81(a)(3).

Civil Procedure > ... > Privileged Communications > Work Product

**HN9[↩]** Not all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Production might be justified where the witnesses are no longer available or can be reached only with difficulty. This does not apply to oral statements made by witnesses, whether presently in the form of the attorney's mental impressions or memoranda.

**Lawyers' Edition Display**

**Decision**

Communications between corporate general counsel and corporate employees, held protected by attorney-client privilege; work-product doctrine, held applicable to Internal Revenue Service summons.

**Summary**

After a corporation's general counsel was informed of certain questionable payments made by one of the corporation's foreign subsidiaries to foreign government officials, he began an internal investigation which included the sending of questionnaires to foreign managers seeking detailed information concerning the payments. Interviews were also conducted with the managers and other corporate officers and employees. The Internal Revenue Service, during the course of an investigation to determine the tax consequences of
the payments, issued a summons pursuant to 26
USCS 7602 demanding production of, among other
things, the questionnaires and the general counsel's
notes on the interviews. The corporation declined to
produce the material sought on the grounds that it
was protected from disclosure by the attorney-client
privilege and constituted the "work product" of an
attorney prepared in anticipation of litigation. The
United States sought enforcement of the summons
in the United States District Court for the Western
District of Michigan, which adopted a magistrate's
conclusion that the summons should be enforced.
On appeal, the United States Court of Appeals for
the Sixth Circuit held that the attorney-client
privilege did not apply to the extent the
communications were made by officers and agents
not responsible for directing the corporation's
actions in response to legal advice, because the
communications were not those of the "client," and
that the work-product doctrine did not apply to IRS
summonses (600 F2d 1223).

On certiorari, the United States Supreme Court
reversed and remanded. In an opinion by
Rehnquist, J., joined by Brennan, Stewart, White,
Marshall, Blackmun, Powell, and Stevens, JJ., and
joined in pertinent part by Burger, Ch. J., it was
held that (1) the communications between the
corporation's employees and the general counsel,
which were evidenced both by the responses to the
questionnaires and by notes taken by the general
counsel reflecting employee responses during the
interviews, were protected by the attorney-client
privilege, and accordingly disclosure of such
communications could not be compelled by the
Internal Revenue Service pursuant to an
administrative summons under 7602 since the
communications at issue were made by the
employees to the general counsel, acting as such, at
the direction of corporate superiors, in order to
secure legal advice from counsel, and concerned
matters within the scope of the employees'
corporate duties, and (2) the work-product doctrine
may be applied to tax summonses issued by the
Internal Revenue Service under 7602, and therefore
the work product of the corporation's general
counsel, including notes and memoranda based on
the oral statements of employees interviewed by the
attorney, to the extent such material did not reveal
communications already protected by the attorney-
client privilege, did not have to be disclosed to the
Internal Revenue Service simply on a showing of
"substantial need" and the inability to obtain the
equivalent "without undue hardship," especially in
view of Rule 26 of the Federal Rules of Civil
Procedure which accords special protection to work
product revealing an attorney's mental processes.

Burger, Ch. J., concurring in part and concurring in
the judgment, agreed with the court's holding as to
the work-product doctrine, and expressed the view
that the court, although properly holding that the
communications in the case at bar were protected
by the attorney-client privilege, should have made
clear that, as a general rule, a communication is
privileged at least when an employee or former
employee speaks with an attorney at the direction
of the management regarding conduct or proposed
conduct within the scope of employment, provided
the attorney is one authorized by the management
to inquire into the subject and is seeking
information to assist counsel in evaluating whether
the employee's conduct has bound or would bind
the corporation, assessing the legal consequences, if
any, of that conduct, or formulating appropriate
legal responses to actions that have been or may be
taken by others with regard to that conduct.

Headnotes

REVENUE §74.5 > IRS summons -- corporate
communications -- attorney-client privilege --
> Headnote:
LEdHN[1A][1A]LEdHN[1B][1B]
[1B]

Communications between corporate employees and
a corporation's general counsel--which are
evidenced both by responses to questionnaires
made by the corporation's foreign managers in
connection with a corporate investigation into
questionable payments made to foreign government officials, and by notes taken by the general counsel reflecting responses in interviews with corporate employees--are protected by the attorney-client privilege, and accordingly disclosure of such communications may not be compelled by the Internal Revenue Service pursuant to an administrative summons issued under 26 USCS 7602 during the course of an investigation into the tax consequences of the payments, where the communications at issue were made by the corporation's employees to the general counsel, acting as such, at the direction of corporate superiors in order to secure legal advice from counsel, and where the communications concerned matters within the scope of the employees' corporate duties.

REVENUE §74.5 > IRS summons -- work-product doctrine -- > Headnote:

The work-product doctrine is applicable to tax summonses issued by the Internal Revenue Service under 26 USCS 7602; accordingly, the work product of a corporation's general counsel including notes and memoranda based on the oral statements of corporate employees interviewed by the attorney in connection with an investigation into questionable payments made to foreign government officials--to the extent such materials do not reveal communications already protected by the attorney-client privilege--need not be disclosed to the Internal Revenue Service during the course of a tax investigation into the payments, simply on a showing by the Service of "substantial need" and the inability to obtain the equivalent "without undue hardship," especially in view of Rule 26 of the Federal Rules of Civil Procedure, which accords special protection from disclosure to work product revealing an attorney's mental processes, such as the general counsel's notes and memoranda.

EVIDENCE §699 > attorney-client privilege -- scope of protection -- > Headnote:
LEdHN[3][3]

The attorney-client privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice.

EVIDENCE §699 > attorney-client privilege -- scope of protection -- facts underlying communications -- > Headnote:
LEdHN[4][4]

The attorney-client privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.

REVENUE §74.5 > tax summons -- traditional privileges and limitations -- > Headnote:
LEdHN[5][5]

The obligation imposed by a tax summons remains subject to the traditional privileges and limitations.

Syllabus

When the General Counsel for petitioner pharmaceutical manufacturing corporation (hereafter petitioner) was informed that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation of such payments was initiated. As part of this investigation, petitioner's attorneys sent
a questionnaire to all foreign managers seeking detailed information concerning such payments, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by [****2] petitioner disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons pursuant to 26 U. S. C. § 7602 demanding production of, *inter alia*, the questionnaires and the memoranda and notes of the interviews. Petitioner refused to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The United States then filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate's recommendation that the summons should be enforced, the Magistrate having concluded, *inter alia*, that the attorney-client privilege had been waived and that the Government had made a sufficient showing of necessity to overcome the protection of the work-product doctrine. The Court of Appeals rejected the Magistrate's finding of a waiver of the attorney-client privilege, but held that under the so-called "control group test" the privilege did not apply "[to] the extent that the communications [****3] were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" The court also held that the work-product doctrine did not apply to IRS summonses.

**Held:**

1. The communications by petitioner's employees to counsel are covered by the attorney-client privilege insofar as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. Pp. 389-397.

(a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation's lawyers. Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their [****4] employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. Pp. 390-392.

(b) The control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. P. 392.

(c) The narrow scope given the attorney-client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. Pp. 392-393.

(d) [****5] Here, the communications at issue were made by petitioner's employees to counsel for petitioner acting as such, at the direction of corporate superiors in order to secure legal advice
from counsel. Information not available from upper-echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. Pp. 394-395.

2. The work-product doctrine applies to IRS summonses. Pp. 397-402.

(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language or legislative history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work-product doctrine. P. 398.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent they do not reveal communications they reveal attorneys' mental processes in evaluating the communications. As Federal Rule of Civil Procedure 26, which accords special protection from disclosure to work product revealing an attorney's mental processes, and Hickman v. Taylor, 329 U.S. 495, make clear, such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. P. 401.

Counsel: Daniel M. Gribbon argued the cause and filed briefs for petitioners.

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief were Solicitor General McCree, Assistant Attorney General Ferguson, Stuart A. Smith, and Robert E. Lindsay. *

Judges: REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Parts I and III of which BURGER, C. J., joined. BURGER, C. J., filed an opinion concurring in part and concurring in the judgment, post, p. 402.

Opinion by: REHNQUIST

Opinion

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U.S. 925. With respect to the privilege question the parties and various amici have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of


William W. Becker filed a brief for the New England Legal Foundation as amicus curiae.
rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege \[****9\] protects the communications involved in this case from compelled disclosure and that \[HNI\] the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed petitioner Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter \[*387\] began by noting recent disclosures that several American companies made "possibly illegal" \[****10\] payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees \[***590\] who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. \[1\] A copy of the report was simultaneously submitted to the Internal Revenue Service, \[****11\] which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U. S. C. § 7602 demanding production of:

"All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political \[*388\] contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

"The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a-18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they \[****12\] were protected from disclosure by the attorney-client privilege and constituted the

\[1\] On July 28, 1976, the company filed an amendment to this report disclosing further payments.
work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U. S. C. §§ 7402 (b) and 7604 (a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F.2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[to] the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" Id., at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U. S. C. § 7602." Id., at 1228, n. 13.

II

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in Fisher v. United States, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, United States v. Louisville & Nashville R. Co., 236 U.S. 318, 336 (1915), and the Government does not contest the general proposition.

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

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice [***592] when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply."

(Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See Trammel, supra, at 51; Fisher, supra, at 403. The first step in the resolution of any legal problem is ascertaining the factual background and sifting [****17] through the facts [*391] with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:

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

See also Hickman v. Taylor, 329 U.S. 495, 511 (1947).

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. HN5[ fundraisers ] In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below -- "officers and agents . . . responsible for directing [the company's] actions in response to legal advice" -- who will possess [****18] the information needed by the corporation's lawyers. Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in Diversified Industries, Inc v. Meredith, 572 F.2d 596 (CA8 1978) (en banc):

"In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem is thus faced with a "Hobson's choice". If he [**684] interviews employees not having "the very highest authority", [*392] their communications to him will not be privileged. If, on the other hand, he interviews only those employees with "the very highest authority", he may find it [***593] extremely difficult, if not impossible, to determine what happened." Id., at 608-609 (quoting Weinschel, [****19] Corporate Employee Interviews and the Attorney-Client Privilege, 12 B. C. Ind. & Com. L. Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more
difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, e.g., Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1164 (SC 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it").

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 440-441 (1978) ("the behavior proscribed by the [Sherman] Act is [often] difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct"). The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, e.g., Hogan v. Zletz, 43 F.R.D. 308, 315-316 (ND Okla. 1967), aff'd in part sub nom. Natta v. Hogan, 392 F.2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with Congoleum Industries, Inc. v. GAF Corp., 49 F.R.D. 82, 83-85 (ED Pa. 1969), aff'd, 478 F.2d 1398 (CA3 1973) (control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research).

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments." (Emphasis supplied.) 78-1 USTC para. 9277, pp. 83,598, 83,599. Information, not

2 The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

3 Seven of the eighty-six employees interviewed by counsel had terminated their employment with Upjohn at the time of the interview. App. 33a-38a. Petitioners argues that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.
available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. 4 The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its [****23] opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." [*395] It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." Id., at 165a-166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of [***595] the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, id., at 39a, [****24] 43a, and have been kept confidential by the company. 5 Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

[****25] LEDHN[4][4] The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

HN6  "[The] protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different [*396] [**686] thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830, 831 (ED Pa. 1962). [****26]

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

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4 See id., at 26a-27a, 103a, 123a-124a. See also In re Grand Jury Investigation, 599 F.2d 1224, 1229 (CA3 1979); In re Grand Jury Subpoena, 599 F.2d 504, 511 (CA2 1979).

5 See Magistrate's opinion, 78-1 USTC para. 9277, p. 83,599: "The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel."
investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329 U.S., at 516: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S. Rep. No. 93-1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"); *Trammel*, 445 U.S., at 47; *United States v. Gillock*, 445 U.S. 360, 367 (1980). While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals in this case cannot, consistent with "the principles of the common law as . . . interpreted . . . in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a-28a, 91a-93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U. S. C. § 7602.6

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in *Hickman v. Taylor*, 329 U.S. 495 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id.*, at 510. The Court noted that "it is essential that a lawyer work with [*398] a certain degree of privacy [**687] " and reasoned that if discovery of the material sought were permitted

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

The "strong public policy" underlying the work-product doctrine was reaffirmed recently in *United States v. Nobles*, 422 U.S. 225, 236-240 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26 (b)(3).7

6 The following discussion will also be relevant to counsel's notes and memoranda of interviews with the seven former employees should it be determined that the attorney-client privilege does not apply to them. See n. 3, supra.

7 This provides, in pertinent part:

| HN7 | "[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only
As we stated last Term, the obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." United States v. Euge, 444 U.S. 707, 714 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26 (b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable to summons enforcement proceedings by Rule 81 (a)(3). See Donaldson v. United States, 400 U.S. 517, 528 (1971). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78-1 USTC para. 9277, p. 83,605. The Government relies on the following language in Hickman:

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

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from Hickman, however, did not apply to "oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." Id., at 512. As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters, petitioner's case is not of that type." Id., at 512-513. See also Nobles, supra, at 252-253 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U.S., at 513 ("what he saw fit to write down regarding witnesses' remarks"); id., at 516-517 ("the statement would be his [the attorney's] language, permeated with his inferences") (Jackson, J., concurring).

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78-1 USTC para. 9277, p. 83,604. Rule 26 goes on, however, to state that "[in] ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the Hickman court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes [Footnote 9]

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8Thomas described his notes of the interviews as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere." 78-1 USTC para. 9277, p. 83,599.
processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U. S. C. App., p. 442 ("The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The Hickman opinion drew special attention to the need for [****35] protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . .").

[*401] Based on the foregoing, some courts have concluded that no showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, e. g., In re Grand Jury Proceedings, 473 F.2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses); In re Grand Jury Investigation, 412 F.Supp. 943, 949 (ED Pa. 1976) (notes of conversation with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, e. g., In re Grand Jury Investigation, 599 F.2d 1224, 1231 (CA3 1979) ("special considerations . . . must shape any ruling on the discoverability of interview memoranda . . .; such documents [****36] will be discoverable only in a 'rare situation'"); cf. In re Grand Jury Subpoena, 599 F.2d 504, 511-512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial [***599] need" and "without undue hardship" standard articulated in the first part of Rule 26 (b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we [*402] [**689] think a far stronger [****37] showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

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

It is so ordered.

Concur by: BURGER (In Part)

Concur

CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment.

I join in Parts I and III of the opinion of the Court
and in the judgment. As to Part II, I agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are [****38] privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." Ante, at 393. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See ante, at 394-395. Because of the great importance of the issue, in my view the Court should make clear now that, as a [*403] general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating [***600] whether the employee's conduct has bound or would bind the corporation; [****39] (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, e.g., Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 609 (CA8 1978) (en banc); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-492 (CA7 1970), affd by an equally divided Court, 400 U.S. 348 (1971); Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1163-1165 (SC 1974). Other communications between employees and corporate counsel may indeed be privileged -- as the petitioners and several amici have suggested in their proposed formulations * -- but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

[****40] Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly [*404] before us. Simply asserting that this failure "may to some slight extent undermine desirable certainty," ante, at 396, neither minimizes the consequences [**690] of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.

References

35 Am Jur 2d, Federal Taxation 9023, 9024
11 Am Jur P.I & Pr Forms (Rev), Federal Practice and Procedure, Form 1093.2
13 Am Jur Trials 1, Defending Federal Tax Evasion Cases
26 USCS 7602

[****41] RIA Federal Tax Coordinator 2d T-1135 et seq.
US L Ed Digest, Internal Revenue 74.5
L Ed Index to Annos, Attorney and Client; Income Taxes

* See Brief for Petitioners 21-23, and n. 25; Brief for American Bar Association as Amicus Curiae 5-6, and n. 2; Brief for American College of Trial Lawyers and 33 Law Firms as Amici Curiae 9-10, and n. 5.
ALR Quick Index, Discovery; Income Taxes; Privileged and Confidential Matters
Federal Quick Index, Privileged Communications; Tax Enforcement; Work Product Doctrine

Annotation References:
What matters are protected by attorney-client privilege or are proper subject of inquiry by Internal Revenue Service where attorney is summoned in connection with taxpayer-client under federal tax examination. 15 ALR Fed 771.

Attorney-client privilege in federal courts: under what circumstances can corporation claim privilege for communications from its employees and agent corporation's attorney. 9 ALR Fed 685.

Development, since Hickman v Taylor, of "work product" doctrine, 35 ALR3d 412.
MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.
There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group’s discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should
memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.¹

I have directed that certain criminal and civil provisions in the United States Attorney’s Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 et seq.) and the commercial litigation provisions in Title 4 (USAM 4-4.000 et seq.), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 et seq.² Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (e.g., the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

¹ The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

² Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. See U.S.S.G. USSG § 8C2.5(g), Application Note 13 (“A prime test of whether the organization has disclosed all pertinent information” necessary to receive a cooperation-related reduction in its offense level calculation “is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct”).
example, the Department’s position on “full cooperation” under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, see USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company’s continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in
these matters. Consultation between the Department’s civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government’s potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. See USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. **Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.**

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division’s Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.
5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department’s ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.**

The Department’s civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals’ ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person’s misconduct was serious, whether
it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual’s misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department’s investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 17-20301-CIV-LENARD/GOODMAN

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

v.

MATHIAS FRANCISCO SANDOVAL
HERRERA, et al.,

Defendants.

ORDER ON DEFENDANTS’ MOTION TO
COMPEL PRODUCTION FROM NON-PARTY LAW FIRM

Very few decisions are consequence-free events. The discovery dispute at issue here is no exception to this practical truism.

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

Because there is little or no substantive distinction for waiver purposes between the actual physical delivery of the work product notes and memoranda and reading or orally summarizing the same written material's meaningful substance to one's legal adversary, the Undersigned concludes that the Morgan Lewis & Bockius LLP law firm ("ML") waived work product protection and must provide to Defendants the interview notes and memoranda that were orally downloaded. To that extent, the Undersigned grants Defendants' motion to compel against ML. [ECF No. 52]. The waiver, however, is limited to only the witnesses whose interview notes and memoranda were orally provided, which is far less than all the witnesses ML interviewed.

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

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

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

I. Procedural and Factual Background

The SEC filed its lawsuit against Mathias Francisco Sandoval Herrera, Maria D. Cidre, and another defendant who entered into a consent judgment with the SEC shortly after the lawsuit was filed. [ECF Nos. 1; 24]. Herrera was the CEO and Cidre was the CFO of GCC's Latin American operation. The Complaint is based on allegations that Herrera and Cidre concealed the manipulation of accounting systems at the Brazilian operations of GCC, a global manufacturer of wire and cable products. The lawsuit alleges that Defendants hid from GCC's executive management material inventory
accounting errors at GCC's Brazilian subsidiary, including the overstatement of inventory.

According to the SEC's Complaint, this improper accounting of inventory caused GCC to overstate inventory and net income by millions of dollars and required the restatement of financial statements. The lawsuit alleges that this misconduct generated myriad violations of the federal securities laws.

The parties filed a joint written notice, consenting to the Undersigned's final handling of discovery disputes. [ECF No. 37]. Based on that, United States District Judge Joan A. Lenard referred to the Undersigned all discovery motions. [ECF No. 41]. The referral directed the parties to designate a discovery motion as a "Consent Motion." [ECF No. 41].

Defendants filed their motion to compel against ML, who filed an opposition response, and then Defendants filed a reply. [ECF Nos. 52; 59; 61]. The motion, the response, and the reply all failed to designate the motion as a "Consent Motion." Nevertheless, since it concerns discovery, the motion is surely a consent motion, which means that any challenge to this discovery Order would be to the Eleventh Circuit Court of Appeals (not the District Court). See 28 U.S.C. § 636(c)(3); Fed. R. Civ. P. 73(c). The motion is fully briefed\(^1\) and is ripe for a ruling.

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\(^1\) Defendants also filed a privileged e-mail string, but the parties later filed a joint notice asking the Court to not consider the attachment (which had been filed under
The origins of the specific discovery dispute date back to late 2012, when GCC retained ML to provide legal advice concerning accounting errors at the Brazilian subsidiary. ML conducted an internal investigation, which included interviewing dozens of GCC personnel. ML attorneys then prepared notes and memoranda about those interviews. According to Defendants, “many” of the witnesses were interviewed “live” in Brazil. [ECF No. 52, p.2].

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

The SEC also asked for the investigative findings, and ML provided the SEC with information about its findings, including a presentation prepared for the SEC and information about specific witness interviews, which were provided orally. An April 15, 2013 PowerPoint presentation that ML made to the SEC contained, among other things, an events timeline, the names of witnesses whom ML had already interviewed, a breakdown of the transactions deemed to be at the heart of the accounting discrepancy, and the results of its investigation. This 28-page PowerPoint presentation is now in the seal) because ML had inadvertently produced it to the SEC. [ECF Nos. 61-1; 70]. The Undersigned will therefore not consider that exhibit.
public record of this lawsuit, as Defendants filed it as an exhibit to their motion. [ECF No. 52-3]. The cover page of the ML-produced PowerPoint says “FOIA Confidential Treatment Request,” however. [ECF No. 52-3, p. 1].

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

In addition, during the investigation, Deloitte asked for information from ML about its investigative steps and findings, including information obtained through ML-conducted witness interviews. ML provided Deloitte with the information and says that it did so because it believed “Deloitte would keep it confidential, consistent with Deloitte’s professional obligations to its client [GCC].” [ECF No. 59, p. 3]. Although ML provided the SEC with oral downloads of only 12 witness interviews, it provided Deloitte with information about all the interviews notes and memoranda. It appears as though this was accomplished through the reading (by an ML attorney) of memoranda and interview notes to Deloitte and generalized “access” to review interview notes selected by Deloitte’s investigative team. [ECF No. 59, p. 8].

The SEC’s investigation ultimately led to a Cease and Desist Order entered against GCC in December 2016, which required the payment of a $6.5 million civil monetary penalty. [ECF No. 52-2].

On August 9, 2017, defense counsel served ML with a Rule 45 subpoena in this lawsuit (filed by the SEC). [ECF No. 52-1]. ML made initial objections, and the parties
had discussions, which led to the narrowing of the issues. Specifically, Defendants’ motion seeks to compel only the witness interview notes and memos (i.e., not the actual documents that ML provided to the SEC, “because those documents would presumably be produced [anyway] to the Defendants by the SEC”). [ECF No. 52, p. 7].

II. Applicable Legal Principles and Analysis

“[D]istrict courts are entitled to broad discretion in managing pretrial discovery matters.” Perez v. Miami-Dade Cty., 297 F.3d 1255, 1263 (11th Cir. 2002) (emphasis added). This discretion extends to rulings concerning the applicability of the work-product doctrine. Republic of Ecuador v. Hinchee, 741 F.3d 1185, 1188 (11th Cir. 2013).


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

Although the party seeking work-product protection bears the initial burden for establishing that the documents are entitled to such protection, after that initial burden is met, the burden shifts to the party asserting waiver to show that the party claiming the privilege has waived its right to do so. *Mitsui Sumitomo Ins. Co. v. Carbel, LLC*, No. 09-21208-CIV, 2011 WL 2682958, at *3 (S.D. Fla. July 11, 2011). In the context of work product, the question is not, as in the case of the attorney-client privilege, *whether* confidential communications are disclosed, but *to whom* the disclosure is made -- because the protection is designed to protect an attorney's mental processes from discovery by adverse parties. See generally *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978).


As noted in *United States v. Gulf Oil Corporation*, 760 F.2d 292, 295 (Temp. Emer.
Ct. App. 1985):\textsuperscript{2}

[The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation.] A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.

760 F.2d 292, 295 (citations omitted) (emphasis added).

Thus, not every situation in which work-product materials are disclosed warrants a finding of waiver. Rather, the “circumstances surrounding the disclosure are key to determining whether an actual waiver of the work-product protection has occurred.” *Stern v. O’Quinn*, 253 F.R.D. 663, 676 (S.D. Fla. 2008) (emphasis added).

Generally speaking, as noted above, work-product protection is waived when protected materials are “disclosed in a manner which is either inconsistent with maintaining secrecy against opponents or substantially increases the opportunity for a potential adversary to obtain the protected information.” *Niagara*, 125 F.R.D. at 590 (citing *Gulf Oil*, 760 F.2d at 295 and other cases) (emphasis supplied); *Kallas v. Carnival Corp.*, No. 06-20115-CIV, 2008 WL 2222152, at *4 (S.D. Fla. May 27, 2008) (noting that a party waives otherwise-protected work-product materials “when the covered materials are used in a manner that is inconsistent with the protection”) (internal quotations omitted); see also *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, No. 93 CIV. 5298 LMM RLE, 1996 WL 944011, at *3 (S.D.N.Y. Dec. 19, 1996) (“Work product immunity is

\textsuperscript{2} Citing *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980).
waived only if the party has voluntarily disclosed the work product in such a manner that it is likely to be revealed to his adversary.”) (emphasis supplied); Falise v. Am. Tobacco Co., 193 F.R.D. 73, 79 (E.D.N.Y. 2000) (waiver of work-product protection found only if disclosure substantially increases the opportunity for potential adversaries to obtain the information) (emphasis added); Stern, 253 F.R.D. at 676 (finding that work-product waiver occurs when disclosure occurs in a way which “substantially increases the opportunities for potential adversaries to obtain the information”).

A. Witness Interview Material Orally Downloaded to the SEC

The SEC was the adversary of ML’s client, GCC. The SEC was investigating GCC for alleged misstatements in its financial reports submitted as a public company and eventually imposed a $6.5 million civil penalty against it. And it does not appear as though ML takes the position that the SEC was not an adversary, as it explains in its response that “Morgan Lewis does not contend that [GCC] and the SEC shared a common interest[.]” [ECF No. 59, p. 7].

So the Undersigned easily concludes that the disclosure to the SEC was one made to an adversary. See In re Initial Pub. Offering Sec. Litig., 249 F.R.D. 457, 465–67 (S.D.N.Y. 2008) (finding that company waived work-product protection by disclosure of memoranda to the SEC, which was investigating the possibility of the company’s wrongdoing, to limit liability for that wrongdoing); United States v. Bergonzi, 216 F.R.D. 487, 497–98 (N.D. Cal. 2003) (finding that the company waived work-product protection
by the disclosure to SEC because SEC had issued a Wells letter to the company); see also
*In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179 (10th Cir. 2006) (collecting cases on waiver
of work-product privilege in disclosures to investigating agencies); *In re Columbia/HCA
permitting selective waiver of work-product material to government agencies and
noting that “[a]torney and client both know the material in question was prepared in
anticipation of litigation; the subsequent decision on whether or not to ‘show your
hand’ is quintessential litigation strategy.”).

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

ML does not contend that it provided only vague references of the witness notes and memoranda to the SEC, nor does it argue that only detail-free conclusions or general impressions were orally provided. To the contrary, it factually concedes that its attorneys provided oral downloads of the substance of the 12 witness interview notes and memos but legally relies on _B.M.I. Interior Yacht Refinishing, Inc. v. M/Y Claire_, No. 13-62676-CIV, 2015 WL 4316929 (S.D. Fla. July 15, 2015), a non-controlling admiralty case which the Undersigned does not deem helpful or applicable.

In _B.M.I._, the Court held that a boat captain’s ambiguous and perhaps only vague oral disclosure of the contents of a boat inspector’s report, prepared at counsel’s request, did not waive counsel’s work-product protection because “an attorney has an independent interest in privacy of his or her work product, even when the client has waived its own claim[].” _Id._ at *5. As an alternative basis for rejecting waiver, the Court noted that no one could recall what portion of the report was disclosed by the captain, so evidence was lacking as to what was waived. _Id._

Moreover, the _B.M.I._ Court implicitly acknowledged the validity of the waiver approach used in _Vitesse Semiconductor_ but distinguished it because the oral summaries

\(^3\) The Undersigned notes that these cases all involve the SEC, the same government agency at issue here.
provided there “were sufficiently detailed,” as opposed to the “not very detailed” summary orally given by a boat captain. *Id.* at *6. But in this case, ML knowingly waived work-product protection in the interview notes and memoranda.

ML also argues that Defendants’ claim -- that they seek to “level the playing field” -- is an argument which “rings hollow” because “the SEC does not have what the Defendants are seeking.” [*ECF No. 59, p. 7*]. But that is an incomplete argument. Yes, it is true that the SEC does not have the actual witness notes and memoranda -- but it has the *functional equivalent* of them by receiving the oral summaries of the interview materials. The cases discussed above reject this crabbed theory. See, e.g., *Vitesse Semiconductor*, 2011 WL 2899082, at *3.

**B. Other Material Provided to SEC**

Defendants argue that the PowerPoint presentations ML made for the SEC is a work-product waiver. ML disagrees, contending that the presentation does not contain work-product material. ML thus takes the position that the Court need not address the waiver issue because the material was never protected by work product in the first place. It says that the presentation’s content concerned facts, not attorney mental processes. For example, simply listing the names of interviewees is not a work-product scenario.

ML relies on *In re General Motors LLC Ignition Switch Litigation*, in which the court denied the plaintiffs’ motion to compel interview notes and memos where GM
produced to government agencies an attorney’s report summarizing an internal investigation, and where the report contained numerous citations to many of the interviews conducted. 80 F. Supp. 3d 521, 533–34 (S.D.N.Y. 2015). The court found that GM had not offensively used the report or made a selective or misleading presentation unfair to its adversaries warranting a finding of waiver with respect to the interview memos and notes. id. at 534.

The Undersigned has reviewed the entire PowerPoint presentation and agrees with ML’s view that it is not protected by work-production immunity for two reasons. First, it was prepared specifically for the SEC. Second, although it mentions, in passing, the names of the interviewees, the substance of what the witnesses said was not provided.

C. Other Disclosures to the SEC

Defendants contend that ML made other oral disclosures of work-product information to the SEC, above and beyond the oral downloads of the 12 interviews. The Undersigned cannot reach any conclusions about further disclosures unless and until ML provides additional clarification about what was disclosed. Defendants contend that the ML attorneys took notes of the discussions they had with the SEC and perhaps with the Department of Justice. Defendants request that the Undersigned review in camera ML’s attorneys’ notes of an October 29, 2013 meeting. ML does not oppose this request. [ECF No. 59, p. 7 n. 3]. But the Undersigned is unsure about whether ML
attorneys met with the SEC and/or the Department of Justice on days other that October 29, 2013.

Therefore, ML shall, **within seven days from this Order**, file under seal a copy of all attorney notes discussing or reflecting what information was disclosed to the SEC or the Department of Justice during meetings (or otherwise). Notes concerning summaries of what ML attorneys told the SEC about the substance of information given by witnesses in interviews are particularly relevant and should be filed under seal. In addition to filing these attorney notes under seal, ML shall deliver a courtesy copy to chambers within the same deadline.

D. **Material Produced to Deloitte**

After describing Defendants' motion concerning the purported waiver by production to Deloitte as based on "scant facts," ML then explains that it does not contest that it read interviews notes and memoranda to Deloitte for purposes of this motion. [ECF No. 59, p. 8]. According to its response memorandum, 38 witnesses were interviewed. [ECF No. 59, p. 8 n. 6]. ML’s argument here is different from the argument it made for the materials provided to the SEC; it contends that even the actual physical production of work product to a company's auditors does not waive work-product protection because an independent or outside auditor typically shares a common interest with the corporation for purpose of the work product and waiver doctrines.

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

In their motion, Defendants say that there is a “split” on the legal consequences arising from disclosures to a corporation’s accountants or auditors but then concede that “the majority” of courts hold that auditing and accounting firms typically do share a common interest. [ECF No. 52, p. 10]. Nevertheless, they have crafted a theory to distinguish the precedent adopting the common-interest approach: they say that Deloitte “itself was on the SEC’s radar and entered into a tolling agreement with the SEC regarding its own conduct.” Id. Therefore, Defendants argue, Deloitte was a
“potential adversary” to GCC “because Deloitte was motivated to claim that GCC personnel had misled Deloitte regarding the accounting practices at GCC.” *Id.* (emphasis added).

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

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

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

Fourth, Defendants have not cited any legal authority, binding or otherwise, to support the notion that a common interest disappears under factually analogous scenarios.

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

E. **Defendants’ “Need” for the Work Product Materials**

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

According to Defendants’ motion, ML has pledged to continue to assist *only* the SEC -- but not Defendants -- by making witnesses, including current and former GCC employees whom ML represents, available for further interviews and testimony in the United States, without regard for territorial limits. [ECF No. 52-2, pp. 8–9]. And Defendants similarly contend that, armed with ML’s prior disclosures and ongoing cooperation, the SEC can cherry-pick which witnesses to call and which to avoid and ML’s counsel can prepare those witnesses to testify with the benefit of a panoramic view of what all witnesses previously stated.

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

The Undersigned is not persuaded.

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

An attorney’s notes and memoranda of interviews performed in the course of an internal investigation are “classic attorney work product.” See, e.g., In re Gen. Motors LLC as329 U.S. 495, 512 (1947) (“the privacy of an attorney’s course of preparation is . . . essential to an orderly working of our system of legal procedure[,]”). Therefore, as the Supreme Court has explained, “Forcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the


F. Conclusion

ML waived work-product protection for the witnesses whose interview notes and memoranda its attorneys disclosed to the SEC in the so-called “oral downloads.” Defendants advise that “at least twelve” interview memos were orally relayed [ECF No. 52, p. 8], so the Undersigned is using that number, as well. If it turns out that ML provided information to the SEC about other witness interviews besides the 12 already identified, then it shall disclose to Defendants the additional notes and memoranda. ML shall provide the notes and memoranda within 7 days of this Order.

In addition, ML shall, by the same deadline, file under seal (with a courtesy copy to chambers) for *in camera* review copies of the notes and memoranda reflecting any other work-product information its attorneys provided to the SEC and the DOJ about the employee interviews.

If the Court determines in its *in camera* review that additional work-product material was provided to the SEC and/or DOJ, then a follow-up order requiring
production under a waiver theory will be issued. If I conclude otherwise, then no further order will be entered.

DONE and ORDERED in Chambers, at Miami, Florida, on December 5, 2017.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Joan A. Lenard
All counsel of record.