VIRGINIA RULES OF

PROFESSIONAL CONDUCT

VIRGINIA STATE BAR

March 12, 2022

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rewrote the last sentence of the paragraph; deleted former paragraph (2) and redesignated former paragraph (3) as present paragraph (2); added the language to comment [7c] "*if the crime is reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another*", substituted the language "*Caution*" is "*warranted*" in place of "Some discretion is involved", and added the last sentence; in Comment [8] deleted the language "The lawyer's exercise of discretion requires consideration of" and replaced it with "*When considering disclosure under paragraph (b), the lawyer should weigh*", and added the language "*and with those who might be injured by the client*"; and added Comment [8a]; and in Comments [13] and [14] substituted the language "(c)(3)" with *"(c)(2)"*.

RULE 1.7 Conflict of Interest: General Rule.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

COMMENT

Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.

[2] *ABA Model Rule* Comment not adopted.

[3] The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the

parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[4] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. *See* Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[5] *ABA Model Rule* Comment not adopted.

[6] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.

[7] *ABA Model Rule* Comment not adopted.

[8] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other

responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Nevertheless, a lawyer can never adequately provide joint representation in certain matters relating to divorce, annulment or separation — specifically, child custody, child support, visitation, spousal support and maintenance or division of property.

Conflict Charged by an Opposing Party

[9] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Lawyer's Interests

[10] A lawyer may not allow business or personal interests to affect representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. *See* Rules 1.1 and 1.5. Similarly, a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest. A lawyer's romantic or other intimate personal relationship can also adversely affect representation of a client.

Interest of Person Paying for a Lawyer's Service

[11-12] *ABA Model Rule* Comment not adopted.

[13] A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. *See* Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

[14-18] *ABA Model Rule* Comment not adopted.

Consultation and Consent

[19] A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

[20] Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

[21–22] *ABA Model Rule* Comment not adopted.

Conflicts in Litigation

[23] Paragraph (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph(a)(2). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

[23a] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit

and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[24] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be materially limited. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

[25] *ABA Model Rule* Comment not adopted.

Other Conflict Situations

[26] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is a potential conflict include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[27] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[28] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. The lawyer should make clear his relationship to the parties involved.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the

relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be

shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(b).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[34] *ABA Model Rule* Comment not adopted.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

VIRGINIA CODE COMPARISON

This Rule is similar to DR 5-101(A) and DR 5-105(C). DR 5-101(A) provided that "[a] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances." DR 5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Rule 1.7(b) clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the lawyer must believe that he can provide competent and diligent representation, that the representation must be lawful, and the representation must not involve asserting a claim on behalf of one client against another client in the same litigation or other proceeding before a tribunal. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it [be] obvious that [the lawyer] can adequately represent" the client, and was implicit in EC 5-2, which stated that a lawyer "should not accept proffered employment if his personal interests or desires may affect adversely the advice to be given or services to be rendered the prospective client."

COMMITTEE COMMENTARY

Although there are few substantive differences between this Rule and corresponding provisions in the Virginia Code, the Committee concluded that the ABA Model Rule provides a more succinct statement of a general conflicts rule.

The amendments effective June 30, 2005, substituted entirely new paragraphs (a) and (b) for the former paragraphs (a) and (b); rewrote Comments [1], [4], [6], [8], [19], [23], [24] and [26]; added Comments [29]–[33].

RULE 1.13 Organization as Client

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the

organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. These persons are referred to herein as the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly

authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] The decisions of constituents of the organization ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Substantial justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance

commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] *ABA Model Rule* Comments not adopted.

[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(c) can be applicable.

[7-8] *ABA Model Rule* Comments not adopted.

Government Agency

[9] The duty defined in this Rule applies to government organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is

prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Government lawyers, in many situations, are asked to represent diverse client interests. The government lawyer may be authorized by the organization to represent subordinate, internal clients in the interest of the organization subject to the other Rules relating to conflicts.

Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. *See* note on Scope.

Clarifying the Lawyer's Role

[10] When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of

interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (e) recognizes that a lawyer for an organization may also represent individuals within the organization. When an organization's lawyer is assigned or authorized to represent such an individual, the lawyer has an attorney-client relationship with both that individual and the organization. Accordingly, the lawyer's representation of both is controlled by the confidentiality and conflicts provisions of these Rules.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. EC 5-18 stated that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer’s professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent the individual in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 stated

that although a lawyer "may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5 106(B) provided that a lawyer "shall not permit a person who ... employs ... him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

COMMITTEE COMMENTARY

The Committee adopted this Rule because it directly addresses matters only implicitly addressed in Ethical Considerations of the *Virginia Code*.

The amendments effective January 1, 2004, in paragraph (b)(1), inserted the word "for".

RULE 1.14 Client With Impairment

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Effective date – This rule and commentary thereto became effective June 21, 2011.

The amendment effective December 23, 2020, removes a phrase from Comment [6] to the Rule, "and the lawyer believes that an effective screen could not be engaged to protect the client," which is inconsistent with the section of the rule the comment is interpreting.

COUNSELOR AND THIRD-PARTY NEUTRAL

RULE 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It could also ignore, to the client's disadvantage, the relational or emotional factors driving a dispute. In such a case, advice may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances.

[2a] It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can

involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal, moral or ethical consequences to the client or to others, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. DR 5-106(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 stated that

"[a]dvice of a lawyer to his client need not be confined to purely legal considerations.... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.... In the final analysis, however, the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client...."

COMMITTEE COMMENTARY

The Committee adopted the *ABA Model Rule* verbatim because it sets forth more clearly than the Disciplinary Rules the scope of a lawyer's advisory role.

RULE 2.2 Intermediary

The amendments effective January 1, 2004, this rule was deleted in its entirety.

RULE 2.3 Evaluation For Use By Third Persons

(a) A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

(b) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

"cooperate" to "cooperate*s*" in Comment [11]; and added "*Duration of Obligation*" before adding new Comment [15].

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be

foreseen. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (c), it is not improper to pay a witness's reasonable expenses or to pay a reasonable fee for the services of an expert witness. The common law rule is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[3a] The legal system depends upon voluntary compliance with court rules and rulings in order to function effectively. Thus, a lawyer generally is not justified in consciously violating such rules or rulings. However, paragraph (d) allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience. *See* also Rule 1.2(c).

[4] Paragraph (h) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. *See* also Rule 4.2.

[5] Although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.

[6] Paragraph (j) deals with conduct that could harass or maliciously injure another. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.

[7] In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this

Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

[8] In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 7-108(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."

Paragraph (b) is identical to DR 7-108(B).

Paragraph (c) is substantially similar to DR 7-108(C) which provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness

contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) A reasonable fee for the professional services of an expert witness." EC 7-25 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (d) is substantially the same as DR 7-105(A).

Paragraph (e) is new.

Paragraph (f) is substantially similar to DR 7-105(C)(1), (2), (3) and (4) which stated:

> In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person. (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness. (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil

litigant, or as to the guilt or innocence of an accused, but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

Paragraph (g) is identical to DR 7-105 (C)(5).

Paragraph (h) is new.

Paragraph (i) is similar to DR 7-104, although a lawyer is no longer prohibited from "participat[ing] in presenting" criminal charges and therefore may freely offer advice to the client about the client's rights under the criminal law.

Paragraph (j) is identical to DR 7-102(A)(1).

COMMITTEE COMMENTARY

The Committee attempted to join the best of both the *Virginia Code* and *ABA Model Rule* 3.4 in this Rule. For example, paragraph (a) was adopted because it appears to place a broader obligation on lawyers than DR 7-108(A), but DR 7-108(B) was added to the Rule as paragraph (b) because it states explicitly what is only implicit in paragraph (a).

Language from DR 7-108(C) was added to paragraph (c) to make it clear that certain witness compensation is permitted—something not clear from the language of the *ABA Model Rule*, although it is stated in the *ABA Model Rule's* Comment.

The language of DR 7-105(A) was adopted as paragraph (d) in lieu of the *ABA Model Rule* language because it states more clearly what is apparently intended by the Rule. However, the Committee deleted as unnecessary the word "appropriate" preceding "steps."

With respect to paragraph (e), the Committee saw no reason to limit the discovery request provisions to the pretrial period, as is explicitly the case in the *ABA Model Rule*.

Paragraph (f) parallels similar provisions in DR 7-105(C) and paragraph (h) covers a subject not addressed in the *Virginia Code*.

Paragraph (i) is similar to DR 7-104, although the Committee voted to delete the reference to "participate in presenting." This deletion allows a lawyer to offer advice to the client about the client's rights under the criminal law without violating this Rule.

The Committee determined that the existing language of DR 7-102(A)(1) should appear as paragraph (j), although the *ABA Model Rules* do not contain this section.

The amendments effective January 1, 2004, added present paragraph (g) and redesignated former paragraphs (g) through (i) as present paragraphs (h) through (j).

RULE 3.5 Impartiality And Decorum Of The Tribunal

(a) A lawyer shall not:

With regard to paragraph (b), DR 7-102(A)(3) provided, "In his representation of a client, a lawyer shall not. . . [c]onceal or knowingly fail to disclose that which he is required by law to reveal."

COMMITTEE COMMENTARY

The Committee deleted the *ABA Model Rule's* references to a "third person" in the belief that such language merely confused the Rule. Additionally, the Committee deleted the word "material" preceding "fact or law" from paragraph (a) to make it more closely parallel DR 7-102(A)(5). The word "material" was similarly deleted from paragraph (b) as it appears somewhat redundant. Finally, the modified Comment expands the coverage of the Rule to constructive misrepresentation – i.e., the knowing failure of a lawyer to correct a material misrepresentation by the client or by someone on behalf of the client.

RULE 4.2 Communication With Persons Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

COMMENT

[1-2] *ABA Model Rule* Comments not adopted.

[3] The Rule applies even though the represented person initiates or consents to

the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation. For example, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with the other party is permitted to do so.

[5] In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, non-custodial circumstances, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by

law if they have been approved by judicial precedent. This Rule does not prohibit a lawyer from providing advice regarding the legality of an interrogation or the legality of other investigative conduct.

[6] *ABA Model Rule* Comment not adopted.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. *Compare* Rule 3.4(h). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* Rule 4.4.

[8] This Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. Neither the need to protect uncounselled persons against being taken advantage of by opposing counsel nor

the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests sought to be protected by the Rule may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.

[9] Concerns regarding the need to protect uncounselled persons against the wiles of opposing counsel and preserving the attorney-client relationship may also be involved where a person is a target of a criminal investigation, knows this, and has retained counsel to receive advice with respect to the investigation. The same concerns may be involved where a "third-party" witness furnishes testimony in an investigation or proceeding, and although not a formal party, has decided to retain counsel to receive advice with respect thereto. Such concerns are equally applicable in a non-adjudicatory context, such as a commercial transaction involving a sale, a lease or some other form of contract.

VIRGINIA CODE COMPARISON

This Rule is substantially the same as DR 7-103(A)(1), except for the change of "party" to "person" to emphasize that the prohibition on certain communications with a represented person applies outside the litigation context.

COMMITTEE COMMENTARY

The Committee believed that substituting "person" for "party" more accurately reflected the intent of the Rule, as shown in the last sentence of the Comment, and was preferable to the apparent limitation of DR 7-103(A)(1) which referred to "[c]ommunicat[ion] on the subject of the representation with a party . . . ."

The following revision to Comment [3] was made to include the language of Comment [3] from the ABA rule regarding the prohibition against communicating with a represented party even when the represented person or the lawyer initiates the contact.

The amendments effective April 13, 2007, added Comment [3].

The amendments effective January 6, 2021, rewrote Comment [7].

RULE 4.3 Dealing With Unrepresented Persons

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

VIRGINIA CODE COMPARISON

Paragraph (a) is identical to DR 7-103(B) and paragraph (b) is similar to DR 7-103(A)(2).

COMMITTEE COMMENTARY

The *Virginia Code* had deviated from the *ABA Model Code* by using the language of *ABA Model Rule* 4.3(a) as DR 7-103(B). This provision continues unchanged in Rule 4.3.

RULE 4.4 Respect For Rights Of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or

756 F.3d 754 (2014)

In re KELLOGG BROWN & ROOT, INC., et al., Petitioners.

No. 14-5055.

United States Court of Appeals, District of Columbia Circuit.

Argued May 7, 2014.
Decided June 27, 2014.
Rehearing En Banc Denied September 2, 2014.

755 *755 John P. Elwood argued the cause for petitioners. With him on the petition for writ of mandamus and the reply were John M. Faust, Craig D. Margolis, Jeremy C. Marwell, and Joshua S. Johnson.

Rachel L. Brand, Steven P. Lehotsky, Quentin Riegel, Carl Nichols, Elisebeth C. Cook, Adam I. Klein, Amar Sarwal, and Wendy E. Ackerman were on the brief for amicus curiae Chamber of Commerce of the United States of America, et al. in support of petitioners.

Stephen M. Kohn argued the cause for respondent. With him on the response to the petition for writ of mandamus were David K. Colapinto and Michael Kohn.

Before: GRIFFITH, KAVANAUGH, and SRINIVASAN, Circuit Judges.

Opinion for the Court filed by Circuit Judge KAVANAUGH.

756 *756 KAVANAUGH, Circuit Judge:

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

I

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

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

After reviewing the disputed documents *in camera,* the District Court determined that the attorney-client privilege protection did not apply because, among other reasons, KBR had not shown that "the communication would not have been made `but for' the fact that legal advice was sought." *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276, ___ F.3d ___, ___, 2014 WL 1016784, at *2 (D.D.C. Mar. 6, 2014) (quoting *United States v. ISS Marine Services, Inc.*, 905 F.Supp.2d 121, 128 (D.D.C.2012)). KBR's internal investigation, the court concluded, was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at ___, 2014 WL 1016784, at *3.

KBR vehemently opposed the ruling. The company asked the District Court to certify the privilege question to this Court for interlocutory appeal and to stay its order pending a petition for mandamus in this Court. The District Court denied those requests and ordered KBR to produce the disputed documents to Barko within a matter of days. *See United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276, 2014 WL 929430 (D.D.C. Mar. 11, 2014). KBR promptly filed a petition for a writ of mandamus in this Court. A number of business organizations and trade associations also objected to the District Court's decision and filed an amicus brief in support of KBR. We stayed the District Court's document production order and held oral argument on the mandamus petition.

The threshold question is whether the District Court's privilege ruling constituted legal error. If not, mandamus is of course
757 inappropriate. If the District Court's ruling was erroneous, the remaining *757 question is whether that error is the kind that justifies mandamus. *See Cheney v. U.S. District Court for the District of Columbia,* 542 U.S. 367, 380-81, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). We address those questions in turn.

II

We first consider whether the District Court's privilege ruling was legally erroneous. We conclude that it was.

Federal Rule of Evidence 501 provides that claims of privilege in federal courts are governed by the "common law — as interpreted by United States courts in the light of reason and experience." Fed. R.Evid. 501. The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). As relevant here, the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client. *See* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-72 (2000); *In re Grand Jury,* 475 F.3d 1299, 1304 (D.C.Cir. 2007); *In re Lindsey,* 158 F.3d 1263, 1270 (D.C.Cir.1998); *In re Sealed Case,* 737 F.2d 94, 98-99 (D.C.Cir.1984); *see also Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

In *Upjohn,* the Supreme Court held that the attorney-client privilege applies to corporations. The Court explained that the attorney-client privilege for business organizations was essential in light of "the vast and complicated array of regulatory legislation confronting the modern corporation," which required corporations to "constantly go to lawyers to find out how to obey the law, ... particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392, 101 S.Ct. 677 (internal quotation marks and citation omitted). The Court stated, moreover, that 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." *Id.* at 390, 101 S.Ct. 677. That is so, the Court said, because the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-91, 101 S.Ct. 677. In *Upjohn,* the communications were made by company employees to company attorneys during an attorney-led internal investigation that was undertaken to ensure the company's "compliance with the law." *Id.* at 392, 101 S.Ct. 677; *see id.* at 394, 101 S.Ct. 677. The Court ruled that the privilege applied to the internal investigation and covered the communications between company employees and company attorneys.

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

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

758 *758 First, the District Court stated that in Upjohn the internal investigation began after in-house counsel conferred with outside counsel, whereas here the investigation was conducted in-house without consultation with outside lawyers. But Upjohn does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel "does not dilute the privilege." *In re Sealed Case,* 737 F.2d at 99. As the Restatement's commentary points out, "Inside legal counsel to a

corporation or similar organization... is fully empowered to engage in privileged communications." 1 RESTATEMENT § 72, cmt. c, at 551.

Second, the District Court noted that in Upjohn the interviews were conducted by attorneys, whereas here many of the interviews in KBR's investigation were conducted by non-attorneys. But the investigation here was conducted at the direction of the attorneys in KBR's Law Department. And communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. *See FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C.Cir.1980); *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 7:18, at 1230-31 (2013) ("If internal investigations are conducted by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted."). So that fact, too, is not a basis on which to distinguish *Upjohn.*

Third, the District Court pointed out that in *Upjohn* the interviewed employees were expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, whereas here they were not. The District Court further stated that the confidentiality agreements signed by KBR employees did not mention that the purpose of KBR's investigation was to obtain legal advice. Yet nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in *Upjohn* employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. *Cf. Upjohn*, 449 U.S. at 387, 101 S.Ct. 677 (Upjohn's managers were "instructed to treat the investigation as `highly confidential'"). KBR employees were also told not to discuss their interviews "without the specific advance authorization of KBR General Counsel." *United States ex rel. Barko v. Halliburton Co.,* No. 1:05-cv-1276 ___ F.3d ___, ___ n. 33, 2014 WL 1016784, at *3 n. 33 (D.D.C. Mar. 6, 2014).

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

More broadly and more importantly, the District Court also distinguished *Upjohn* on the ground that KBR's internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The District Court therefore concluded that the purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice. In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation,
759 the attorney-client *759 privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.

The District Court began its analysis by reciting the "primary purpose" test, which many courts (including this one) have used to resolve privilege disputes when attorney-client communications may have had both legal and business purposes. *See id.* at *2; *see also In re Sealed Case,* 737 F.2d at 98-99. But in a key move, the District Court then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made "but for" the fact that legal advice was sought. 2014 WL 1016784, at *2. In other words, if there was any other purpose behind the communication, the attorney-client privilege apparently does not apply. The District Court went on to conclude that KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at *3; *see id.* at *3 n. 28 (citing federal contracting regulations). Therefore, in the District Court's view, "the primary purpose of" the internal investigation "was to comply with federal defense contractor regulations, not to secure legal advice." *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276, 4 F.Supp.3d 162, 166, 2014 WL 929430, at *2 (D.D.C. Mar. 11, 2014); *see id.* ("Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense.").

The District Court erred because it employed the wrong legal test. The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Under the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. We are aware of no Supreme Court or court of appeals decision that has adopted a test of this kind in this context. The District Court's novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in

a significant swath of American industry. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn,* 449 U.S. at 392, 101 S.Ct. 677. We reject the District Court's but-for test as inconsistent with the principle of *Upjohn* and longstanding attorney-client privilege law.

Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for
760 a court to presume that a communication can have only one primary purpose. *760 It is likewise not correct for a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication? As the Reporter's Note to the Restatement says, "In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." 1 RESTATEMENT § 72, Reporter's Note, at 554. We agree with and adopt that formulation — "one of the significant purposes" — as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.

In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy. *Cf.* Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure,* 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) ("Helping a corporation comply with a statute or regulation — although required by law — does not transform quintessentially legal advice into business advice.").

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

III

Having concluded that the District Court's privilege ruling constituted error, we still must decide whether that error justifies a writ of mandamus. *See* 28 U.S.C. § 1651. Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. District Court for the District of Columbia,* 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (quoting *Ex parte Fahey,* 332 U.S. 258, 259-60, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947)). In keeping with that high standard, the Supreme Court in *Cheney* stated that three conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have "no other adequate means to attain the relief he desires," (2) the mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable," and (3) the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 380-81, 124 S.Ct. 2576 (quoting and citing *Kerr v. United States District Court for the Northern District of California,* 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976)). We conclude that all three conditions are satisfied in this case.

A

First, a mandamus petitioner must have "no other adequate means to attain the relief he desires." *Cheney,* 542 U.S. at 380,
761 124 S.Ct. 2576. That initial requirement will often be met in cases where a petitioner claims that a district *761 court erroneously ordered disclosure of attorney-client privileged documents. That is because (i) an interlocutory appeal is not available in attorney-client privilege cases (absent district court certification) and (ii) appeal after final judgment will come too late because the privileged communications will already have been disclosed pursuant to the district court's order.

The Supreme Court has ruled that an interlocutory appeal under the collateral order doctrine is not available in attorney-client privilege cases. *See* Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 106-13, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009); *see also* 28 U.S.C. § 1291. To be sure, a party in KBR's position may ask the district court to certify the privilege question for interlocutory appeal. *See* 28 U.S.C. § 1292(b). But that avenue is available only at the discretion of the district court. And here, the District Court denied KBR's request for certification. *See* United States ex rel. Barko v. Halliburton Co., No. 1:05-cv-1276, 4 F.Supp.3d 162, 165-68, 2014 WL 929430, at *1-3 (D.D.C. Mar. 11, 2014). It is also true that a party in KBR's position may defy the district court's ruling and appeal if the district court imposes contempt sanctions for non-disclosure. But as this Court has explained, forcing a party to go into contempt is not an "adequate" means of relief in these circumstances. *See* In re Sealed Case, 151 F.3d 1059, 1064-65 (D.C.Cir.1998); *see also* In re City of New York, 607 F.3d 923, 934 (2d Cir.2010) (same).

On the other hand, appeal after final judgment will often come too late because the privileged materials will already have been released. In other words, "the cat is out of the bag." In re Papandreou, 139 F.3d 247, 251 (D.C.Cir.1998). As this Court and others have explained, post-release review of a ruling that documents are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents. *See id.; see also* In re Sims, 534 F.3d 117, 129 (2d Cir.2008) ("a remedy after final judgment cannot unsay the confidential information that has been revealed") (quoting In re von Bulow, 828 F.2d 94, 99 (2d Cir.1987)).

For those reasons, the first condition for mandamus — no other adequate means to obtain relief — will often be satisfied in attorney-client privilege cases. Barko responds that the Supreme Court in *Mohawk,* although addressing only the availability of interlocutory appeal under the collateral order doctrine, in effect also barred the use of mandamus in attorney-client privilege cases. According to Barko, *Mohawk* means that the first prong of the mandamus test cannot be met in attorney-client privilege cases because of the availability of post-judgment appeal. That is incorrect. It is true that *Mohawk* held that attorney-client privilege rulings are not appealable under the collateral order doctrine because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." 558 U.S. at 109, 130 S.Ct. 599. But at the same time, the Court repeatedly and expressly reaffirmed that *mandamus* — as opposed to the collateral order doctrine — remains a "useful safety valve" in some cases of clear error to correct "some of the more consequential attorney-client privilege rulings." *Id.* at 110-12, 130 S.Ct. 599 (internal quotation marks and alteration omitted). It would make little sense to read *Mohawk* to implicitly preclude mandamus review in all cases given that *Mohawk* explicitly preserved mandamus review in some cases. Other appellate courts that have considered this question have agreed. *See* Hernandez v. Tanninen, 604 F.3d 1095, 1101 (9th Cir.2010); In re Whirlpool Corp., 597 F.3d 858, 860 (7th
762 Cir.2010); *see also* In *762 re Perez, 749 F.3d 849 (9th Cir.2014) (granting mandamus after *Mohawk* on informants privilege ruling); City of New York, 607 F.3d at 933 (same on law enforcement privilege ruling).

B

Second, a mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable." *Cheney,* 542 U.S. at 381, 124 S.Ct. 2576. Although the first mandamus requirement is often met in attorney-client privilege cases, this second requirement is rarely met. An erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus. The error has to be clear. As a result, appellate courts will often deny interlocutory mandamus petitions advancing claims of error by the district court on attorney-client privilege matters. In this case, for the reasons explained at length in Part II, we conclude that the District Court's privilege ruling constitutes a clear legal error. The second prong of the mandamus test is therefore satisfied in this case.

C

Third, before granting mandamus, we must be "satisfied that the writ is appropriate under the circumstances." *Cheney,* 542 U.S. at 381, 124 S.Ct. 2576. As its phrasing suggests, that is a relatively broad and amorphous totality of the circumstances consideration. The upshot of the third factor is this: Even in cases of clear district court error on an attorney-client privilege matter, the circumstances may not always justify mandamus.

In this case, considering all of the circumstances, we are convinced that mandamus is appropriate. The District Court's privilege ruling would have potentially far-reaching consequences. In distinguishing *Upjohn,* the District Court relied on a number of factors that threaten to vastly diminish the attorney-client privilege in the business setting. Perhaps most

importantly, the District Court's distinction of *Upjohn* on the ground that the internal investigation here was conducted pursuant to a compliance program mandated by federal regulations would potentially upend certain settled understandings and practices. Because defense contractors are subject to regulatory requirements of the sort cited by the District Court, the logic of the ruling would seemingly prevent any defense contractor from invoking the attorney-client privilege to protect internal investigations undertaken as part of a mandatory compliance program. *See* 48 C.F.R. § 52.203-13 (2010). And because a variety of other federal laws require similar internal controls or compliance programs, many other companies likewise would not be able to assert the privilege to protect the records of their internal investigations. *See, e.g.,* 15 U.S.C. §§ 78m(b)(2), 7262; 41 U.S.C. § 8703. As KBR explained, the District Court's decision "would disable *most public companies* from undertaking confidential internal investigations." KBR Pet. 19. As amici added, the District Court's novel approach has the potential to "work a sea change in the well-settled rules governing internal corporate investigations." Br. of Chamber of Commerce et al. as Amici Curaie 1; *see* KBR Reply Br. 1 n. 1 (citing commentary to same effect); Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure,* 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) (assessing broad impact of ruling on government contractors).

To be sure, there are limits to the impact of a single district court ruling because it is not binding on any other court or judge.
763 But prudent counsel monitor court decisions closely and adapt their *763 practices in response. The amicus brief in this case, which was joined by numerous business and trade associations, convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning. That uncertainty matters in the privilege context, for the Supreme Court has told us that 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." *Upjohn Co. v. United States,* 449 U.S. 383, 393, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). More generally, this Court has long recognized that mandamus can be appropriate to "forestall future error in trial courts" and "eliminate uncertainty" in important areas of law. *Colonial Times, Inc. v. Gasch,* 509 F.2d 517, 524 (D.C.Cir.1975). Other courts have granted mandamus based on similar considerations. *See In re Sims,* 534 F.3d 117, 129 (2d Cir.2008) (granting mandamus where "immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege") (quotation omitted); *In re Seagate Technology, LLC,* 497 F.3d 1360, 1367 (Fed.Cir.2007) (en banc) (same). The novelty of the District Court's privilege ruling, combined with its potentially broad and destabilizing effects in an important area of law, convinces us that granting the writ is "appropriate under the circumstances." *Cheney,* 542 U.S. at 381, 124 S.Ct. 2576. In saying that, we do not mean to imply that all of the circumstances present in this case are necessary to meet the third prong of the mandamus test. But they are sufficient to do so here. We therefore grant KBR's petition for a writ of mandamus.

IV

We have one final matter to address. At oral argument, KBR requested that if we grant mandamus, we also reassign this case to a different district court judge. *See* Tr. of Oral Arg. at 17-19; 28 U.S.C. § 2106. KBR grounds its request on the District Court's erroneous decisions on the privilege claim, as well as on a letter sent by the District Court to the Clerk of this Court in which the District Court arranged to transfer the record in the case and identified certain documents as particularly important for this Court's review. *See* KBR Reply Br.App. 142. KBR claims that the letter violated Federal Rule of Appellate Procedure 21(b)(4), which provides that in a mandamus proceeding the "trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals."

In its mandamus petition, KBR did not request reassignment. Nor did KBR do so in its reply brief, even though the company knew by that time of the District Court letter that it complains about. Ordinarily, we do not consider a request for relief that a party failed to clearly articulate in its briefs. To be sure, appellate courts on rare occasions will reassign a case sua sponte. *See Ligon v. City of New York,* 736 F.3d 118, 129 & n. 31 (2d Cir.2013) (collecting cases), *vacated in part,* 743 F.3d 362 (2d Cir.2014). But whether requested to do so or considering the matter sua sponte, we will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is "so extreme as to display clear inability to render fair judgment." *Liteky v. United States,* 510 U.S. 540, 551, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); *see also United States v. Microsoft Corp.,* 253 F.3d 34, 107 (D.C.Cir.2001) (en banc). Nothing in the District Court's decisions or subsequent letter
764 reaches that very high standard. Based on the record before us, we have no reason to doubt that the District Court will *764 render fair judgment in further proceedings. We will not reassign the case.

*** * ***

In reaching our decision here, we stress, as the Supreme Court did in *Upjohn,* that 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." *Upjohn Co. v. United States*, 449 U.S. 383, 395, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Barko was able to pursue the facts underlying KBR's investigation. But he was not entitled to KBR's own investigation files. As the *Upjohn* Court stated, quoting Justice Jackson, "Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary." *Id.* at 396, 101 S.Ct. 677 (quoting *Hickman v. Taylor,* 329 U.S. 495, 515, 67 S.Ct. 385, 91 L.Ed. 451 (1947) (Jackson, J., concurring)).

Although the attorney-client privilege covers only communications and not facts, we acknowledge that the privilege carries costs. The privilege means that potentially critical evidence may be withheld from the factfinder. Indeed, as the District Court here noted, that may be the end result in this case. But our legal system tolerates those costs because the privilege "is intended to encourage `full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States,* 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (quoting *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677).

We grant the petition for a writ of mandamus and vacate the District Court's March 6 document production order. To the extent that Barko has timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments.

So ordered.

23 F.4th 1088 (2021)

IN RE GRAND JURY.

Nos. 21-55085, 21-55145.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 7, 2021 Pasadena, California.
Filed September 13, 2021.
Amended January 27, 2022.

Appeal from the United States District Court for the Central District of California; John Kronstadt, District Judge, Presiding, D.C. Nos. 2:20-cm-00046-UA-1 2:18-cm-01758-UA-1.

Thomas F. Carlucci (argued), Foley & Lardner LLP, San Francisco, California; Evan J. Davis (argued), Hochman Salkin Toscher Perez P.C., Beverly Hills, California; for Movants-Appellants.

Mark S. Determan (argued) and Joseph B. Syverson, Attorneys; S. Robert Lyons, Chief, Criminal Appeals
1090 & Tax Enforcement Policy Section; David A. Hubbert, *1090 Acting Assistant Attorney General; Tracy Wilkison, Acting United States Attorney; Tax Division, United States Department of Justice, Washington, D.C.; for Plaintiff-Appellee.

Laura L. Buckley, Higgs Fletcher & Mack, San Diego, California; Kevan P. McLaughlin, McLaughlin Legal APC, San Diego, California; for Amicus Curiae Executive Committee on the Taxation Section of the California Lawyers Association.

Jenny Johnson Ware, McDermott Will & Emery LLP, Chicago, Illinois, for Amicus Curiae American College of Tax Counsel.

Before: MARY H. MURGUIA, BRIDGET S. BADE, and KENNETH K. LEE, Circuit Judges.

Order; Opinion by Judge LEE

1089 *1089 ## ORDER

The Opinion filed on September 13, 2021, is amended as follows:

On slip opinion page 12, footnote 5, replace with .

The Clerk shall file the amended opinion submitted with this Order.

Appellants' Petitions for Panel Rehearing and Rehearing En Banc (Dkt. No. 65) are otherwise DENIED. No further petitions for rehearing may be filed. Appellants' motion to unseal the petitions and the amicus briefs (Dkt. No. 66) is DENIED as moot.

AMENDED OPINION

LEE, Circuit Judge:

Given our increasingly complex regulatory landscape, attorneys often wear dual hats, serving as both a lawyer and a trusted business advisor. Our court, however, has yet to articulate a consistent standard for determining when the attorney-client privilege applies to dual-purpose communications that implicate both legal and business concerns.

In this case, the grand jury issued subpoenas related to a criminal investigation. The district court held Appellants—whom we identify as "Company" and "Law Firm"—in contempt after they failed to comply with the subpoenas. The district court ruled that certain dual-purpose communications were not privileged because the "primary purpose" of the documents was to obtain tax advice, not legal advice. Appellants argue that the district court erred in relying on the "primary purpose" test and should have instead relied on a broader "because of" test. We affirm and conclude that the primary-purpose test governs in assessing attorney-client privilege for dual-purpose communications.[1]

BACKGROUND

Company and Law Firm were each served with grand jury subpoenas requesting documents and communications related to a criminal investigation. The target of the criminal investigation is the owner of Company as well as a client of Law Firm. In response to the grand jury subpoenas, Company and Law Firm each produced some documents but withheld others, citing attorney-client privilege and the work-product doctrine.

The government moved to compel production of the withheld documents, which the district court granted in part. In those orders, the district court explained that these documents were either not protected by any
1091 privilege or were discoverable under the crime-fraud exception. Company *1091 and Law Firm disagreed with the district court's privilege rulings, so they continued to withhold the disputed documents. The government followed up with motions to hold Company and Law Firm in contempt, both of which the district court again granted. These appeals followed, and we have jurisdiction under 28 U.S.C. § 1291.

STANDARD OF REVIEW

Whether the attorney-client privilege applies to specific documents represents "a mixed question of law and fact which this court reviews independently and without deference to the district court." *United States v. Richey,* 632 F.3d 559, 563 (9th Cir. 2011) (cleaned up). The district court's legal rulings about the scope of the privilege are reviewed de novo. *Id.* So is the district court's choice of the applicable legal standard. *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). We review the district court's factual findings for clear error. *Richey,* 632 F.3d at 563.

ANALYSIS

I. District Courts in Our Circuit Have Applied Both the "Primary Purpose" and "Because Of" Tests for Attorney-Client Privilege Claims for Dual-Purpose Communications.

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Sanmina Corp.,* 968 F.3d 1107, 1116 (9th Cir. 2020). Generally, communications related to an attorney's preparation of tax returns are not covered by attorney-client privilege. *Olender v. United States,* 210 F.2d 795, 806 (9th Cir. 1954). So, for example, "a client may communicate the figures from his W-2 Form to an attorney while litigation is in progress, but this information certainly is not privileged." *United States v. Abrahams,* 905 F.2d 1276, 1283-84 (9th Cir. 1990), *overruled on other grounds by United States v. Jose,* 131 F.3d 1325 (9th Cir. 1997). On the other hand, if a client seeks a lawyer's legal advice to figure out what to claim on a tax return, then that advice may be privileged. *Abrahams,* 905 F.2d at 1284.

But some communications might have more than one purpose, especially "in the tax law context, where an attorney's advice may integrally involve both legal and non-legal analyses." *Sanmina,* 968 F.3d at 1118. *Sanmina,* for example, involved communications about the propriety of a particular tax deduction, which could have both a non-legal purpose (tax compliance considerations) as well as potentially a legal purpose (seeking advice on what to do if the IRS challenged the deduction). *Id.* at 1117-18.

When dual-purpose communications are involved, there are two potential tests that courts have adopted: the "primary purpose" test and the "because of" test. Under the "primary purpose" test, courts look at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice. *See In re County of Erie,* 473 F.3d 413, 420 (2d Cir. 2007) ("We consider whether the predominant purpose of the communication is to render or solicit legal advice."). The natural implication of this inquiry is that a dual-purpose communication can only have a single "primary" purpose.

On the other hand, the "because of" test—which typically applies in the work-product context—"does not consider whether litigation was a primary or secondary motive behind the creation of a document." *In re*
1092 *Grand Jury Subpoena (Mark Torf/Torf Env't Mgmt.),* 357 F.3d 900, 908 (9th Cir. 2004). It instead "considers
*1092 the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation." *Id.* (cleaned up). It is a broader test than the "primary purpose" test because it looks only at causal connection, and not a "primary" reason. *See Visa U.S.A., Inc. v. First Data Corp.*, No. C-02-1786JSW(EMC), 2004 WL 1878209, at *4 (N.D. Cal. Aug. 23, 2004). In the attorney-client privilege context, the "because of" test might thus ask whether a dual-purpose communication was made "because of" the need to give or receive legal advice.

As the *Sanmina* court recently noted, the Ninth Circuit has not explicitly adopted either the "primary purpose" test or the "because of" test in determining whether dual-purpose communications are entitled to attorney-client privilege. *Sanmina,* 968 F.3d at 1118.[2] And *Sanmina* itself declined to resolve this issue because the district court there had made a factual finding that the communications were not dual-purpose. *Id.* at 1119. Without guidance from our court, district courts in this circuit have split, applying both tests for attorney-client privilege claims. *Id.* at 1118 n.5 (summarizing district court cases).

II. The Primary-Purpose Test Applies to Dual-Purpose Communications in the Attorney-Client Privilege Context.

Because this case squarely involves dual-purpose communications, we now answer the question that *Sanmina* left open. We hold that the primary-purpose test applies to attorney-client privilege claims for dual-

purpose communications.

To start, the "interpretation of the privilege's scope is guided by `the principles of the common law ... as interpreted by the courts ... in the light of reason and experience.'" *Swidler & Berlin v. United States,* 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (quoting Fed. R. Evid. 501). At common law, the attorney-client privilege extends only to communications made "for the purpose of facilitating the rendition of professional legal services." *See United States v. Rowe,* 96 F.3d 1294, 1296 (9th Cir. 1996) (citation omitted); Restatement (Third) of the Law Governing Lawyers § 68 (Am. L. Inst. 2000) (stating that communication must be "for the purpose of obtaining or providing legal assistance for the client" to qualify for protection under attorney-client privilege). Thus, the "client must consult the lawyer for the purpose of obtaining legal assistance and not predominantly for another purpose." Restatement, *supra,* § 72 cmt. c; *see Swidler & Berlin,* 524 U.S. at 406-07, 118 S.Ct. 2081 (discussing scholarly commentary in describing the contours of privilege at common law). As the Supreme Court has recognized, the attorney-client privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *See Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48
1093 L.Ed.2d 39 (1976) (citation omitted). Thus, the scope of the attorney-client privilege is *1093 defined by the purpose of the communication consistent with the common law. *See Swidler & Berlin,* 524 U.S. at 410-11, 118 S.Ct. 2081; Fed. R. Evid. 501.

Appellants assert, however, that we should instead borrow the test from the work-product doctrine when a communication has a dual purpose. In Appellants' view, the attorney-client privilege should apply "when it can be fairly said that the document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospect of that litigation." *See In re Grand Jury Subpoena (Mark Torf/Torf Env't Mgmt.),* 357 F.3d 900, 908 (9th Cir. 2004) (describing when work-product doctrine applies). Appellants thus ask us to depart from the holdings of most courts and adopt a new test for attorney-client privilege—at least in the context of dual-purpose communications. But, as in *Swidler & Berlin,* Appellants offer no persuasive reason to abandon the common-law rule, 524 U.S. at 410-11, 118 S.Ct. 2081, which focuses on the purpose of the communication, not its relation to anticipated litigation. While the dual-purpose nature of Law Firm's representation can complicate the analysis of whether the communication was made to obtain legal advice, we see no reason to tinker with the privilege's scope and deviate from its common-law form to accommodate that concern.

While the attorney-client privilege and work-product doctrine are typically mentioned together, attorney-client privilege and the work-product protection doctrine are animated by different policy goals. It thus makes sense to have different tests for the two. *See id.* at 404-05, 118 S.Ct. 2081 (discussing policy rationale behind common-law scope of privilege in declining to adjust privilege's scope).

In the work-product context, the concern is "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries." *United States v. Adlman,* 134 F.3d 1194, 1196 (2d Cir. 1998) (cleaned up). In short, the work-product doctrine upholds the fairness of the adversarial process by allowing litigators to creatively develop legal theories and strategies—without their adversaries invoking the discovery process to pry into the litigators' minds and free-ride off them. *See, e.g., Allen v. Chi. Transit Auth.,* 198 F.R.D. 495, 500 (N.D. Ill. 2001) (explaining that the intent of the work-product doctrine "is to protect the adversarial process by providing an environment of privacy" and insure "that the litigator's opponent is unable to ride on the litigator's wits"). Given this goal, it makes sense to have a broader "because of" test that shields lawyers' litigation strategies from their adversaries.

In contrast, the attorney-client privilege encourages "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Unlike the work-product doctrine, the privilege is not necessarily tied to any adversarial process, and it is not so much concerned with the fairness of litigation as it is with providing a sanctuary for candid communication about any legal matter, not just impending litigation. Applying a broader "because of" test to attorney-client privilege might harm our adversarial system if parties try to withhold key documents as privileged by claiming that they were created "because of" litigation concerns. Indeed, it would create perverse incentives for companies to add layers of lawyers to every business decision in hopes of insulating themselves from
1094 scrutiny in any future *1094 litigation. Because of these different aims, it makes sense to apply different tests for the attorney-client privilege and the work-product doctrine. *See Sanmina*, 968 F.3d at 1120 ("[W]ork-product protection is not as easily waived as the attorney-client privilege based on the distinct purposes of the two privileges." (cleaned up)).

Further, Appellants only point to two district court cases to support their position, but most, if not all, of our sister circuits that have addressed this issue have opted for some version of the "primary purpose" test instead of the "because of" test.[3] *See Swidler & Berlin*, 524 U.S. at 404, 118 S.Ct. 2081 (rejecting invitation to change scope of privilege from its common law form after noting that majority view tracked common law). The great weight of the authority goes against Appellants' position, which counsels against adopting it.

In sum, we reject Appellants' invitation to extend the "because of" test to the attorney-client privilege context, and hold that the "primary purpose" test applies to dual-purpose communications.

III. We Leave Open Whether the "A Primary Purpose Test" Should Apply.

Even if the "primary purpose test" applies here, Appellants argue that we should adopt "*a* primary purpose" as the test instead of "*the* primary purpose," relying on the D.C. Circuit's decision in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). The D.C. Circuit articulated its version of the primary-purpose test: "Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.* at 760. As *Kellogg* explained, "trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task" because, often, it is "not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B." *Id.* at 759.

In the eyes of the *Kellogg* court, "the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other." *Id.* Even though it theoretically sounds easy to isolate "the primary or predominant" purpose of a communication, the exercise can quickly become messy in practice. That was the case in *Kellogg* in which the company conducted an internal investigation for both legal (*e.g.,* to obtain legal advice) *and* business reasons (*e.g.,* to comply with regulatory requirements and corporate policy). A test that focuses on *a* primary purpose instead of *the* primary purpose would save courts the trouble of having to identify a predominate purpose among two (or more) potentially equal purposes.

We see the merits of the reasoning in *Kellogg.* But we see no need to adopt that reasoning in this case. None of our other sister circuits have openly embraced *Kellogg* yet.[4] We also recognize that *Kellogg* dealt with the very specific context of corporate internal investigations, and its reasoning *1095 does not apply with equal force in the tax context.[5] Nor are we persuaded that the facts here require us to reach the *Kellogg* question. Moreover, the universe of documents in which the *Kellogg* test would make a difference is limited. The *Kellogg* test would only change the out-come of a privilege analysis in truly close cases, like where the legal purpose is just as significant as a non-legal purpose. Because the district court did not clearly err in finding that *the* predominate purpose of the disputed communications was not to obtain legal advice, they do not fall within the narrow universe where the *Kellogg* test would change the outcome of the privilege analysis. *See Sanmina,* 968 F.3d at 1119 (affirming the district court's finding about the purpose of a communication because it was not clearly erroneous). We thus see no need to adopt or apply the *Kellogg* formulation of the primary-purpose test here.

1095

CONCLUSION

The district court's orders holding Company and Law Firm in contempt are AFFIRMED.[6]

[1] This opinion only addresses the issue of dual-purpose communications. The remaining issues on appeal are resolved in a concurrently filed, sealed memorandum disposition.

[2] The government suggests that dual-purpose communications in the tax advice context can never be privileged, but we reject that argument. The case law, at least in the Ninth Circuit, does not go so far. *See Abrahams,* 905 F.2d at 1284 (holding that attorney-client privilege might apply to legal advice about what to claim on a tax return, even if it does not apply to the numbers themselves). *But see United States v. Frederick,* 182 F.3d 496, 501 (7th Cir. 1999) ("Put differently, a dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation —is not privileged....").

[3] *See County of Erie,* 473 F.3d at 420 ("We consider whether the predominant purpose of the communication is to render or solicit legal advice."); *United States v. Robinson,* 121 F.3d 971, 974 (5th Cir. 1997) (requiring communication to be made "for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding" (cleaned up)); *Alomari v. Ohio Dep't of Pub. Safety,* 626 F. App'x 558, 572-73 (6th Cir. 2015) (applying primary purpose test); *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754, 760 (D.C. Cir. 2014).

[4] That said, some district courts have adopted *Kellogg*'s "significant purpose" analysis. *See In re Gen. Motors LLC Ignition Switch Litig.,* 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015) ("To be sure, the D.C. Circuit's decision in *Kellogg Brown & Root* is not binding on this Court. Nevertheless, its analysis of the `primary purpose' test as applied to internal investigations in the corporate setting is consistent with the Second Circuit's analysis in *County of Erie*...."); *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prods. Liab. Litig.,* No. 1:17-md-2775, 2019 WL 2330863, at *2 (D. Md. May 31, 2019); *Edwards v. Scripps Media, Inc.,* No. 18-10735, 2019 WL 2448654, at *1-2 (E.D. Mich. June 10, 2019).

[5] We are aware, for example, that normal tax return preparation assistance—even coming from lawyers—is generally *not* privileged, and courts should be careful to not accidentally create an accountant's privilege where none is supposed to exist. *See Frederick,* 182 F.3d at 500 ("There is no common law accountant's or tax preparer's privilege, and a taxpayer must not be allowed, by hiring a lawyer to do the work that an accountant, or other tax preparer, or the taxpayer himself or herself, normally would do, to obtain greater protection from government investigators than a taxpayer who did not use a lawyer as his tax preparer would be entitled to." (cleaned up)). Thus, it is not clear whether a more protective version of the primary-purpose test is appropriate in this context.

[6] The motion for immediate issuance of the mandate [Dkt. 60] is DENIED.

IN THE SUPREME COURT OF NORTH CAROLINA

2022-NCSC-94

No. 219A21

Filed 19 August 2022

BUCKLEY, LLP

v.

SERIES 1 OF OXFORD INSURANCE COMPANY, NC, LLC

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion granting in part and denying in part plaintiff's and defendant's motions to compel entered on 9 November 2020 by Judge Louis A. Bledsoe III, Chief Business Court Judge, in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 9 May 2022.

McGuire Woods LLP, by Mark W. Kinghorn for plaintiff-appellant.

Womble Bond Dickinson (US) LLP, by James P. Cooney III and G. Michael Barnhill, for defendant-appellee.

Patterson Harkavy LLP, by Paul E. Smith and Narendra K. Ghosh, and Winslow Wetsch, PLLC, by Laura J. Wetsch, for NC Advocates for Justice, amicus curiae.

Alston & Bird LLP, by Brian D. Boone for Chamber of Commerce of the United States of America and Association of Corporate Counsel, amicus curiae.

PER CURIAM.

¶ 1 The order and opinion entered on 9 November 2020, from which this interlocutory appeal is taken, is affirmed per curiam.

¶ 2 Under North Carolina law, to avail itself of attorney-client privilege, a party seeking to shield a portion of a communication from disclosure must show, *inter alia*, "the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated." *In re Miller*, 357 N.C. 316, 335 (2003) (quoting *State v. McIntosh*, 336 N.C. 517, 524 (1994)). "If [this] element[] is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *Id.*

¶ 3 This Court recently affirmed a Business Court opinion stating that "[b]usiness advice, such as financial advice or discussion concerning business negotiations, is not privileged." *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2019 NCBC 53, 2019 WL 3995941, at *25 (N.C. Super. Aug. 16, 2019), *aff'd per curiam*, 377 N.C. 551, 2021-NCSC-70, ¶ 1 (quoting *N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 517 (M.D.N.C. 1986)). In *Window World*, the trial court further stated that "North Carolina courts apply the protection of the attorney-client privilege to in-house counsel in the same way that it is applied to other attorneys." 2019 WL 3995941, at *25. In today's business world, investigations of alleged violations of company policy, including policies prohibiting sexual harassment or discrimination, are ordinary business activities and, accordingly, the communications

made in such investigations are not necessarily "made in the course of giving or seeking legal advice for a proper purpose." *In re Miller*, 357 N.C. at 335 (quoting *McIntosh*, 336 N.C. at 24). "When communications contain intertwined business and legal advice, courts consider whether the 'primary purpose' of the communication was to seek or provide legal advice." *Window World*, 2019 WL 3995941, at *25.

¶ 4 Here the business court properly interpreted North Carolina law, including *In re Miller* and *Window World*, by recognizing that the investigation by outside counsel presented in this case had both business and legal purposes, conducting a detailed in camera review of each disputed document, and mandating disclosure of all communications that "were unrelated to the rendition of legal services," while protecting communications that "reflect a primary purpose of giving or receiving legal advice." Accordingly, the business court order is affirmed.

AFFIRMED.[1]

[1] The order and opinion of the North Carolina Business Court, 2020 NCBC 81, is available at https://www.nccourts.gov/documents/business-court-opinions/buckley-llp-v-series-1-of-oxford-ins-co-nc-llc-2020-ncbc-81.

473 F.3d 413 (2007)

In re the COUNTY OF ERIE.

Adam Pritchard, Edward Robinson, and Julenne Tucker, both individually and on behalf of a class of others similarly situated, Plaintiffs-Respondents,

v.

The County of Erie, Patrick Gallivan, both individually and in his official capacity as Sheriff of the County of Erie, Timothy Howard, both individually and as Undersheriff of the County of Erie, Donald Livingston, both individually and as Acting Superintendent of the Erie County Correctional Facility, and Robert Huggins, both individually and as Deputy Superintendent of the Erie County Correctional Facility, Defendants-Petitioners,

H. McCarthy Gibson, both individually and as Superintendent of the Erie County Holding Center, Defendant.

Docket No. 06-2459-OP.

United States Court of Appeals, Second Circuit.

Submitted: September 12, 2006.
Decided: January 3, 2007.

415 *415 Frank T. Gaglione, Hiscock & Barclay LLP, Buffalo, NY, for Defendants-Petitioners.

Elmer Robert Keach, III, Law Offices of Elmer Robert Keach, III, PC, Amsterdam, NY; Jonathan W. Cuneo, Charles J. LaDuca, Alexandra Coler, Cuneo, Gilbert & Laduca, LLP, Washington, DC; Gary E. Mason, Nicholas A. Migliaccio, The Mason Law Firm, PC, Washington, DC; Alexander E. Barnett, The Mason Law Firm, P.C., New York, NY; David Gerald Jay, Buffalo, NY; Bruce E. Menken, Jason J. Rozger, Beranbaum Menken Ben-Asher & Biermam LLP, New York, NY, for Plaintiffs-Respondents.

Before JACOBS, Chief Judge, CARDAMONE and MINER, Circuit Judges.

DENNIS JACOBS, Chief Judge.

In the course of a lawsuit by a class of arrested persons against Erie County (and certain of its officials) alleging that they were subjected to unconstitutional strip searches, the United States District Court for the Western District of New York (Curtin, J.) ordered the discovery of e-mails (and other documents) between an Assistant Erie County Attorney and County officials that solicit, contain and discuss advice from attorney to client. The County defendants petition for a writ of mandamus directing the district court to vacate that order. The writ is available because: important issues of first impression are raised; the privilege will be irreversibly lost if review awaits final judgment; and immediate resolution of this dispute will promote sound discovery practices and doctrine. Upon consideration of the circumstances, we issue the writ ordering the district court: to vacate its order, to determine whether the privilege was otherwise waived, and to enter an interim order to protect the confidentiality of the disputed communications.

I

416 On July 21, 2004, plaintiffs-respondents Adam Pritchard, Edward Robinson and *416 Julenne Tucker commenced suit under 42 U.S.C. § 1983, individually and on behalf of a class of others similarly situated, alleging that, pursuant to a written policy of the Erie County Sheriff's Office and promulgated by County officials, every detainee who entered the Erie County Holding Center or Erie County Correctional Facility (including plaintiffs) was subjected to an invasive strip search, without regard to individualized suspicion or the offense alleged, and that this policy violates the Fourth Amendment.[1] They sued the County of Erie, New York, as well as Erie County Sheriff Patrick Gallivan; Undersheriff Timothy Howard; the acting Superintendent of the Erie County Correctional Facility, Donald Livingston; the Deputy Superintendent, Robert Huggins; and the Superintendent of the Erie County Holding Center, H. McCarthy Gibson (collectively, the "County").

During the course of discovery, the County withheld production of certain documents as privileged attorney-client communications; a privilege log was produced instead, pursuant to the Federal Rules of Civil Procedure and Local Civil Rules for the Western District of New York. In August 2005, plaintiffs moved to compel production of the logged documents, almost all of which were e-mails. The County submitted the documents to Magistrate Judge Hugh B. Scott for inspection *in camera.* In January 2006, Judge Scott ordered production of ten of the withheld e-mails,[2] which (variously) reviewed the law concerning strip searches of detainees, assessed the County's current search policy, recommended alternative policies, and monitored the implementation of these policy changes.

Judge Scott reasoned that:

> · These communications "go beyond rendering `legal analysis' [by] propos[ing] changes to existing policy to make it constitutional, including drafting of policy regulations";
>
> The "drafting and subsequent oversight of implementation of the new strip search policy ventured beyond merely rendering legal advice and analysis into the realm of policy making and administration"; and
>
> · "[N]o legal advice is rendered apart from policy recommendations."

Judge Scott ordered the County to deliver these ten e-mails to the plaintiffs.

After considering the County's objections to this order, the district court independently reviewed the disputed e-mails *in camera* and, applying a "clearly erroneous" standard, overruled the objections, and directed production. This petition for a writ of mandamus followed.

II

Ordinarily, pretrial discovery orders involving a claim of privilege are unreviewable on interlocutory appeal, "and we have expressed reluctance to circumvent this salutary rule by use of mandamus." *In re W.R. Grace & Co.*, 984 F.2d 587, 589 (2d Cir.1993). At the same time, the writ is appropriate to review discovery orders that potentially invade a privilege, where: (A) the petition raises an important issue of first impression; (B)
417 the privilege will be lost if review must await final judgment; and (C) immediate resolution *417 will avoid the development of discovery practices or doctrine that undermine the privilege. *Chase Manhattan Bank, N.A. v. Turner & Newall PLC,* 964 F.2d 159, 163 (2d Cir.1992); *In re Long Island Lighting Co.*, 129 F.3d 268, 270

(2d Cir. 1997). (Although the County argues that any single showing is enough, the test sprouts three prongs; in any event, the County prevails on all three.)

(A) This petition raises an issue of first impression: whether the attorney-client privilege protects communications that pass between a government lawyer having no policymaking authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light.[3] The issue is not unimportant.

"[T]here is little case law addressing the application of the attorney-client privilege" in the government context. *In re Grand Jury Investigation,* 399 F.3d 527, 530 (2d Cir.2005); *see also* *Ross v. City of Memphis,* 423 F.3d 596, 601 (6th Cir.2005) (same). The issue of first impression here concerns policy advice rendered by a government lawyer, and the distinction between (on the one hand) attorney-client privileged recommendations designed to achieve compliance with the law or reduce legal risk, and (on the other) recommendations made for other reasons, which advice may not be privileged.[4]

(B) Post-judgment relief would be inadequate to protect the privilege, if it exists; this consideration "justifies the more liberal use of mandamus in the context of privilege issues." *In re Long Island Lighting Co.,* 129 F.3d at 271; *see also* *In re von Bulow,* 828 F.2d 94, 99 (2d Cir. 1987).

A motions panel of this Court denied the County's motion for a stay pending appeal, so the communications at issue are already in plaintiffs' hands. Plaintiffs argue that the dispute is now moot because "the risks associated with the development of discovery practices ... undermining the privilege ... have already been realized." Issuing the writ "cannot unsay the confidential information that has been revealed." *In re von Bulow,* 828 F.2d at 99. In the circumstances presented, the privilege can nevertheless be vindicated by preventing the use of the documents during further discovery (including, for example, in depositions, interrogatories, document requests and pretrial motions) and at trial.

(C) To await resolution of this issue pending final judgment risks the development of discovery practices and doctrine that unsettle and undermine the governmental attorney-client privilege. *See* *Chase Manhattan,* 964 F.2d at 164. To "encourage full and frank communication *418 between attorneys and their clients," *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), lawyers and clients need to know which of their communications are protected. "An uncertain privilege ... is little better than no privilege." *In re von Bulow,* 828 F.2d at 100. The "potentially broad applicability and influence of the privilege ruling" weighs heavily in favor of adjudicating the dispute now. *In re Long Island Lighting Co.,* 129 F.3d at 271.

418

III

The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance. *United States v. Const. Prod. Research, Inc.,* 73 F.3d 464, 473 (2d Cir.1996). Its purpose is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote "broader public interests in the observance of law and administration of justice." *Upjohn,* 449 U.S. at 389, 101 S.Ct. 677; *see also* *In re John Doe, Inc.,* 13 F.3d 633, 635-36 (2d Cir.1994). "The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d 1032, 1036-37 (2d Cir.1984).

At the same time, we construe the privilege narrowly because it renders relevant information undiscoverable; we apply it "only where necessary to achieve its purpose." *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); *see In re Grand Jury Investigation,* 399 F.3d at 531. The burden of establishing the applicability of the privilege rests with the party invoking it. *In re Grand Jury Proceedings,* 219 F.3d 175, 182 (2d Cir.2000); *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL-CIO,* 119 F.3d 210, 214 (2d Cir.1997).

In civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance.[5] *In re Grand Jury Investigation,* 399 F.3d at 532; *see, e.g., Ross v. City of Memphis,* 423 F.3d 596, 601 (6th Cir.2005) ("[A] government entity can assert attorney-client privilege in the civil context."); *In re Lindsey,* 148 F.3d 1100, 1107 (D.C.Cir.1998) (*per curiam*) (noting the existence of "a government attorney-client privilege that is rather absolute in civil litigation"); *cf.* Proposed Fed. R.Evid. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972) (describing a client, for the purpose of defining the attorney-client privilege, as a "person, *public officer,* or corporation, association, or other organization or entity, *either public or private*") (emphasis added).

419 The attorney-client privilege accommodates competing values; the competition is *419 sharpened when the privilege is asserted by a government. On the one hand, non-disclosure impinges on open and accessible government. *See Reed v. Baxter,* 134 F.3d 351, 356-57 (6th Cir.1998). On the other hand, public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest:

> We believe that, if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.

In re Grand Jury Investigation, 399 F.3d at 534. Access to legal advice by officials responsible for formulating, implementing and monitoring governmental policy is fundamental to "promot[ing] broader public interests in the observance of law and administration of justice," *Upjohn,* 449 U.S. at 389, 101 S.Ct. 677. At least in civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or a corporate entity.

IV

A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice. *Const. Prod. Research, Inc.,* 73 F.3d at 473. At issue here is the third consideration: whether the communications were made for the purpose of obtaining or providing legal advice, as opposed to advice on policy.[6]

The rule that a confidential communication between client and counsel is privileged only if it is generated for the purpose of obtaining or providing legal assistance is often recited. The issue usually arises in the

context of communications to and from corporate in-house lawyers who also serve as business executives. *See, e.g., MSF Holding, Ltd. v. Fiduciary Trust Co. Int'l,* No. 03 Civ. 1818, 2005 WL 3338510, at *1 (S.D.N.Y. Dec. 7, 2005); *Bank Brussels Lambert v. Credit Lyonnais (Suisse),* 220 F.Supp.2d 283, 286 (S.D.N.Y.2002); *U.S. Postal Serv. v. Phelps Dodge Refining Corp.,* 852 F.Supp. 156, 160 (E.D.N.Y.1994). So the question usually is whether the communication was generated for the purpose of obtaining or providing legal advice as opposed to business advice. *See In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d at 1036-37.

Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct. *See generally* 1 Paul R. Rice, *Attorney Client Privilege in the United States* § 7:9 (2d ed.1999). It requires a lawyer to rely on legal education and experience to inform
420 judgment. *Ball v. U.S. Fid. & Guar. Co.,* No. M8-85, 1989 *420 WL 135903, at *1 (S.D.N.Y. Nov.8, 1989) (reasoning that legal advice "involve[s] the judgment of a lawyer in his capacity as a lawyer"). But it is broader, and is not demarcated by a bright line. What Judge Wyzanski observed long ago applies with equal force today:

> The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the ... public interest that the lawyer should regard himself as more than [a] predicter of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

United States v. United Shoe Mach. Corp., 89 F.Supp. 357, 359 (D.Mass.1950). We consider whether the predominant purpose of the communication is to render or solicit legal advice. *United States v. Int'l Bus. Machs. Corp.,* 66 F.R.D. 206, 212 (S.D.N.Y. 1974); *see also In re Buspirone Antitrust Litig.,* 211 F.R.D. 249, 252-53 (S.D.N.Y. 2002) (employing the "primary purpose" standard in assessing whether the attorney-client privilege protects certain documents); *In re Grand Jury Proceedings,* No. M-11-198, 2001 WL 1167497, at *25 (S.D.N.Y. Oct.3, 2001) (same); *Armstrong v. Brookdale Hosp.,* No. 98 Civ. 2416, 1999 WL 690149, at *2 (E.D.N.Y. Aug. 28, 1999) (same); *U.S. Postal Serv.,* 852 F.Supp. at 163 (applying a "dominant purpose" standard).[7]

The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light
421 of the advice being sought or rendered, as well as the *421 relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer.[8] The more careful the lawyer, the more likely it is that the legal advice will entail follow-through by facilitation, encouragement and monitoring.

V

The County asserts that the Assistant County Attorney whose advice was solicited could not have been conveying non-legal policy advice because the Erie County Charter (§ 602) confines her authority to that of a "legal advisor," and because "only the County Sheriff and his direct appointees ha[ve] policy-making authority for the [Sheriff's] department." This argument does not assist the analysis much. A lawyer's lack of formal authority to formulate, approve or enact policy does not actually prevent the rendering of policy advice to officials who do possess that authority. A similar consideration may be useful in different circumstances. When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged. *In re Lindsey,* 148 F.3d at 1106 (citing 1 McCormick on Evidence § 88, at 322-24 (4th ed.1992); Restatement (Third) of the Law Governing Lawyers § 122 (Proposed Final Draft No. 1, 1996)).[9] In the government context, one court considered relevant the fact that the attorney seeking to invoke the privilege held two formal positions: Assistant to the President (ostensibly non-legal) and Deputy White House Counsel (ostensibly legal). *In re Lindsey,* 148 F.3d at 1103, 1106-07. The same is true in the private sector where "in-house attorneys are more likely to mix legal and business functions." *Bank Brussels Lambert,* 220 F.Supp.2d at 286; *accord Hercules, Inc. v. Exxon Corp.,* 434 F.Supp. 136, 147 (D.Del.1977). In short, an attorney's dual legal and non-legal responsibilities may bear on whether a particular communication was generated for the purpose of soliciting or rendering legal advice; but here, the Assistant County Attorney's lack of formal policymaking authority is not a compelling circumstance.

The predominant purpose of a particular document — legal advice, or not — may also be informed by the overall needs and objectives that animate the client's request for advice. For example, Erie County's objective was to ascertain its obligations under the Fourth Amendment and how those requirements may be fulfilled, rather than to save money or please the electorate (even though these latter objectives would not be beyond the lawyer's consideration).

VI

After reviewing *in camera* the documents listed on the County's privilege log, Judge Scott determined that
422 the ten e-mails at issue here are not privileged. These e-mails, dated between December *422 23, 2002 and December 11, 2003, passed between the Assistant County Attorney and various officials in the Sheriff's Office (primarily petitioners). The ten e-mails are an amalgam of the following six broad issues:

> (i) The compliance of the County's search policy with the Fourth Amendment (EC-C-0014, EC-C-0060, EC-C-00119, EC-C-00126 and EC-C-00161);
>
> (ii) Any possible liability of the County and its officials stemming from the existing policy (EC-C-0014, EC-C-0060, EC-C-00119 and EC-C-00126);
>
> (iii) Alternative search policies, including the availability of equipment to assist in conducting searches that comply with constitutional requirements (EC-C-14, EC-C-0060, EC-C-00108, EC-C-00119, EC-C-00126, EC-C-00161-79, EC-C-00180 and EC-C-00227);
>
> (iv) Guidance for implementing and funding these alternative policies (EC-C-14, EC-C-0060, EC-C-00119, EC-C-00126, EC-C-00161, EC-C-00180, EC-C-204-20 and EC-C-00227);
>
> (v) Maintenance of records concerning the original search policy (EC-C-00225); and

(vi) Evaluations of the County's progress implementing the alternative search policy (EC-C-00204-20 and EC-C-00223-25).[10]

The judge reasoned (*inter alia*) that because these e-mails "propose[d] changes to existing policy to make it constitutional" and provided guidance "to executive officials within the Sheriff's Department to take steps to implement the new policy ... no legal advice is rendered or rendered apart from policy recommendations." Because the e-mails "go beyond rendering legal analysis," the judge concluded that they were not privileged. We disagree.

It is to be hoped that legal considerations will play a role in governmental policymaking. When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation — or that advocates and promotes compliance, or oversees implementation of compliance measures — is legal advice. Public officials who craft policies that may directly implicate the legal rights or responsibilities of the public should be "encouraged to seek out and receive fully informed legal advice" in the course of formulating such policies. *In re Grand Jury Investigation,* 399 F.3d at 534. To repeat: "The availability of sound legal advice inures to the benefit not only of the client ... but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d at 1036-37. This observation has added force when the legal advice is sought by officials responsible for law enforcement and corrections policies.

We conclude that each of the ten disputed e-mails was sent for the predominant purpose of soliciting or rendering legal advice. They convey to the public officials responsible for formulating, implementing and monitoring Erie County's corrections policies, a lawyer's assessment of Fourth Amendment requirements,
423 and provide guidance in crafting and implementing alternative *423 policies for compliance. This advice — particularly when viewed in the context in which it was solicited and rendered-does not constitute "general policy or political advice" unprotected by the privilege. *In re Lindsey,* 148 F.3d at 1120 (Tatel, J., dissenting).

Although the e-mails at issue were generated for the predominant purpose of legal advice, we remand for the district court to determine whether the distribution of some of the disputed e-mail communications to others within the Erie County Sheriff's Department constituted a waiver of the attorney-client privilege. *Cf. In re Horowitz,* 482 F.2d 72, 81-82 (2d Cir.1973); *see also United States v. DeFonte,* 441 F.3d 92, 94-95 (2d Cir.2006) (*per curiam*).

Conclusion

The writ of mandamus is granted; the district court's April 17, 2006 order is vacated; the district court is instructed to determine whether the attorney-client privilege was nonetheless waived; pending adjudication, the district court is directed to enter an order protecting the confidentiality of the disputed e-mails.

[1] We intimate no view as to the underlying merits.

[2] Certain of these e-mails are better characterized as e-mail chains, because they contain the initial e-mail as well as subsequent responses. Because the chains concern the subject of the original e-mail, for simplicity's sake, we use the term "e-mail" to encompass the entire e-mail "conversation."

[3] The parties have not raised the applicability of the deliberative process privilege. *See Nat'l Council of La Raza v. Dep't of Justice,* 411 F.3d 350, 356 (2d Cir.2005) ("[T]he deliberative process privilege [is] a sub-species of work-product privilege that covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." (internal quotation marks omitted)).

[4] Respondents assert that this issue is not novel and that it was raised in *Mobil Oil Corp. v. Dep't of Energy*, 102 F.R.D. 1 (N.D.N.Y. 1983). *Mobil Oil* is useful; but it applies the familiar requirement that a factual communication sent to an attorney is protected by the attorney-client privilege only if the communication was generated for the purpose of securing legal assistance. *Id.* at 9-10. Because in that case it was "impossible to determine" whether certain factual memoranda were sent to government lawyers primarily for the purpose of securing legal assistance, the government did not discharge its burden to prove that the privilege applied. *Id.*

[5] Certain limitations to the government attorney-client privilege, not implicated here, may render an otherwise protectable communication unprotected. *See Nat'l Council of La Raza*, 411 F.3d at 360-61 (holding that the government could not invoke the attorney-client privilege to bar disclosure of a legal memorandum where the government had incorporated it into its policy by repeatedly, publicly and expressly relying upon its reasoning and had adopted its reasoning as authoritative within the agency); *see also Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 974 (7th Cir.1977); *Falcone v. IRS*, 479 F.Supp. 985, 989-90 (E.D.Mich. 1979).

[6] As discussed *infra* in Part VI, we remand to the district court to consider whether petitioners waived the privilege through distribution of certain e-mails. However, that is not the focus of this opinion, and we intimate no view of its resolution on remand.

[7] In *dicta,* this Court has observed that "[t]he [corporate attorney-client] privilege is clearly limited to communications made to attorneys *solely* for the purpose of the corporation seeking legal advice and its counsel rendering it." *In re John Doe Corp.*, 675 F.2d 482, 488 (2d Cir.1982) (emphasis added). However, because the Court held that the corporation had waived the privilege (and because there was cause to believe that the crime-fraud exception applied), the issue was not further considered. *Id.* at 488-89. As discussed in the accompanying text, however, we think the predominant-purpose rule is the correct one. *Accord In re Lindsey*, 148 F.3d at 1106; *In re Grand Jury Subpoena*, 204 F.3d 516, 520 n. 1 (4th Cir.2000) (requiring that the confidential communication must be made "for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding"); *Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 301 (3d Cir.1999) (same); *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir.1997) (same); *see also* Rice, *Attorney Client Privilege in the United States* § 7:5 ("[T]here is general agreement that the protection of the privilege applies only if the *primary or predominate purpose* of the attorney-client consultation is to seek legal advice or assistance." (emphasis in original)); 24 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5490 (1986) (observing that while this issue is "seldom discussed by the courts and writers," the majority rule is the "dominant purpose doctrine").

[8] Importantly, redaction is available for documents which contain legal advice that is incidental to the nonlegal advice that is the predominant purpose of the communication. *See, e.g., United States v. Weisman*, No. 94 Cr. 760, 1995 WL 244522, at *4 (S.D.N.Y. Apr.26, 1995) (recognizing the availability of redaction to protect legal advice in hybrid documents); *Detection Sys., Inc. v. Pittway Corp.*, 96 F.R.D. 152, 155 (W.D.N.Y.1982) ("In those instances where both privileged and non-privileged material exist, the privileged material has been deleted.").

[9] Normally, the capacity in which a lawyer receives or generates a communication is related to determining whether the communication actually involves a lawyer; in other words, a lawyer not acting in her capacity as a lawyer is not a lawyer for the purpose of the attorney-client privilege.

[10] Because these documents have been and will be under seal, we limit our description, to the extent possible, to that which the rules require be disclosed: "the general subject matter of the document." W.D.N.Y. Civ. R. 26(f)(1)(B)(i)(I I). No description by this Court or by the trial court should be taken to prejudge any issue relevant to the underlying claim.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 15, 2022

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION
ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL Lisa Monaco

SUBJECT: Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group

By combating corporate crime, the Department of Justice protects the public, strengthens our markets, discourages unlawful business practices, and upholds the rule of law. Strong corporate criminal enforcement also assures the public that there are not two sets of rules in this country—one for corporations and executives, and another for the rest of America. Corporate criminal enforcement will therefore always be a core priority for the Department.

In October 2021, the Department announced three steps to strengthen our corporate criminal enforcement policies and practices with respect to individual accountability, the treatment of a corporation's prior misconduct, and the use of corporate monitors. *See* Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021 ("October 2021 Memorandum"). Simultaneously, we established the Corporate Crime Advisory Group ("CCAG")[1] within the Department to evaluate and recommend further guidance and consider

[1] CCAG members included leaders and experienced prosecutors from all components of the Department that handle corporate criminal matters: the Criminal Division; the Antitrust Division; the Executive Office of United States

revisions and reforms to enhance our approach to corporate crime, provide additional clarity on what constitutes cooperation by a corporation, and strengthen the tools our attorneys have to prosecute responsible individuals and companies.[2] This review considered and incorporated helpful input from a broad cross-section of individuals and entities with relevant expertise and representing diverse perspectives, including public interest groups, consumer advocacy organizations, experts in corporate ethics and compliance, representatives from the academic community, audit committee members, in-house attorneys, and individuals who previously served as corporate monitors, as well as members of the business community and defense bar.

With the benefit of this input, this memorandum announces additional revisions to the Department's existing corporate criminal enforcement policies and practices. This memorandum provides guidance on how prosecutors should ensure individual and corporate accountability, including through evaluation of: a corporation's history of misconduct; self-disclosure and cooperation provided by a corporation; the strength of a corporation's existing compliance program; and the use of monitors, including their selection and the appropriate scope of a monitor's work. Finally, this memorandum emphasizes the importance of transparency in corporate criminal enforcement.

In order to promote consistency across the Department, these policy revisions apply Department-wide. Some announcements herein establish the first-ever Department-wide policies on certain areas of corporate crime, such as guidance on evaluating a corporation's compensation plans; others supplement and clarify existing guidance. The policies set forth in this Memorandum, as well as additional guidance on subjects like cooperation, will be incorporated into the Justice Manual through forthcoming revisions, including new sections on independent corporate monitors.[3]

I. Guidance on Individual Accountability

The Department's first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime. Such accountability deters future illegal activity, incentivizes changes in individual and corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system. *See* Memorandum from Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," Sept. 9, 2015. Many existing Department policies promote the identification and investigation of the individuals responsible for corporate crimes. The following policies reinforce this priority.

Attorneys; multiple United States Attorneys' Offices; the Civil Division; the National Security Division; the Environment and Natural Resources Division; the Tax Division; and the Federal Bureau of Investigation.

[2] While this Memorandum refers to corporations and companies, the terms apply to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations. *See* Justice Manual ("JM") § 9-28.200.

[3] Department prosecutors will continue to employ the Principles of Federal Prosecution of Business Organizations—as amended by the October 2021 Memorandum and this memorandum—to guide investigations and prosecutions of corporate crime, including with respect to prosecutors' assessment and evaluation of just and efficient resolutions in corporate criminal cases. *See* JM §§ 9-28.000 *et seq.* ("Principles of Federal Prosecution of Business Organizations").

A. Timely Disclosures and Prioritization of Individual Investigations

To be eligible for any cooperation credit, corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct. *See* October 2021 Memorandum, at 3. The mere disclosure of records, however, is not enough. If disclosures come too long after the misconduct in question, they reduce the likelihood that the government may be able to adequately investigate the matter in time to seek appropriate criminal charges against individuals. The expiration of statutes of limitations, the dissipation of corroborating evidence, and other factors can inhibit individual accountability when the disclosure of facts about individual misconduct is delayed.

In particular, it is imperative that Department prosecutors gain access to all relevant, non-privileged facts about individual misconduct swiftly and without delay. Therefore, to receive full cooperation credit, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals. Companies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit. Companies seeking cooperation credit ultimately bear the burden of ensuring that documents are produced in a timely manner to prosecutors.

Likewise, production of evidence to the government that is most relevant for assessing individual culpability should be prioritized. Such priority evidence includes information and communications associated with relevant individuals during the period of misconduct. Department prosecutors will frequently identify the priority evidence they are seeking from a cooperating corporation, but in the absence of specific requests from prosecutors, cooperating corporations should understand that information pertaining to individual misconduct will be most significant.

Going forward, in connection with every corporate resolution, Department prosecutors must specifically assess whether the corporation provided cooperation in a timely fashion. Prosecutors will consider, for example, whether a company promptly notified prosecutors of particularly relevant information once it was discovered, or if the company instead delayed disclosure in a manner that inhibited the government's investigation. Where prosecutors identify undue or intentional delay in the production of information or documents—particularly with respect to documents that impact the government's ability to assess individual culpability—cooperation credit will be reduced or eliminated.

Finally, prosecutors must strive to complete investigations into individuals—and seek any warranted individual criminal charges—prior to or simultaneously with the entry of a resolution against the corporation. If prosecutors seek to resolve a corporate case prior to completing an investigation into responsible individuals, the prosecution or corporate resolution authorization memorandum must be accompanied by a memorandum that includes a discussion of all potentially culpable 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. *See* JM § 9-28.210. In such cases,

prosecutors must obtain the approval of the supervising United States Attorney or Assistant Attorney General of both the corporate resolution and the memorandum addressing responsible individuals.

B. Foreign Prosecutions of Individuals Responsible for Corporate Crime

The prosecution by foreign counterparts of individuals responsible for cross-border corporate crime plays an increasingly important role in holding individuals accountable and deterring future criminal conduct. Cooperation with foreign law enforcement partners—both in terms of evidence-sharing and capacity-building—has become a significant part of the Department's overall efforts to fight corporate crime. At the same time, the Department must continue to pursue forcefully its own individual prosecutions, as U.S. federal prosecution serves as a particularly significant instrument for accountability and deterrence.

At times, Department criminal investigations take place in parallel to criminal investigations by foreign jurisdictions into the same or related conduct. In such situations, the Department may learn that a foreign jurisdiction intends to bring criminal charges against an individual whom the Department is also investigating. The Principles of Federal Prosecution recognize that effective prosecution in another jurisdiction may be grounds to forego federal prosecution. JM § 9-27.220. Going forward, before declining to commence a prosecution in the United States on that basis, prosecutors must make a case-specific determination as to whether there is a significant likelihood that the individual will be subject to effective prosecution in the other jurisdiction. To determine whether an individual is subject to effective prosecution in another jurisdiction, prosecutors should consider, *inter alia*: (1) the strength of the other jurisdiction's interest in the prosecution; (2) the other jurisdiction's ability and willingness to prosecute effectively; and (3) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction. JM § 9-27.240.

When appropriate, Department prosecutors may wait to initiate a federal prosecution in order to better understand the scope and effectiveness of a prosecution in another jurisdiction. However, prosecutors should not delay commencing federal prosecution to the extent that delay could prevent the government from pursuing certain charges (*e.g.*, on statute of limitations grounds), reduce the chance of arresting the individual, or otherwise undermine the strength of the federal case.

Similarly, prosecutors should not be deterred from pursuing appropriate charges just because an individual liable for corporate crime is located outside the United States.

II. Guidance on Corporate Accountability

A. Evaluating a Corporation's History of Misconduct

As discussed in the October 2021 Memorandum, in determining how best to resolve an investigation of corporate criminal activity, prosecutors should, among other factors, consider the corporation's record of past misconduct, including prior criminal, civil, and regulatory resolutions,

both domestically and internationally.[4] Consideration of a company's historical misconduct harmonizes the way the Department treats corporate and individual criminal histories, and ensures that prosecutors give due weight to an important factor in evaluating the proper form of resolution.

Not all instances of prior misconduct, however, are equally relevant or probative. To that end, prosecutors should consider the form of prior resolution and the associated sanctions or penalties, as well as the elapsed time between the instant misconduct, the prior resolution, and the conduct underlying the prior resolution. In general, prosecutors weighing these factors should assign the greatest significance to recent U.S. criminal resolutions, and to prior misconduct involving the same personnel or management. Dated conduct addressed by prior criminal resolutions entered into more than ten years before the conduct currently under investigation, and civil or regulatory resolutions that were finalized more than five years before the conduct currently under investigation, should generally be accorded less weight as such conduct may be generally less reflective of the corporation's current compliance culture, program, and risk tolerance.[5] However, depending on the facts of the particular case, even if it falls outside these time periods, repeated misconduct may be indicative of a corporation that operates without an appropriate compliance culture or institutional safeguards.

In addition to its form, Department prosecutors should consider the facts and circumstances underlying a corporation's prior resolution, including any factual admissions by the corporation. Prosecutors should consider the seriousness and pervasiveness of the misconduct underlying each prior resolution and whether that conduct was similar in nature to the instant misconduct under investigation, even if it was prosecuted under different statutes. Prosecutors should also consider whether at the time of the misconduct under review, the corporation was serving a term of probation or was subject to supervision, monitorship, or other obligation imposed by the prior resolution.

Corporations operate in varying regulatory and other environments, and prosecutors should be mindful when comparing corporate track records to ensure that any comparison is apt. For example, if a corporation operates in a highly regulated industry, a corporation's history of regulatory compliance or shortcomings should likely be compared to that of similarly situated companies in the industry. Prior resolutions that involved entities that do not have common management or share compliance resources with the entity under investigation, or that involved conduct that is not chargeable as a criminal violation under U.S. federal law, should also generally receive less weight. Prior misconduct committed by an acquired entity should receive less weight if the acquired entity has been integrated into an effective, well-designed compliance program at the acquiring corporation and if the acquiring corporation addressed the root cause of the prior

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[4] The term "resolution" covers both post-trial adjudications and stipulated non-trial resolutions, such as plea agreements, non-prosecution agreements, deferred prosecution agreements, civil consent decrees and stipulated orders, and pre-trial regulatory enforcement actions.

[5] Corporations should be prepared to produce a list and summary of all prior criminal resolutions within the last ten years and all civil or regulatory resolutions within the last five years, as well as any known pending investigations by U.S. (federal and state) and foreign government authorities. Attorneys for the government may tailor (or expand) this request to obtain the information that would be most relevant to the Department's analysis.

misconduct before the conduct currently under investigation occurred, and full and timely remediation occurred within the acquired entity before the conduct currently under investigation.

Department prosecutors should also evaluate whether the conduct at issue in the prior and current matters reflects broader weaknesses in a corporation's compliance culture or practices. One consideration is whether the conduct occurred under the same management team and executive leadership. Overlap in involved personnel—at any level—could indicate a lack of commitment to compliance or insufficient oversight of compliance risk at the management or board level. Beyond personnel, prosecutors should consider whether the present and prior instances of misconduct share the same root causes. Prosecutors should also consider what remediation was taken to address the root causes of prior misconduct, including employee discipline, compensation clawbacks, restitution, management restructuring, and compliance program upgrades.

Multiple non-prosecution or deferred prosecution agreements are generally disfavored, especially where the matters at issue involve similar types of misconduct; the same personnel, officers, or executives; or the same entities. Before making a corporate resolution offer that would result in multiple non-prosecution or deferred prosecution agreements for a corporation (including its affiliated entities), Department prosecutors must secure the written approval of the responsible U.S. Attorney or Assistant Attorney General and provide notice to the Office of the Deputy Attorney General (ODAG) in the manner set forth in JM § 1-14.000. Notice provided to ODAG pursuant to JM § 1-14.000 must be made at least 10 business days prior to the issuance of an offer to the corporation, except in extraordinary circumstances.

While multiple deferred or non-prosecution agreements are generally disfavored, nothing in this memorandum should disincentivize corporations that have been the subject of prior resolutions from voluntarily disclosing misconduct to the Department. Department prosecutors must weigh and appropriately credit voluntary and timely self-disclosures of current or prior conduct. Indeed, timely voluntary disclosures do not simply reveal misconduct at a corporation; they can also reflect that a corporation is appropriately working to detect misconduct and takes seriously its responsibility to instill and act upon a culture of compliance. As set forth in the next section of this Memorandum, when determining the appropriate form and substance of a corporate criminal resolution for any corporation, including one with a prior resolution, prosecutors should consider whether the criminal conduct at issue came to light as a result of the corporation's timely, voluntary self-disclosure and credit such disclosure appropriately.

B. Voluntary Self-Disclosure by Corporations

In many circumstances, a corporation becomes aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the Department. In those cases, corporations may come to the Department and disclose this misconduct, enabling the government to investigate and hold wrongdoers accountable more quickly than would otherwise be the case. Department policies and procedures must ensure that a corporation benefits from its decision to come forward to the Department and voluntarily self-disclose misconduct, through resolution under more favorable terms than if the government had learned of the misconduct

through other means. And Department policies and procedures should be sufficiently transparent such that the benefits of voluntary self-disclosure are clear and predictable.

Many Department components that prosecute corporate criminal misconduct have already adopted policies regarding the treatment of corporations who voluntarily disclose their misconduct. *See, e.g.*, Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy (Criminal Division); Leniency Policy and Procedures (Antitrust Division); Export Control and Sanctions Enforcement Policy for Business Organizations (National Security Division); and Factors in Decisions on Criminal Prosecutions (Environment & Natural Resources Division). Of course, voluntary self-disclosure only occurs when companies disclose misconduct promptly and voluntarily (*i.e.*, where they have no preexisting obligation to disclose, such as pursuant to regulation, contract, or prior Department resolution) and when they do so prior to an imminent threat of disclosure or government investigation.[6]

Through this memorandum, I am directing each Department of Justice component that prosecutes corporate crime to review its policies on corporate voluntary self-disclosure, and if the component lacks a formal, written policy to incentivize such self-disclosure, it must draft and publicly share such a policy. Any such policy should set forth the component's expectations of what constitutes a voluntary self-disclosure, including with regard to the timing of the disclosure, the need for the disclosure to be accompanied by timely preservation, collection, and production of relevant documents and/or information, and a description of the types of information and facts that should be provided as part of the disclosure process.[7] The policies should also lay out the benefits that corporations can expect to receive if they meet the standards for voluntary self-disclosure under that component's policy.

All Department components must adhere to the following core principles regarding voluntary self-disclosure. First, absent the presence of aggravating factors, the Department will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct. Each component will, as part of its written guidance on voluntary self-disclosure, provide guidance on what circumstances would constitute such aggravating factors, but examples may include misconduct that poses a grave threat to national security or is deeply pervasive throughout the company. Second, the Department will not require the imposition of an independent compliance monitor for a cooperating corporation that voluntarily self-discloses the relevant conduct if, at the time of resolution, it also demonstrates that it has implemented and tested an effective compliance program. Such decisions about the

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[6] Voluntary self-disclosure of misconduct is distinct from cooperation with the government's investigation, and prosecutors should thus consider these factors separately. *See, e.g.*, JM § 9-28.900 (addressing voluntary disclosures generally); JM § 9-47.120 (describing credit for voluntary self-disclosure in FCPA matters).

[7] For example, the FCPA Corporate Enforcement policy sets forth the following requirements for a corporation to receive credit for voluntary self-disclosure of wrongdoing: the disclosure must qualify under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation"; the corporation must disclose the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden on the corporation to demonstrate timeliness; and the corporation must disclose all relevant facts known to it, "including as to any individuals substantially involved in or responsible for the misconduct at issue." JM § 9-47.120.

imposition of a monitor will continue to be made on a case-by-case basis and at the sole discretion of the Department.

C. Evaluation of Cooperation by Corporations

Cooperation can be a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that is appropriate for indictment and prosecution. JM § 9-28.700. Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. JM § 9-28.720.[8]

Credit for cooperation takes many forms and is calculated differently based on the degree to which a corporation cooperates with the government's investigation and the commitment that the corporation demonstrates in doing so. The level of a corporation's cooperation can affect the form of the resolution, the applicable fine range, and the undertakings involved in the resolution.

Many existing Department policies discuss the Department's expectations for full and effective cooperation. *See, e.g.*, JM § 9-28.720 (Cooperation: Disclosing the Relevant Facts); JM § 9-47.120, ¶ 1.3(b) (Full Cooperation in FCPA Matters). The Department will update the Justice Manual to ensure greater consistency across components as to the steps that a corporation will need to take to receive maximum credit for full cooperation.

Companies seeking credit for cooperation must timely preserve, collect, and disclose relevant documents located both within the United States and overseas. In some cases, data privacy laws, blocking statutes, or other restrictions imposed by foreign law may complicate the method of production of documents located overseas. In such cases, the cooperating corporation bears the burden of establishing the existence of any restriction on production and of identifying reasonable alternatives to provide the requested facts and evidence, and is expected to work diligently to identify all available legal bases to preserve, collect, and produce such documents, data, and other evidence expeditiously.[9]

Department prosecutors should provide credit to corporations that find ways to navigate such issues of foreign law and produce such records. Conversely, where a corporation actively seeks to capitalize on data privacy laws and similar statutes to shield misconduct inappropriately from detection and investigation by U.S. law enforcement, an adverse inference as to the corporation's cooperation may be applicable if such a corporation subsequently fails to produce foreign evidence.

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[8] Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and the individual's attorneys. *Id.*

[9] This requirement now applies to all corporations under investigation that are seeking to cooperate. The requirement already applies to investigations involving potential violations of the FCPA. *See* JM § 9-47.120.

D. Evaluation of a Corporation's Compliance Program

Although an effective compliance program and ethical corporate culture do not constitute a defense to prosecution of corporate misconduct, they can have a direct and significant impact on the terms of a corporation's potential resolution with the Department. Prosecutors should evaluate a corporation's compliance program as a factor in determining the appropriate terms for a corporate resolution, including whether an independent compliance monitor is warranted.[10] Prosecutors should assess the adequacy and effectiveness of the corporation's compliance program at two points in time: (1) the time of the offense; and (2) the time of a charging decision. The same criteria should be used in each instance.

Prosecutors should evaluate the corporation's commitment to fostering a strong culture of compliance at all levels of the corporation—not just within its compliance department. For example, as part of this evaluation, prosecutors should consider how the corporation has incentivized or sanctioned employee, executive, and director behavior, including through compensation plans, as part of its efforts to create a culture of compliance.

There are many factors that prosecutors should consider when evaluating a corporate compliance program. The Criminal Division has developed resources to assist prosecutors in assessing the effectiveness of a corporation's compliance program. *See* Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020). Additional guidance has been provided by other Department components as to specialized areas of corporate compliance. *See, e.g.*, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019). Prosecutors should consider, among other factors, whether the corporation's compliance program is well designed, adequately resourced, empowered to function effectively, and working in practice. Prior guidance has identified numerous considerations for this evaluation, including, *inter alia*, how corporations measure and identify compliance risk; how they monitor payment and vendor systems for suspicious transactions; how they make disciplinary decisions within the human resources process; and how senior leaders have, through their words and actions, encouraged or discouraged compliance.

In addition to those factors, this Memorandum identifies additional metrics relevant to prosecutors' evaluation of a corporation's compliance program and culture.

1. Compensation Structures that Promote Compliance

Corporations can help to deter criminal activity if they reward compliant behavior and penalize individuals who engage in misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can incentivize compliant conduct, deter risky behavior, and instill a corporate culture in which employees follow the law and avoid legal "gray areas." When conducting this evaluation, prosecutors should consider how the corporation

[10] At the same time, the mere existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. *See* JM 9-28.800.

has incentivized employee behavior as part of its efforts to create a culture of ethics and compliance within its organization.

Corporations can best deter misconduct if they make clear that all individuals who engage in or contribute to criminal misconduct will be held personally accountable. In assessing a compliance program, prosecutors should consider whether the corporation's compensation agreements, arrangements, and packages (the "compensation systems") incorporate elements—such as compensation clawback provisions—that enable penalties to be levied against current or former employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. Since misconduct is often discovered after it has occurred, prosecutors should examine whether compensation systems are crafted in a way that allows for retroactive discipline, including through the use of clawback measures, partial escrowing of compensation, or equivalent arrangements.

Similarly, corporations can promote an ethical corporate culture by rewarding those executives and employees who promote compliance within the organization. Prosecutors should therefore also consider whether a corporation's compensation systems provide affirmative incentives for compliance-promoting behavior. Affirmative incentives include, for example, the use of compliance metrics and benchmarks in compensation calculations and the use of performance reviews that measure and reward compliance-promoting behavior, both as to the employee and any subordinates whom they supervise. When effectively implemented, such provisions incentivize executives and employees to engage in and promote compliant behavior and emphasize the corporation's commitment to its compliance programs and its culture.

Prosecutors should look to what has happened in practice at a corporation—not just what is written down. As part of their evaluation of a corporation's compliance program, prosecutors should review a corporation's policies and practices regarding compensation and determine whether they are followed in practice. If a corporation has included clawback provisions in its compensation agreements, prosecutors should consider whether, following the corporation's discovery of misconduct, a corporation has, to the extent possible, taken affirmative steps to execute on such agreements and clawback compensation previously paid to current or former executives whose actions or omissions resulted in, or contributed to, the criminal conduct at issue.

Finally, prosecutors should consider whether a corporation uses or has used non-disclosure or non-disparagement provisions in compensation agreements, severance agreements, or other financial arrangements so as to inhibit the public disclosure of criminal misconduct by the corporation or its employees.

The use of financial incentives to align the interests of the C-suite with the interests of the compliance department can greatly amplify a corporation's overall level of compliance. To that end, I have asked the Criminal Division to develop further guidance by the end of the year on how to reward corporations that develop and apply compensation clawback policies, including how to shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a role in misconduct—onto those more directly responsible.

2. Use of Personal Devices and Third-Party Applications

The ubiquity of personal smartphones, tablets, laptops, and other devices poses significant corporate compliance risks, particularly as to the ability of companies to monitor the use of such devices for misconduct and to recover relevant data from them during a subsequent investigation. The rise in use of third-party messaging platforms, including the use of ephemeral and encrypted messaging applications, poses a similar challenge.

Many companies require all work to be conducted on corporate devices; others permit the use of personal devices but limit their use for business purposes to authorized applications and platforms that preserve data and communications for compliance review. How companies address the use of personal devices and third-party messaging platforms can impact a prosecutor's evaluation of the effectiveness of a corporation's compliance program, as well as the assessment of a corporation's cooperation during a criminal investigation.

As part of evaluating a corporation's policies and mechanisms for identifying, reporting, investigating, and remediating potential violations of law, prosecutors should consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved. To assist prosecutors in this evaluation, I have asked the Criminal Division to further study best corporate practices regarding use of personal devices and third-party messaging platforms and incorporate the product of that effort into the next edition of its Evaluation of Corporate Compliance Programs, so that the Department can address these issues thoughtfully and consistently.

As a general rule, all corporations with robust compliance programs should have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, should provide clear training to employees about such policies, and should enforce such policies when violations are identified. Prosecutors should also consider whether a corporation seeking cooperation credit in connection with an investigation has instituted policies to ensure that it will be able to collect and provide to the government all non-privileged responsive documents relevant to the investigation, including work-related communications (*e.g.*, texts, e-messages, or chats), and data contained on phones, tablets, or other devices that are used by its employees for business purposes.

III. Independent Compliance Monitorships[11]

As set forth in the October 2021 Memorandum, Department prosecutors will not apply any general presumption against requiring an independent compliance monitor ("monitor") as part of a corporate criminal resolution, nor will they apply any presumption in favor of imposing one.

[11] In September 2021, the Associate Attorney General issued a memorandum concerning the use of monitorships in civil settlements involving state and local governmental entities. Memorandum from Associate Attorney General Vanita Gupta, "Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Government Entities," Sept. 13, 2021. That memorandum continues to govern the use of monitors in those cases.

Rather, the need for a monitor and the scope of any monitorship must depend on the facts and circumstances of the particular case.

A. Factors to Consider When Evaluating Whether a Monitor is Appropriate

Independent compliance monitors can be an effective means of reducing the risk of further corporate misconduct and rectifying compliance lapses identified during a corporate criminal investigation. Prosecutors should analyze and carefully assess the need for a monitor on a case-by-case basis, using the following non-exhaustive list of factors when evaluating the necessity and potential benefits of a monitor:[12]

1. Whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's self-disclosure policy;

2. Whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;

3. Whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;

4. Whether the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns);

5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;

6. Whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;

7. Whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct;

8. Whether, at the time of the resolution, the corporation's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;

[12] For components or U.S. Attorney's Offices that do not have extensive corporate resolution experience, consultation with DOJ components that more routinely assess such compliance programs, internal controls, and remedial measures is recommended.

9. Whether the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates or the nature of the corporation's customers; and

10. Whether and to what extent the corporation is subject to oversight from industry regulators or a monitor imposed by another domestic or foreign enforcement authority or regulator.

The factors listed above are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Department attorneys should determine whether a monitor is required based on the facts and circumstances presented in each case.

B. Selection of Monitors

In selecting a monitor, prosecutors should employ consistent and transparent procedures. Monitor selection should be performed pursuant to a documented selection process that is readily available to the public. *See, e.g.,* Memorandum of Assistant Attorney General Brian A. Benczkowski, Selection of Monitors in Criminal Division Matters, Oct. 11, 2018, Section E ("The Selection Process"); Environment and Natural Resources Division, Environmental Crimes Section, Corporate Monitors: Selection Best Practices (Mar. 2018); Antitrust Division, Selection of Monitors in Criminal Cases (July 2019).[13] Every component involved in corporate criminal resolutions that does not currently have a public monitor selection process must adopt an already existing Department process, or develop and publish its own selection process before December 31, 2022.[14] All new selection processes must be approved by ODAG and made public before their implementation as part of any corporate criminal resolution. The appropriate United States Attorney or Department Component Head shall also provide a copy of the process to the Assistant Attorney General for the Criminal Division, who shall maintain a record of such processes.

Any selection process must incorporate elements that promote consistency, predictability, and transparency. First, per existing policy, the consideration of monitor candidates shall be done by a standing or *ad hoc* committee within the office or component where the case originated. To the extent that such committees did not previously do so, every monitorship committee must now include as a member an ethics official or professional responsibility officer from that office or component, who shall ensure that the other members of the committee do not have any conflicts of interest in selection of the monitor. There shall be a written memorandum to file confirming that no conflicts exist in the committee prior to the selection process or as to the monitor prior to the commencement of the monitor's work. Second, monitor selection processes shall be conducted in keeping with the Department's commitment to diversity and inclusion. Third, prosecutors shall

[13] This requirement does not apply to cases involving court-appointed monitors, where prosecutors must give due regard to the appropriate role and procedures of the court.

[14] Unless they adopt and publish their own processes pursuant to the principles set forth herein, U.S. Attorney's Offices should follow the selection process developed by the Criminal Division, unless partnering with a Department component that has its own preexisting selection process.

notify the appropriate United States Attorney or Department Component Head of their decision regarding whether to require an independent compliance monitor. In order to promote greater transparency, any agreement imposing a monitorship should describe the reasoning for requiring a monitor.[15] ODAG must approve the monitor selection for all cases in which a monitor is recommended, unless the monitor is court-appointed.[16]

C. Continued Review of Monitorships

In matters where an independent corporate monitor is imposed pursuant to a resolution with the Department, prosecutors should ensure that the monitor's responsibilities and scope of authority are well-defined and recorded in writing, and that a clear workplan is agreed upon between the monitor and the corporation—all to ensure agreement among the corporation, monitor, and Department as to the proper scope of review.

For the term of the monitorship, Department prosecutors must remain apprised of the ongoing work conducted by the monitor.[17] Continued review of the monitorship requires ongoing communication with both the monitor and the corporation.[18]

Prosecutors should receive regular updates from the monitor about the status of the monitorship and any issues presented. Monitors should promptly alert prosecutors if they are being denied access to information, resources, or corporate employees or agents necessary to execute their charge. Prosecutors should also regularly receive information about the work the monitor is doing to ensure that it remains tailored to the workplan and scope of the monitorship. In reviewing information relating to the monitor's work, prosecutors should consider the reasonableness of the monitor's review, including, where appropriate, issues relating to the cost of the monitor's work. In certain cases, prosecutors may determine that the initial term of the monitorship is longer than necessary to address the concerns that created the need for the monitor, or that the scope of the monitorship is broader than necessary to accomplish the goals of the monitorship. For example, a corporation may demonstrate significant and faster-than-anticipated improvements to its compliance program, and this could reduce the need for continued monitoring. Conversely, prosecutors may determine that newly identified concerns require lengthening the term or amending the scope of the monitorship.

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[15] The appropriate United States Attorney or Department Component Head shall, in turn, provide a copy of the agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed. The Assistant Attorney General for the Criminal Division shall maintain a record of all such agreements.

[16] *See* Morford Memorandum, at p. 3 (requiring, for cases involving the use of monitors in DPAs and NPAs, that "the Office of the Deputy Attorney General must approve the monitor").

[17] In cases of court-appointed monitors, the court may elect to oversee this inquiry.

[18] Per existing policy, any agreement requiring a monitor should also explain what role the Department could play in resolving disputes that may arise between the monitor and the corporation, given the facts and circumstances of the case. *See* Acting Deputy Attorney General Gary C. Grindler, "Additional Guidance on the Use of Monitors in Deferred Prosecutions and Non-Prosecution Agreements with Corporation," May 25, 2010.

IV. Commitment to Transparency in Corporate Criminal Enforcement

Transparency regarding the Department's corporate criminal enforcement priorities and processes—including its expectations as to corporate cooperation and compliance, and the consequences of meeting or failing to meet those expectations—can encourage companies to adopt robust compliance programs, voluntarily disclose misconduct, and cooperate fully with the Department's investigations. Transparency can also instill public confidence in the Department's work.

When the Department elects to enter into an agreement to resolve corporate criminal liability, the agreement should, to the greatest extent possible, include: (1) an agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement; and (2) a statement of relevant considerations that explains the Department's reasons for entering into the agreement. Relevant considerations may, for example, include the corporation's voluntary self-disclosure, cooperation, and remedial efforts (or lack thereof); the cooperation credit, if any, that the corporation is receiving; the seriousness and pervasiveness of the criminal conduct; the corporation's history of misconduct; the state of the corporation's compliance program at the time of the underlying criminal conduct and the time of the resolution; the reasons for imposing an independent compliance monitor or any other compliance undertaking, if applicable; other applicable factors listed in JM § 9-28.300; and any other key considerations related to the Department's decision regarding the resolution.

Absent exceptional circumstances, corporate criminal resolution agreements will be published on the Department's public website.

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Robust corporate criminal enforcement remains central to preserving the rule of law—ensuring the same accountability for all, regardless of station or privilege. Thank you for the work you do every day to fulfill the Department's mission.

488 F.Supp.2d 350 (2007)

UNITED STATES of America

v.

Jeffrey STEIN, et al., Defendants.

No. S1 05 Crim. 0888(LAK).

United States District Court, S.D. New York.

May 1, 2007.

352 *351 *352 Michael J. Madigan, Robert H. Hotz, Jr., Christopher T. Schulten, Kathleen C. Leicht, Akin Gump Strauss Hauer & Feld LLP, John M. Hillebrecht, Stanley J. Okula, Jr., Rita M. Glavin, Margaret Garnett, Kevin M. Downing, Assistant United States Attorneys, Michael J. Garcia, United States Attorney, New York, NY, for Defendant John Laming and on behalf of all defendants.

Charles A. Stillman, John B. Harris, Stillman, Friedman & Shechtman, P.C., New York, NY, for Movant KPMG.

MEMORANDUM OPINION

KAPLAN, District Judge.

This matter is before the Court on motions by (1) all defendants for an order, pursuant to FED.R.CRIM.P. 16, compelling the government to produce certain materials in the files of KPMG LLP ("KPMG") and (2) KPMG to quash a Rule 17(c) subpoena seeking the same materials.

I

A. Background

1. The Investigation

In 2001 or early 2002, the Internal Revenue Service ("IRS") began investigating tax shelters, including a number that are subjects of the indictment in this case. In early 2002, it issued nine summonses to KPMG, which was less than fully compliant. Accordingly, on July 9, 2002, the government filed a petition in the United States District Court for the District of Columbia to enforce them.[1]

A few months later, the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs "began an investigation into the development, marketing, and implementation of abusive tax shelters by accountants, lawyers, financial advisors, and bankers."[2] This led to public hearings in November 2003 at which several senior KPMG partners or former partners — five of them now defendants here — testified.[3] As noted elsewhere, the firm's reception at the hearing was not favorable.[4] In the early part of 2004, the IRS made a criminal referral to the Department of Justice ("DOJ"), which in turn passed it on to the United States Attorney's Office for this district ("USAO"). As detailed in a prior

353 opinion, KPMG retained new counsel and engaged in vigorous efforts *353 to forestall the indictment of the firm.[5]

2. The Deferred Prosecution Agreement

On August 29, 2005, KPMG and the government entered into a Deferred Prosecution Agreement ("DPA").[6] KPMG agreed, among other things, to waive indictment, to be charged in a one-count information, to admit extensive wrongdoing, to pay a $456 million fine, and to accept restrictions on its practice. The government agreed that it would seek dismissal of the information after December 31, 2006 if KPMG complied with its obligations.[7] Moreover, two additional aspects of the DPA are noteworthy in the present context.

First, the DPA contained an agreed Statement of Facts (the "Statement"), accepted by KPMG, that contained a detailed account of alleged wrongdoing on the part of the firm. The Statement therefore is significant in that it includes factual assertions that KPMG admitted, but it may be significant also in that it may exclude factual assertions that KPMG declined to admit.

Second, the DPA obliges KPMG to cooperate extensively with the government, both in general and in the government's prosecution of this indictment. It provides in part:

> "7. KPMG acknowledges and understands that its cooperation with the criminal investigation by the Office [USAO] is an important and material factor underlying the Office's decision to enter into this Agreement, and, therefore, *KPMG agrees to cooperate fully and actively with the Office, the IRS, and with any other agency of the government designated by the Office (`Designated Agencies) regarding any matter relating to the Office's investigation about which KPMG has knowledge or information.*
>
> "8. KPMG agrees that its continuing cooperation with the Office's investigation shall include, *but not be limited to,* the following:
>
> "(a). *Completely and truthfully disclosing all information in its possession to the Office and the IRS about which the Office and the IRS* may *inquire, including but not limited to all information about activities of KPMG, present and former partners, employees, and agents of KPMG;*
>
> * * *
>
> "(d). *Assembling, organizing, and providing, in responsive and prompt fashion, and, upon request, expedited fashion, all documents, records, information, and other evidence in KPMG's possession, custody, or control as may be requested by the Office or the IRS;*
>
> "(e). Not asserting, in relation to the Office, any claim of privilege (including but not limited to the attorney-client privilege and the work product protection) as to any documents, records, information, or testimony requested by the Office related to its investigation, provided that:
>
> "(I) notwithstanding the provisions of this subparagraph (e), KPMG may assert the attorney-
354 client privilege, work product protection, or other *354 privileges with respect to (A) privileged communications between KPMG and its counsel that post-date February 1, 2004 and that concern the Office's investigation, (B) privileged communications between KPMG and

> Skadden, Arps, Slate, Meagher & Flom LLP, concerning the IRS's promoter penalty audit, or (C) any private litigation; and
>
> "(II) by producing privileged materials pursuant to this subparagraph (e), KPMG does not intend to waive the protection of the attorney-client privilege, work product protection, or any other applicable privilege as to third parties.
>
> "(f). Using its reasonable best efforts to make available its present and former partners and employees to provide information and/or testimony as requested by the Office and the IRS, including sworn testimony before a grand jury or in court proceedings, as well as interviews with law enforcement authorities. . . .
>
> * * *
>
> "9. KPMG agrees that its obligations to cooperate will continue even after the dismissal of the Information, and *KPMG will continue to fulfill the cooperation obligations set forth in this Agreement in connection with any investigation, criminal prosecution or civil proceeding brought by the Office* or by or against the IRS or the United States relating to or arising out of the conduct set forth in the Information and the Statement of Facts and relating in any way to the Office's investigation."[8]

The cooperation provisions of the DPA thus require KPMG to comply with demands by the USAO in connection with this prosecution.

B. The Indictment

Only days before the filing of the information against KPMG and the DPA, the government indicted a number of individual defendants including several by-then former partners of KPMG. The superseding indictment, which in general terms follows the original, albeit naming more defendants and asserting more charges, contains forty-six counts.

Count One (the "Conspiracy Count") charges all defendants with conspiracy to defraud the IRS by designing, marketing, and implementing fraudulent tax shelters for wealthy individual clients and deliberately concealing those shelters from the IRS. KPMG is named as an unindicted coconspirator. The scheme allegedly involved at least four separate tax shelter vehicles, called FLIP, OPIS, BLIPS, and SOS, designed to generate phony tax losses through a series of sham transactions. The conspirators allegedly sought to protect their clients from potential IRS penalties by paying co-defendant Raymond Ruble, a New York tax attorney, to issue opinion letters falsely representing that the tax shelters were likely to survive IRS review. Count One charges also that the participants conspired to conceal the fraudulent tax shelters from the IRS by, among other things, preparing tax returns that concealed the phony tax losses, obstructing IRS and Senate investigations into the shelters, and failing to register the shelters with the IRS.[9]

Counts Two through Forty (the "Tax Evasion Counts") charge all defendants with tax evasion based on the
355 tax returns of approximately twenty-five different tax *355 shelter clients and defendants.[10]

Counts Forty-one through Forty-four charge defendant Ruble with evading taxes on income related to the alleged scheme, including payments he received from nominee entities controlled by John Larson and Robert Pfaff in exchange for fraudulent opinion letters included in Count One. Two of these counts name defendants Larson and Pfaff as well.[11]

Finally, Counts Forty-five and Forty-six charge certain defendants with obstructing the IRS investigation of the tax shelters.[12]

C. The Subpoena

In November 2006, the defendants applied for a subpoena pursuant to Rule 17(c) requiring KPMG to produce documents that may be organized in three groups:

> 1. Documents relating to expert opinions prepared by or for KPMG during the period January 1, 1996 to date concerning the legality or propriety of any aspect of the tax shelters here at issue as well as documents prepared by counsel retained by KPMG that discuss or relate to any defendant or any of the events set forth in the indictment.[13]
>
> 2. Documents relating to communications between KPMG and the government regarding the production of documents; waiver of the attorney-client privilege, or the tax shelters and events here at issue, including privilege logs.[14]
>
> 3. Copies of certain KPMG manuals, calendars kept by or for all but three of the defendants, and deposition transcripts from litigation relating to the tax shelters at issue here in which KPMG was a party.[15]

The government opposed issuance of the subpoena, arguing among other things that the specifications in the first two groups were insufficiently specific and that they did not seek evidentiary material.[16] While it did not object to production of the third group, it maintained that there was no need to issue a subpoena to KPMG because the government would "promptly request these materials from KPMG and provide them to the defense."[17] This of course was a tacit acknowledgment — which subsequently has been made explicit — that the government has the legal right to require KPMG to produce documents for the purpose of enabling the government to disclose them to the defense.

At argument, the Court noted that KPMG would be likely to seek to quash the subpoena if it were issued and suggested that it might make more sense to issue the subpoena without prejudice to the government's arguments and then to hear the government's substantive objections at the same time as KPMG's anticipated motion to quash. The government agreed.[18]

Following service of the subpoena, KPMG and the defendants reached agreement with respect to the third group of documents and certain documents in the *356 first two groups.[19] On January 22, 2007, however, KPMG moved to quash the subpoena insofar as it sought production of certain of the documents in the first two requested groups. In briefest outline, it contends that some or all of the requested documents are privileged, that compliance would be unduly burdensome, and that the defendants have failed to meet the standard articulated in *United States v. Nixon*,[20] which it contends controls here.

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In advance of oral argument, the Court invited the parties to address the questions (a) whether the subpoenaed documents would be discoverable under Rule 16(a)(1)(E)(i) if they were in the physical possession of the prosecution team, (b) whether they are within the government's "possession, custody or control" within the meaning of that rule by virtue of the DPA or otherwise, and (c) assuming that these conditions were met, whether the standard of Rule 16(a)(1)(E)(i) rather than that of *United States v. Nixon* should control determination of KPMG's motion to quash.[21]

At oral argument, the Court inquired whether the defendants were seeking an order, pursuant to Rule 16, compelling the government to produce the documents that are the subject of the subpoena to KPMG. They answered affirmatively. The Court then inquired whether there was any objection to treating the defendants as having made that motion. The government stated that it had no objection.[22]

Following the argument, the Court directed KPMG to submit any evidence and argument it wished "on the issue whether the documents described by the subpoena are within the government's control and whether KPMG is obliged to produce them to the government, either voluntarily or upon request."[23] KPMG responded with a memorandum of law but submitted no evidence.

While the motion was under consideration, the defendants and KPMG reached agreement with respect to all aspects of the subpoena save Specification 6, and KPMG withdrew the motion to quash except as to that item.[24]

II

The Court begins with the defendants' motion to compel the government to produce the documents described by Specification 6 of the subpoena served upon KPMG. This raises essentially two questions: whether the documents are "material to the preparation of the defense" and, to whatever extent they are, whether they are within the government's "possession, custody or control."

A. Materiality

The "materiality standard [of Rule 16] normally is not a heavy burden; rather, evidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding
357 witness preparation, corroborating *357 testimony, or assisting impeachment or rebuttal."[25] "Evidence that the government does not intend to use in its case in chief is material if it could be used to counter the government's case or to bolster a defense."[26] "There must be some indication that the pretrial disclosure of the disputed evidence would . . . enable[] the defendant significantly to alter the quantum of proof in his favor."[27] With this in mind, the Court turns to the disputed specification of the subpoena which, as noted above, describes also the documents sought under Rule 16 from the government.

Specification 6 seeks:

> All documents relating to communications between KPMG or its outside counsel and the United States Attorney's Office for the Southern District of New York, the United States Department of Justice, the United States Internal Revenue Service or the United States Senate relating to FLIP, OPIS, BLIPS and SOS and any of the events alleged in the Superseding Indictment, including, but not limited to, correspondence and drafts of the Deferred Prosecution Agreement and any submissions made by KPMG to the United States Attorney's Office for the Southern District of New York, the. United States Department of Justice, the United States Internal Revenue Service, or the United States Senate.

Thus, the principal categories of documents sought include:

> (1) Correspondence between KPMG and both the Senate subcommittee and the IRS. In this case, KPMG undoubtedly has copies of the documents, whereas the likelihood that the USAO

also has copies is unclear.

(2) Correspondence between KPMG and the USAO and the Justice Department. This includes a so-called White Paper and appendices, in which KPMG argued that the firm should not be indicted, and almost certainly drafts of the Statement of Facts, but may include also letters and e-mails relating to the underlying facts, KPMG's cooperation with the USAO's investigation, and related matters. Both KPMG and the prosecution team doubtless have copies of all of these materials.

(3) Documents *relating to* communications between KPMG, on the one hand, and the USAO, the Justice Department, the Senate subcommittee and the IRS on the other.[28] These probably include memoranda concerning meetings and telephone conversations, but, may well include other materials as well. In contrast to the documents described in (1) and (2) above, materials in this category probably are internal in nature. In other words, neither KPMG nor the government is likely to have copies of the internal materials of the other.

358 *358 *1. Correspondence Between KPMG and the IRS and the Senate Subcommittee*

Category 1 is the easiest to resolve. The indictment charges the defendants with participation, along with KPMG, in a conspiracy to conceal the allegedly fraudulent tax shelters from the IRS and obstructing IRS and Senate investigations. In the circumstances, correspondence between KPMG on the one hand and the IRS or the Senate on the other is likely to "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal."[29] In consequence, these documents are material to the preparation of the defense.

2. Correspondence Between KPMG and the USAO and Justice Department

Category 2 presents a marginally more difficult question. The government argues that disclosure of communications between a subject of an investigation and the prosecution in the course of negotiating a plea or other disposition could affect the manner in which such negotiations are conducted.[30] But this point cannot be taken too far. For one thing, statements made during plea negotiations routinely are disclosed in criminal trials of other defendants in a variety of contexts.[31] For another, the government is required by the Constitution to disclose exculpatory evidence regardless of whether it obtained that evidence in the course of plea negotiations.[32] So there is no blanket foreclosure of discovery of communications made during plea negotiations. The question again comes down to whether there is any real "indication that the pretrial disclosure of the disputed evidence would . . . enable[] the defendant[s] significantly to alter the quantum of proof in [their] favor."[33]

(a) The White Paper

359 Perhaps the defendants' principal focus in this category is the White Paper, which *359 they suppose may discuss facts that would supply leads helpful to them in developing their cases or, at least, lead to information useful for the cross-examination of various government witnesses. They are especially interested in a section entitled "KPMG Did Not Corruptly Obstruct The Investigations By The IRS Or The Senate Permanent Subcommittee On Investigations" (the "Obstruction Section").[34]

The Court has reviewed the White Paper and appendices *in camera.* In the main, they are not material to the preparation of the defense. The Obstruction Section, however, does contain KPMG's explanation of three incidents that appear to be at the heart of the obstruction claims in the present indictment. In one instance, KPMG attributed a failure to produce certain documents to confusion on the part of KPMG personnel responsible for responding to an IRS summons. In another, it sought to shift responsibility for an allegedly misleading statement by a KPMG attorney to a KPMG partner who allegedly relied in turn upon a statement by a defendant in this case. In short, the Obstruction Section of the White Paper is material.

(b) Drafts of the Statement of Facts

The Statement of Facts that was filed publicly with the DPA was not the first draft, but the culmination of a negotiation between KPMG and the USAO. Disclosure of the give and take as to what KPMG was prepared to admit and what the government unsuccessfully sought is likely to shed light on matters at issue in this case. Disclosure therefore is likely to "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal."[35]

(c) Other Communications

For reasons explained above, other communications (i.e., communications other than the White Paper and drafts of the Statement of Facts) between KPMG and the USAO and the Department of Justice that relate to the facts at issue in this indictment plainly are material to the defense. To the extent that this category sweeps more broadly, however, the Court is unpersuaded that it seeks material disclosure.

3. Documents Relating to the Foregoing Communications

As indicated above, Category 3 is the broadest, seeking to catch in its net internal documents relating to communications between KPMG on the one hand and the various relevant government entities on the other. It would require production, of memoranda of telephone conversations and other communications between KPMG and government entities. But it would apply also to such matters as internal discussions about how to respond to positions taken by the government, what offers might be made, and a host of other matters bearing little or no necessary relationship to the facts at issue in this case.

As an initial matter, defendants are not entitled to "internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case" regardless of whether they otherwise would be material.[36] Hence, the only aspect of Category 3 that is in play is internal KPMG documents.

360 *360 Insofar as Category 3 seeks production of documents (i) summarizing or recording the substance of communications between KPMG and government agencies that relate to the facts at issue in this indictment, or (ii) discussing evidence bearing on the accuracy of the Statement of Facts or any admissions sought by the government, Category 3 seeks information material to the preparation of the defense for the reasons already given. The Court is not satisfied, however, that Category 3 seeks material information to the extent it would sweep more broadly.

*** * ***

In sum, the Court finds that part but by no means all of Specification 6 seeks information material to the preparation of the defense. For the most part, the material documents are in the possession of the USAO and, in some cases, also in KPMG's possession. To a very limited extent, they apparently are in the exclusive possession of KPMG.

B. Possession, Custody or Control

1. The Legal Standard

Rule 16(a)(1)(E) provides in relevant part that the government, upon request, must permit a defendant to inspect and copy an item material to the preparation of the defense "if the item is within the government's possession, custody or control."[37] In consequence, the next question is whether documents in the hands of KPMG and/or its counsel and agents are within the "possession, custody or control" of the government within the meaning of Rule 16.

The government takes the position that the DPA gives it the unqualified right to demand from KPMG the production of any documents within KPMG's control except to the extent that such documents (a) are privileged, and (b) fall within the limited carve-out from KPMG's waiver of privilege that appears in paragraph 8(e)(I) of the DPA.[38] Indeed, as the Court has noted, the government originally resisted the, issuance of a Rule 17(c) subpoena to KPMG in part on the ground that a subpoena was not necessary for certain of the requested materials because the government would "promptly request these materials from KPMG and provide them to the defense."[39] Nevertheless, both the government[40] and KPMG[41] argue that the DPA does not give the government "possession, custody or control" of documents that are within the hands of KPMG and its agents. This position is untenable.

The phrase "possession, custody or control" has a venerable history in the federal rules of procedure. It first appeared in 1938 in the original version of Civil Rule 34, which provided for discovery in civil cases of documents in the "possession, custody, or control" of any party.[42] As adopted in 1945, Criminal Rule 16 did not use the phrase, but it was incorporated by the 1966 amendments into the predecessor of current Rule 16(a)(1)(E), which permitted discovery from the government, upon motion, of documents "within the
361 possession, custody or control of the government" upon a showing of materiality to the *361 preparation of the defense.[43] The 1991 revision of Civil Rule 45, which governs subpoenas, also adopted the term, using it in Rule 45(a)(1)(C).

There is no hint in the history of these rules that the meaning of the phrase differs depending upon which rule is in question. To the contrary, the phrase in each case defines in identical language the extent of the obligation of a party subject to a duty to produce evidence to respond. Common sense, not to mention settled principles of construction, suggests a uniform construction.[44] Hence, case law under all of the relevant rules is equally instructive.

One noted commentator aptly summarized the scope of the obligation:

> "Legal ownership of the requested documents or things is not determinative, nor is actual possession necessary if the party has control of the items. *Control* has been defined to include the legal right to obtain the documents requested upon demand.' The term `Control' is broadly construed."[45]

These principles have been applied in a wide variety of situations. Parent corporations have been compelled to produce documents in the hands of subsidiaries, subsidiaries documents in the hands of their parent entities, corporations documents in the hands of employees, clients documents in the hands of attorneys, corporate officers and directors documents in" the hands of their corporations, and patients documents in the hands of health care providers.[46] Indeed, the principles have been applied even where the legal relationship arguably was less compelling. In *In re NTL Securities Litigation,*[47] a corporate
362 defendant was sanctioned for failing to produce documents that were in *362 the hands of another company where the possessor was under a contractual obligation to provide the documents to the defendant.[48] And in *In re Auction Houses Antitrust Litigation,*[49] a corporation was ordered under an analogous portion of Civil Rule 33 to answer interrogatories calling for information in the hands of its former chief executive officer where the former officer had contracted to provide the company with such information as it might request in exchange for substantial severance payments that had not all been made.

While there have been few criminal cases dealing with the meaning of "possession, custody or control," they are, not surprisingly, to the same effect. In *United States v. Kilroy,*[50] for example, the defendant, a former employee of Standard Oil charged with interstate transportation of stolen securities, sought discovery from the government under Rule 16 of certain bank records that were in the hands of his former employer. The government resisted. In light of the fact that Standard Oil was cooperating with the government, however, the court ruled for the defendant. It wrote:

> "I see no objection to an order requiring the Government, as the defendant asks, to use its `best efforts' to obtain from Standard Oil all of the documents in its possession which came out of the defendant's former office. The Government has 30 days to try to obtain the records. Standard Oil is admittedly not a party to this suit and has no obligation to turn over any of its records to the defendant or to the Government except at trial pursuant to a valid subpoena. Since Standard Oil is cooperating with the Government in the preparation of the case and is making available to the Government for retention in the Government's files any records which Standard Oil has and which the Government wants, however, it is not unreasonable to treat the records as being within the Government's control at least to the extent of requiring the Government to request the records on the defendant's behalf and to include them in its files for the defendant's review if Standard Oil agrees to make them available to the Government. The alternative course is to require the defendant to subpoena the records for production at trial and, at the time of production, to grant him a recess adequate to allow him to thoroughly review the records. I see no need for disruption of the trial in that manner when it appears that the records are, practically speaking, within the Government's control."[51]

2. The Arguments of KPMG and the Government

Given the terms of the DPA and the government's admission that it has the unqualified right to demand production by KPMG of any documents it wishes for purposes of this case, subject to the limited privilege carve-out of paragraph 8(e)(I), the requested documents, to the extent the Court has found them material to preparing the defense, appear to be within the possession, custody or control of the government. Nevertheless, both KPMG and the government resist this conclusion, albeit on different bases.

363 *363 KPMG makes two arguments. It contends first that the government does not have "Rule 16 control over documents that are not in its physical possession — whether or not the government may assert a claim to the documents pursuant to Paragraph 8 of the DPA."[52] It contends also that the DPA simply

vested discretion in the government to request documents from KPMG, leaving this Court unable to compel the government to make such a request. Neither of these arguments is persuasive.

The first argument cannot be reconciled with the plain language of Rule 16. The rule speaks of "possession, custody or control," not simply "possession." KPMG's argument would read the words "custody or control" out of the rule in flat contravention of the principle that all words in a statute, rule or contract are to be given meaning whenever possible.[53] It therefore is not surprising that every circuit to have considered the question has held that "control" under the federal rules of procedure includes the legal right to obtain the documents in question.

Here, the DPA gives the government the legal right to obtain these documents subject to the limited carve-out set forth in paragraph 8(e)(I). Despite having been afforded the opportunity to do so, KPMG has offered no evidence that the DPA does not mean precisely what it says. The cases it relies upon are not even remotely in point.[54]

Nor does KPMG's other argument carry the day. The rule requires that the government produce all documents material to preparing the defense that are within its possession, custody or control. The text affords the government no greater discretion in determining whether to ask KPMG for the documents than it would have if the documents were in the hands of an Assistant United States Attorney. Once control is established, the obligation exists.

The government too resists the conclusion that the documents that KPMG is obliged by the DPA to produce upon *request* are within the government's control. It asserts that language obligating entities with which the government enters into non-prosecution or deferred prosecution agreements to produce documents upon the government's request "is standard" and that the implications of holding that such language places the documents in the government's control would be "untenable."[55] *364 Although the government has provided no such evidence, the Court assumes that such provisions have become common in non-prosecution and deferred prosecution agreements. But the government has offered no reason whatever to justify a conclusion that finding documents that parties to such agreements are legally obliged to supply the government upon request to be within the government's control would be either "untenable" or undesirable. The plain language of Rule 16 makes clear that documents material to the defense that are within the government's control are producible. That the government has begun making broad use of agreements of this sort only in comparatively recent years or that it might regard compliance with the rule in such cases to be inconvenient warrants no different conclusion. If it is uncomfortable with the consequences of such provisions, it need not insist upon them in future cases.

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Accordingly, the Court finds that the requested documents, to the extent set forth above, are in the possession, custody or control of the government subject only to the paragraph 8(e)(I) carve-out. As the Court concludes below, in the discussion of KPMG's privilege objection to the Rule 17(c) subpoena, that KPMG has failed to establish any privilege or, work product protection, all responsive documents are within the government's control. The government therefore will be directed to produce them pursuant to Rule 16. Moreover, as KPMG is before the Court and has had a full opportunity to be heard, it too will be so directed.

III

The Court turns now to KPMG's motion to quash the Rule 17(c) subpoena served upon it. It deals first with the scope of the documents available under the Rule and then turns to KPMG's privilege and burden

arguments.

A. The Scope of Rule 17(c) in the Present Context

Rule 17(c) provides:

> "(c) Producing Documents and Objects.
>
> "(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.
>
> "(2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

On the face of it, the Rule appears to permit, subject to the court's discretion, the use of compulsory process to obtain pretrial disclosure in criminal cases provided only that compliance with a subpoena not be unreasonable or oppressive. In *United States v. Nixon*,[56] a case involving a subpoena issued on motion of the government, however, the Supreme Court made clear that the Rule is not so capacious, at least as respects pretrial disclosure:

> "[I]n order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably
365 in advance of trial by exercise of due diligence; (3) *365 that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general `fishing expedition.'"[57]

KPMG and the government contend that *Nixon* supplies the controlling rule with respect to the subpoena to KPMG. They argue that the defendants are on a "general `fishing expedition,'" that the documents sought have not been described specifically, and that the materials sought are neither evidentiary nor relevant. Defendants argue also that *Nixon* is not the proper standard and, in any case, that they have satisfied its requirements.

The Court begins with the applicable standard. There is no question that courts confronted with subpoenas in criminal cases, at least subpoenas seeking pretrial production, have applied *Nixon* almost without exception. The Court has done so itself.[58] But it is vitally important never to let the frequent repetition of a familiar principle obscure its origins and thus lead to mindless application in circumstances to which the principle never was intended to apply. That is what both KPMG and the government seek here. But *Nixon* should not so readily be divorced from the concerns that produced it.

The Federal Rules of Criminal Procedure became effective in 1946. Rule 16 created only a narrow right of pretrial discovery from the government. Rule 17 provided for the issuance of subpoenas requiring pretrial production without specifying the circumstances in which such pretrial disclosure might be appropriate subject only to the ability of the court to quash subpoenas if compliance would be unreasonable or oppressive. The question quickly arose whether the seemingly generous availability of Rule 17 subpoenas returnable before trial would trump Rule 16's limitations on pretrial disclosure from the government.

In *Bowman Dairy Co. v. United States,*[59] the Supreme Court, unsurprisingly, held that Rule 17 must be read in light of Rule 16:

> "It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provided for the usual subpoena ad testificandum and duces tecum, which may be issued by the clerk, with the provision that the court may direct the materials designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials."[60]

Bowman was followed swiftly by *United States v. Iozia.*[61] Judge Weinfeld there held that a Rule 17(c) subpoena returnable before trial requires good cause and that good cause requires a showing:

> "(1) That the documents are evidentiary and relevant; (2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the *366 exercise of due diligence; (3) That the defendant cannot properly prepare for trial without such, production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; [and] (4) That the application is made in good faith and is not intended as a general fishing expedition."[62]

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Nixon adopted Judge Weinfeld's test.

The significance of this is plain. The *Bowman-Iozia-Nixon* standard exists to reconcile the broad language of Rule 17(c) with the limitations on pretrial discovery inherent in the far narrower language of Rule 16. In other words, its function is to prevent the "exception" (i.e., the broad language of Rule 17(c)) from swallowing the "rule" (i.e., the Rule 16 limitations on the discovery available to criminal defendants). Here, however, no reconciliation of Rules 16 and 17(c) is necessary to the extent that the documents defendants seek are material to the preparation of their defense. *Nixon* therefore does not even address, much less resolve, the issue of the appropriate standard where a Rule 17(c) subpoena is sought to compel production by a person in physical possession of materials that are within the legal control of the government and to which defendants have a right under Rule 16(a)(1)(E).

KPMG nevertheless argues that *Nixon* should be applied here to quash to the subpoena and thus to rely only upon a demand by the government that KPMG give the documents to it so that the government may produce them to the defendants. But its argument is unpersuasive.

First, as the foregoing discussion shows, there is no reason to limit the plain language of Rule 17(c) where, as here, there is no conflict between the limited discovery afforded by Rule 16 and the broad words of Rule 17(c). The text of Rule 17(c) alone strongly suggests the conclusion that the subpoena should be enforced unless compliance would be unreasonable or oppressive. No rational purpose would be advanced by going through the charade of ordering the government to request the documents from KPMG so that the government may turn them over to the defendants.

Second, the Court cannot imagine any proper reason for KPMG to insist on applying the *Nixon* criteria even to documents producible under Rule 16(a)(1)(E). True, it perhaps is conceivable that the government, if the subpoena were quashed, would decide, notwithstanding its legal obligations and its previous statements, not to insist that KPMG produce the documents to it under the DPA. But no one has suggested any

legitimate basis for the government to make such a decision. To the contrary, the government already has offered to make the request, at least with respect to certain of the specifications. So KPMG must have in mind refusing to comply and thus forcing the government to sue it to enforce KPMG's obligations under the DPA — a course that would do nothing save, perhaps, stalling a final resolution and perhaps the trial of this case indefinitely. KPMG should not be permitted to employ empty formalisms that contribute nothing to a just, speedy and economical resolution of this matter on the merits.

Finally, and perhaps most importantly, KPMG has had a full and fair opportunity to litigate any claim that it is not obliged to produce to the government the documents that the Court has found to be material to the
367 defense. Its arguments have been rejected. There is no proper *367 reason to permit it to attempt to revisit this ground in another forum.

The Court therefore applies Rule 16's standard and declines to quash the subpoena to the extent it seeks documents that it has held are material to the preparation of the defense and within the possession, custody or control of the government.

B. The Privilege Claim

KPMG's motion to quash makes broad, unspecific and unsubstantiated claims of attorney-client privilege and work product protection. These claims are pertinent both to its motion to quash the Rule 17(c) subpoena and to its contention that documents in its physical possession that are within the government's legal control by virtue of the DPA nevertheless are beyond the government's authority under paragraph 8(e)(I).[63]

"The broad outlines of the attorney-client privilege are clear: `(1) where legal advice of any kind is sought (2) from a professional legal advisor 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 advisor, (8) except the protection be waived.'"[64]

As an initial matter, the Category 1 and 2 documents were not communications between attorney"and client, were not intended to be and were not in fact kept confidential by KPMG, and were not made for the purpose of obtaining or rendering legal advice. They were parts of exchanges with the government. They never were privileged.[65]

Category 3 documents in KPMG's hands in theory might have been privileged or contained protected work product. It is well settled, however, that "[t]he burden of establishing the existence of an attorneyclient privilege, *in all of its elements,* rests with the party asserting it.[66] Thus, KPMG had the burden of
368 identifying the documents as to which it claims privilege *368 and, with respect to each, demonstrating "that [it] was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice."[67] "That burden cannot be met by `mere conclusory or ipse dixit assertions' in unsworn motion papers authored by attorneys."[68] Work product claims are subject to similar principles.[69]

KPMG has offered no evidence that any Category 3 documents were confidential attorney-client communications or attorney work product in inception, let alone that they have remained confidential. Accordingly, KPMG has failed to carry its burden of demonstrating that the materials in question are protected.[70]

C. Alleged Burden

KPMG's motion sought to quash Specifications 1 through 6 of the subpoena on the ground that compliance would be unduly burdensome. It is unclear to what extent this objection was directed to Specification 6 alone,[71] and it could not have been directed to the narrow subset of the documents sought by Specification 6 that the Court has found to be material. In any event, it is unpersuasive.

A person or entity served with a subpoena or discovery request:

> "cannot evade its discovery responsibilities by simply intoning this familiar litany that the [disclosure sought would be] burdensome, oppressive or overly broad. In *Roesberg* [*v. Johns-Manville Corp.,* 85 F.R.D. 292, 296-97 (E.D.Pa.1980)], the Court articulated defendant's burden:
>
> "`Defendant must show specifically how, despite the broad and liberal construction afforded the federal discovery rules, each [request] is not relevant or how each question is overly broad, burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.'"[72]

369 *369 KPMG's entire showing on the issue of burden consists of a declaration of counsel that states that KPMG has been named in numerous civil suits regarding these tax shelters and that an initial survey of its outside counsel indicated that those counsel "possess over 1000 boxes of documents as well as numerous gigabytes of electronic data potentially responsive to the Subpoena requests."[73] In consequence, the declaration submitted on KPMG's behalf was not sufficient to establish the extent of the burden that would be required to comply with the subpoena. Moreover, the matters at issue now have been dramatically reduced because KPMG has withdrawn the motion as to all specifications save Specification 6, and the Court has narrowed Specification 6 substantially. There is simply no basis upon which to conclude that compliance with Specification 6, as modified, would be burdensome save that it would make little sense to require KPMG to produce Category 2 documents absent some reason to believe that the government does not have or will not produce all of them to the extent the Court has found production required.

IV

Accordingly, the defendants' motion for an order, pursuant to FED.R.CRIM.P. 16(a)(1)(E), directing the government to produce the materials described in the subpoena directed to KPMG is granted to the extent that the government, on or before May 11, 2007, shall produce to defendants the following documents in its possession, custody or control, including such documents as are in the physical possession of KPMG:

> 1. Correspondence between KPMG on the one hand and the IRS or the Senate relating to FLIP, OPIS, BLIPS, SOS and any of the events alleged in the superseding indictment.
>
> 2. The Obstruction Section (as defined above) of the KPMG White Paper.
>
> 3. All drafts of the DPA Statement of Facts.
>
> 4 Communications between KPMG and the USAO and Department of Justice relating to FLIP, OPIS, BLIPS, SOS and any of the events alleged in the superseding indictment.

5. Documents prepared by KPMG or its counsel (i) summarizing or recording in any way the substance of communications between KPMG on the one hand and the USAO, the Department of Justice, the IRS, or the Senate on the other that relate to the events alleged in the superseding indictment, or (ii) discussing evidence bearing on the accuracy of the Statement of Facts or any admissions sought by the government.

The motion is denied in all other respects. As these documents are within the physical possession of KPMG but also within the legal control of the government, and as KPMG is before the Court and has had a full opportunity to be heard on the question whether it is obliged to produce them pursuant to the DPA, KPMG shall produce the documents described by paragraphs 1 and 5 to defendants and the government on or before May 11, 2007. Inasmuch as the documents described by paragraphs 2 through 4 are in the physical possession of the government, there appears to be no need to require KPMG also to produce them.

370 KPMG's motion to quash the subpoena [docket item 856] is withdrawn insofar as it *370 seeks to quash Specifications 1 through 5. Insofar as the motion to quash is directed to Specification 6, it is granted except insofar as Specification 6 seeks production of the documents described in paragraphs 1 and 5 above. KPMG shall produce all documents described in paragraphs 1 and 5 to the defendants and the government on or before May 11, 2007.

SO ORDERED.

[1] *United States v. KPMG LLP*, 316 F.Supp.2d 30, 31-32 (D.D.C.2004).

It appears, in addition, that the IRS was conducting a penalty promoter audit of KPMG. Tr., May 9, 2006 [docket item 503], (Neiman) 270:8-11.

[2] STAFF OF THE PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, THE ROLE OF PROF'L FIRMS IN THE U.S. TAX SHELTER INDUS. 1 (Comm. Print 2005) ("SENATE REPORT").

[3] *Id.* at 1-2.

[4] *United States v. Stein*, 435 F.Supp.2d 330, 338-39 (S.D.N.Y.2006) ("*Stein I*").

[5] *Id.* at 339, 344-49.

[6] *United States v. KPMG LLP*, 05 Crim. 0903(LAP), docket item 4 (filed Aug. 29, 2005).

[7] Pursuant to this agreement, the government sought and Judge Preska granted an order of *noelle prosequi* as to the information on January 3, 2007. *Id.,* docket item 8.

[8] DPA ¶¶ 7-9 (emphasis added).

[9] Ind. ¶¶ 1-78.

[10] *Id.* ¶¶ 79-80.

[11] *Id.* ¶¶ 81-83.

[12] *Id.* ¶¶ 84-85.

[13] Stillman Decl. (1/22/07) [docket item 858], Ex. A at 3, Specifications 1-3.

[14] *Id.* at 4, Specifications 4-6.

[15] *Id.* at 4-5, Specifications 7-9.

[16] Govt. Mem. [docket item 825] 1.

[17] *Id.* at 1, 22-23.

[18] Tr., Nov. 21, 2006 [docket item 845], 37-38.

[19] Stillman Decl. (1/22/07) [docket item 858], Exs. C, E.

[20] 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

[21] Order, Mar. 9, 2007 [docket item 886].

[22] While KPMG said that it objected, it probably lacks standing to object to the procedural mechanism adopted for bringing on a motion seeking relief only against the government. In any case, KPMG was afforded a full opportunity to submit evidence and argument. Order, Mar. 20, 2007 [docket item 898].

[23] *Id.*

[24] KPMG asserts that it has produced some, but not all, documents responsive to this request. KPMG Mem. (4/5/07) [docket item 909] 13. Since KPMG's production thus far is incomplete, the Court will address the obligations of the government and KPMG to produce all documents in this specification.

[25] *United States v. Lloyd,* 992 F.2d 348, 351 (D.C.Cir.1993) (internal quotations marks and citations omitted).

[26] *United States v. Stevens,* 985 F.2d 1175, 1180 (2d Cir.1993).

[27] *United States v. Maniktala,* 934 F.2d 25, 28 (2d Cir.1991) (quoting *United States v. Ross,* 511 F.2d 757, 762-63 (5th Cir.) (citations omitted), *cert. denied,* 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975)).

[28] Although KPMG initially asserted its understanding that the defendants did not seek documents in this category, *see* KPMG Mem. (1/22/07) [docket item 857] 18-19; Tr., Mar. 12, 2007 [docket item 903], 49, it recently stated that this initial belief was mistaken. Ltr., Charles A. Stillman, Apr. 26, 2007. Defendants have confirmed that they seek these documents. Ltr., Robert H. Hotz, Jr., Apr. 25, 2007.

[29] *Lloyd,* 992 F.2d at 351,

[30] Tr., Mar. 12, 2007 [docket item 903], 98-99.

The government, however, candidly admits that statements made by one prospective defendant in the course of settlement negotiations are not rendered inadmissible upon the offer by another under the terms of FED. R.EVID. 410. *Id.* at 99.

[31] When, for example, one of a number of defendants pleads guilty and testifies against others who stand trial, those who stand trial are entitled under the Jencks Act, 18 U.S.C. § 3500, to the minutes of the plea allocution and any written statement made or adopted by the witness. Similarly, law enforcement officers' notes and memoranda of statements made during proffer sessions routinely are produced when the officers take the stand. There may well be other examples.

[32] *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."); *see also California v, Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (due process requires "[t]he prosecution [to] reveal the contents of plea agreements with key government witnesses") (citing *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)); *Giglio v. United States,* 405 U.S. at 151, 155, 92 S.Ct. 763 (due process violation where government "failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government"); *cf. United States v. Paulino,* 445 F.3d 211, 224-25 (2d Cir.2006) (no *Brady* violation for failure to disclose third party's allegedly exculpatory plea discussions because plea discussions not exculpatory and defendant knew relevant facts).

[33] *United States v. Maniktala,* 934 F.2d at 28 (quoting *United States v. Ross,* 511 F.2d at 762-63).

[34] They are aware of this section by virtue of disclosure to them earlier in this litigation of the document's table of contents.

[35] *Lloyd,* 992 F.2d at 351.

[36] FED.R.CRIM.P. 16(a)(2).

[37] FED.R.CRIM.P. 16(a)(1)(E).

[38] Tr., Mar. 12, 2007 [docket item 903], 65.

[39] Govt. Mem. [docket item 825] 1, 22-23.

[40] Tr., Mar. 12, 2007 [docket item 903], 95-96.

[41] KPMG Mem. (4/5/07) [docket item 909] 14-17.

[42] FED.R.CIV.P. 34, 308 U.S. 707 (1939) (amended 1946).

[43] FED.R.CRIM P. 16(b), 383 U.S. 1098 (1965) (amended 1974).

[44] *E.g.,* *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 (S.D.N.Y.1992); *United States v. Skeddle*, 176 F.R.D. 258, 261 n. 5 (N.D.Ohio 1997).

[45] 7 MOORE'S FEDERAL PRACTICE § 34.14[2][b], at 34-63 to 34-64 (3d ed.2006), (footnotes omitted); *accord* *Gerling Int'l Ins. Co. v. CIR*, 839 F.2d 131, 140 (3d Cir.1988) (quoting 8 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 2210) (control includes "the legal right to obtain the documents required on demand"); *In re Citric Acid Litig.*, 191 F.3d 1090, 1107-08 (9th Cir.1999) (same); *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229-30 (Fed.Cir. 1996) (same); *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir.1995) (same); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir.1993) (same); *United States v. Int'l Union of Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir.1989) (same); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir.1984) ("Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand."); *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471 (S.D.N.Y.2000) (control is "the legal right, authority, or practical ability to obtain the materials sought upon demand"); *Florentia Contracting Corp. v. Resolution Trust Corp.*, No. 92 Civ. 1188(PKL), 1993 WL 127187, at *3 (S.D.N.Y. Apr.22, 1993) (same).

[46] *See, e.g.,* *Dietrich v. Bauer*, No. 95 Civ. 7051(RWS), 2000 WL 1171132, at *3-4 (S.D.N.Y. Aug.16, 2000) (parent/subsidiary), *clarified on reconsideration,* 198 F.R.D. 397, 401-01 (S.D.N.Y.2001); *Ferber v. Sharp Flees. Corp.,* No. 84 Civ. 3105(RO)(MHD), 1984 WL 912479 (S.D.N.Y. Nov 28, 1984) (Dolinger, M.J.) (subsidiary/parent); *Herbst v. Able*, 63 F.R.D. 135, 138 (S.D.N.Y.1972) (corporation/employee); *CSI Inv. Partners II, L.P. v. Cendant Corp.,* No. 00 Civ. 1422(DAB)(DFE), 2006 WL 617983, at *6 (S.D.N.Y. Mar. 13, 2006) (Eaton, M.J.) (client/attorney); *United States v. Int'l Bus. Machs. Corp.*, 71 F.R.D. 88, 91 (S.D.N.Y.1976) (officer/corporation); *Schwartz v. Travelers Ins. Co.*, 17 F.R.D. 330 (S.D.N.Y.1954) (patient/doctor).

[47] Nos. 02 Civ. 3013(LAK)(AJP), 7377(LAK)(AJP), 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007) (Peck, M.J.).

[48] *Id.* at *16-17.

[49] 196 F.R.D. 444 (S.D.N.Y.2000).

[50] 523 F.Supp. 206 (E.D.Wis.1981).

[51] *Id.* at 215.

See also *United States v. Skeddle*, 176 F.R.D. at 261-62 (government required to obtain documents previously made available to prosecutors, but returned by them, from company possessing them and produce documents to defendant).

[52] KPMG Mem. (4/5/07) [docket item 909] 14.

[53] *See* *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted).

[54] *United States v. Fort*, 472 F.3d 1106 (9th Cir.2007), held only that investigative records in the hands of state law enforcement authorities are not within the possession, custody or control of federal prosecutors. While both *United States v. Adkins*, 741 F.2d 744 (5th Cir.1984), and *United States v. Matthews*, 20 F.3d 538 (2d Cir.1994), contain language that, read out of context, might suggest that the government's Rule 16 obligations are limited to documents in its physical possession or the physical possession of a government agent, neither dealt with a situation in which the government had the legal right to require the production of materials. Neither, therefore, concerned the proper construction of the word "control" in Rule 16, which is the pertinent issue here. And *United States v. Finnerty*, 411 F.Supp.2d 428 (S.D.N.Y.2006), held only that there was no possession, custody, or control because the New York Stock Exchange is not a government agency and was not involved in a joint investigation with federal prosecutors. The court noted specifically, in fact, that the NYSE had refused some of the government's requests for documents. *Id.* at 433.

[55] Tr., Mar. 12, 2007 [docket item 903], 95-96.

[56] 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

[57] *Id.* at 699-700, 94 S.Ct. 3090 (footnote omitted).

[58] *See, e.g.,* *United States v. Scala*, 439 F.Supp.2d 278 (S.D.N.Y.2006) (Kaplan, J.).

[59] 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879 (1951).

[60] *Id.* at 220, 71 S.Ct. 675.

[61] 13 F.R.D. 335 (S.D.N.Y.1952).

[62] *Id.* at 338.

[63] At oral argument, counsel for KPMG quoted *United States v. Nachamie*, 91 F.Supp.2d 552, 564 (S.D.N.Y.2000), for the proposition that communications between the government and a third party about whether the government will bring charges against the third party are not discoverable because they may be protected by work product privilege. Tr., Mar. 12, 2007 [docket item 903], 106. *Nachamie,* however, was applying the *Nixon* standard to a Rule 17(c) subpoena. Rule 16 contains its own exception for materials protected by work product privilege, FED. R.CRIM.P. 16(a)(2), which does not bar the production ordered by the Court. As the Court is applying Rule 16's standard to the subpoena directed to KPMG, *Nachamie* would be inapposite in any case. The Court therefore need not address the question whether it is persuasive on this point.

[64] *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO,* 119 F.3d 210, 214 (2d Cir.1997) (quoting *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d 1032, 1036 (2d Cir.1984)).

There are two important qualifications to this summary, although neither is material here. First, the privilege in some, circumstances covers communications from the lawyer to the client. Second, "in appropriate circumstances [it] extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services." *In re Grand Jury Subpoenas Dated Mar. 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness,* 265 F.Supp.2d 321, 324-25 (S.D.N.Y.2003).

[65] KPMG apparently concedes this. KPMG Mem. (1/22/07) [docket item 857] 18-19.

[66] *In re Grand Jury Proceedings,* 219 F.3d 175, 182 (2d Cir.2000) (quoting *Int'l Bhd. of Teamsters,* 119 F.3d at 214) (alteration in original, emphasis added); *see also United States v. Schwimmer,* 892 F.2d 237, 244 (2d Cir.1989); *In re Horowitz,* 482 F.2d 72, 82 (2d Cir.1973).

[67] *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir.1996); *accord, In re Grand Jury Proceeding,* 79 Fed.Appx. 476, 477 (2d Cir.2003).

[68] *OneBeacon Ins. Co. v. Forman Intl, Ltd.*, No. 04 Civ. 2271(RWS), 2006 WL 3771010, at *4 (S.D.N.Y. Dec.15, 2006) (quoting *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 472 (S.D.N.Y.2003) (quoting *von Bulow by Auersperg v. von Bulow,* 811 F.2d 136, 146 (2d Cir.1987) (quoting *In re Bonanno,* 344 F.2d 830, 833 (2d Cir. 1965)))).

[69] *E.g., In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002,* 318 F.3d 379, 384 (2d Cir.2003).

[70] *See von Bulow,* 811 F.2d at 146 (burden of proving elements of privilege not discharged by "mere conclusory or ipse dixit assertions"); *see also Bogle v. McClure,* 332 F.3d 1347, 1358 & n. 9 (11th Cir.2003) (affirming finding of no privilege where appellants failed to provide any evidence on certain elements); *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 709 n. 5 (5th Cir.2001) (affirming finding of no privilege for failure to provide evidence and rejecting "[t]he dissent's argument that the district court was obliged to examine each document before ruling [because] . . . the claimants of the attorney-client privilege had the burden of demonstrating that each document withheld was entitled to protection"); *United States v. Aramony,* 88 F.3d 1369, 1392 n. 14 (4th Cir.1996) (where a party "provided no support, such as affidavits, for his claim that the disputed communications were protected by the attorney-client privilege[, . . .] the district court was entitled to find that he had not met his burden in establishing that these communications were protected by the attorney-client privilege").

[71] KPMG Mem. (1/22/07) [docket item 857] 18-19.

[72] *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 42 (S.D.N.Y.1984) (internal quotations, alterations and citations omitted).

[73] Stillman. Decl. (1/22/07) [docket item 858] ¶ 10.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

MATTHEW CONNOLLY and
GAVIN CAMPBELL BLACK

Defendants.

No. 16 Cr. 0370 (CM)

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT GAVIN BLACK'S MOTION FOR *KASTIGAR* RELIEF

Black moves for relief under *United States v. Kastigar*, 406 U.S. 441 (1972), on the basis that statements obtained by his employer, Deutsche Bank AG ("Deutsche Bank"), in the course of what purported to be an internal investigation into the possible manipulation of the London Inter-Bank Offered Rate ("LIBOR"), are fairly attributable to the Government within the meaning of *Garrity v. New Jersey*, 385 U.S. 493 (1967). Black argues that, in light of Deutsche Bank's close relationship with the Government, two conclusions follow:

First, that his prosecution was predicated on and infected by those statements, such that the indictment against him must be dismissed, pursuant to the Second Circuit's ruling in *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017).

Second, the Court's earlier *Kastigar* decision—in which it determined that statements compelled by the United Kingdom's Financial Conduct Authority ("UK FCA") did not taint the Government's grand jury presentation—was erroneous because it was predicated on incorrect information about the relationship between Deutsche Bank and the Government entities

investigating it, and so raises the specter that other evidence used by the Government was tainted.

Black has made a rather convincing showing that Deutsche Bank and its outside counsel, Paul Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"), were *de facto* the Government for *Garrity* purposes; more important, the Government has made an utterly unpersuasive case in rebuttal. There remain holes in the record, however, and a full-bore *Garrity* hearing would be a fascinating exercise—especially because there are profound implications if the Government, as has been suggested elsewhere, is routinely outsourcing its investigations into complex financial matters to the targets of those investigations, who are in a uniquely coercive position *vis-à-vis* potential targets of criminal activity. *See, e.g.*, Abbe David Lowell & Christopher D. Man, *Federalizing Corporate Internal Investigations and the Erosion of Employees' Fifth Amendment Rights*, 40 Geo. L. J. Ann. Rev. Crim. Proc. iii (2011). The Court is deeply troubled by this issue.

But the Court is not eager to put the parties through a purely academic exercise. And in this case, holding a *Garrity* hearing would be a purely academic exercise because, even if Deutsche bank and Paul Weiss were agents of the Government, Black's *Kastigar* rights were not violated. The motion is, therefore, denied.

I. Factual Background

The following facts reflect what the Court knows about Deutsche Bank's LIBOR investigation.

A. The Government's Launch of a LIBOR investigation into Deutsche Bank

In or about October 2008, the United States Commodity Futures Trading Commission ("CFTC") opened an investigation into LIBOR manipulation by two financial services firms—Barclays PLC ("Barclays") and UBS Group AG ("UBS")—both of which were LIBOR panel

submitting banks. (United States' Resp. to Def. Gavin Black's Mot. for Kastigar Relief, ("Gov't's Kastigar Br."), Exs. 1 & 3, Dkt. No. 409.)

In 2010, the Government started looking at another LIBOR panel member, Deutsche Bank. (Trial Tr. at 2236:22-24.) The United States Securities and Exchange Commission ("SEC") was the first federal agency to open an investigation into Deutsche Bank's role in LIBOR manipulation. (*Id.* at 1490:5-19.) The Bank retained Paul Weiss sometime in "early 2010" to respond to the SEC's inquiry. (*See id.* at 1490:19; *see also* Gov't's Kastigar Br. Ex. 4 at DB-SFO-DOJ_02131090.)

On April 19, 2010, the CFTC sent a letter to Deutsche Bank's General Counsel for the Americas, Joseph Polizzotto, stating that it, too, intended to look into whether Deutsche Bank had submitted false or misleading LIBOR reports. (Defs.' Trial Ex. 9072 at 1.) The CFTC advised Deutsche Bank that it "expect[ed]" the Bank to "cooperate fully" with its investigation. It then went on to explain exactly what cooperation would look like:

> Accordingly, the Division requests that Deutsche Bank Securities Inc. (and its parent, subsidiaries, affiliates and divisions, collectively referred to as "Deutsche Bank") voluntarily conduct by **external** counsel a full review of Deutsche Bank's U.S. Dollar LIBOR reporting for the relevant time period, and report on an on-going basis the results of that review to the Division, with the review to be completed by no later than September 1, 2010. Further, the Division requests that Deutsche Bank certify that it was in compliance with the Act and Regulations with respect to its reporting of LIBOR and related trading.

(*Id.* (emphasis in original).)

Appended to the CFTC's letter was a CFTC Enforcement Advisory Memorandum titled "Cooperation Factors in Enforcement Division Sanction Recommendations." (*Id.* at 3–7.) This memorandum stated that a corporate cooperator might receive cooperation credit if, among other things, it "utilize[s] all available means to [] make employee testimony or other relevant corporate documents available in a timely manner." (*Id.* at 4.) It also noted that the quality of a

corporation's cooperation might depend upon whether the company "avoid[ed] entering into joint defense agreements with counsel for employees[.]" (*Id.*)

Deutsche Bank expanded Paul Weiss's representation to include conducting the so-called "voluntary" investigation that was demanded (not requested) by the CFTC. (Trial Tr. 1493:20-23.) According to Walter Ricciardi, the Paul Weiss partner who headed the Bank's internal investigation into LIBOR from its inception until January 2013, there was nothing "voluntary" about the investigation that followed the CFTC letter; given the draconian consequences that would likely ensue if it did not accept the agency's invitation, Deutsche Bank's only choice was about its "level of cooperation" with the Government, not about whether to cooperate. (Trial Tr. at 1499:8-9.) Accordingly, Deutsche Bank immediately decided that it would go all-in with cooperation. (*See, e.g.*, Trial Tr. 1499:24-25, 1500:19-22; *see also* Defs.' Trial Exs. 9076, 9080.)

On the record presently before the Court, it is clear enough that, for five years, Deutsche Bank and its outside counsel coordinated extensively with the three Government agencies—the SEC, the CFTC, and eventually the United States Department of Justice ("DOJ")—that were looking into possible LIBOR manipulation. Indeed, it is apparent that the Government was kept abreast of developments on a regular basis, and that the federal agencies gave considerable direction to the investigating Paul Weiss attorneys, both about what to do and about how to do it. The issue raised by Black's motion is just exactly how much the investigation conducted by Paul Weiss was a substitute for investigative efforts by Government attorneys.

B. Beginning Stages of Deutsche Bank's Investigation

In the early days of the CFTC's investigation, counsel for Deutsche Bank and the CFTC held a series of telephone meetings during which they laid out the framework for the Bank's initial investigatory steps. The CFTC proposed, and Deutsche Bank expressly agreed, to take certain immediate actions, including specifically, "Interview[ing] [] all relevant Bank staff,

including those who had knowledge/approval/oversight of, input on or discussions regarding the setting and submission of the Bank's LIBOR[.]" (Defs.' Trial Ex. 9080 at 02634011.)

In a letter "set[ting] forth" the actions Deutsche Bank had "agreed" to undertake, the CFTC also conveyed the Government's expectation that counsel would regularly provide updates on its internal investigation:

> [A]s we discussed, the CFTC and the SEC further envision regular updates, initially occurring weekly, from Counsel concerning the status and progress of the internal investigation. These updates will include simultaneous productions of responsive documents and information uncovered in the internal investigation.

(*Id.* at 02634013.) The Court will assume that the CFTC and SEC received the weekly reports demanded in the July 14, 2010 letter, especially since Ricciardi testified that, while he did not recall the CFTC's specific request for ongoing updates, he "probably didn't pay much attention to it because that's just the standard way it's always done." (Trial. Tr. 1501:5-7.)

At the same time that the CFTC opened its investigation, the DOJ submitted an "Access Request Letter" to the CFTC, asking it to provide DOJ with all documents it obtained as part of its investigation into LIBOR manipulation generally. (Dkt. No. 51 at 10 (Gov't's Br. on the Scope of the Prosecution Team).) As a result of this access request letter, DOJ ultimately "received [from CFTC] hundreds of thousands of documents throughout the course of its investigation of Deutsche Bank[.]" (*Id.* at 11.)

On November 4, 2010, Paul Weiss lawyers and representatives of Deutsche Bank's legal department met in person with CFTC representatives in order to provide a summary of the Bank's investigation to date. (Defs.' Trial Ex. 9075.) Prior to that meeting, Paul Weiss lawyers had conducted telephone interviews with several people at Deutsche Bank who ended up being part of this case, including James King and Michael Curtler (both of whom eventually testified at

Black's trial). (*Id.*) They had also interviewed David Nicholls, an individual who oversaw Deutsche Bank's global finance and currency forward-trading desks from London. (*Id.*)

At the November 4 meeting, the CFTC "asked" (*i.e.*, instructed) Paul Weiss to "interview King, Curtler, and Nicholls again, this time in person, before Thanksgiving, *and that at the same time, to the extent* [*Paul Weiss*] *learn*[*s*] *that King or Curtler regularly interact with or obtain information from others, on the same desk or other desks,* [*Paul Weiss*] *interview those individuals as well*[.]") (*Id.* at DB-SFO-DOJ_02618646 (emphasis added).) Deutsche Bank identified Gavin Black as an individual who fell within the parameters of the Government's interview request. (*See* Decl. of Seth L. Levine in Supp. of Def. Black's *Kastigar* Relief ("Levine Kastigar Decl.") Ex. 1, Dkt. No. 396.) The Government concedes "for the purposes of this motion" that the "certain employees" it expected Paul Weiss to interview included Gavin Black. (Gov't's Kastigar Br. at 14 n.2.)

Paul Weiss lawyers, acting on behalf of Deutsche Bank, interviewed Black on November 22, 2010. (*See* Trial Tr. 1486:7-13.) Black did not have discretion to refuse to talk to the investigative team. Deutsche Bank's employee policy, titled "Global Compliance Core Principles," provides that an employee "*must* fully cooperate with Compliance and other appropriate Deutsche Bank departments (*e.g.*, Legal, Group Audit, etc.) handling internal and external examinations, investigations and other reviews involving Deutsche Bank, its customers and other related company activities." (Gov't's Kastigar Br. Ex. 17 at DOJ-SFO-DB-00002682 (emphasis added).) Although the policy did not explicitly provide for termination if employees did not comply—it only states, "Employees who violate Deutsche Bank's policies *may* be subject to disciplinary action up to and including termination of employment[]" (*id.* at DOJ-SFO-DB-0002680 (emphasis added))—Ricciardi testified, credibly, that any employee who did not

cooperate with the investigation would have lost his job. (*See* Trial Tr. 1527:14-15 ("The choice is too cooperate or find new employment, basically.").) Moreover, Black himself has submitted a declaration in which he avers that "[he] did not believe that [he] had any choice but to agree to meet with Paul Weiss lawyers and answer their questions[,]" and that, "had [he] refused to do so, it would have resulted in [his] termination from Deutsche Bank." (Declaration of Gavin Black ("Black Decl.") ¶ 3, Dkt. No. 234.) In light of Ricciardi's testimony, Black's subjective understanding is what any reasonable employee of Deutsche Bank would have understood.

C. Developments in Deutsche Bank's Investigation

As the Paul Weiss investigation continued, Deutsche Bank representatives and counsel continued to update the Government about their findings and coordinate next steps, as to Black and others. The Government gave Deutsche Bank/Paul Weiss marching orders during these meetings. For example, on December 4, 2014, a Government official directed Roberto Finzi, a Paul Weiss partner, to "approach [an employee] interview as if he were a prosecutor"—a request with which Finzi complied by giving his "word." (Dkt. No. 233-4 at DOJ-DB-KAST-00003527.) It is not clear whether the Government followed a similar protocol with respect to some or all of Paul Weiss's earlier interviews of Deutsche Bank employees. Other evidence indicates that the UK FCA—which was conducting a LIBOR investigation of its own—required Paul Weiss to provide it with an "interview plan and a list of documents" before it was permitted to interview another Deutsche Bank employee. (Dkt. No. 233-5 at DOJ-DB-KAST-0003528.)

Nonetheless, the Court has only a limited picture of Black's interactions with Paul Weiss and Deutsche Bank. It knows even less about the Government's role in those interactions.

1. Black's Interviews with Paul Weiss

Paul Weiss lawyers interviewed Black a second time on August 25, 2011 and a third time on June 19, 2012. (*See* Gov't's Ex. 3500-WR-11 at 10–11, 13; Black Decl. ¶ 2; *see also* Trial

Tr. 1484:2-8.) Black was not represented by counsel at either of these interviews—just as he had not been represented at the November 22, 2010 interview. (*See* Trial Tr. 1486:7-13, 1487:17-20, 1510:24-1511:1; Black Decl. ¶ 2.) Nor does it appear that he was provided with any advance information about what to prepare (or be prepared for) at these interviews. (*Id.* at 1511:2-15.) He was given standard *Upjohn* warnings at all interviews. (Gov't's Kastigar Br. Ex. 22 at DOJ-A-0000495 (August 25, 2011 interview); *id.* at DOJ-A-0013117 (noting that Black was provided with "detailed *Upjohn* warnings at the outset of Ricciardi's first and second interviews of Black," and that "Ricciardi did not attend a third interview of Black, but the general practice of Ricciardi's firm was to have *Upjohn* warnings repeated even if the witness had been previously interviewed"); *accord* Trial Tr. 1487:7-1488:17 (Ricciardi's testimony that counsel administered *Upjohn* warnings to Black).)[1]

The record does not contain any information about what was said at the initial November 22, 2010 interview. Paul Weiss attorney Joyce Huang, who conducted that interview (Trial Tr. 1486:7-13; *accord* Govt's Kastigar Br. Ex. 22 at DOJ-A-0000495), did not testify at trial, so the Court does not have the benefit of 3500 material to review.

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[1] An "*Upjohn* warning" is the notice an attorney (in-house or outside counsel) provides a company employee to inform her that the attorney represents only the company and not the employee individually. An attorney cautions a company employee with an *Upjohn* warning when the company is involved in litigation or conducting an internal investigation. Providing an employee with an *Upjohn* warning should make it clear that:

- The attorney-client privilege over communications between the attorney and the employee belongs solely to, and is controlled by, the company.
- The company may choose to waive the privilege and disclose what the employee tells the attorney to a government agency or any other third party.

The term originated with *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in which the Supreme Court held that the attorney-client privilege is preserved between the company and its attorney when its attorney communicates with the company's employees, despite the rule that communications with third parties constitute a waiver of the attorney-client privilege.

The record does, however, contain some evidence about Black's 2011 and 2012 interviews. The clearest picture of what was said at those interviews comes from the Government's FD-302 forms ("302s") recording its conversations with Ricciardi. (*See* Gov't's Kastigar Br. Ex. 22 (documenting seven Ricciardi interviews).)

According to Ricciardi, both the 2011 and 2012 interviews proceeded in a similar fashion, and Black gave similar statements at both. In addition to explaining his role at Deutsche Bank, the Bank's LIBOR submission process generally, and specifically how it related to his trading (Govt's Kastigar Br. Ex. 22 at DOJ-A-0000496), Black denied that he ever attempted to improperly influence LIBOR. (*Id.* at DOJ-A-0000497; *id.* at DOJ-0013108–09.) When confronted with potentially incriminating emails—only some of which are in the record[2]—Black always denied wrongdoing, and, in so doing, clarified that his seemingly incriminating statements were in fact innocuous, in that they provided "market color" or were simply "jokes." (*See, e.g.*, *id.* at DOJ-0013109–10, 12, 20, 22.)

Certain exchanges are illustrative.

One document, bearing Bates Number DBGJ 00001637, reflects an internal Deutsche Bank chat, dated February 5, 2005, between Black and an individual named Gurjit Dehl, who was then a vice president at the Bank:

Black: Can we have a high 6mth libor today pls gezzer?

Dehl: sure dude, where wld you like it made?

Black: think it should be 095?

Dehl: cool, was going 9, so 9.5 it is

Black: super – don't get that level of flexibility when curtler is in the chair fyg!

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[2] Ricciardi's 3500 material cites the Bates Numbers of certain emails, but the Court was not able to locate every email referenced therein, making it difficult to contextualize Ricciardi's statements about Black's interviews. That said, the Court was able to cross-reference certain emails with other items in the record.

(Levine Kastigar Decl. Ex. 5.) Ricciardi recalls that Black told him that the reference to "flexibility" was a joke. (Gov't's Kastigar Br. Ex. 22 at DOJ-A-0013110.)

Another document, bearing Bates Number DBGJ 00002395, contains an internal Deutsche Bank message, dated September 26, 2005, from Curtler to Black, Dehl, and King, in which Curtler asked the group: "[L]ibors any requests?" (Levine Kastigar Decl. Ex. 5.) According to Ricciardi, "Black said that Curtler was just asking for market color," not seeking input from traders about setting LIBOR at a position that was helpful to their trading positions. (Gov't's Kastigar Br. Ex. 22 at DOJ-A-0013110.) Black provided a similar defense when confronted with his own message, dated June 4, 2009, in which Black asked Curtler: "Geez – will you be moving 3mth libor lower tom?" (*Compare* Gov't's Kastigar Br. Ex. 22 at DOJ-A-0013112 (Ricciardi recalling Black's response) *with* Levine Kastigar Decl. Ex. 5 (containing text of Black's email).)

A final document, bearing Bates Number DBGJ 00002407, is an exchange, dated September 26, 2007, between Black and an individual named Lee Stewart, who worked at Rabobank. (*See* Gov't's Kastigar Br. Ex. 22 at DOJ-A-0018469.) In this conversation, Black reached out to Stewart, who was his friend, to gauge where Rabobank might publish its 3 Month LIBOR submission. (*Id.*) Black also expressed concern that certain panel banks might "forget" that "it is even a turn fix[,]" (Levine Kastigar Decl. Ex. 5 at DBGJ 00002407), meaning that they might submit "LIBORs without looking at their own circumstances." (Gov't's Kastigar Br. Ex. 22 at DOJ-A-0013110.) "Black said [that] it was [okay] to talk to other banks to find out what trades were going on in the market." (*Id.*)

Ricciardi reported that he did not have the general "impression" that Black "wanted to be helpful in his answers." (*Id.* at DOJ-A-0000497 (2011 interview); *accord id.* DOJ-A-0013112

(stating that Ricciardi believed Black was "very militaristic" in answering questions at 2012 interview).)

2. Coordination Between Deutsche Bank and the Government During the Bank's Investigation

The limited record reflects that the Government and Paul Weiss discussed Black, in real time and at least to a limited extent, as the Bank's internal investigation progressed.[3] It does not, however, provide much information about the content of those discussions. Nor does it indicate what the Government did with that information in connection with its investigation into Gavin Black.

Government email records reflect that, on August 26, 2011, Ricciardi telephoned a Government attorney (whose name is redacted) to tell that person that Paul Weiss had interviewed Black the day before. (Gov't's Ex. 3500-WR-11 at 13.) This particular email states that Paul Weiss offered "to give [the Government] a presentation whenever [the Government] want[s], but [Paul Weiss] [is] of the opinion that it would be more fruitful in about a month when [the Government] (hopefully) ha[s] the documents and [Paul Weiss] ha[s] completed their next round of interviews." (*Id.*) The record does not indicate if a presentation ever took place.

In October 2012, Paul Weiss provided the CFTC with "interview summaries" of the interviews it had conducted to date—which, of course, would have included a summary of counsel's interviews of Black. (Gov't's Ex. 3500-WR-11 at 10.) Those summaries were then forwarded to the DOJ. (*See id.*)

On December 5, 2012, DOJ representatives from the antitrust and criminal divisions met with Paul Weiss attorneys to discuss the status of the Bank's ongoing investigation and learn

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[3] According to the 3500 material, the earliest date that Ricciardi met and shared information with the Government was August 11, 2016, which is after Black was indicted. His 3500 material therefore does not provide any evidence of what the Bank contemporaneously shared with the Government as its own investigation progressed.

about what "submitters" and "traders" shared with Paul Weiss. (*See* Levine Kastigar Decl. Ex. 6 at DOJ-A-0009956 (Government notes of meeting with Paul Weiss).) Notes from that meeting indicate that the parties talked about Black. (*Id.*) These notes suggest that Paul Weiss shared Black's exculpatory statements about his emails and other messages with Government lawyers. (*Id.* ("Black – seeking mkt [*sic*] color or to move real rate").)

After the Bank interviewed Black for the third time in 2012, its lawyers met with the Government in person to provide a "download," meaning an exhaustive summary, of Black's statements to Paul Weiss attorneys. (*See* Levine Kastigar Decl. Exs. 2–4; *see also* Trial Tr. 1515:8-15 (describing meaning of "download").) Government notes from the "download" meeting corroborate the version of events that Ricciardi subsequently provided to the Government, *viz*, that Black's interviews with Paul Weiss largely consisted of his denying any wrongdoing. (*See* Levine Kastigar Decl. Ex. 2 at DOJ-A-0009862–64.) They also reflect some willingness by Paul Weiss to help the Government investigate Black, should it ever come to that point:

> Gavin, if you choose to interview him, may recall only one or two e-mails presented before him; beyond that he does not recall any email exchanges. He will be exceptionally clear and straightforward with his answers. That said, he does not recall communication entirely. At best 3-4 occasions, which the emails may cover, are recalled. [O]ne communication where a setter asks: "Any Requests" Black would not interpret this to be soliciting a LIBOR request at that time, nor would he see anything wrong with that statement today. There is no nefarious meaning behind it, he would say.

(*Id.* at DOJ-A-0009864 (bullet points removed for clarity).)

According to Black's counsel, the Government ultimately used the information it learned from this "download" meeting to question Black during his proffer session (Def.'s Br. in Supp. Kastigar Relief ("Def.'s Kastigar Br.") at 9, Dkt. No. 395),[4] which took place in London on

[4] Black does not provide a citation to support this assertion.

October 1, 2013—long after Deutsche Bank, through Paul Weiss, had interviewed Black and then relayed his statements to the Government. (*See* Gov't's Ex. 3500-MM-2 (Government notes of Black's proffer session).)

On September 9, 2014, as the Bank's internal investigation was drawing to a close, Deutsche Bank's counsel sought the Government's "permission" to interview Gavin Black, who still worked at the Bank, for a fourth time—which is to say, Deutsche Bank *asked the Government for "permission" to interview its own employee*. (Dkt. No. 233-6 at DOJ-DB-KAST-0003459.) The Government asserts in its brief that Paul Weiss interviewed Gavin Black on December 4, 2014, at which interview Black was represented by counsel. (Gov't's Kastigar Br. at 12.) While the Government does not provide a citation to the record to support this assertion (*id.*), and the Court has not located other evidence to corroborate this assertion, it will accept the Government's representation.

D. The Paul Weiss White Paper

On January 21, 2015, Paul Weiss submitted a report, known colloquially as the Paul Weiss "White Paper," summarizing the findings of its LIBOR investigation and laying out a roadmap of the case against Deutsche Bank and various individuals who worked for the Bank. (*See* Defs.' Trial Ex. 0862.)

Among other things, the White Paper provides an exhaustive overview of the Bank's substantial cooperation with the Government during its LIBOR investigation. During the course of Deutsche Bank's nearly five-year internal investigation, Paul Weiss lawyers conducted nearly 200 interviews of more than fifty Bank employees—including, of course, of Black—and shared the results of these interviews with the Government. (Defs.' Trial Ex. 0862 at 44.) In addition to conducting interviews, Paul Weiss extracted and reviewed 158 million electronic documents, as

well as listened to 850,00 audio files, or over hundreds of thousands of hours of audio tapes. (*Id.* at 44, 47.)

Despite complicated data privacy and other restrictions in Germany and elsewhere, Deutsche Bank provided the Government with all "the facts necessary to allow the DOJ to complete its investigation and reach its own conclusions about the misconduct at issue." (*Id.* at 5–6.) The White Paper stated:

> We believe that these efforts . . . have provided the DOJ with a full and complete picture of the facts. Indeed, we expect that *much (if not most) of the information that will ultimately be used in making charging decisions . . . will have come from the Bank's identification of notable communications and its having brought those communications to the DOJ's attention.*"

(*Id.* at 6 (emphasis added).) Deutsche Bank would not have been eligible for cooperation credit had it not done these things. (*See* Dkt. No. 233-1 (Filip Memorandum §§ 9-28.700, 9-28.720(a)) (stating that a corporation's failure to provide relevant facts "means that the corporation will not be entitled to mitigating credit for cooperation").)

As the investigation proceeded, counsel "interacted with [the Government] on hundreds if not thousands of occasions." (Defs.' Trial Ex. 0862 at 5.) This included some 230 phone calls and 30 in-person meetings with Government officials. (*Id.* at 49.) For the final 14 months of the Bank's internal investigation, counsel held joint "weekly update calls" to provide the Government with the latest developments and afford it an opportunity to "make new requests." (*Id.*) Included on these calls were, among others, representatives from the DOJ Antitrust Division (Alison Anderson and Ryan Fitzpatrick); the DOJ Criminal Division (Richard Powers and Paul Park); the CFTC (Jonathan Huth and Jason Wright); and the Federal Bureau of Investigations ("FBI") (Michael McGillicuddy). (*See, e.g.*, Defs.' Trial Ex. 9061.)

The Bank's "efforts to cooperate . . . [were] not [] limited to the raw transmission of documents and data." (Defs.' Trial Ex. 0862 at 48.) In other words, Deutsche Bank did not simply respond to Government document requests by producing responsive documents for the Government's review. Instead, Deutsche Bank flagged "'notable' . . . evidence or information that [it] believed would be of particular interest" to the Government. (*Id.* at 45.) It also "complement[ed] [document] productions with facts learned from [Deutsche Bank's] own interviews of relevant employees." (*Id.* at 48.) To that end, Paul Weiss provided the Government with real time updates about facts gleaned from employee interviews. (*Id.* at 49 ("the Bank has sought to keep the DOJ apprised of all relevant facts, including 'relevant factual information' acquired through its dozens of interviews.").) And it did "everything in its power to facilitate the [Government's own] interviews of relevant current and former Deutsche Bank employees[,]" which included "actively encourag[ing] its employees (current and former) to participate in interviews with regulators[.]" (*Id.* at 49–50 (citing Filip Memorandum § 9.28-720(a) n.2).)

The White Paper was candid about the context in which all of this occurred, as well as the substantial pressure Deutsche Bank faced to cooperate in every conceivable way with the Government:

> Like all banks, especially large banks subject to heightened supervision by multiple regulators, Deutsche Bank cannot operate in its core business except with the blessing of its regulators. If [Deutsche Bank] were required, unlike any of the other settling banks, to plead guilty to a felony conviction with the resolution of these investigations, its ability to operate in significant segments of its business would be in jeopardy. Such an outcome with be unfair, and the brunt of it would be borne by innocent stakeholders—employees, investors, clients, and counterparties—who played no role in and had no knowledge of the misconduct sought to be punished.

(*Id.* at 58–59.) The Bank ticked off the dangers that could set off a series of cascading harmful events: A guilty plea would have forced the Bank's operating subsidiaries to lose key licenses

and authorizations in the United States, which would have wreaked substantial regulatory uncertainty overseas in the more than 70 countries that Deutsche Bank does business. (*Id.* at 59.) Because "there is no need for a fiduciary concerned with its own reputation or liability to transact with an entity that has pled guilty to a felony when there are a multitude of other options available[,]" the Bank would have lost business in virtually all aspects of its operations. (*Id.* at 60.) A guilty plea also would have affected Deutsche Bank's ability to raise money on the capital markets, which, in turn, would have prompted credit agencies to downgrade the company's credit rating. (*Id.* at 61–62.) The White Paper concluded, "The point is not that any particular parade of horrible collateral consequences would be certain to occur in the event of a guilty plea by Deutsche Bank. The point is that what would occur cannot be foreseen with any clarity and could be severe." (*Id.* at 62.)

When all was said and done, the LIBOR investigation was the largest and most expensive internal investigation in the respective histories of both Deutsche Bank and Paul Weiss. (*Id.* at 5 (largest in Deutsche Bank's history); Trial Tr. at 1502:22-1503:4 (largest in Paul Weiss's history); 1516:25-1517:1 (Ricciardi testimony that Deutsche Bank investigation was "larger by ten times any [investigation] [he has] ever been involved with").)

But the investigation was a conspicuous success for Deutsche Bank. On April 23, 2015, Deutsche Bank entered into a deferred prosecution agreement ("DPA") with DOJ, under which Deutsche Bank agreed to (*i*) pay $775 million in criminal penalties; (*ii*) continue cooperating with the Government in its ongoing investigation; and (*iii*) retain a corporate monitor for the three-year term of the agreement. (*See* Gov't's Kastigar Br. Ex. 27 (Deutsche Bank DPA).) In addition, one of Deutsche Bank's subsidiaries, Deutsche Bank Group Services (UK) Limited, agreed to plead guilty to one count of wire fraud and pay its own fine. (*Id.*)

In the DPA, DOJ touted the benefits of the cooperation that Deutsche Bank and Paul Weiss provided:

> Although Deutsche Bank did not self-disclose this misconduct, upon being alerted to an investigation by the Department and other regulatory authorities, Deutsche Bank commenced an internal investigation and cooperated with authorities, including disclosing much of the misconduct described in the Information and Statement of Facts. *Deutsche Bank collected, analyzed, and organized voluminous evidence, data, and information, and did so in a way that saved the Department significant resources* by identifying certain documents and segments of audio files and providing translations for certain documents where applicable. *Deutsche Bank also assisted and facilitated the Department's interviews of current and former employees*, including foreign employees and Deutsche Bank communicated with and updated the Department with increasing frequency as the investigation progressed.

(*Id.* ¶ 4a (emphases added).)

In addition to the DPA, Deutsche Bank entered into a consent order with the New York Department of Financial Services ("NYDFS"), in which Deutsche Bank avoided prosecution for violations of New York anti-money laundering laws by, among other things, agreeing to terminate certain employees who were allegedly involved in LIBOR manipulation. (Defs.' Trial Ex. 9084.) *See also* Deutsche Bank Consent Order (Jan. 30, 2017) *available at* https://www.dfs.ny.gov/docs/about/ea/ea170130.pdf.

Gavin Black was fired in early 2015 at the insistence of the NYDFS.

E. What the Government Was Doing During Deutsche Bank's Internal Investigation

One critically important issue is just what the Government was doing during the five years between the sending of the CFTC's April 2010 letter and Deutsche Bank's eventual entry into a DPA with DOJ on April 23, 2015. Did the Government conduct a substantive parallel investigation to the "internal" investigation at Deutsche Bank, or did it simply give direction to

Deutsche Bank/Paul Weiss, take the results of their labor (which appears to have been fully disclosed to Government lawyers), and save itself the trouble of doing its own work?[5]

On the record presently before it, the Court would have to conclude the latter. The Government—which has never treated this matter with the seriousness it deserves—did not provide the Court with much information about any independent investigative activities it may have undertaken during those years. Indeed, it has declared that it has no need to do so. (Gov't's Kastigar Br. at 57 ("The Government will not seek to supplement the record on this issue [.]").)

The Government—first the SEC on April 4, 2010, then the DOJ on June 27, 2011—subpoenaed Deutsche Bank for documents. (*See* Gov't's Kastigar Br. Exs. 8–9.) However, the Government does not appear to have interviewed any witnesses from Deutsche Bank—at least, not until after Paul Weiss interviewed those witnesses and passed information gleaned from those interviews on to the Government—or taken any investigative depositions, or reviewed anything that had not first passed through the maw of Paul Weiss's five-year, $10 million investigative machine and been fully digested for the Government by the target of the investigation. The first 302s that the Court has reviewed in the 3500 material provided during the trial are dated three years after Paul Weiss started its investigation, and well after the firm interviewed Black during the 2010–2012 period. The lion's share of 302s were generated from interviews held after Paul Weiss submitted its White Paper in 2015. It is hard not to conclude that the Government did not conduct a single interview of its own without first using a road map

[5] The Court places the word "internal" in quotation marks, because internal investigations are commissioned by boards of directors, with the results reported to boards of directors—not commissioned by the Government with regular reports to the Government. While the Court imagines that Deutsche Bank's board was kept abreast of developments in the investigation, by no standard known to this Court can the investigation that Paul Weiss conducted be accurately characterized as an "internal" investigation.

that Paul Weiss provided—illuminating just how the Government should "investigate" the case against certain Deutsche Bank employees, including Black.

In short, while the record before the Court is incomplete (at the Government's choice), everything I have read suggests that the United States outsourced its investigation to Deutsche Bank and its lawyers. The inference one draws from a lack of evidence from the Government is not an inference that is favorable to the Government.

It is against this backdrop that Black makes his *Kastigar* motion.

II. Discussion

Black asks the Court to vacate his conviction and dismiss the indictment against him on the grounds that his interview statements to Paul Weiss were both "fairly attributable" to the Government and "compelled," thereby violating his constitutional right against self-incrimination, as first articulated by the Supreme Court in *Garrity v. New Jersey*. These statements, he argues, constitute "compelled testimony" within the meaning *Kastigar v. United States*, which the Government then improperly "used" in prosecuting him. Moreover, he submits that the Bank's close relationship with the Government requires the Court to revisit its earlier *Kastigar* decision, in which it determined that Black's compelled statements to the UK FCA did not taint the Government's presentation to the grand jury.

Before turning to the two bases for Black's *Kastigar* motion, the Court will address Black's *Garrity* argument.

A. For Purpose of this Motion, the Court Finds that the Deutsche Bank "Internal" Investigation is "Fairly Attributable to the Government"

The Fifth Amendment provides in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. An individual claiming a violation of the privilege against self-incrimination must prove that the statements at issue were

both the product of coercion and attributable to the government. *See, e.g.*, *Garrity*, 385 U.S. at 497.

In *Garrity*, the Supreme Court held that the statements obtained from police officers under threat of termination of employment were involuntary and therefore inadmissible against them in a criminal trial. 385 U.S. at 496–97. Justice William O. Douglas, writing for the majority, reasoned that the "fear of being discharged under [New Jersey's public employment forfeiture statute] for refusal to answer on the one hand and the fear of self-incrimination on the other hand was 'a choice between the rock and the whirlpool,'" *id.* at 496 (quoting *Stevens v. Marks*, 383 U.S. 234, 243 (1966)). Subjecting employees to that Hobson's choice violates the Constitution. *Id.* at 500.

While *Garrity* involved the conduct of a government employer, the *Garrity* rule applies with equal vigor to private conduct where the actions of a private employer in obtaining statements are "fairly attributable to the government." *United States v. Stein*, 541 F.3d 130, 152 n.11 (2d Cir. 2008) ("*Stein II*"). Private conduct is attributed to the government when "there is a sufficiently close nexus between the state and the challenged action." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (internal quotation marks and citation omitted); *Stein II*, 541 F.3d at 146–47.

As the Second Circuit explained in *Stein II*, a close nexus of state action exists between a private entity and the state when a governmental actor (*i*) exercises coercive power; (*ii*) is entwined in the management or control of the private actor; (*iii*) provides the private action with significant encouragement, either over or covert; (*iv*) engages in a joint activity in which the private actor is a willful participant; (*v*) delegates a public function to the private actor; or (*vi*) entwines the private actor in governmental policies. *Stein II*, 541 F.3d at 147 (citing *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 187 (2d Cir. 2005)).

It is not enough, however, that there be a close nexus between the state and the actions undertaken by a private entity; the Government must influence the specific conduct of which the party complains. *See Desiderio v. Nat'l Ass'n of Securities Dealers, Inc.*, 191 F.3d 198, 206–07 (2d Cir. 1999) (quoting *Blum*, 457 U.S. at 1004–05). The "controlling factor" is not whether the state directed the constitutionally prohibited conduct, but whether the state "involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement." *United States ex rel. Sanney v. Montanye*, 500 F.2d 411, 415 (2d Cir. 1974), *cert. denied*, 419 U.S. 1027 (1974). The defendant bears the initial burden of showing that his interview statements are subject to *Garrity* protection. *See, e.g., D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002); *accord United States v. Stein*, 440 F. Supp. 2d 315, 327–29 (S.D.N.Y. 2006) ("*Stein I*").

There is no question in the Court's mind that Black was compelled, upon pain of losing his job, to sit for at least three, probably four, interviews with Paul Weiss. Ricciardi testified that the "choice" facing an employee asked to sit for an interview "is to cooperate or find new employment, basically[.]" (Trial Tr. at 1527:14-15.) Black has stated that "[he] did not believe that [he] had any choice but to agree to meet with Paul Weiss lawyers and answer their questions[,]" and that, "had [he] refused to do so, it would have resulted in [his] termination from Deutsche Bank." (Black Decl. ¶ 3.) And, as prominent practitioners have noted:

> [T]he government often will defer its interviews of the witnesses until after the corporate internal investigators can conduct their own interviews. Given the employees' fear of termination by their employer, the government knows that the corporation can be more effective in persuading its employees to speak than it could be, and the government knows all to [*sic*] well that it can then use its leverage over the company to compel the company to tell it what the employees say, even if that requires the waiver of the attorney-client privilege or work product doctrine.

Lowell & Man, *supra* at 2, 40 Geo. L.J. Ann Rev. Crim. Proc. at xiii n.75 (internal citation omitted). As a result, the only real issue for the Court to consider under *Garrity* is whether

Deutsche Bank's internal investigation—and, specifically, the investigatory steps it took with respect to Gavin Black—can be attributed to the Government.

Over the past three years, Black has mounted an increasingly persuasive case that Deutsche Bank's internal investigation, conducted by its outside counsel, Paul Weiss, was neither voluntary nor internal to Deutsche Bank.

The record, which is limited (the responsibility for which falls squarely on the Government), contains compelling evidence that Deutsche Bank's investigation is fairly attributable to the Government. Among other things, it suggests that the Government directed Deutsche Bank to investigate Gavin Black on its behalf. The Bank's first interview of Black was conducted at the behest of the Government. Although there is no evidence either way about whether the fruits of that interview were shared with the Government agencies investigating Deutsche Bank, it is plausible—if not likely—that they did, since the record reflects that Paul Weiss was eager to share information about Black's subsequent two interviews. Record evidence also establishes that, as Deutsche Bank's investigation progressed, the Government continued to discuss Black by name in meetings with Bank investigators. All of this occurred well before any representative of the Government made any effort to speak with Black; that did not occur until the fall of 2013, three and a half years after Deutsche Bank's "internal" investigation began.

Of course, it is not enough under *Garrity* that Deutsche Bank's investigation was *generally* fairly attributable to the Government. The Bank's interviews of Black must have been Government-engineered interviews. The evidence certainly points in that direction. There is no evidence suggesting that Black's interviews were conducted on some different footing than were the interviews of other Deutsche Bank employees. During the period when Paul Weiss

conducted the first three (of four) interviews of Black, the Government told Deutsche Bank whom to interview and when. It told Deutsche Bank to interview Gavin Black. Moreover, even as late as 2014—when the investigation was in its fourth year—the Government was still directing Paul Weiss's activities. When Paul Weiss wanted to interview Gavin Black on September 9, 2014, it sought the Government's permission to do so. (Dkt. No. 233-6 at DOJ-DB-KAST-0003459.) And the Government did not simply give permission; it directed an experienced Paul Weiss partner and former Assistant U.S. Attorney for the Southern District of New York on the precise manner in which he should ask his questions. (*See* Dkt. No. 233-4 at DOJ-DB-KAST-00003526–27 (instructing Roberto Finzi to "approach [an] interview [of Bank employee Michele Faissola] as if he were a prosecutor," given the concern that Paul Weiss "will put the key document to him and he will manufacture an explanation for it.").) For its part, rather than simply producing documents and providing interview summaries, Paul Weiss, in full (and understandable) aid of its client's (*i.e.*, Deutsche Bank's) interests, digested the vast information it collected, highlighted the most important nuggets, and shared a blueprint for what prosecutors should expect should they finally interview Black on their own. Not surprisingly, when it came time to resolve its case against Deutsche Bank, the Government credited Paul Weiss for its extensive support of its own investigative efforts. (Deutsche Bank DPA ¶ 4(a).)

The only conclusion one can draw from this evidence is that, rather than conduct its own investigation, the Government outsourced the important developmental stage of its investigation to Deutsche Bank—the original target of that investigation—and then built its own "investigation" into specific employees, such as Gavin Black, on a very firm foundation constructed for it by the Bank and its lawyers. This was no ordinary "outside" investigation. Deutsche Bank did not respond to the Government's subpoenas by turning over

documents without comment, and its employees were not subjected to government or regulatory depositions on notice, at which they were defended by company counsel. Indeed, Deutsche Bank did the opposite—it effectively deposed their employees by company counsel and then turned over the resulting questions and answers to the investigating agencies.

In other words, Paul Weiss did everything that the Government could, should, and would have done had the Government been doing its own work. The fact that the record contains very little evidence about the Government's own independent investigative efforts during the first three years of Deutsche Bank's "voluntary" investigation renders that inference all the more compelling—and means that the Government did not do enough (indeed, has not done much of anything at all) to rebut Black's contention that the actions of Deutsche Bank and Paul Weiss were fairly attributable to the Government within the meaning of *Garrity*.

For the past three years, the Government has had every opportunity to rebut this inference by demonstrating, at the very least, that it was conducting a parallel investigation into Deutsche Bank's LIBOR-setting practices. Not only has the Government not taken this opportunity to rebut that inference; it has explicitly refused to do so. In responding to Black's present motion, the Government stated:

> While the Court noted in its December 19, 2018 order that it anticipated that the Government would supply additional facts relevant to the issue of what the CFTC and DOJ did to investigate this case aside from receiving materials from Paul Weiss, the Government will not seek to supplement the record on this issue as, in this case and as discussed above, the issue of whether the DOJ or CFTC "outsourced their investigations" is not relevant or necessary to deny the Defendant's motion.

(Gov't's Kastigar Br. at 57.) This post-trial motion was the Government's opportunity to make its *Garrity* case. It certainly knew the Court was interested in the issue and was troubled by the fair implication of the evidence. Nonetheless, it chose to remain all but silent.

The Government points to the LIBOR-related interviews it conducted prior to the date of Gavin Black's first interview with Paul Weiss as proof that it conducted a meaningful investigation that ran parallel to the Bank's. (Gov't's Kastigar Br. at 7 (citing *id.* Ex. 11).) What the Government fails to mention is that those interviews—four in total—were conducted in connection with its investigation into *another panel bank*. (Gov't's Kastigar Br. Ex. 11 (identifying interviews of Barclays employees).) Their relevance to the issue of whether Deutsche Bank was used by the Government to discharge its own responsibility to conduct a parallel investigation is at best *de minimis*. Moreover, given the massiveness and complexity of the inquiry that was required of Deutsche Bank (let alone the other panel Banks whose activities were under review), the fact that the Government can point to just four such interviews is far more suggestive of outsourcing than it is of some genuine parallel Government investigation.

As additional proof of its own investigative efforts, the Government points to the fact that it conducted an additional twenty-two interviews before August 25, 2011, the date of Gavin Black's second interview with Paul Weiss. (Gov't's Kastigar Br. at 7 (citing *id.* Ex. 12).) Once again, the Government makes Black's point for him. Of those interviewed, none appear to have been employees of Deutsche Bank; these were interviews of employees at Barclays, UBS, Bloomberg, and the Bank of England. (Gov't's Kastigar Br. Ex. 12.) The 302s that the Government submitted in this case corroborate this sequence of events. They establish that the Government did not interview anyone at Deutsche Bank until late 2013—three and a half years after the Government first opened an investigation into the Bank.

Since the Government has refused to give the Court much of a window into its investigatory conduct prior to its receipt of the Paul Weiss White Paper, there is little evidence to support the Government's contention that it conducted a parallel investigation into Deutsche

Bank.[6] Without the benefit of an evidentiary showing on the part of the Government, the Court is left with this: Deutsche Bank's investigation pretty much *was* the Government's investigation until January 21, 2015, the date that Paul Weiss issued its White Paper. The Government's investigatory strategy up to that point was to let the Bank carry its water for it.

Having declined to offer much by way of evidence, the Government falls back on strained legal and policy arguments that are not just unconvincing, but unworthy.

The Government (repeatedly) argues, for example, that Deutsche Bank could not have shared a close enough nexus with the Government, because its fiduciary duty diverged from the Government's, in that Deutsche Bank—as a public company—owed its duty to shareholders, and Paul Weiss—as counsel to Deutsche Bank—owed a duty of loyalty to its client. (Gov't's Kastigar Br. at 5–6, 38, 52, 53 & n.12.) It is hard to take this argument seriously.

The Second Circuit noted in *Stein II* that, "The threat of [ruinous indictment] brings significant pressure to bear on corporations, and that threat 'provides a sufficient nexus' between a private entity's employment decision at the government's behest and the government itself." *See Stein II*, 541 F.3d at 151 (citing Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 367 (2007)). According to Ricciardi, Deutsche Bank was facing the threat of ruin, such that the only "choice" facing Deutsche Bank when it received the CFTC's letter was the "level of cooperation" it would provide to the Government—because not cooperating was not an option. (Trial Tr. at 1499:8-9.) Viewed in that light, the CFTC's request that Deutsche Bank conduct a "voluntary" investigation was a classic "Godfather offer"—one that could not be refused. And Deutsche

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[6] We know that the Government interviewed Deutsche Bank witnesses, including Black (who proffered), in the fall of 2013—eighteen months before the White Paper was delivered but years after Paul Weiss reported on its first three Black interviews.

Bank's interest in cooperating was perfectly aligned with the Government's interest in outsourcing its investigative functions (if that is indeed what occurred in this case). This massive amount of pressure is highly relevant to any assessment of the sufficiency of the nexus between the Government and Deutsche Bank's "internal" investigation.

Of course, it is beyond cavil that Deutsche Bank had its own interests and responsibilities when it undertook to conduct the investigation that was "requested" by the CFTC. It is equally indisputable that Deutsche Bank was vindicating those purely private interests and responsibilities by cooperating with the Government to the uttermost. The same was also true in *Cromwell*, 279 F.3d at 163, and *United States v. Solomon*, 509 F.2d 863, 869 (2d Cir. 1975)—both cases in which non-governmental regulators (the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE"), respectively) required employees of member institutions to submit to interviews in connection with investigations they were undertaking.

The critical difference between this case and *Solomon* or *Cromwell* is that, in those cases, the NASD and the NYSE—the regulators, the entities that stood in the shoes occupied by the CFTC/SEC/DOJ here—were *actually conducting parallel investigations*. They asked their own questions; they did not have the interviewee's employer, the regulated firm that was under investigation, do so for them. *Cromwell*, 279 F.3d at 156–58; *Solomon*, 509 F.2d at 864–65. *See also Stein II*, 541 F.3d at 150 (quoting Lisa Kern Griffin, *supra* at 26, 82 N.Y.U. L. Rev. at 369 ("observing that *D.L. Cromwell* and *Solomon* 'turned in in large part on the fact that requests for interviews" were not "generated by governmental persuasion or collusion'").)

Nor does *Gilman v. Marsh & McLennan Cos., Inc.*, 826 F.3d 69 (2d Cir. 2016), dispose of Black's *Garrity* claim. *Gilman* differs from this case in one critical aspect: In that case, the

Second Circuit explicitly found, "There [was] no evidence that [the New York Attorney General] 'forced' Marsh to demand interviews, 'intervened' in Marsh's decisionmaking, 'steered' Marsh to request interviews, or 'supervised' the interview requests." *Id.* at 76. This Court cannot reach the same conclusion on the record before it. On the contrary, the limited record suggests that Deutsche Bank was told by the Government to conduct an investigation into a particular matter, to do so in a particular fashion, to interview particular people (including Black), to share its findings with the Government on a regular basis, and to carry out governmental investigative demands that were generated by its earlier efforts. Deutsche Bank, facing ruin, complied with the Government's directives in every particular.

Finally, the Government urges that the Court must not conclude that there was a sufficiently close nexus between it and Deutsche Bank, because doing so will hamper law enforcement by curtailing the Government's ability to encourage cooperation, which will prove a bad idea as a matter of policy.

The Court does not doubt that it saves the Government considerable time and precious resources to permit counsel for the target of an investigation to do the heavy lifting of ferreting out the truth—especially in a case like this one, which is so large, technical, and complicated. But this is a court of law, not a court of policy. The Court is not concerned with whether the outsourcing of investigations to private parties makes life easier for the Government or for the taxpayers; it is concerned with the protection of the defendant's constitutional right against self-incrimination, and so with the constitutional implications, if any, of such outsourcing. That concern trumps the Government's interest in convenience.

In conclusion, given the Government's deliberate choice not to create a record that would allow for a contrary finding, the record presently before the Court establishes that the

Government violated *Garrity*, because Deutsche Bank's interviews of Gavin Black, for which he was compelled to sit under threat of termination, are fairly attributable to the Government. *See Stein II*, 541 F.3d at 152 n.11.

The Court is fully aware that this ruling may have implications that extend well beyond this particular case. Were it of the slightest moment, I might even give the Government one more chance to acquit itself by demonstrating what it needs to demonstrate (assuming, of course, that the evidence that the Government declined to present to me would support its position).

But it would be a waste of this Court's time and resources to hold a full-bore *Garrity* hearing, because Black can only obtain the relief he seeks—vacatur of his conviction and dismissal of the indictment—if, as a result of any *Garrity* questions or otherwise, he is able to establish a *Kastigar* violation.

On this point, the record is considerably clearer and more complete. There was no *Kastigar* violation.

B. Black is Not Entitled to *Kastigar* Relief

Any use, direct or indirect, of a defendant's compelled statements is unconstitutional under the Fifth Amendment's self-incrimination clause. *Kastigar*, 406 U.S. at 453. Under *Kastigar*, the Government bears the burden of affirmatively proving, by a preponderance of the evidence, that "the evidence it proposes to use is derived from a legitimate source wholly independent of compelled testimony." *Id.* at 460. The Government's burden "is not limited to a negation of taint." *Id.* Rather, the Fifth Amendment's "total prohibition" on the use, or derivative use, of compelled testimony encompasses a range of impermissible "uses," including "obtaining [an] indictment" based on tainted evidence, *United States v. Hubbell*, 530 U.S. 27, 45 (2000); "preparing [the Government's case] for trial," *id.*; and presenting tainted evidence to the

grand jury. *United States v. Poindexter*, 951 F.2d 369, 377 (D.C. Cir. 1991) (internal citation omitted).

There is some uncertainty in the law about the precise breadth of *Kastigar*. In *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), the Eighth Circuit wrote that *Kastigar*'s prohibition "could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *Id.* at 311. The Second Circuit, while not explicitly rejecting this formulation, has instructed courts not to read *McDaniel* broadly. "To the extent that *McDaniel* can be read to foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial, we decline to follow that reasoning." *United States v. Mariani*, 851 F.2d 595, 600 (2d Cir. 1988). In one case decided shortly after *Mariani*, the Second Circuit cited *McDaniel* with approval in warning against the "disquiet[ing]" effect of even "non-evidentiary use of [] compelled testimony." *United States v. Schwimmer*, 882 F.2d 22, 26 (2d Cir. 1989). But in *United States v. Rivieccio*, 919 F.2d 812 (2d Cir. 1990), the Circuit reaffirmed its holding in *Mariani*, saying that "merely tangential" non-evidentiary uses of compelled testimony do not violate *Kastigar*. *Id.* at 815 & n.3, *abrogation on other grounds recognized by United States v. Allen*, 864 F.3d 63, 99 (2017).

Reading *Mariani*, *Schwimmer*, and *Rivieccio* together counsels that, in this Circuit, the outer bounds of *Kastigar* are broad but not limitless.

Asking whether compelled testimony has only a "tangential"—and, thus, constitutionally inoffensive—effect on the government's case is not a self-defining inquiry. The Second Circuit has promulgated the following articulation to give courts guidance:

> In determining whether the immunized testimony could have influenced the government's decision to pursue its line of investigation, if it appears that that pursuit could have been motivated by both tainted and independent factors, the court must determine whether the government would have taken the same steps "entirely apart from the motivating effect of the immunized testimony."

United States v. Nanni, 59 F.3d 1425, 1432 (2d Cir. 1995) (quoting *United States v. Biaggi*, 909 F.2d 662, 689 (2d Cir. 1990)).

Having dispensed with the applicable legal standards, the Court ordinarily would turn to a *Kastigar* analysis. The Government, however, raises two threshold arguments for why there could be no *Kastigar* violation in this case.

1. *Kastigar* is Applicable to the Instant Case

First, the Government argues that *Kastigar* is inapplicable because the remedy for a *Garrity* violation is suppression, not use and derivative use immunity. It reasons that the sort of statements elicited in the *Garrity* context are akin to other custodial confessions elicited in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The remedy for the latter is suppression; so too, the Government argues, should suppression apply to the former. (Gov't's Kastigar Br. at 40–45.)

The problem with the Government's argument is that an overwhelming body of law says that it is wrong—a fact that the Government fails to even acknowledge.[7] Numerous authorities, including courts in the Second Circuit, have concluded that immunity automatically follows when a public employer obtains statements from an employee under threat of termination in violation of *Garrity*.

This theory of *Garrity* first originated in *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of the City of N.Y.*, 426 F.2d 619 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972).

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[7] The Court recognizes that some courts, including this one, have considered the remedy of suppression in response to pre-trial *Kastigar* motions.

There, the Second Circuit stated that when an employee is confronted with the threat of an adverse employment action for refusing to answer a question, "the very act of . . . telling the witness that he would be subject to removal if he refused to answer *was held to have conferred such immunity*." *Id.* at 626 (emphasis added). In so concluding, the court reasoned that immunity under *Garrity* "followed from the very language of the Fifth Amendment," because "the threat of removal constitute[s] the kind of compulsion against which the constitutional privilege was directed." *Id.* at 624.

Even though *Uniformed Sanitation Men* predated *Kastigar*, several courts have found the Second Circuit's reasoning to be persuasive in a post-*Kastigar* world. For instance, the First Circuit has interpreted *Uniformed Sanitation Men* to mean that "testimony compelled by the threat of adverse employment action *automatically* triggers a grant of immunity under *Garrity*." *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 502 n.12 (1st Cir. 2007) (emphasis added). "Under the[] circumstances [of *Garrity*], no specific grant of immunity is necessary: 'It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity.'" *Id.* at 502 (quoting *Gulden v. McCorkle*, 680 F.2d 1070, 1075 (5th Cir. 1982)); *see also United States v. Veal,* 153 F.3d 1233, 1239 n.4 (11th Cir. 1998), *overruled on other grounds by Fowler v. United States*, 563 U.S. 668 (2011) ("The Fifth Amendment protection afforded by *Garrity* to an accused who reasonably believes that he may lose his job if he does not answer investigation questions *is Supreme Court-created and self-executing; it arises by operation of law; no authority or statute needs to grant it.*") (emphasis added). In a subsequent decision, the First Circuit re-affirmed the principle that "*Garrity* immunity automatically attache[s]" where an employer makes a sufficiently clear and direct

threat that it will take an adverse employment action against a public employee. *United States v. Palmquist*, 712 F.3d 640, 646 (1st Cir. 2013).

Various other appellate courts—federal and state—have similarly concluded that a public employer's threat of adverse employment action operates as an automatic grant of immunity once the employee answers, meaning that the statements elicited from her are deemed "compelled testimony" and not merely involuntary or coerced confessions. *See, e.g.*, *Aguilera v. Baca*, 510 F.3d 1161, 1177–78 (9th Cir. 2007); *Grand Jury Subpoenas Dated Dec. 7 & 8*, 40 F.3d 1096, 1102–03 (10th Cir. 1994); *United States v. Koon*, 34 F.3d 1416, 1433 n.13 (9th Cir. 1994), *rev'd in part on other grounds*, 518 U.S. 81 (1996); *In re Fed. Grand Jury Proceedings (FGJ 91-9), Cohen*, 975 F.2d 1488, 1490 (11th Cir. 1992) (per curiam); *Wiley v. Mayor & City Council of Balt.*, 48 F.3d 773, 777 n.7 (4th Cir. 1995); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 n.4 (7th Cir. 1973); *Benjamin v. City of Montgomery*, 785 F.2d 959, 960–61 (11th Cir. 1986); *Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985); *Nat'l Acceptance Co. v. Bathalter*, 705 F.2d 924, 928 (7th Cir. 1983); *Evangelou v. D.C.*, 901 F. Supp. 2d 159, 165 (D.D.C. 2012); *Hank v. Codd*, 424 F. Supp. 1086, 1087 (S.D.N.Y. 1975); *Carney v. City of Springfield*, 532 N.E.2d 631, 634 n.5 (Mass. 1988); *Spielbauer v. Cnty. of Santa Clara*, 199 P.3d 1125, 1131 (Cal. 2009); *Matt v. Larocca*, 518 N.E.2d 1172, 1174 (N.Y. 1987).

The Court sees no reason to depart from this body of law. It therefore rejects the Government's first threshold objection.

Second, the Government argues that *Kastigar* does not apply in this case, because Black's interview statements purportedly consisted solely of false exculpatory statements, *i.e.*, "false denials." (Gov't's Kastigar Br. at 55–56.) This argument proceeds in two parts: (*i*) that *Kastigar* does not contemplate immunity for false exculpatory statements, since such statements

are not part of what the Government bargains for when it grants immunity; and (*ii*) even if immunity could attach to false denials, such denials cannot be "used" within the meaning of *Kastigar*. (*Id.*)

Although these arguments are distinct, they fail for the same reason: they depend upon the incorrect legal premise that the privilege against self-incrimination does not apply to false exculpatory statements.

The applicability of the Fifth Amendment's privilege against self-incrimination does not depend upon the truth or falsity of an accused's statements. *See Rogers v. Richmond*, 365 U.S. 534, 544 (1961) (whether privilege against self-incrimination applies is "to be answered with complete disregard of whether or not [the accused] in fact spoke the truth"); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 351 & n.10 (1963) (concluding that although the self-incrimination clause did not prohibit prosecutorial use of false statements made pursuant to a voluntary disclosure policy, "[a] quite different case would be presented if an offer of immunity had been specifically directed to petitioners in the context of an investigation, accusation, or prosecution" because "the truth or falsity of such a disclosure would then be irrelevant to the question of its admissibility."). This is so because "incrimination" under the Fifth Amendment is defined broadly so as to encompass not only "answers that would in themselves support a conviction . . . but likewise . . . those which would furnish a link the chain of evidence needed to prosecute the [defendant]." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "Compelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *Hubbell*, 530 U.S. at 38 (quoting *Doe v. United States*, 487 U.S. 201, 208 n.6 (1988)).

The foregoing principle applies with equal force in the *Garrity/Kastigar* context. As the Supreme Court stated in *Kastigar*, the Fifth Amendment privilege against self-incrimination "protects against any disclosures that the witness reasonably believes could be use in a criminal prosecution or could lead to other evidence that might be so used." 406 U.S. at 445. Immunity under *Kastigar* therefore turns, not on whether a defendant's statements were true, but the ways in which they influenced the Government's case. *See United States v. North*, 910 F.2d 843, 861 (D.C. Cir. 1990) *opinion withdrawn and superseded in part on reh'g on other grounds*, 920 F.2d 940 (D.C. Cir. 1990) ("*Kastigar* addresses 'use,' not 'truth.'").

Indeed, courts have concluded that false compelled testimony is still susceptible to *Garrity* protection and, thus, potential immunity under *Kastigar*. *See Veal*, 153 F.3d at 1242; *United States v. Slough*, 677 F. Supp. 2d 112, 143 (D.D.C. 2009), *vacated on other grounds*, 641 F.3d 544 (D.C. Cir. 2011) (citing cases where false exculpatory statements still subjected to a *Kastigar* analysis).

Accordingly, despite the Government's contention to the contrary, false exculpatory statements may be "used" within the meaning of *Kastigar*. The Second Circuit expressly said so in *United States v. Hinton*, 543 F.2d 1002 (2d Cir. 1976). There, the court stated that the fact that immunized testimony consists of false denials "does not preclude the possibility of improper use against" a defendant, because there are situations in which their use would put the defendant in a less advantageous position than if he had chosen to remain silent. *Id.* at 1009. A false denial can be "'used' against [defendants] in the sense that" such denials might "provide[] the motivation for" cooperating witnesses to testify. *Biaggi*, 909 F.2d at 689. Exculpatory statements also might tip off a grand jury that a defendant's testimony is not credible. *See United States v. Cortese*, 568 F. Supp. 119, 131–32 (M.D. Pa. 1983).

This is not to say, however, that the fact that a defendant's statements consisted mostly of false denials is factually irrelevant. On the contrary, courts have made factual findings that a defendant's false statements left prosecutors with nothing to "use." *See, e.g.*, *United States v. Gallo*, 863 F.2d 185, 190 (2d Cir. 1988); *United States v. Harloff*, 807 F. Supp. 270, 282 (W.D.N.Y. 1992). But as a matter of law, the fact that a defendant's statements are false and exculpatory does not put them outside the ambit of *Kastigar*.[8]

The Court thus rejects the Government's second objection to a *Kastigar* analysis.

2. Whether the Government Violated *Kastigar*

Black argues that, if the Government obtained his testimony in violation of *Garrity*, he is automatically entitled to *Kastigar* relief. Specifically, he claims that the case against him was tainted, because, "As the Government concedes, Deutsche Bank and its counsel relied on their initial interviews with Mr. Black to gain an understanding of the LIBOR process, identify evidence, and develop investigative leads." (Gavin Black's Second Partial Reply Mem. of Law in Supp. of *Kastigar* Relief ("Def.'s Kastigar Reply") at 2, Dkt. No. 424; *see also id.* at 12–13.)

The Court disagrees.

i. Black's Theory of *Kastigar* Taint

A defendant who seeks *Kastigar* relief must first articulate the purported violation with enough specificity to permit the Government to respond. This entails a showing that there is a

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[8] The Government's remedy for a defendant's making false exculpatory statements under a grant of immunity is not the abrogation of immunity—it is charging the defendant with perjury. "[T]he ordinary remedy for the Government when an immunized witness lies or fails to cooperate fully is a prosecution for perjury or for contempt, rather than abrogation of the immunity agreement and use of the information truthfully given by the immunized witness to prosecute him for other offenses." *United States v. Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976) (citing *United States v. Tramunti*, 500 F.2d 1334, 1345 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974)); *see also McKinley v. City of Mansfield*, 404 F.3d 418, 427 (6th Cir. 2005) ("As a matter of Fifth Amendment right, *Garrity* precludes use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation. However, *Garrity* does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it.").

"sufficient nexus between the immunized testimony and the federal prosecution." *United States v. Fuller*, 149 F. Supp. 2d 17, 26 (S.D.N.Y. 2001) (citing *United States v. Helmsley*, 941 F.2d 71, 80 (2d Cir. 1991)); *see also United States v. Blau*, 159 F.3d 68, 72 (2d Cir. 1998) (quoting *Kastigar*, 406 U.S. at 460) (must show that one's "immunized testimony 'pertained to matters related to the federal prosecution'"). Put otherwise, "The defendant is not entitled to a *Kastigar* hearing merely because he has, at some point in the past, provided *Garrity* statements." *United States v. Krug*, 198 F. Supp. 3d 235, 246 (W.D.N.Y. 2016) (quoting *Blau*, 159 F.3d at 72).

To be sure, the defendant's burden of articulation is not heavy. But it is still a burden. "[A]n insubstantial and speculative possibility of taint" does not trigger *Kastigar*. *Harloff*, 807 F. Supp. at 282. "[F]ailure to show the requisite factual relationship [is] sufficient to end the inquiry[.]" *Blau*, 159 F.3d at 72 (citing *United States v. Mariani*, 851 F.2d at 599–600).

The clearest articulation of Black's theory of taint is found in his final reply brief. There, he states, "As the Government concedes, Deutsche Bank and its counsel relied on their initial interviews with Mr. Black to gain an understanding of the LIBOR process, identify evidence, and develop investigative leads." (Def.'s Kastigar Reply at 2; *see also id.* at 12–13.) Indeed, as Black points out, the Government (in its customary careless fashion) unwittingly gave Black the fodder for his argument; in its opposition papers, the Government states:

> [D]uring the early stages of the internal investigation, Mr. Ricciardi and his team were still learning about LIBOR, and they were trying to figure out how the benchmark worked: "the process was initially we had no idea what we were doing, so we started talking to people about how did LIBOR work, how does the submission process work, who's involved with that, and we started talking to people involved with the process. And then we learned that there's also trading related to it, and we started interviewing traders."
>
> At the other end of the table sat Gavin Black, the well-educated, greatly experienced, and highly compensated career swaps trader at an elite bank who knew more about LIBOR, and the derivatives to which it was linked, than almost anyone else on the planet.

(Gov't's Kastigar Br. at 32–33 (citing Trial Tr. at 1485) (Ricciardi testimony).) This passage indeed suggests—as Black's theory of taint so describes it—that Paul Weiss relied (at least in part) on Gavin Black to teach them about the LIBOR submission process, which, in turn, led to the collection of evidence that was used against him in his prosecution.

Following is the relevant excerpt of Ricciardi's testimony on direct examination:

Q. As part of that investigation, did you interview Deutsche Bank employees?

A. Yes.

Q. Did that include Gavin Black?

A. Yes.

Q. What was your purpose for interviewing Deutsche Bank employees?

A. Well, they're a public company, and I believe that as a responsible public company, they wanted to know if there was any wrongdoing going on, and, if so, take appropriate remedial steps and also cooperate fully with the government's investigations.

Q. Why did you—what brought you to interview Gavin Black specifically?

A. Well, the process was initially we had no idea what we were doing, so we started talking to people about how did LIBOR work, how does the submission process work, who's involved with that, and we started talking to people involved with the process. And then we learned that there's also trading related to it, and we started also interviewing the traders.

Q. Did the Department of Justice specifically ask you to interview Gavin Black?

A. No.

(Trial Tr. 1485:2-24.)

One way to read this testimony is that, contrary to Black's contention, Paul Weiss attorneys only spoke to Black after others educated them about the LIBOR submission process and pointed the firm in Black's direction. If that is indeed what occurred, the distinction would be critical, because it lies at the very heart of *Kastigar*: How the Government (in the person of

Deutsche Bank/Paul Weiss, which ultimately fed the Government its information) may have "used" Black's compelled statements against him.

But the Court concedes that an equally fair reading is the one supplied by Black (as aided by the Government): That Paul Weiss truly relied upon Black to educate its attorneys about the LIBOR submission process and develop investigatory leads. While this theory of *Kastigar* taint is not particularly compelling, it is still a cognizable theory of taint.

Given the minimal burden a defendant must shoulder to state a plausible *Kastigar* violation, *see, e.g.*, *Harloff*, 807 F. Supp. at 282, the Court concludes that Black has articulated a sufficient nexus between his compelled interview statements to Paul Weiss and his prosecution such that his *Kastigar* motion may proceed forward. In other words, tie goes to the defendant.

However, that Black has stated a viable *Kastigar* claim does not automatically entitle him to a hearing on the matter. "[T]o be entitled to a hearing on whether immunized testimony" tainted the Government's case, "a defendant must lay a firm 'foundation' resting on more than 'suspicion' that this may in fact have happened." *North*, 920 F.2d at 949 n.9 (quoting *Lawn v. United States*, 355 U.S. 339, 348–49 (1958) (affirming lower courts' denials of defendants' request for a "full-dress hearing" to enable them to determine whether immunized testimony had tainted grand jury proceedings, because petitioners "laid no foundation" other than mere suspicion)); *see also Biaggi*, 908 F.2d at 689–90; *Harloff*, 807 F. Sup at 283 (citing cases).

As the Court told the parties in connection with Black's earlier *Kastigar* motion, "[N]othing in *Kastigar* suggests that the mere invocation of that word by a defendant compels the Government to try to prove a negative." (Dkt. No. 274 at 18.) That statement remains true today. The Court will not abide a full-on fishing expedition where a *Kastigar* motion can be resolved on the papers.

That is exactly the case here.

ii. The Government's "Use" of Black's Interview Statements

As stated earlier, the Fifth Amendment prevents the Government from making any use, direct or indirect, of a defendant's compelled statements. *Kastigar*, 406 U.S. at 453. The Government must affirmatively prove by a preponderance of the evidence that the evidence it "used" was derived from a source that was "wholly independent" of Black's compelled testimony. *Id.* at 460. Prohibited "uses" of compelled testimony include "obtaining [an] indictment" based on tainted evidence, *Hubbell*, 530 U.S. at 45; "preparing [the Government's case for trial," *id.*; and presenting tainted evidence to the grand jury. *Poindexter*, 951 F.2d at 377. *Kastigar* does not, however, encompass "merely tangential" non-evidentiary uses of compelled testimony, *Rivieccio*, 919 F.2d at 815 & n.3, such as evidence that does not "influence[] the [G]overnment's decision to pursue its line of investigation." *Nanni*, 59 F.3d at 1432.

None of Black's interview statements was introduced into evidence at his trial. In fact, the Government, in view of the looming *Garrity/Kastigar* issue, declined to call Ricciardi as a prosecution witness at the last possible moment—which it initially planned to do for the sole and exclusive purpose of getting Black's false denials before the jury, so the Government could argue that they were completely at odds with the literal text of his emails and chats.

Nor did the Government make indirect use Black's false exculpatory statements at trial. There is not a single item of trial evidence that would not have come in but for Black's interview statements to Paul Weiss. Black does not identify, and the Court cannot find, a single question that was asked that otherwise would not have been asked.

In addition to the trial record (which is part of the Government's affirmative showing), the Government has produced 3500 material for every witness it called; that included notes from

every interview the Government itself conducted with those witnesses. None of that 3500 material contains any information indicating that the Government discussed or used Black's statements to Paul Weiss in any way in its dealings with its cooperators or other witnesses as it prepared them for trial.

The Government thus did not violate *Kastigar* at Black's trial.

The Government also did not make direct or indirect use of any of Black's interview statements before the grand jury. As found in the Court's Order Denying the Pretrial Motion of Defendant Gavin Black to Dismiss the Indictment for Alleged Violations of *Kastigar*, dated May 29, 2018, the Government identifies an independent source other than Black's interviews (whether with the UK FCA or with Paul Weiss) for everything that FBI Special Agent Jeffrey Weeks (the only grand jury witness) presented to the grand jury—either in the form of documents, cooperators, or information received from Deutsche Bank. (*See* Dkt. No. 274 at 7–16.) Indeed, in connection with the Court's prior *Kastigar* opinion, the Court reviewed the Government's alternative source material for *every line* of grand jury testimony; all were accounted for, and none derived, directly or indirectly, from Black.

In this respect, Black's case is very different from the parallel Rabobank case, *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017). There, the indictment was dismissed pursuant to *Kastigar* because the Government plainly presented evidence to the grand jury that could only have been derived from the defendants' UK FCA-compelled testimony. 864 F.3d at 100. The compelled testimony from defendants Allen and Conti was reviewed by Paul Robson, Allen and Conti's coworker, before Robson became a cooperator. The evidence demonstrated that Robson learned things from reviewing the defendants' compelled testimony that he had no other way of knowing. Robson was then debriefed by Special Agent Weeks, and gave Weeks information that

Robson had learned only from reading Allen's and Conti's compelled testimony, for which Weeks had no other source. Weeks then transmitted some of that information to the grand jury when the case was presented. This, the Second Circuit held, meant that Weeks had presented compelled testimony to the grand jury, which required dismissal of the indictment unless the Government could prove beyond a reasonable doubt the grand jury would have indicted Allen and Conti absent that testimony. The Government failed to meet its burden, and the indictment was dismissed.

Here, unlike in *Allen*, the Government learned about "the LIBOR submission process, identif[ied] evidence, and develop[ed] investigative leads" (Def.'s Kastigar Reply. at 2) from a variety of sources and using various methods—chief among them being Deutsche Bank itself and the assistance of the three cooperators. Deutsche Bank employees King, Curtler, and Timothy Parrieti provided Paul Weiss with all of the same information as Black did. To the extent Black's interview statements overlapped with the information they provided to the Government in preparation for grand jury proceedings, everything presented to the grand jury was sourced independently.

Finally, the Government did not make direct or indirect non-evidentiary use of Black's statements during its investigation in violation of *Kastigar*.

For one thing, even if the Court were to accept Black's theory of taint—that the Government relied on Paul Weiss' initial interviews with Black to gain an understanding of the LIBOR process, identify evidence, and develop investigative leads—those actions are the sort of "merely tangential" non-evidentiary uses that, according to the Second Circuit, do not violate *Kastigar*. *Mariani*, 851 F.2d at 600; *accord Rivieccio*, 919 F.2d at 815.

For another, it bears repeating that anything that the Government (through Deutsche Bank or Paul Weiss) heard from Black about the matters underlying his prosecution was told to it by untainted cooperators and documents provided directly from Deutsche Bank, including Black's messages. In view of that evidence, there is no doubt that the Government would have indicted Black, even if he had remained silent and refused to talk to Paul Weiss.

Finally, it appears that, during his October 2013 proffer session with Government lawyers, Black told the Government everything that he told Paul Weiss. (*See* Gov't's Ex. 3500 MM-2.) During his proffer, Black discussed LIBOR and how it affected his work; he explained certain seemingly incriminating emails as either being jokes or proper discussions of "market color" with colleagues; and he flatly denied any wrongdoing. (*Id.*) Accordingly, any investigatory leads that the Government may have derived from Black's compelled statements to Paul Weiss were independently sourced.

The Government did not violate *Kastigar*.

iii. Harmless Error

Even assuming that the Government violated *Kastigar*, any such *Kastigar* violation would constitute harmless error.

As the Second Circuit recently instructed, even where the government fails to establish by a preponderance of the evidence that it did not use a defendant's immunized testimony, a court may not vacate or reserve a conviction where the error was harmless. *Allen*, 864 F.3d at 97. The Government bears the burden of proving that the error was harmless beyond a reasonable doubt. *Id.*; *Nanni*, 59 F.3d at 1443; *United States v. Gallo*, 859 F.2d 1078, 1082–84 (2d Cir. 1988); *Poindexter*, 951 F.2d at 377; *United States v. Serrano*, 870 F.2d 1, 16 (1st Cir. 1989); *United States v. Byrd,* 765 F.2d 1524, 1529 n.8 (11th Cir. 1985); *United States v. Beery,* 678 F.2d 856, 860 n.3, 863 (10th Cir. 1982). For purposes of harmless error analysis,

inferences are not drawn in favor of the Government. *See United States v. Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008).

"Where . . . immunized evidence emerges early in the investigation, the court must determine whether the government 'would have taken the same steps entirely apart from the motivating effect of the immunized testimony.'" *United States v. Ponds*, 454 F.3d 313, 328 (D.C. Cir. 2006) (quoting *Nanni*, 59 F.3d at 1433). "The government cannot escape its error simply by showing the availability of 'wholly independent' evidence from which it *might* have procured indictment or convictions had it not used the immunized testimony." *United States v. Pelletier*, 898 F.2d 297, 303 (2d Cir. 1990) (emphasis added). Instead, it must demonstrate that the prosecution would have been vigorously pursued, and the same investigative steps taken, had the government not relied on immunized material. *Ponds*, 454 F.3d at 329–330. If, in light of evidence obtained from independent sources, *Kastigar* evidence was "so unimportant and insignificant and has so little, if any, likelihood of having changed the result of the proceeding[,]" it "may be deemed harmless." *Id.* at 329 (quoting *Gallo*, 859 F.2d at 1082) (internal quotation marks and alterations omitted).

The Government has persuaded the Court that any improper use of Black's compelled statements was harmless. As should be readily clear to the parties by now, the Court—having sat through a lengthy trial and reviewed the evidence on numerous occasions—does not doubt that Black would have been indicted and convicted even if Paul Weiss lawyers had never spoken to him. The evidence that the Government obtained against Black from its many independent sources was overwhelming.

Moreover, Black's primary theory of *Kastigar* taint—that Paul Weiss (in the person of the Government) relied upon Black to teach it about LIBOR—lends itself to finding harmless

error. If, as Black speculates, Paul Weiss indeed relied upon him to educate the firm about LIBOR, that reliance is simply "too insignificant and has so little, if any, likelihood of having changed the result of th[is] proceeding[.]" *Ponds*, 454 F.3d at 329 (quoting *Gallo*, 859 F.2d at 1082). Certainly, Paul Weiss—a sophisticated, multinational law firm—could have turned elsewhere, within Deutsche Bank and outside of it, to learn about how USD LIBORs were set. The record plainly reveals that it did so.

Once again, this case is a far cry from *Allen*. There, the Second Circuit had "no trouble concluding that [the Government's] error was not harmless beyond a reasonable doubt," since Robson testified to damning information at trial and supplied "essential" tainted information to the FBI agent who presented the case to the grand jury. *Allen*, 864 F.3d at 97–98, 100. Here, by contrast, the Government did not offer Black's statements to Paul Weiss at trial or to the grand jury.

Indeed, this case is much closer to *Gallo*, whose reasoning is instructive even if the facts are dissimilar.

In *Gallo*, the defendant's immunized grand jury testimony had been used inadvertently to support a wiretap application. This grand jury testimony had been given in 1980 and related to events that occurred in the 1970's. The defendant was indicted and charged with crimes that occurred between 1981 and 1983. The defendant moved to dismiss the indictment or, in the alternative, to suppress evidence on the grounds that his immunized 1980 grand jury testimony was used to develop evidence that led to his indictment for crimes he committed after this testimony was given. The Government argued that because the crimes committed by the defendant occurred after he gave his immunized testimony, the use of that testimony in securing

the indictment and his conviction violated neither the Fifth Amendment nor the immunity statute. *Gallo*, 859 F.2d at 1081.

In an opinion authored by Judge Winter, the court determined that, even though the Government violated *Kastigar*, that violation was harmless, because it "had no effect on the course of events leading to his indictment and conviction." *Id.* at 1082. "While it is of utmost importance that the government respect and scrupulously observe restrictions on the use of immunized testimony, I see no reason to set aside an otherwise valid conviction because of an error that had no effect on the course of events." *Id.* at 1084. The case against the defendant was "not a borderline case," *id.* at 1083; the defendant's immunized testimony "was of negligible significance . . . in light of independent evidence" coming from "reliable FBI informants other than appellant, and from direct surveillance." *Id.* at 1082–83.

In so concluding, the court "bolstered" its "analysis" by analogizing the case to *Murray v. United States*, 487 U.S. 533, 108 (1988), a Fourth Amendment case in which the Supreme Court held that the "independent source" doctrine permits the admission of evidence initially discovered during an unlawful search but later obtained independently from lawful activities. "The *Murray* holding clearly is apposite to the instant case, where neither the government's decision to seek the expanded wiretap order nor the judge's decision to grant it was affected by the use of the small portion of immunized testimony." *Id.* at 1084.

As in *Gallo*, Black's interview statements "had no effect on the course of events leading to his indictment and conviction." *Id.* at 1082. As stated numerous times, the Government's case against him was strong. It depended, not on any investigatory lead derived from Black's Paul Weiss interviews, but rather on his incriminating messages and the testimony of cooperators—none of which was tainted. Moreover, Black's decision to proffer, in which he

apparently told the Government everything that he told Paul Weiss, is akin to the situation described in *Murray*: The Government may have initially obtained evidence in violation of his constitutional rights, but later obtained the same evidence through perfectly lawful means. In a case like this, the Court shares Judge Winter's sentiment—there is "no reason to set aside an otherwise valid conviction because of an error that had no effect on the course of events." *Id.* at 1084.

For all the reasons discussed above, Black's motion for *Kastigar* relief is denied.

C. The Court Will Not Revisit its Earlier *Kastigar* Decision Regarding Black's UK FCA Testimony

Black also moves for *Kastigar* relief on the basis that compelled statements to the UK FCA, which conducted a parallel investigation into LIBOR manipulation, possibly tainted the Government's case against him.

This issue was the subject of a prior *Kastigar* motion. After conducting an evidentiary hearing and holding oral argument on the matter, the Court denied Black's earlier *Kastigar* motion, because it concluded that Black's UK FCA testimony did not taint the Government's presentation of evidence to the grand jury. (*See* Dkt. No. 274.)

Now, Black asks the Court to revisit its earlier *Kastigar* ruling in light of new revelations about the close relationship between various Government entities and Deutsche Bank while the Bank conducted its "internal" investigation. Black posits that Deutsche Bank may have collected certain evidence as a result of what it learned from the UK FCA while the two (plus counsel) were interacting during the regulator's investigation. Since Deutsche Bank ultimately provided the Government with much of the evidence it used at trial, the Government, Black argues, now must affirmatively prove that none of the evidence it used was based on Black's UK FCA testimony or anything derived therefrom.

The Court declines Black's invitation to revisit its earlier *Kastigar* decision. Black's motion is nothing more than a second lunge at the apple. It rests on a singular contention: That the interactions between Deutsche Bank (and its counsel) with the UK FCA may have tainted the Government's case. But this contention is mere conjecture. Black is well aware of the contents of his own compelled testimony, yet he has failed to point to a single example of evidence introduced at trial that was purportedly tainted by his UK FCA testimony. As the Court instructed in its earlier *Kastigar* hearing, "[I]n the absence of a much stronger and more plausible showing of possible taint than Black has been able to mount to date, the [C]ourt does not anticipate engaging in this exercise again." (Dkt. No. 274 at 18.) Black's showing is no more plausible today than it was last year. Thus, the Court sees no reason to engage in the same exercise that consumed it last year.

Moreover, the record on which the Court ruled in Black's earlier *Kastigar* motion sufficiently addresses the issue of taint through Deutsche Bank or its counsel. As the declarations of Patrick Meaney on behalf of the UK FCA and Louise van der Straeten on behalf of the United Kingdom's Serious Fraud Office ("UK SFO") make clear, the UK FCA and the UK SFO provided Gavin Black's compelled testimony to a limited list of recipients, none of whom worked for Deutsche Bank or its counsel. (*See* Dkt. No. 170 Exs. 1–2.) These affidavits also make clear that, under United Kingdom law, it is a crime to share confidential compelled testimony without taking certain steps to ensure its confidentiality. (*Id.* Ex. 1 ¶ 8, *id.* Ex. 2 ¶ 4.) This sworn testimony, coupled with the law governing the confidentiality of Black's compelled UK FCA testimony, establishes that Deutsche Bank and its counsel did not receive Gavin Black's UK FCA-compelled testimony or a summary thereof from either the UK FCA or UK SFO.

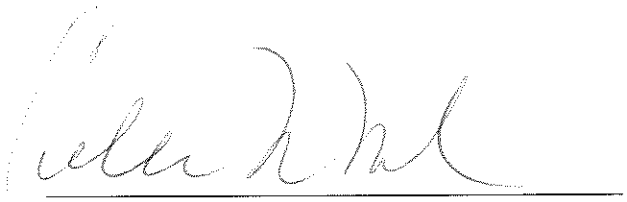
Black's request that the Court either dismiss the indictment or hold another *Kastigar* hearing examining whether his UK FCA testimony tainted the Government's case is denied.

CONCLUSION

Based on the foregoing, the Court **DENIES** Black's motion for *Kastigar* relief. The Clerk of Court is respectfully requested to close the open motion at Dkt. No. 394.

This constitutes the decision and order of the Court.

Dated: May 2, 2019



Chief Judge

BY ECF TO ALL PARTIES

2021 WL 3857413
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United States District Court, D. Arizona.

FEDERAL TRADE COMMISSION, Plaintiff,

v.

James D. NOLAND, Jr., et al., Defendants.

No. CV-20-00047-PHX-DWL

Signed 08/30/2021

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ORDER

Dominic W. Lanza, United States District Judge

INTRODUCTION

***1** In May 2019, Defendant James Noland ("Noland") discovered, via the inadvertent disclosure of a bank subpoena, that the FTC was conducting an investigation of him and his business, Success By Health ("SBH"). When the FTC learned its investigation was no longer covert, it specifically advised Noland and SBH to preserve relevant documents.

They did no such thing. The day after learning about the FTC's investigation, Noland instructed the other members of SBH's leadership team, Defendants Lina Noland, Thomas Sacca ("Sacca"), and Scott Harris ("Harris") (together with Noland, the "Individual Defendants"), to start using a pair of encrypted communications platforms called Signal and ProtonMail. After doing so, the Individual Defendants stopped using their previous messaging platforms for work-related communications, apparently turned on Signal's "auto-delete" function, and then proceeded to exchange an untold number of messages related to SBH's business.

In January 2020, after completing its investigation, the FTC filed this action. At the same time, the FTC sought and obtained a temporary restraining order ("TRO") that, among other things, appointed a receiver to assume control over SBH, required the Individual Defendants to produce their electronic communications, and required the Individual Defendants to turn over the mobile devices they had used to operate the business. Notwithstanding these orders, the Individual Defendants did not initially turn over their mobile devices and did not produce any Signal communications. Additionally, during a post-TRO deposition, Noland failed to disclose the Signal and ProtonMail accounts in response to direct questioning about the existence of any encrypted communications platforms.

It gets worse. It has now come to light that, during the months following the issuance of the TRO, Noland used his ProtonMail account to provide third-party witnesses with what can be construed as a script to follow when drafting declarations the Individual Defendants wished to submit in support of their defense. These communications only came to light by fortuity, when one of the recipients anonymously disclosed them to the FTC.

Finally, in August 2020, just as they were about to belatedly turn over their mobile devices for imaging, the Individual Defendants deleted the Signal app from their phones in coordinated fashion. As a result, neither side's forensic specialists have been able to recover any of the Signal communications the Individual Defendants sent and received between May 2019 and August 2020.

Based on all of this, the FTC now moves for the imposition of spoliation sanctions. (Doc. 259.) The motion is fully briefed (Docs. 276, 277) and neither side requested oral argument. For the following reasons, the motion is granted. The Individual Defendants' systematic efforts to conceal and destroy evidence are deeply troubling and have cast a pall over this action.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This case concerns the business activities of SBH, "an affiliate-marketing program that sells coffee products and other nutraceuticals through its online platform and network of affiliates." (Doc. 106 at 1-2.) SBH is an unincorporated division of Success by Media Holdings Inc. ("SBM"). (*Id.* at 1-2, 6.) The FTC alleges, among other things, that SBH operated as an illegal pyramid scheme and that the Individual Defendants, who held various leadership roles within SBH, made false statements to SBH's affiliates. (Doc. 3.)

***2** On April 26, 2019, the FTC issued a subpoena to Wells Fargo seeking financial information related to Noland and SBH. (Doc. 259-1 at 26-42.)

On or around May 15, 2019, Wells Fargo inadvertently disclosed the subpoena to Noland. (Doc. 8-19 at 5 ¶¶ 13-15; Doc. 259-1 at 25.)

On May 16, 2019, one day after inadvertently learning about the FTC's subpoena, Noland sent an invitation to Harris to install "Signal," a mobile messaging application that emphasizes user privacy,[1] and separately sent a message to the "SBH Leadership Council" (which included Noland, Harris, and Sacca) stating that he had "[j]ust sent y'all an important invite to an app you need to install." (Doc. 259-1 at 4-5 ¶¶ 7-8, 14 ¶ 19.) The evidence proffered by the FTC, which the Individual Defendants do not dispute, suggests that Noland, Harris, and the other Individual Defendants began using Signal for the first time that same day. (Doc. 228-1 at 2-3; Doc. 259-1 at 136, 147; Doc. 276-1 at 46, lines 3-12.) Thereafter, Noland and the other Individual Defendants began encouraging SBH employees and affiliates to install the Signal app. (Doc. 259-1 at 7-17 ¶¶ 15-23.) It appears the Individual Defendants also turned on Signal's "auto-delete" function after installing the app, such that messages exchanged via Signal were not preserved.[2]

[1] Signal, as noted, emphasizes user privacy. (Doc. 259-1 at 20 ¶ 32, 111-12.) The key security features of Signal are its end-to-end encryption and its assurance that all messaging data, including the content of the communications, cannot be tracked or observed by Signal itself or any party that does not have access to the user's device. (*Id.* at 111-12, 119-20.)

[2] In an October 2020 letter to the FTC, the Individual Defendants' counsel made statements about the use of the auto-delete function. (Doc. 228-2 at 42 ["Our clients inform us that they set all conversations to auto-delete with the exception of conversations with their attorney."].) During a subsequent deposition, Noland was asked further questions on this topic. (Doc. 259-1 at 139-40.) In response, Noland seemed to confirm the accuracy of his counsel's statement in the letter. (*Id.*) Unfortunately, the Individual Defendants' deletion of the Signal app from their phones has made it impossible to forensically verify whether and when the auto-delete feature was, in fact, enabled. (Doc. 228-2 at 42.)

Around the same time he started using Signal, Noland also began using "ProtonMail," a Switzerland-based encrypted email service. (Doc. 259-1 at 22 ¶ 38, 140.) ProtonMail, like Signal, emphasizes user privacy. (*Id.* at 20 ¶ 33, 115-17.) Thereafter, Noland and the other Individual Defendants encouraged SBH employees and affiliates to use ProtonMail. (Doc. 228-2 at 5 ¶ 14, 6 ¶ 15; Doc. 259-1 at 12 ¶ 17, 13 ¶ 18, 15 ¶ 20, 22 ¶ 38.)

On May 20, 2019, Noland, through his attorney, contacted the FTC and offered to cooperate with the FTC's investigation. (Doc. 8-19 at 5 ¶ 15; Doc. 259-1 at 44, 138-39.)

On May 29, 2019, the FTC responded by stating that it did "not have any requests" at that time and that "[Noland] and the company should suspend any ordinary course destruction of documents, communications, and records." (Doc. 259-1 at 44.)

***3** Throughout the remainder of 2019, the Individual Defendants instructed each other (as well as SBH employees and affiliates) to use Signal or ProtonMail for "anything sensitive" or "important things." (Doc. 259-1 at 12 ¶ 17, 18 ¶ 24.) Additionally, some of the Individual Defendants' unencrypted text messages simply referenced "Signal" or "ProtonMail" or directed persons to check Signal or ProtonMail messages. (Doc. 259-1 at 13, ¶ 17, 16 ¶¶ 20-21, 18 ¶ 24.)

On January 8, 2020, the FTC initiated this action. (Doc. 3.) That same day, the FTC moved for an *ex parte* TRO,

which the Court substantially granted (Docs. 19, 38).[3] The TRO was served on the Individual Defendants shortly thereafter. (Docs. 44-49.) In the TRO, the Court appointed Kimberly Friday to serve as the receiver (the "Receiver") of SBH and affiliated entities. (Doc. 38 at 16.)[4] The TRO required the Individual Defendants to, among other things, "immediately transfer or deliver to the [Receiver] possession, custody, and control of ... [a]ll Documents of or pertaining to the Receivership Entities, including all communications occurring via electronic mail, electronic messaging service, or encrypted messaging service...." (Doc. 21 at 21; Doc. 38 at 21.) The TRO also required the Individual Defendants to turn over "[a]ll keys, codes, user names and passwords necessary to gain or to secure access to any Assets or Documents of or pertaining to the Receivership Entities, including access to their business premises, means of communication, ... encrypted messaging services ..., or other property." (Doc. 21 at 21-22; Doc. 38 at 22.) The same obligations applied under the preliminary injunction entered on February 28, 2020. (Doc. 109 at 17-18.)

[3] The TRO was later amended. (Docs. 20, 21.) The final, unsealed version of the TRO was filed on January 17, 2020. (Doc. 38.)

[4] Friday has since been replaced as the Receiver by Peter S. Davis. (Doc. 395).

On February 5, 2020, Noland participated in a post-TRO deposition. (Doc. 259-1 at 130.) During the deposition, Noland was specifically asked about his use of encrypted communication platforms. (*Id.*) In response, he failed to disclose the existence of his Signal and ProtonMail accounts:

> Q: Have you ever used any type of encrypted communications to conduct Success by Media business?
>
> A: I'm not sure what you mean, sir.
>
> Q: Have you used any type of phone application or software system that encrypts the substance of the communication from point to point?
>
> A: I mean, I think it's like standard practice now. I don't know. It's standard practice.
>
> Q: Do you know that in your course of your work for Success by Media?
>
> A: I don't know. Whatever communication. I mean, it's a phone call. The encrypted, what Verizon offers.
>
> Q: Do you do anything separately to encrypt your communications apart from what a Verizon provider may do on their end?
>
> A: *Just have, you know, I think WhatsApp uses that now.*

(*Id.*, emphasis added.)

On March 19, 2020, the Individual Defendants provided their initial discovery responses pursuant to the Court's Mandatory Initial Discovery Pilot Project ("MIDP"). Among other things, the MIDP requires a party to "[l]ist the documents, *electronically stored information ('ESI')*, tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses." D. Ariz. G.O. 17-08 § B.3 (emphasis added). In their responses, however, the Individual Defendants did not disclose the existence of any Signal or ProtonMail messages. (Doc. 259-1 at 95-96.)

***4** On May 29, 2020, Noland used his ProtonMail account to send an email entitled "Declarations Needed from SBH Affiliates." (Doc. 228-2 at 8.) Although the recipient's name is blacked out in the copy of the email that has been provided to the Court, the FTC asserts (and the Individual Defendants do not deny) that the recipient was Robert Mehler, who previously served as SBH's director of sales. (Doc. 259 at 13.) In the body of the email, Noland asked Mehler to solicit declarations from SBH affiliates and provided a list of information that affiliates should include in their declarations, such as "The purpose of the company is to sell product," "Each affiliate and user of the product believes there is a healthful or positive effects [sic] that comes from using the SBH products," "Affiliates have found financial freedom because of their ability to earn commissions from the sale of products," and "Does not feels [sic] as though any SBH Affiliate received misrepresentations have been made to them by Success By Health." (Doc. 228-2 at 8.)[5] After sending this email, Noland deleted it without disclosing it to the FTC. (Doc. 276 at 3 [Individual Defendants' response, conceding that Noland deleted and failed to produce this email].) The email only happened to come to the FTC's attention months later, via "an SBH Affiliate who requested to remain anonymous." (Doc. 259 at 13 n.10.)

[5] The Court notes that, in the months after Noland sent this email from his ProtonMail account, the Individual Defendants filed an array of declarations

from affiliates that seemed to closely track the statements in Noland's email. (*See, e.g.,* Docs. 146-1, 146-2.)

On August 18-19, 2020, the Individual Defendants provided their cell phones to be forensically imaged. (Doc. 228-1 at 2; Doc. 259-1 at 140.) The day beforehand, all four Individual Defendants deleted the Signal app from their phones. (Doc. 228-1 at 2-3; Doc. 259-1 at 140.) The Individual Defendants took this step without the knowledge or approval of their counsel, the Receiver, or the FTC. Indeed, during post-destruction correspondence with the FTC, the Individual Defendants' counsel stated that "our clients, without our knowledge, uninstalled the Signal app a few days before their phones were imaged.... [We] had a very unpleasant conversation[ ] with our clients this morning about what happened." (Doc. 228-2 at 21-22.) The deletion of Signal has resulted in a total inability of the parties or outside forensic experts to recover the contents of the Signal messages. (Doc. 228-2 at 17-19, 21-22.)

In late September or early October 2020, the FTC belatedly learned about the Individual Defendants' use of Signal. (Doc. 228 at 6; Doc. 259-1 at 3 ¶ 5.) The discovery occurred after the Individual Defendants produced a batch of discovery materials to the FTC. (*Id.*) In that production, the Individual Defendants included several Excel spreadsheets containing their text message communications. (Doc. 259-1 at 3 ¶ 5.) Among these were 7,507 WhatsApp messages exchanged within the SBH Leadership Council—a group text message thread consisting of Noland, Harris, Sacca, and nonparty Luke Curry ("Curry").[6] (*Id.* at 4-5 ¶¶ 7-8.) Of these 7,507 messages, 7,505 were sent between September 2, 2017 and May 16, 2019, with the remaining two sent in August 2019. (*Id.*) All contact between Noland and the SBH Leadership Council (via the WhatsApp thread) ceased on May 16, 2019, while some messages between Sacca and Harris continued. (*Id.* at 4-7 ¶¶ 7-12.) According to the FTC's investigator, Noland's communications with the SBH Leadership Council group chat averaged 20.82 communications per day in 2017, 10.03 communications per day in 2018, and 13.80 communications per day in 2019 before all communications on that platform dwindled after May 16, 2019. (*Id.* at 6 ¶¶ 12-14.) Noland and other SBH leaders also exchanged thousands of text messages through similar iOS messaging groups from 2017 to May 16, 2019. (*Id.* at 5-6 ¶¶ 9-11.) As noted, May 16, 2019 is when Noland invited the other members of the SBH Leadership Council to install Signal, and from that point forward Noland, Harris, and Sacca encouraged each other and SBH employees and affiliates to use Signal and ProtonMail for "anything sensitive" and "important things." (*Id.* at 7 ¶ 15, 10 ¶ 16, 12-14 ¶¶ 17-18, 16-18 ¶¶ 21-24.)

6 In its moving papers, the FTC asserts that Curry was only part of the SBH Leadership Council group chat until October 2018 (Doc. 259 at 1) but does not attach evidence showing that Curry left the SBH Leadership Council at that time. The FTC's declaration indicates that Curry remained part of the WhatsApp chat group through 2019. (Doc. 259-1 at 4-6 ¶¶ 7-11.)

***5** The FTC asserts that the WhatsApp and iOS messages from before May 16, 2019 reveal that the Individual Defendants and their associates discussed relevant matters —including the Individual Defendants' focus on recruiting, substantial income claims, and actual financial results—on those platforms before the apparent switch to Signal and ProtonMail. (Doc. 259 at 2; Doc. 259-1 at 7-15 ¶¶ 15-20.)

On October 30, 2020, after the parties' counsel became aware of the unavailability of the Individual Defendants' Signal and ProtonMail messages, the Individual Defendants' counsel sent a letter to 22 SBH employees or affiliates seeking their Signal and/or ProtonMail communications with the Individual Defendants on relevant topics. (Doc. 259-1 at 18-19 ¶ 27-28, 47, 61.) Ten responded. (*Id.* at 18-19 ¶ 27-28, 49-59.) All said they did not have any Signal or ProtonMail messages to produce. (*Id.* at 49-59.) Several attributed the absence of messages to their use of Signal's auto-delete feature (*id.* at 51-53, 55) or their suspending or clearing of ProtonMail accounts (*id.* at 53, 55).[7]

7 One of the individuals who responded was Mehler. (Doc. 259-1 at 51.) In his response, Mehler stated: "I also have no communication via proton mail with the executives regarding SBH business as ... there was no 'company business' to discuss." (*Id.*) Mehler did not, in other words, disclose and produce the ProtonMail email that was apparently sent to him by Noland on May 29, 2020.

In December 2020, the FTC deposed the Individual Defendants. (*Id.* at 136-43; Doc. 276-1 at 28-29, 38, 46; Doc. 277-1 at 6.) During these depositions, the FTC asked various questions regarding the use of Signal and ProtonMail. (*Id.*) Noland admitted that he installed Signal on his phone on or around May 16, 2019 and, around the same time, asked Harris and Sacca to install Signal on their phones. (Doc. 259-1 at

136.) Harris and Sacca recalled being asked to install Signal and installing it around this time. (Doc 276-1 at 38, 46.) Sacca further testified that Noland informed him about receiving the FTC bank subpoena in May 2019. (*Id.* at 48-49.) Noland, Sacca, and Harris also acknowledged that they deleted Signal from the phones just before imaging. (*Id.* at 19-21, 50-51.) Sacca testified that the deletion was part of a coordinated plan between himself, Harris, and Noland. (*Id.* at 50-51.) Noland provided a similar account of the joint plan to delete the app. (*Id.* at 20 [discussing "a conversation with Scott and Tommy" that preceded the deletion].)

On January 28, 2021, the FTC filed the motion for sanctions. (Doc. 259.) The motion thereafter became fully briefed. (Docs. 276, 277.)

DISCUSSION

The FTC seeks an adverse inference against the Individual Defendants pursuant to Rule 37(e)(2) of the Federal Rules of Civil Procedure based on their intentional spoliation of evidence. (Doc. 259 at 13-17.)

I. Legal Standard

Rule 37(e) was "completely rewritten" in 2015 to "provide[ ] a nationally uniform standard for when courts can give an adverse inference instruction, or impose equally or more severe sanctions, to remedy the loss of ESI." *See generally* 1 Gensler, Federal Rules of Civil Procedure, Rules and Commentary, Rule 37, at 1194 (2021). The text of Rule 37(e)(2) now provides:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> ***6** ...
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

(*Id.*) A court cannot rely on its inherent authority (or state law) when deciding whether sanctions based on the loss of ESI are appropriate—the standards supplied by Rule 37(e) are exclusive. Gensler, *supra*, at 1198. *See also Newberry v. County of San Bernardino*, 750 Fed. App'x 534, 537 (9th Cir. 2018) ("The parties framed the sanctions issue as invoking the district court's inherent authority. However, at the time the sanctions motion was filed, sanctions were governed by the current version of Rule 37(e) ... [which] therefore foreclose[d] reliance on inherent authority to determine whether terminating sanctions were appropriate.") (citations and internal quotation marks omitted).

A party seeking sanctions under Rule 37(e) has a threshold duty to show that the ESI at issue was, in fact, lost or destroyed. Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment ("The new rule applies only ... when [ESI] is lost."). If such a showing has been made, the court must then determine whether "(1) the ESI should have been preserved in the anticipation or conduct of litigation; (2) the ESI is lost because a party failed to take reasonable steps to preserve it; and (3) the ESI cannot be restored or replaced through additional discovery." *Porter v. City & County of San Francisco*, 2018 WL 4215602, *3 (N.D. Cal. 2018) (cleaned up). *See also* Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment ("The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it.").

If each of these questions is answered in the affirmative, the next inquiry under Rule 37(e)(2) is whether the nonmovant "acted with the intent to deprive another party of the information's use in the litigation." *Porter*, 2018 WL 4215602 at *3. Unlike Rule 37(e)(1), Rule 37(e)(2) "does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice." Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment.

If such intent is found, the Court has discretion to impose any of the sanctions authorized in subsections (e)(2)(A)-(C) (*i.e.,* an adverse inference, an adverse-inference jury instruction, or a terminating sanction). However, "[f]inding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss." *Id.*

***7** "[T]he applicable standard of proof for spoliation in the Ninth Circuit appears to be by a preponderance of the evidence." *Compass Bank v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d. 1040, 1052-53 (S.D. Cal. 2015). *See also* *Singleton v. Kernan*, 2018 WL 5761688, *2 (S.D. Cal. 2018) ("A party seeking sanctions for spoliation of evidence has the burden of establishing [spoliation of non-electronic records] by a preponderance of the evidence[.]"). The Court is the appropriate finder of fact on a Rule 37(e) motion. *Mannion v. Ameri-Can Freight Sys. Inc.*, 2020 WL 417492, *4 (D. Ariz. 2020). *See also* *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1408 (9th Cir. 1990) ("The imposition of discovery sanctions pursuant to [Rule 37] is reviewed for abuse of discretion. Absent a definite and firm conviction that the district court made a clear error in judgment, this court will not overturn a Rule 37 sanction. Findings of fact related to a motion for discovery sanctions are reviewed under the clearly erroneous standard. If the district court fails to make factual findings, the decision on a motion for sanctions is reviewed de novo.") (citations omitted).

II. Analysis

A. **Whether ESI Was Lost**

1. Signal

It is undisputed that the Individual Defendants deleted the Signal app and Signal messages. (Doc. 230 at 2; Doc. 259-1 at 139-40, 143, 148; Doc. 276 at 1; Doc. 277-1 at 6.) It is also undisputed that the Individual Defendants used Signal to communicate about SBH business. (*See, e.g.*, Doc. 259-1 at 13 ¶ 18, 138-41; Doc. 276 at 1-2; Doc. 276-1 at 12-14.) For example, during his December 2020 deposition, Noland stated that he communicated or likely communicated with Harris, Sacca, and various "Staff members" on Signal. (Doc. 159-1 at 138.) Noland also acknowledged that he discussed SBH business on Signal "from time to time." (*Id.*) He further admitted that he continued to use Signal after the TRO in this case was issued. (*Id.* at 139.)

The parties disagree about the precise mechanism by which the Signal messages were lost. The Individual Defendants assert that they used Signal's "auto-delete" feature, meaning messages would disappear from users' devices shortly after they were read by the recipient. (Doc. 276 at 1-2; Doc. 276-1 at 18-19.) The FTC sounds a note of skepticism about the Individual Defendants' use of auto-delete because the Individual Defendants belatedly offered this explanation for the loss of the messages "[w]eeks after admitting to deleting the Signal apps." (Doc. 259 at 11 n.5.) The FTC also considers this explanation "implausible" for a variety of reasons (Doc. 277 at 4-6) but argues that, regardless of whether the auto-delete function was enabled, the bottom line is that the Individual Defendants caused ESI to be lost. (*Id.* at 4, 8-9.)

The Court agrees with the FTC that, for the purposes of the threshold inquiry of whether any ESI was lost, it is irrelevant whether the Signal messages were lost in one fell swoop in August 2020 (when the Individual Defendants deleted the Signal app) or whether the loss occurred on a continuous basis from May 2019 through August 2020 (due to the Individual Defendants' choice to turn on Signal's auto-delete feature). Regardless of how and when it occurred, Signal-related ESI was lost. *Cf.* *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 931-33 (N.D. Ill. 2021) ("[A]utodelete functionality is and has been a near ubiquitous feature in programs and email services that produce ESI, leading to a phalanx of publications warning litigators of the need to clearly and adequately inform their clients to investigate and turn off autodelete functions as part of their litigation hold processes. It follows that in cases involving ESI, to satisfy their preservation duties, parties must investigate and disable autodelete functions on email accounts (client and web-based) at the onset of litigation if those accounts reasonably contain relevant information and it is reasonable under the circumstances of the case to do so.... [P]arties that ignore their obligations to reasonably investigate the possibility of or disregard autodelete functions run the risk of destroying relevant evidence and visiting prejudice upon their litigation adversaries, thereby earning sanctions."); The Sedona Conference, *The Sedona Conference Primer on*

Social Media, Second Edition, 20 Sedona Conf. J. 1, 90-91 (2019) ("A client's use of ephemeral messaging for relevant communications after a duty to preserve has arisen may be particularly problematic, as it would have the potential to deprive adversaries and the court of relevant evidence.")

2. ProtonMail

***8** The FTC asserts that it uncovered a May 2020 email from Noland's ProtonMail account providing instructions for declarations to be submitted to the Court in this action. (Doc. 228-2 at 3 ¶ 5, 8; Doc. 259 at 10 & n.3.) During meet-and-confer correspondence in October 2020, in response to questions about why the Individual Defendants had not produced this email, the Individual Defendants' counsel admitted that Noland deleted it. (Doc. 228-2 at 29.) And in their response to the FTC's motion for sanctions, the Individual Defendants again admit that Noland deleted it. (Doc. 276 at 3 n.3 ["Noland ... deleted at least one post-TRO email from his new [ProtonMail] account...."].)

Given this backdrop, it is clear that ProtonMail ESI was lost. Although the parties disagree about whether the loss extended beyond the May 2020 email, it is undisputed that at least one email was lost (although another version was found through other channels). [8]

8 The Court clarifies that, even if the FTC hadn't proved the loss of any ProtonMail ESI, it would impose an adverse-inference sanction based on the loss of Signal ESI.

B. **Duty To Preserve**

Sanctions are available under Rule 37(e) only if the loss of ESI occurred at a time when litigation was pending or reasonably foreseeable. Fed. R. Civ. P. Rule 37(e), advisory committee's note to 2015 amendment ("The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation.... Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises."). Further, the ESI must have been foreseeably relevant to the pending or foreseeable litigation. *Id.* ("Courts should consider the extent to which a party was on notice that litigation was likely *and that the information would be relevant*.") (emphasis added).

1. Reasonable Foreseeability Of Litigation

As the Ninth Circuit has explained, parties "engage in spoliation of documents as a matter of law only if they had 'some notice that the documents were potentially relevant' to the litigation before they were destroyed." *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002) (citation omitted). "This is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." *Waymo LLC v. Uber Techs., Inc.*, 2018 WL 646701, *14 (N.D. Cal. 2018) (internal quotation marks omitted). The reasonable foreseeability of litigation "is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation. This standard does not trigger the duty to preserve documents from the mere existence of a potential claim or the distant possibility of litigation. However, it is not so inflexible as to require that litigation be 'imminent, or probable without significant contingencies.' " *Id.* at *15 (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011)).

The FTC argues the Individual Defendants' preservation obligations arose in May 2019, when they became aware of the FTC's investigation. (Doc. 259 at 14 n.7.) Alternatively, the FTC argues the obligation arose no later than mid-January 2020, when they were served with the TRO. (*Id.* 14.) In response, the Individual Defendants argue that, although they learned about the FTC's investigation in May 2019, they believed this investigation had concluded (due to the FTC's rejection of Noland's offer to cooperate). (Doc. 276 at 2-3.) The Individual Defendants do not address the propriety of continuing to erase Signal messages (and at least one ProtonMail email) after the TRO and preliminary injunction were entered. (*Id.*) The FTC replies that the Individual Defendants have admitted, at a minimum, that they violated their post-TRO preservation obligations, which encompass the duty to preserve any pre-TRO communications that were still available. (Doc. 277 at 4; *see also* Doc. 259 at 13-14 ["From the date of the TRO, Defendants had an obligation to preserve their SBM-related Signal and ProtonMail communications, both pre- and post-TRO."].)

***9** The Court concludes that the Individual Defendants' document preservation obligations arose on May 29, 2019, when the FTC responded to Noland's counsel's email by stating that Noland "and the company should suspend any ordinary course destruction of documents, communications, and records." (Doc. 259-1 at 44.) Although Noland contends he subjectively believed the FTC's rejection of his offer to cooperate signaled that the investigation against him (and SBH) was closed, that was not an objectively reasonable conclusion under the circumstances. Noland was aware that the FTC had recently subpoenaed his bank records and was aware that the FTC had unambiguously requested the suspension of document destruction. Additionally, Noland was aware that he remained subject to the consent order arising from a previous FTC enforcement action, *FTC v. Netforce Seminars*. (*See generally* Doc. 177 at 15 n.7.) It would be objectively unreasonable, under these circumstances, to conclude that litigation is not probable and that the retention of evidence is not required. *Cf.* *Blazer v. Gall*, 2019 WL 3494785, *3 (D.S.D. 2019) ("The clearest signal of impending litigation came when Blazer's [attorney] ... emailed an explicit request to Sheriff Boll for the production or preservation of any recordings of Blazer.... While defendants posit that [the] email was not worded harshly enough to trigger a duty to preserve, the email's courteous phrasing does not nullify its effectiveness as an indicator of impending litigation."); *O'Berry v. Turner*, 2016 WL 1700403, *3 (M.D. Ga. 2016) ("Here, the duty to preserve the driver's log and additional PeopleNet data arose at the very latest when Mr. Helms faxed a spoliation letter to ADM[.]"); *Sampson v. City of Cambridge*, 251 F.R.D. 172, 181 (D. Md. 2008) ("It is clear that defendant had a duty to preserve relevant evidence that arose no later than June 26, 2006, when plaintiff's counsel sent the letter to defendant requesting the preservation of relevant evidence, including electronic documents. At that time, although litigation had not yet begun, defendant reasonably should have known that the evidence described in the letter may be relevant to anticipated litigation.") (internal quotation marks omitted). [9]

9 Indeed, a duty to preserve may arise even where no preservation request has issued. *Clear-View Techs., Inc. v. Rasnick*, 2015 WL 2251005, *1 (N.D. Cal. 2015) ("At times, a defendant's duty to preserve arises when plaintiff's counsel provides a defendant with notice to preserve relevant evidence. However, a future litigant need not make such a request....") (footnote omitted).

At any rate, the availability of sanctions under Rule 37(e)(2) does not turn on whether the Individual Defendants' preservation obligations arose in May 2019 or January 2020. It is undisputed that the Individual Defendants' destruction of evidence continued after January 2020—after this date, Signal messages continued to be sent (and deleted), the May 2020 ProtonMail email from Noland to Mehler was sent and deleted, and the Individual Defendants worked together to delete the Signal app in coordinated fashion.

2. Reasonable Foreseeability Of The Relevance Of The Signal And ProtonMail Messages

The FTC acknowledges that the relevance of the lost ESI cannot be definitively ascertained (because it no longer exists) but argues that, in such circumstances, the Individual Defendants cannot assert any presumption of irrelevance. (Doc. 259 at 16-17.) The Individual Defendants respond that much, if not all, of the missing ESI is irrelevant. (Doc. 276 at 2-4.) First, they argue that the information lost when they deleted Signal was limited to the identities and contact lists of the persons with whom they communicated via the app and that such information "is not relevant and certainly not irretrievable." (*Id.* at 2.) They also dispute the relevance of their post-TRO communications (but not, it appears, their pre-TRO communications) on the ground that "the overwhelming majority of evidence" in this case is public. (*Id.* at 3-4.) The FTC replies that the Individual Defendants do not dispute that the deleted messages included discussion of relevant matters such as SBH's recruiting focus and income claims and that the Individual Defendants "do not get to pick the evidence that they think is sufficient for the FTC and then destroy the rest." (Doc. 277 at 11.)

The FTC has the better side of these arguments. Noland admitted that he discussed SBH business matters on Signal "from time to time." (Doc. 259-1 at 138.) Similarly, Sacca admitted that he used Signal to discuss SBH business. (Doc. 276-1 at 45.) This testimony, standing alone, strongly suggests that the deleted ESI was at least "potentially relevant to the litigation." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006). At any rate, "because the relevance of destroyed documents cannot be clearly ascertained because the documents no longer exist, a party can hardly assert any presumption of irrelevance as to the destroyed documents."

Id. (cleaned up). *See also* *Rasnick*, 2015 WL 2251005 at *8 ("[T]he law presumes that spoliated evidence goes to the merits of the case....") (internal quotation marks omitted).

***10** The lone deleted ProtonMail email that has been recovered further bolsters this conclusion. In that email, Noland asked Mehler to persuade SBH affiliates—that is, potential witnesses in this case—to make exculpatory representations about the purpose of the company, how Affiliates earn income from SBH, the absence of misrepresentations, and the like. (Doc. 228-2 at 8.) These topics are relevant to this litigation.[10] This raises an inference that other lost ESI addressed relevant topics, too. *Cf. Youngevity Int'l v. Smith*, 2020 WL 7048687, *3 (S.D. Cal. 2020) (inferring spoliated text messages were relevant where the messages "were exchanged during periods significant to this litigation" and the text messages that had been produced were relevant).

10 Courts have sharply criticized the practice of secretly providing a script for third-party witnesses to follow during depositions or when drafting declarations. *Innospan Corp. v. Intuit Inc.*, 2011 WL 2669465, *2-3 (N.D. Cal. 2011); *Hogan v. Higgins*, 2008 WL 3200252, *3 (E.D.N.Y. 2008) (where plaintiff's counsel wrote a detailed letter to a non-party witness that set forth the plaintiff's theory of the case and asked the witness to offer testimony consistent with it, observing that "[t]he letter is, conservatively construed, a blatant attempt to coach a witness, and may reasonably be understood as an attempt to persuade a witness to change his testimony"). Although the Court reaches no conclusions about whether Noland's May 2020 email to affiliates (via Mehler) constituted such a script, the optics are concerning.

The foreseeable relevance of the Signal and ProtonMail messages is also established by circumstantial evidence. For example, the FTC has submitted evidence establishing that the Individual Defendants' pre-May 2019 communications via WhatsApp and iOS (on the SBH Leadership Council group chat and more generally) covered a variety of relevant topics. Then, in May 2019, almost immediately after learning they were under investigation by the FTC, the Individual Defendants started using Signal and ProtonMail and encouraged others to do so as well. Starting at the exact same time, the Individual Defendants' WhatsApp and iOS communications, on relevant topics or otherwise, dwindled to almost nothing. The reasonable inference to be drawn from these undisputed facts is that the Individual Defendants continued their discussions of relevant matters on Signal and ProtonMail after switching over to those apps. The alternative inference—that the Individual Defendants simply stopped communicating about anything related to their business on any text-messaging platform, at the same time that they installed an encrypted messaging service for the purpose of discussing "anything sensitive" and "important matters"—strains credulity.

The FTC has thus carried its burden of showing the reasonably foreseeable relevance of the destroyed ESI to this litigation.

C. **Reasonable Steps To Preserve**

The parties do not dispute that the Individual Defendants failed to take reasonable steps to preserve the deleted communications. The Individual Defendants admit that they "uninstalled the Signal messaging application just prior to having their phones forensically imaged" (Doc. 276 at 1); that "Noland did not preserve some emails from an account that was created after the temporary restraining order" (*id.*); and that "the un-installation of Signal was intentional" (*id.* at 4). (*See also* Doc. 259-2 at 2 [Receiver's Declaration].).

These admissions, coupled with the evidence outlined above, establish that the Individual Defendants failed to take reasonable steps to preserve the Signal and ProtonMail messages. This is true irrespective of whether the messages were lost because of intentional deletion, through the intentional use of an auto-delete function, or some combination thereof. *Cf.* *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 233-34 (D. Minn. 2019) ("There is no doubt that Staley and Wilson are the types of persons likely to have relevant information, given their status as principals of RMA and owners of Deliverance. Nor can there be any reasonable dispute as to the fact that their text messages were likely to contain information relevant to this litigation.... Thus, the RMA Defendants were required to take reasonable steps to preserve Staley and Wilson's text messages. The RMA Defendants did not do so. [They] did not suspend the auto-erase function on their phones ... [and it] takes, at most, only a few minutes to disengage the auto-delete function on a cell phone.... Failure to follow [such] simple steps ... alone is sufficient to show that Defendants acted unreasonably."); *Youngevity*, 2020 WL 7048687 at *2 ("Defendants' failure to prevent destruction by backing up their phones' contents

or disabling automatic deletion functions was not reasonable because they had control over their text messages and should have taken affirmative steps to prevent their destruction when they became aware of their potential relevance.").

D. **Replaceability**

***11** The next question under Rule 37(e) is whether the lost discovery "can[ ] be restored or replaced through additional discovery."

The FTC argues that the lost ESI is irreplaceable, because the deletion of the messages and Signal app "leaves no way to recover them," and further argues that although the FTC and Individual Defendants' counsel worked together to attempt to retrieve the missing materials, those efforts were unsuccessful. (Doc. 259 at 17-18.) The Individual Defendants do not dispute these points, acknowledging that the "forensic expert attempted to recover the Signal data and could not." (Doc. 276 at 2.) Of note, the Individual Defendants' counsel contacted 22 persons affiliated with SBH and asked them if they had any ProtonMail or Signal communications with the Individual Defendants. (Doc. 259-1 at 46-61.) The 10 responding parties reported that they did not have any ProtonMail or Signal communications with the Individual Defendants on their devices. (*Id.* at 49-59.) [11]

11 The Individual Defendants argue that these persons' failure to identify any responsive Signal or ProtonMail communications "supports the individual defendants' position that they were using the auto-delete feature, and did not intentionally (or in actuality) destroy relevant evidence they were under a duty to preserve." (Doc. 276 at 2.) This argument is unpersuasive. The responding persons did not uniformly assert that they had been using the auto-delete feature, instead often stating, without elaboration, that they simply did not have any records of communications with the Individual Defendants in their Signal or ProtonMail platforms. (*See, e.g.*, Doc. 259-1 at 49.) Further, only 10 out of 22 persons responded —the parties and the Court thus remain unaware of whether relevant communications might be found on the remaining 12 persons' devices. Finally, many of the relevant communications likely would have been exchanged between the Individual Defendants. That the 10 persons who responded had no relevant messages says nothing about whether there may have been relevant communications between the Individual Defendants.

The Court finds that the lost messages cannot be restored or replaced through additional discovery.

E. **Finding Of Prejudice Unnecessary**

The FTC seeks sanctions under Rule 37(e)(2). (Doc. 259 at 13-17.) That provision, unlike Rule 37(e)(1), does not require a finding of prejudice to another party from loss of the information: "Rule 37(e)(2) does not require that the court find prejudice to the party deprived of the information. While the common law spoliation tests often required a showing of prejudice for the types of severe sanctions covered by Rule 37(e)(2), the Advisory Committee determined that there was no need to require a specific showing of prejudice once a finding of intent to deprive had been made." 1 Gensler, *supra*, Rule 37, at 1203.

Thus, the Individual Defendants' argument that the FTC has not shown it was prejudiced by the loss of information (Doc. 276 at 3-4) is unavailing. Rule 37(e)(2) does not require a finding of prejudice "because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position." Fed. R. Civ. P. 37(e), advisory committee's note to 2015 amendment. The Court addresses potential prejudice, however, when discussing the appropriate sanction.

F. **Intent To Deprive**

i. The Parties' Arguments

***12** The parties dispute whether the Individual Defendants' use of Signal and ProtonMail, and subsequent concealment and deletion of Signal and ProtonMail communications, constitute sufficient evidence of intent to deprive the FTC of these communications. (Doc. 259 at 15-16; Doc. 276 at 4.) The Individual Defendants assert that they switched from WhatsApp and iOS to Signal in May 2019 for an innocent reason—to avoid the hacking, eavesdropping, and infiltration efforts of former SBH associate Luke Curry [12] and "a small group of saboteurs." (Doc. 276 at 3.) [13] The FTC argues this explanation is implausible. (Doc. 259 at 8 n.2.) The FTC's investigator ran searches in the

Individual Defendants' document productions and found no communications suggesting that the Individual Defendants were concerned about hacking or other interference from Luke Curry in or around May 2019. (Doc. 259-1 at 21-22 ¶¶ 35-37.) Further, when later asked about the motivation to install Signal, Harris did not mention Luke Curry or any other specific hacking concerns—instead, he more generally stated that the Individual Defendants "wanted to make sure we had whatever was the most secure at the time to be able to – sometimes we send things like a copy of a driver's license or someone asks for a Social Security number or we send pictures of our kids and things like that." (*Id.* at 147-48.) Harris did, however, recall that at an unspecified time Noland raised concerns that the company and Noland's personal phone were being hacked and mentioned that Luke Curry or his associates were responsible. (*Id.* at 148.) Sacca testified that he began to have concerns that his phone was hacked as early as 2016 or 2017 and that he was the person who strongly urged additional cyber and in-person security measures in light of the Luke Curry imbroglio. (Doc. 276-1 at 46-47.) Lina Noland also testified that hacking concerns tied to SBH's problems with Luke Curry motivated the installation of Signal. (Doc. 276-1 at 29-30, 32.)

12 The Individual Defendants obtained, by default, a preliminary injunction against Curry in Nevada state court in December 2018. (Doc. 276-1 at 53-55.) The preliminary injunction prevents Curry from advertising, promoting, or selling SBH competitor products; advertising, promoting, or selling SBH products; and making or disseminating disparaging remarks about any aspect of SBH, including SBH personnel. (*Id.* at 54.)

13 During his December 2020 deposition, Noland provided the following explanation for why he chose to install the Signal app in May 2019: "Best I can remember, we were being – we were being – we were being attacked by different people that Luke Curry was stirring up, and it seemed to be some hacking going on. So we wanted to be able to try to help, you know, secure some of our messaging with the different attacks that were going on." (Doc. 259-1 at 136.) Noland continued: "Like I said, that's when we started noticing some issues that were going on with our phones. It seemed like – it just started ramping up more and more. We thought it was going to die down once we sued Luke in the Nevada court. We thought that that would – and he had a temporary restraining order on him, and then he had a preliminary injunction on him from the Nevada state court.... So we thought, with those measures from a judge – from a state judge, that maybe that would quiet some of that noise down, and it seemed to for a little bit period of time, and then it started to ramp back up. And then it looked like, as we got into the spring, the attacks started to ramp up." (*Id.* at 137.) Noland testified that the same reasons motivated him to start using ProtonMail. (*Id.* at 140-41.)

As for Noland's failure to disclose his ongoing use of Signal and ProtonMail during his February 2020 deposition, Noland contends that he was attempting to provide this information when he was cut off by the FTC's counsel. (Doc. 259-1 at 141-42.) The FTC asserts that this explanation is implausible. (Doc. 259 at 12.)

As for the Individual Defendants' deletion of the Signal app in August 2020, they contend it was justified because they didn't want the FTC to learn the names of the individuals who have been donating to their legal defense in this case. (Doc. 276 at 1-2; Doc. 259-1 at 140, 148; Doc. 276-1 at 50-51.) The FTC argues this explanation is implausible because "Defendants do not explain how a mere list of contacts and a phone log would somehow have revealed to the FTC who donated money to them." (Doc. 277 at 7.) Further, the FTC argues, at other points in this litigation the Individual Defendants have represented that they don't know the identity of their donors, so it is inconsistent for them to aver that they don't know their donors' identities while simultaneously positing that they needed to delete Signal to protect those unknown persons' identities. (*Id.* at 7-8.)

ii. Analysis

The FTC has easily carried its burden of showing that the Individual Defendants acted with the intent to deprive the FTC of the information contained in the Signal and ProtonMail messages. The most decisive factor is the timing of the installation and use of Signal and ProtonMail. The Individual Defendants installed these apps in late May 2019, *one day* after Noland discovered the FTC was investigating him and SBH. The Individual Defendants would have the Court believe this timing was a coincidence—they happened to install elaborate encrypted privacy-focused apps immediately after discovering they were the subject of an FTC investigation because, around that same time,

they noticed hacking attempts from Curry and his fellow "saboteurs." This explanation is incredible. Apart from the Individual Defendants' testimony, there is no documentary or other evidence supporting the notion that the Individual Defendants were being hacked at this time. (Doc. 259-1 at 21-22 ¶¶ 35-37.)

***13** The plausibility of this explanation is further undermined by Noland's failure to disclose the existence of the Signal or ProtonMail accounts during his February 2020 deposition, despite being asked targeted questions on this exact topic. If the switch to these accounts was part of an innocuous effort to avoid hacking, Noland could have easily said so. His failure to do so raises the inference that the motivation for switching to the accounts was more nefarious. *Herzig v. Ark. Found. for Med. Care, Inc.*, 2019 WL 2870106, *4-5 (W.D. Ark. 2019) (concluding, where the plaintiffs "install[ed] and [began] using the Signal application on their mobile devices" after the dispute arose, and used the Signal application to engage in "numerous responsive communications with one another and with other AFMC employees," yet provided an "initial misleading response ... that [they] had no responsive communications" and "did not disclose that they had switched to [Signal] until discovery was nearly complete," that the plaintiffs had engaged in "intentional, bad-faith spoliation of evidence" that constituted "an abuse of the judicial process" and "warrants a sanction").

The Court also rejects the Individual Defendants' proffered justification for Noland's failure to disclose the Signal and ProtonMail accounts during his deposition (*i.e.* he was confused and/or got cut off by the FTC's counsel). The deposition transcript contains no evidence of confusion or an interruption, Noland also failed to disclose the accounts in response to a later question about encrypted communications, and Noland made no effort to correct the transcript after the deposition was complete.

The content of the ProtonMail email from May 2020, which the FTC lucked into discovering despite Noland's efforts to destroy it, serves as further circumstantial proof that the Individual Defendants' evidence-destruction efforts were not innocuous. 1 Gensler, *supra*, Rule 37 at 1202 ("[A] court can find intent to deprive based on circumstantial evidence."). As discussed elsewhere in this order, the May 2020 email can be construed as an attempt to shape the testimony of third-party witnesses on the key disputed issues in this case. If the evidence being destroyed was potentially harmful to the Individual Defendants' case, it is reasonable to infer that their motivations for destroying it were not innocuous.

Finally, the coordinated deletion of the Signal app from the Individual Defendants' phones in August 2020, just as the phones were about to be turned over for imaging, is the *pièce de résistance.* Notably, the Individual Defendants took this step without the knowledge or approval of their counsel. This was an outrageous maneuver that raises a strong inference of bad faith. *Cf.* *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 746 (N.D. Ala. 2017) ("No credible explanation has been given as to why they departed from the ... protocols and intentionally deleted Blake's information.... This type of unexplained, blatantly irresponsible behavior leads the court to conclude that Boeing acted with the intent to deprive....").

This inference is not undermined, in any way, by the Individual Defendants' proffered justification for their coordinated deletion effort (*i.e.,* they wanted to prevent the FTC from learning the identify of their donors). As an initial matter, this explanation makes no sense. If, as Noland testified, the Signal app was set on "auto-delete," then the only information the FTC could have extracted from the Signal apps on the Individual Defendants' phones was their contact lists and call logs—the content of any messages would have already been deleted. But seeing a contact list and/or call log would not, on its own, tell the FTC anything about which of the Individual Defendants' contacts were donating to their legal defense. Further, the Individual Defendants have asserted ignorance as to these persons' identities. If the Individual Defendants are unaware of this information, how could the FTC have gleaned it from a mere examination of their call logs and contact lists? More important, putting aside these logical contradictions, the Individual Defendants "donor protection" defense fails for the more fundamental reason that they were not entitled to take it upon themselves to delete the entire Signal app (which contained at least some discoverable, relevant information) simply because they didn't want the FTC to have access to other non-privileged information that might be found in the app.

G. **Adverse Inference**

***14** The FTC seeks an inference that the spoliated evidence is presumed to be unfavorable to the Individual Defendants. (Doc. 259 at 19-20.) The Individual Defendants object to this adverse inference as "yet to be articulated." (Doc. 276 at 4.) They also assert that the FTC's motion goes to witness credibility more than the loss of potentially relevant evidence,

so the FTC's interests can be vindicated through cross-examination rather than an adverse inference. (*Id.* at 3-4.) Finally, they emphasize that the prejudice to the FTC is minimal because "this case concerns claims of false and misleading marketing and a fraudulent compensation plan" and "the overwhelming majority of evidence in this case is public knowledge or in the FTC's possession." (*Id.* at 4.)

It is true that "the severe measures authorized by [Rule 37(e)(2)] should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss." Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment. Nevertheless, the Court concludes that the requested adverse-inference sanction is appropriate. As explained above, it is likely that the deleted Signal and ProtonMail communications addressed matters relevant to this litigation. Further, the Individual Defendants' conduct violated not only Rule 37(e), but also the MIDP (Doc. 14 at 8); the TRO (Doc. 38 at 21), and the preliminary injunction (Doc. 109 at 17). These violations raise the possibility of Rule 37(b)(2) sanctions, including the drawing of an adverse inference. *See generally* *Nyerges v. Hillstone Rest. Grp. Inc.*, 2021 WL 3299625, *8-17 (D. Ariz. 2021).

To the extent the Individual Defendants' position is that the relevant evidence they destroyed in violation of the Court's orders was insufficiently prejudicial to warrant an adverse-inference sanction, this argument lacks merit. The information lost does not appear to have been "relatively unimportant" and lesser remedies would be insufficient under the circumstances. Indeed, courts have suggested that even stronger sanctions than those sought here by the FTC may be permissible to address analogous misconduct. *See, e.g.,* *WeRide Corp. v. Kun Huang*, 2020 WL 1967209, *9 (N.D. Cal. 2020) ("The amount of spoliation that AllRide concedes is staggering. AllRide admits that it kept its company-wide policy of deleting from its server all emails older than 90 days until months after the preliminary injunction issued ... and that its employees began communicating with DingTalk's ephemeral messaging feature after the preliminary injunction issued. Based on these undisputed facts, the Court finds it appropriate to issue terminating sanctions."); *Paisley Park Enterprises*, 330 F.R.D. at 233-34 ("Failure to [turn off the auto-delete function] ... alone is sufficient to show that Defendants acted unreasonably. But that is not all the RMA Defendants did and did not do. Most troubling of all, they wiped and destroyed their phones after Deliverance and RMA had been sued, and, in the second instance for Wilson, after the Court ordered the parties to preserve all relevant electronic information, after the parties had entered into an agreement regarding the preservation and production of ESI, and after Plaintiffs had sent Defendants a letter alerting them to the fact they needed to produce their text messages. As Plaintiffs note, had Staley and Wilson not destroyed their phones, it is possible that Plaintiffs might have been able to recover the missing text messages by use of the 'cloud' function or through consultation with a software expert. But the content will never be known because of Staley and Wilson's intentional acts.... This is even more egregious because litigation had already commenced."). Accordingly, a general adverse inference is proper. *Cf.* *Moody v. CSX Transportation, Inc.*, 271 F. Supp. 3d 410, 432 (W.D.N.Y. 2017) (imposing adverse inference sanction when evidence was spoliated with intent to deprive); *Ala. Aircraft*, 319 F.R.D. at 746-47 (same).

***15** Finally, the Individual Defendants suggest that this matter "can better be addressed through an evidentiary hearing." (Doc. 276 at 1.) However, the Individual Defendants make no effort to identify the evidence they would attempt to submit during such a hearing or explain how it would differ from the voluminous evidence already submitted by the parties in relation to the FTC's motion. No evidentiary hearing is required in these circumstances. *Cf.* *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1164-65 (9th Cir. 2003) ("Paladin is correct that Rule 37(c)(1) permits a court to impose sanctions only 'after affording an opportunity to be heard.' However, conforming to the rule does not require an evidentiary hearing in every case.... Here, Paladin received notice of the possibility of sanctions when MPC filed its motions for costs. It was afforded the opportunity to respond, and did indeed do so by filing a responsive brief. Given that the issues were such that an evidentiary hearing would not have aided its decision making process, the district court did not abuse its discretion in proceeding without an evidentiary hearing after briefing.").

Accordingly,

IT IS ORDERED THAT the FTC's motion for sanctions (Doc. 259) is **granted**.

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449 U.S. 383 (1981)

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

No. 79-886.

Supreme Court of United States.

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

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

385 *385 *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.*[*]

William W. Becker filed a brief for the New England Legal Foundation as *amicus curiae.*

386 *386 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 rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

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
387 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" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments.[1] A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special

agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U. S. C. § 7602 demanding production of:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments
388 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 were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U. S. C. §§ 7402 (b) and 7604 (a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F. 2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the `client's.'" *Id.,* at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the
389 Court of Appeals remanded to the District Court so that a determination of who was *389 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
390 when the client is a corporation, which in theory is an artificial creature of the *390 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 Co.* 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 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
391 factual background and sifting 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. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—"officers and agents . . . responsible for directing [the company's] actions in response to legal advice" —who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in *Diversified Industries, Inc.* v. *Meredith,* 572 F. 2d 596 (CA8 1978) (en banc):

> "In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem `is thus faced with a "Hobson's choice". If he interviews employees not having "the
392 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 extremely difficult, if not impossible, to determine what happened." *Id.,* at 608-609 (quoting Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B. C. Ind. & Com. L. Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, *e. g., Duplan Corp.* v. *Deering Milliken, Inc.,* 397 F. Supp. 1146, 1164 (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*
393 *States Gypsum Co.,* 438 U. S. 422, 440-441 (1978) ("the behavior proscribed by the [Sherman] Act is *393 often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct").[2] 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).

394 *394 The communications at issue were made by Upjohn employees[3] 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 ¶ 9277, pp. 83,598, 83,599. 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.[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 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
395 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 the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, *id.,* at 39a, 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.

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

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a
> 396 communication concerning that fact is an entirely different *396 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 communications to his attorney." *Philadelphia* v. *Westinghouse Electric Corp.,* 205 F. Supp. 830, 831 (ED Pa. 1962).

See also *Diversified Industries,* 572 F. 2d, at 611; *State ex rel. Dudek* v. *Circuit Court,* 34 Wis. 2d 559, 580, 150 N. W. 2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman* v. *Taylor,* 329 U. S., at 516: "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
397 "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client *397 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
398 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" 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]

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
399 26 (b) (3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable *399 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 ¶ 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
400 516-517 ("the statement would be his [the *400 attorney's] language, permeated with his inferences") (Jackson, J., concurring).[8]

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 ¶ 9277, p. 83,604. Rule 26 goes on, however, to state that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U. S. C. App., p. 442 ("The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . .").

401 *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 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 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.

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

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

It is so ordered.

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 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
403 *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 whether the employee's conduct has bound or would bind the corporation; (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), aff'd 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.

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
404 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 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.

[*] Briefs of *amici curiae* urging reversal were filed by *Leonard S. Janofsky, Leon Jaworski,* and *Keith A. Jones* for the American Bar Association; by *Thomas G. Lilly, Alfred F. Belcuore, Paul F. Rothstein,* and *Ronald L. Carlson* for the Federal Bar Association; by *Erwin N. Griswold* for the American College of Trial Lawyers et al.; by *Stanley T. Kaleczyc* and *J. Bruce Brown* for the Chamber of Commerce of the United States; and by *Lewis A. Kaplan, James N. Benedict, Brian D. Forrow, John G. Koeltl, Standish Forde Medina, Jr., Renee J. Roberts,* and *Marvin Wexler* for the Committee on Federal Courts et al.

[1] On July 28, 1976, the Company filed and amendment to this report disclosing further payments.

[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 argue 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.

[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 ¶ 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."

[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:

"[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 upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 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."

[8] Thomas 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 ¶ 9277, p. 83,599.

[*] 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.

583 F.3d 600 (2009)

UNITED STATES of America, Plaintiff-Appellant,

v.

William J. RUEHLE, Defendant-Appellee.

No. 09-50161.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted September 1, 2009.
Filed September 30, 2009.

601 *601 Daniel B. Levin (argued), Gregory W. Staples, Andrew D. Stopler, United States Attorney's Office, Los Angeles, CA; Robb C. Adkins, United States Attorney's Office, Santa Ana, CA; Thomas P. O'Brien, United States Attorney, for plaintiff-appellant United States of America.

Matthew D. Umhofer (argued), Richard Marmaro, Matthew E. Sloan, Skadden, Arps, Slate, Meagher & Flom LLP, Los Angeles, CA, for defendant-appellee William J. Ruehle.

Before: RAYMOND C. FISHER, RONALD M. GOULD, and RICHARD C. TALLMAN, Circuit Judges.

TALLMAN, Circuit Judge:

We here explore the treacherous path which corporate counsel must tread under the attorney-client privilege when
602 conducting an internal investigation to advise a *602 publicly traded company on its financial disclosure obligations. Defendant-Appellee William J. Ruehle is the former Chief Financial Officer ("CFO") of Broadcom Corporation, a California-based, publicly traded semiconductor supplier that came under intense scrutiny for its suspected backdating of company stock options. Following a government investigation, Ruehle was criminally indicted for his involvement in an alleged backdating scheme that ultimately resulted in Broadcom's restatement of its earnings to account for approximately $2.2 billion in additional stock-based compensation expenses. The district court held an evidentiary hearing and, after evaluating the extensive briefing and evidence presented, issued an order suppressing all evidence reflecting Ruehle's statements to attorneys from Irell & Manella LLP ("Irell"), Broadcom's outside counsel, regarding the stock option granting practices at Broadcom. The court found that at the initial stages of the inquiry by Irell (called the "Equity Review") an attorney-client relationship also existed with the CFO individually, and not just with Broadcom, and that the lawyers breached their ethical duties to their client Ruehle in disclosing what he had told them in a preliminary interview.

The government filed an interlocutory appeal. We have jurisdiction pursuant to 18 U.S.C. § 3731, and we reverse and remand for further proceedings.

I

In March 2006, the *Wall Street Journal* published the first of a series of articles called "The Perfect Payday," which suggested that a number of public companies were backdating stock options granted to their employees.[1] Shortly thereafter, in mid-May 2006, an investor rights group publicly identified Broadcom as one of the corporations that appeared to have engaged in backdating. As a result of the media attention and in anticipation of an inquiry from the Securities and Exchange Commission ("SEC"), Broadcom's Board of Directors and company management decided to bring in outside counsel to commence an internal review of the company's current and past stock option granting practices. Ruehle, as
603 Broadcom's CFO, was among those intimately involved in that decision from the outset. On May 18, *603 2006, Broadcom's Audit Committee engaged Irell, a private law firm with which it had longstanding ties, to conduct the Equity Review by investigating the propriety of the measurement dates utilized by Broadcom in its option granting process and identifying those grants which failed to meet the measurement date requirements of generally accepted accounting principles.[2] Irell immediately commenced its review, which entailed collecting corporate documents and records and conducting interviews with past and current Broadcom employees.

Broadcom representatives, including Ruehle, met with Irell lawyers on May 24 and 25, 2006, to discuss the scope of the Equity Review. It was agreed that Irell would report the results of its inquiries to the Audit Committee. It was also decided that the Board would not appoint a panel of independent, outside directors to oversee the Equity Review. On May 26, 2006, a formal meeting of the Audit Committee was convened. Ruehle and other senior Broadcom executives, several members of the Board, and Irell lawyers were among those present. During the hour-long meeting, Irell partner David Siegel explained the nature of typical "backdating" investigations and discussed the status of Irell's internal review, including the necessary involvement of Broadcom's outside independent auditors, Ernst & Young LLP, who would have to review and opine on the accuracy of the company's audited financial statements and regulatory filings. Siegel also cautioned "that Irell can handle issues related to the proper accounting for option grants but that if an issue of self-dealing or management or Board integrity arose, a special committee of independent directors would need to be appointed and special independent counsel engaged to conduct that inquiry." The Audit Committee and other representatives of Broadcom made clear that the intent was to turn over the information obtained through the Equity Review to the auditors, to fully cooperate with government regulators, and, if necessary, to self-report any problems with Broadcom's financial statements.

As many within Broadcom had anticipated, civil lawsuits soon followed the media reports about the company's back-dating of stock options. On May 25, 2006, a shareholder derivative suit captioned *Murphy v. McGregor* was filed in California federal court. The following day, on May 26, the plaintiffs in the ongoing securities class action in California state superior court, *Jin v. Broadcom Corp.,* filed an amended complaint. Both the *Murphy* action and the *Jin* amended class action now alleged wrongdoing in relation to Broadcom's stock option granting practices; both suits named Broadcom and also personally named Ruehle, among other Broadcom officers and directors, as an individual defendant.

604 *604 On May 30, 2006, Broadcom's in-house General Counsel David Dull sent an e-mail to various Broadcom employees, including Ruehle, notifying them of the *Murphy* action and of the amended complaint filed in the *Jin* securities class action. Dull invited anyone with concerns to contact either him or Irell attorneys Siegel, Kenneth Heitz, or Dan Lefler. Shortly after receiving Dull's message, Ruehle received a separate e-mail from Heitz, one of the Irell partners with whom Ruehle had already conferred as part of the Equity Review. Heitz's e-mail updated Ruehle concerning the scheduling of interviews of three current or former Broadcom employees and, finally, inquired, "if you have open time on Thursday Dan Lefler and I would like to spend an hour or so with you...."

As arranged, Heitz and Lefler met with Ruehle in his office on Thursday, June 1, 2006, to discuss Broadcom's stock option granting practices and his role as the company's CFO.[3] Ruehle had subsequent, brief discussions with the Irell lawyers as the Equity Review continued and the lawyers reported back to the CFO their progress in unearthing the facts. At no point did the topic of the civil securities lawsuits arise as it might relate to Ruehle personally. Nor did Ruehle ever indicate to the lawyers that he was seeking legal advice in his individual capacity. It is the substance of these June 2006 interactions that lies at the center of the present dispute.

In late June 2006, Irell advised Ruehle to secure independent counsel with respect to the investigations and the pending civil suits. Ruehle retained the law firm Wilson Sonsini Goodrich & Rosati to represent him individually. Nevertheless, Ruehle remained heavily involved in the company's internal review and he was privy to Irell's reports to the Audit Committee of its findings and ultimately the disclosures of the information gathered by Irell to Ernst & Young.

In August 2006, at Broadcom's direction, Irell fully disclosed the information obtained from the Equity Review to the Ernst & Young auditors. Irell had a series of meetings with Ernst & Young in which the lawyers reported what they had found, which necessarily included the substance of Ruehle's June 1, 2006, interview with Heitz and Lefler. Ruehle was present for at least some of these meetings between Irell and the Ernst & Young auditors. There is no dispute that the Irell lawyers regularly updated Ruehle and others in senior management about the progress of the Equity Review and their meetings and contacts with the auditors.

The Equity Review revealed several accounting irregularities with respect to certain stock option grants. In January 2007, on the advice of its outside counsel and auditors, Broadcom restated its earnings as reported in its financial disclosure
605 statements to include a total of $2.2 billion in *605 previously undisclosed compensation expenses.

The SEC and the United States Attorney's Office commenced formal enforcement and grand jury investigations of several company executives in relation to Broadcom's stock option granting practices. In May and June 2007, with Broadcom's authorization, government investigators interviewed Irell attorneys Heitz and Lefler by telephone regarding their conversations with Ruehle in June 2006. The information they provided was summarized in FBI Form FD-302 reports of

investigation, which are part of the sealed record. When he learned that the government intended to use this information against him in connection with possible criminal charges, Ruehle objected and claimed that any statements to the Irell attorneys were protected by his attorney-client privilege. Ruehle also insisted, after the fact, that whatever he said to Irell could not be disclosed without his prior written consent.

On June 4, 2008, a grand jury in the Central District of California indicted Ruehle and Henry T. Nicholas III— Broadcom's founder, and former President and Chief Executive Officer—on charges of conspiracy, securities and wire fraud, and various other violations of Title 15 of the United States Code. The indictment alleges that beginning in or around 1999 and continuing until at least in or around 2005, Nicholas and Ruehle, among others, engaged in a fraudulent scheme and conspiracy to disguise, conceal, understate, and mischaracterize compensation expenses Broadcom was required to recognize in connection with granting its stock options to various employees. Among the allegations of wrongdoing, the indictment claims that as part of the backdating scheme the defendants paid a former employee who threatened to expose the scheme, concealed the payoff from Broadcom's Board and its independent auditors, and took various steps to create plausible deniability as to Broadcom's option backdating practices.

On January 12, 2009, the government moved *ex parte* for a hearing to resolve whether the statements Ruehle made to Irell lawyers in June 2006 were privileged communications. Ruehle argued that he had an individual attorney-client relationship with Irell arising from the securities lawsuits, in which he was a named defendant. Beginning on February 23, 2009, the district court held a three-day evidentiary hearing at which Ruehle and Irell attorneys Heitz and Lefler testified. At Ruehle's request, a substantial portion of the testimony and evidence was received *in camera* outside the presence of the federal prosecutors. Both Irell attorneys insisted that Irell's individual representation of Ruehle in relation to the civil securities lawsuits did not commence until after the June 1, 2006, interview.[4] Among other things, the attorneys testified that they began the June 2006 meeting with a so-called *Upjohn* or corporate *Miranda* warning, which included notice that the Irell attorneys were acting as representatives of Broadcom—specifically, the Audit Committee—and that the privilege therefore rested only with the company. Ruehle, however, denied any recollection of receiving such cautionary warnings at the June 1, 2006, interview. Ruehle testified that at the time he spoke with Heitz and Lefler he believed Irell represented everyone
606 named in the civil suits, including *606 him, and that Heitz and Lefler were acting at least in part as his personal attorneys during the interview.

At the conclusion of the hearing, the district court rendered its oral ruling which strongly condemned the Irell attorneys' behavior with respect to the firm's handling of the Equity Review. The court then found that Ruehle "had a reasonable belief that Irell and Manella were his lawyers prior to the June 1, 2006 interrogation by Irell, and that he never gave informed written consent, either to the dual representation by Irell or the disclosure of privileged information to third parties, including Ernst & Young and the government." Based on this reasoning, the court ordered suppression. The district court subsequently issued a written order, which included an additional finding that Ruehle intended his statements to Heitz and Lefler to be confidential. The order stated that "all evidence reflecting Mr. Ruehle's statements to Irell regarding the stock option granting practices at Broadcom is suppressed."[5] The court also referred Irell to the California State Bar for possible discipline in light of numerous perceived violations of state rules of professional conduct.

The government interlocutorily appealed the district court's suppression order and we consider it on an expedited basis.[6]

II

The district court's conclusion that statements are protected by an individual attorney-client privilege is "a mixed question of law and fact which this court reviews independently and without deference to the district court." *United States v. Bauer,* 132 F.3d 504, 507 (9th Cir.1997) (quoting *United States v. Gray,* 876 F.2d 1411, 1415 (9th Cir.1989)). That is, whether the party has met the requirements to establish the existence of the attorney-client privilege is reviewed de novo. *Id.* We also review de novo the district court's rulings on the scope of the attorney-client privilege. *Id.* Factual findings are reviewed for clear error. *See Al-Haramain Islamic Found. v. Bush,* 507 F.3d 1190, 1196 (9th Cir.2007). A district court's credibility
607 determinations are given "special deference." *United States v. Craighead,* 539 F.3d 1073, 1082 (9th Cir.2008) *607 (citing *United States v. Nelson,* 137 F.3d 1094, 1110 (9th Cir.1998)).

III

The government raises several arguments challenging the district court's order excluding Ruehle's statements to Irell attorneys. We begin with some basic premises. First, there is no dispute that Broadcom had an existing attorney-client relationship with Irell and, by electing to reveal the information gathered to Ernst & Young (and later to various agencies of the United States), deliberately waived any corporate attorney-client privilege it held with respect to all matters at issue. Second, the Equity Review and the civil securities suits, to which Ruehle was a party, both concerned the same general subject matter as of June 1, 2006—i.e., the stock option granting practices of Broadcom. Finally, the district court concluded as a fact that Ruehle reasonably believed that Irell represented him individually with respect to the ongoing civil lawsuits when the June 1, 2006, meeting took place. Because this factual finding is not clearly erroneous, we approach the parties' arguments from the perspective that Irell had attorney-client relationships with both Broadcom and Ruehle individually.

We, however, must inquire further. After all, "[a] party asserting the attorney-client privilege has the burden of establishing the relationship *and* the privileged nature of the communication." *Bauer,* 132 F.3d at 507 (citing *Ralls v. United States,* 52 F.3d 223, 225 (9th Cir.1995)) (emphasis added); *accord In re Grand Jury Subpoenas,* 144 F.3d 653, 659 (10th Cir.1998) ("In certain circumstances, reasonable belief may be enough to create an attorney-client *relationship,* but it is not sufficient here to create a *personal* attorney-client *privilege.*"). We must determine whether Ruehle's communications to the Irell attorneys regarding Broadcom's stock option granting practices are protected by a personal attorney-client privilege belonging to Ruehle.

"The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, ... as well as an attorney's advice in response to such disclosures." *Bauer,* 132 F.3d at 507 (quoting *United States v. Chen,* 99 F.3d 1495, 1501 (9th Cir.1996)) (emphasis omitted). "The fact that a person is a lawyer does not make all communications with that person privileged." *United States v. Martin,* 278 F.3d 988, 999 (9th Cir.2002) (citing *Chen,* 99 F.3d at 1501). "Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed." *Id.* (quoting *Weil v. Inv./Indicators, Research & Mgmt., Inc.,* 647 F.2d 18, 24 (9th Cir.1981)); *accord United States v. Plache,* 913 F.2d 1375, 1379 (9th Cir.1990). "[T]he privilege stands in derogation of the public's `right to every man's evidence' and as `an obstacle to the investigation of the truth,' [and] thus, ... `[i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *In re Horowitz,* 482 F.2d 72, 81 (2d Cir.1973) (citations omitted). Typically, an eight-part test determines whether information is covered by the attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

608 *In re Grand Jury Investigation,* 974 F.2d 1068, 1071 n. 2 (9th Cir.1992) (quoting *United States v. Margolis (In re Fischel),* *608 557 F.2d 209, 211 (9th Cir.1977)).[7] The party asserting the privilege bears the burden of proving each essential element. *United States v. Munoz,* 233 F.3d 1117, 1128 (9th Cir.2000).

A

At the outset we note a fundamental flaw in the district court's analysis. "Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law." *Bauer,* 132 F.3d at 510 n. 4 (quoting *Clarke v. Am. Commerce Nat. Bank,* 974 F.2d 127, 129 (9th Cir.1992)); *see also United States v. Blackman,* 72 F.3d 1418, 1423 (9th Cir.1995) ("[S]ince the adoption of the Federal Rules of Evidence, courts have uniformly held that federal common law of privilege, not state law applies." (citations omitted)). The district court, however, applied a "reasonable belief" standard without ever referencing the well-established eight-part test. Rather, in reaching its holding, the court relied almost exclusively upon California state law to define both the attorney-client relationship and the attorney-client privilege. Most significantly, the court cited California Evidence Code section 917(a) for the proposition that all "communications made in the course of an attorney-client relationship are presumed confidential."[8]

609 This legal error is critical in this case. The district court applied a liberal view of the privilege that conflicts with the strict *609 view applied under federal common law, which governs here. *See Martin,* 278 F.3d at 999. By approaching the exclusion question with a presumption that the privilege attached, the district court inverted the burden of proof, improperly placing the onus on the government to show what information was not privileged. *See Gordon v. Superior Court of L.A. County,* 55

Cal.App.4th 1546, 65 Cal.Rptr.2d 53, 59 (1997) ("[C]ommunications between a lawyer and his client are presumed confidential, with the burden on the party seeking disclosure to show otherwise." (citations omitted)).

As the party asserting the privilege, Ruehle was obliged by federal law to establish the privileged nature of the communications and, if necessary, to segregate the privileged information from the non-privileged information. *See* Bauer, 132 F.3d at 507; *see also* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence,* § 503.20[4][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed.2009) (discussing rule that blanket claims of privilege are generally disfavored). With respect to the latter obligation, Ruehle has made no effort to identify with particularity which of his communications to the Irell attorneys are within his claim of privilege, in either his public or sealed filings before us. Under federal law, the attorney-client privilege is strictly construed. Ruehle's failure to define the scope of his claim of privilege weighs in favor of disclosure; in any event, his claim cannot support the overly broad, blanket suppression order entered here.

B

With the burden properly on Ruehle, and after carefully reviewing and evaluating the record, we hold that Ruehle fails the fourth element of the traditional eight-part privilege test. Ruehle's statements to the Irell attorneys were not "made in confidence" but rather for the purpose of disclosure to the outside auditors. That he might regret those statements after later learning of the subsequent corporate disclosure to law enforcement officials is not material to the privilege determination as of June 2006.

The district court reached the contrary conclusion: "Mr. Ruehle intended his statements to be confidential, and he had no reason to suspect that his conversations with the Irell lawyers would be disclosed to third parties." We are unable to square this factual finding, which forms the linchpin of the suppression order, with the evidence presented at the evidentiary hearing. The notion that Ruehle spoke with Irell attorneys Heitz and Lefler with the reasonable belief that his statements were confidential is unsupported by the record. Of particular significance is what was said in the meetings he attended prior to June 1, 2006, with Irell attorneys, company management, and the Audit Committee, as acknowledged in Ruehle's own testimony. He frankly admitted that he understood the fruits of Irell's searching inquiries would be disclosed to Ernst & Young in order to convince the independent auditors of the integrity of Broadcom's financial statements to the public, or to take appropriate accounting measures to rectify any misleading reports. We reject the district court's contrary finding that an expectation of confidentiality was established because, upon review of the record, we are left with the "definite and firm conviction that a mistake has been committed" and thus we determine that this factual finding was clearly erroneous. *United States v. Overton,* 573 F.3d 679, 688 (9th Cir.2009) (quoting *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001)).

610 *610 Ruehle was no ordinary Broadcom employee. He served as the public company's CFO—the senior corporate executive charged with primary responsibility for Broadcom's financial affairs. This was a sophisticated corporate enterprise with billions of dollars in sales worldwide, aided by accountants, lawyers, and advisors entrusted with meeting a multitude of regulatory obligations. The duties undertaken by Ruehle broadly encompassed not only accurately and completely reporting the company's historical and current stock option granting practices, but also Broadcom's strict compliance with reporting and record keeping requirements imposed through the Securities Exchange Act of 1934 and the Sarbanes-Oxley Act of 2002, among many other federal and state rules and regulations. *See, e.g.,* 15 U.S.C. §§ 7241, 7262(a). As the head of finance, Ruehle cannot now credibly claim ignorance of the general disclosure requirements imposed on a publicly traded company with respect to its outside auditors or the need to truthfully report corporate information to the SEC.

Ruehle was also intimately involved in all aspects of the Equity Review, including the planning, investigatory, and disclosure stages. Ruehle was a full participant in the initial May 2006 meetings with the Irell attorneys where the scope of representation and the details of the Equity Review were decided and agreed upon, even before convening the formal Audit Committee meeting. From the outset, it was settled and made widely known to senior management that Broadcom intended to fully cooperate with the SEC and the auditors. Ruehle, as the primary contact with Ernst & Young over the years, personally introduced the Irell attorneys to the team of outside auditors. Thereafter, he repeatedly met with the Audit Committee, senior management, the Irell attorneys, and the auditors, and remained fully apprised throughout the summer of 2006 of the status of Irell's investigation and the flow of information.

In his testimony at the evidentiary hearing, Ruehle acknowledged the broad nature of the planned third-party disclosure, noting that Irell was directed, to his knowledge, to freely share "all factual information" gleaned through the Equity Review—

whether "good, bad, or ugly." As he explained, at the time of the June 1, 2006, interview, he understood that nothing would be withheld from Ernst & Young:

> Q: Did you think it was appropriate for Broadcom, represented by Irell ..., to withhold information from the auditors in connection with their work in early June of 2006?
>
> A: We were not withholding information from the auditors.
>
> Q: They were not withholding information from the auditors; is that correct?
>
> A: That's correct.
>
> Q: And you understood that to be the case at the time; correct?
>
> A: That's correct.

Indeed, Ruehle confirmed over and over again his awareness that the substance of his June 2006 interviews with the Irell lawyers was not to be held in confidence:

> Q: You understood that Irell was going to be sharing the factual information they gathered to third parties?
>
> A: That's correct.
>
> Q: And fair to say you understood that Irell was there, among other things, to gather facts; correct?
>
> A: Correct.

To dispel any doubt, Ruehle also confirmed that the information he provided to Heitz and Lefler was largely factual in nature — the type of information he understood would be disclosed to third parties.

611 *611 Q: To be clear, the information you provided to Irell was factual information; correct?

> A: It was a combination of factual information and some assumptions and some recollections.
>
> * * *
>
> Q: And you understood that Ernst & Young was going to be looking to you, among other people, to help them understand what had happened as part of Broadcom's historical options review; correct?
>
> A: That's correct.

As Ruehle anticipated when he met with the Irell attorneys in June 2006, the information obtained through the Equity Review, including his input, was passed on to Ernst & Young. He never raised any anxiety about the possible disclosure over what he now claims was intended to be confidential and thus privileged information. Ruehle had ample opportunity to raise any concern he might have harbored. Ruehle not only attended meetings where the Audit Committee directed Irell to disclose to Ernst & Young the fruits of the Equity Review, he was also present at meetings where disclosures to the auditors actually occurred. He did not object. Even after engaging independent counsel to apprise him of his legal rights, Ruehle never claimed that he thought his statements to Irell during the Equity Review, later shared with the auditors, were confidential—until the specter of criminal liability arose in 2008.

On appeal, Ruehle tries to minimize the damning evidence confirming his awareness that his interactions with Irell would not be held in confidence. He places much weight on the assertion that he only learned of the details of Irell's disclosures to Ernst & Young and the government in 2008 and that he was "shocked." Ruehle contends that, notwithstanding his obligation to fully cooperate in Broadcom's internal review, he would not have provided information as part of the Equity Review had he known it could be used in support of a criminal investigation or an SEC enforcement action. The district court seems to have agreed with Ruehle's analysis, noting:

> The Government argues that Mr. Ruehle knew that Irell would make some disclosure to Ernst & Young in connection with its investigation, and therefore Mr. Ruehle knew that his statements were not confidential. This argument is unpersuasive. Mr. Ruehle never understood that Irell might disclose statements adverse to Mr. Ruehle's interests to the Government for use in a criminal case against him.

This analysis misses the mark. The salient point from a privilege perspective is that Ruehle readily admits his understanding that all factual information would be communicated to third parties, which undermines his claim of confidentiality to support invoking the privilege. Ruehle's subjective shock and surprise about the subsequent usage of the information he knew would be disclosed to third-party auditors—e.g., information subsequently shared with securities regulators and the Justice Department now used to support a criminal investigation and his prosecution—is frankly of no consequence here.

In support of his case for invocation of the privilege, Ruehle also repeatedly points to attorney Heitz's testimony that he could not "split his mind" so as to distinguish between facts relevant to the Equity Review and those relevant to the defense of Ruehle in the pending civil securities litigation, because they both had at their core Broadcom's stock option granting
612 practices. But his efforts to make gold from lead are met with failure. The implicit concession on Ruehle's part— *612 that the information underlying the Equity Review and the lawsuits was largely inseparable, if not one and the same—is detrimental, not helpful, to his case. His admitted awareness that anything relating to the former would not be held in confidence but rather shared with at least one third party destroys the confidentiality essential to establishing the privilege as to both.

Ruehle attempts to raise an exception to the full disclosure of all factual information, insisting that he anticipated the disclosure of only factual information "that was not otherwise privileged information." In other words, Ruehle now asserts an expectation of confidentiality only over statements that he claims were really given in confidence. He does not distinguish what those statements might be in his blanket invocation of the privilege. This circular reasoning is, analytically speaking, unpersuasive and cannot overcome the concrete evidence in the record before us. Even supposing he subjectively believed that *some* of the information he conveyed to the Irell lawyers was confidential, upon asserting the attorney-client privilege Ruehle was obliged to distinguish which particular statements should be afforded the privilege. He made no effort to do so before the district court and fares no better on appeal. His testimony at the evidentiary hearing, despite being held *in camera* at his request, due ostensibly to the sensitive subject matter to be discussed, did not delve into the details of his substantive contributions to the Equity Review and, frankly, entailed largely non-privileged matters. We are left guessing as to what particular facts Ruehle purportedly believed were disclosed in breach of confidence.

Ruehle's position is, at bottom, that some nebulous portion of his communications with Heitz and Lefler was intended to be confidential as to him personally and therefore everything said or not said to the attorneys should be protected by his individual attorney-client privilege. That is not the law nor, in our view, should it be. Having failed to better articulate his expectations regarding the scope of disclosure to Ernst & Young, he has failed to carry his burden with respect to any and all factual information arising from the Equity Review.

Moreover, Ruehle's argument runs squarely into the settled rule that *any* voluntary disclosure of information to a third party waives the attorney-client privilege, regardless of whether such disclosure later turns out to be harmful. *See* 3 Weinstein & Berger, *supra,* § 503.40. Ruehle freely and voluntarily disclosed the information in June 2006 and did not mention an individualized privilege until nearly two years later, after having sat in on the very meetings where his allegedly-privileged information was disclosed. Ruehle's assertion about his subjective intent in 2006 cannot sustain his privilege claim when he has freely admitted that the disclosure to Ernst & Young was planned. *See* *Weil,* 647 F.2d at 24 (holding subjective intent not dispositive and privilege waived).

In sum, the overwhelming evidence demonstrates that Ruehle's statements to Heitz and Lefler were not "made in confidence" but rather for the purpose of outside disclosure. Accordingly, we hold that Ruehle has failed to meet his burden of establishing the existence of an individual attorney-client privilege with respect to the information provided to the Irell attorneys in the June 2006 time frame.

IV

A considerable portion of the district court's suppression order was dedicated to recounting perceived violations of the
613 California Rules of Professional Conduct committed *613 by Irell attorneys. This portion of the order, which relates to possible disciplinary action by the state bar, is not before us on appeal. Ruehle, however, asserts that clear breaches of professional duties warrant suppression in a criminal prosecution. We disagree and reject this novel argument, which stands apart from the attorney-client privilege determination.[9]

"[A] state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible." *United States v. Lowery,* 166 F.3d 1119, 1124 (11th Cir. 1999); *accord* *United States v. Keen*, 508 F.2d 986, 989 (9th Cir.1974) ("[E]vidence obtained in violation of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law." (citations omitted)). To be clear, in some cases, material protected by the attorney-client privilege may come to light as a result of counsel's breach of a duty of confidentiality. But it is the protected nature of the information that is material, not the ethical violation by counsel. *See* *Int'l Bhd. of Teamsters*, 119 F.3d at 217 (holding that an individual could not assert individual privilege even though the law firm failed to clarify that it represented only his employer, in violation of state rules of professional responsibility).

Contrary to Ruehle's contention, *United States v. Rogers,* 751 F.2d 1074 (9th Cir. 1985), provides him no support. As the government correctly distinguishes it, *Rogers* involved government misconduct in acquiring evidence. *Id.* at 1079 (holding that a federal agent's "inducement of a violation of an ethical obligation of confidentiality... does not warrant dismissal of an indictment" where suppression is a possible remedy with respect to the improperly obtained evidence). Read properly, that case supports the government's position that the suppression order was in error. *Id.* at 1077 ("The attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer."). There has been no allegation that the government encouraged, was complicit in, or was even aware of, any breach of ethical obligations on Irell's part. It learned of the information only after Broadcom made an intentional disclosure to the government in response to regulatory inquiries as evidence of the company's good faith efforts to comply with its financial reporting obligations. Irell's allegedly unprofessional conduct in counseling Broadcom to disclose, without obtaining written consent from Ruehle, while troubling, provides no independent basis for suppression of statements he made in June 2006.

V

The district court erred in forbidding the United States from calling Irell attorneys to testify to the information they learned from Ruehle in June 2006. Consistent with his admitted understanding that Broadcom would fully disclose what Irell learned as part of the Equity Review to Ernst & Young, Ruehle lacks an expectation of confidentiality to support a blanket invocation of his individual attorney-client privilege over *all* factual information he provided.[10]

614 *614 The district court's order suppressing the Irell evidence is reversed and the matter is remanded for trial.

REVERSED and REMANDED.

[1] Stock options give individuals the right to buy shares of stock on a future date at a set price, commonly known as the "exercise" or "strike" price. Typically, as was the practice at Broadcom, stock options granted to employees could not be exercised until the end of a fixed vesting period. Once an option vested, the holder could exercise it and purchase stock from the company at the strike price. Thus, options that have a strike price below the current trading price in the stock market are commonly referred to as being "in the money," whereas options with a strike price above the current trading price are considered "underwater."

The strike price is typically equal to the market price on the date that the option is granted. "Backdating" refers to the practice of recording an option's grant date and strike price retrospectively. *See* *United States v. Reyes,* 577 F.3d 1069, 1073 (9th Cir.2009). The ability to manipulate the strike price maximizes the benefit to the option holders. Selection of an initial grant date when the share price, and thus the strike price, is at its lowest during a given period will increase the amount an option is "in the money" or, in some cases, may determine whether an option is "in the money" at all, rather than "underwater." In either case, the employee may immediately exercise the options to buy shares at the optimally low strike price, sell the stock at the current market price, and pocket any gain. "Backdating is not itself illegal, provided that the benefit to the employees is recorded on the corporate books as a non-cash compensation expense to the corporation, in accordance with an accounting convention promulgated in 1972 referred to as Accounting Principles Board Opinion No. 25." *Id.*

[2] The relationship between Broadcom and Irell runs deep, as Ruehle contends, and dates back to before 1998 when Irell assisted Broadcom in its initial public offering of stock ("IPO"), which led to its becoming an investor-owned public company. Irell itself acquired stock during the IPO and its partners profited handsomely when the stock price rose. Since then, Irell has represented Broadcom in relation to numerous acquisitions and the firm has handled several litigation matters for Broadcom and its officers and directors. At the time it was engaged to conduct the Equity Review, the firm was counsel of record for Broadcom and its management employees named as individual defendants in a then-unrelated securities class action, *Jin v. Broadcom Corp.,* pending in California state superior court. Moreover, Irell had recently represented Broadcom, as well as several of its officers and directors, including Ruehle, in an unrelated securities action referred to as the "warrants litigation." The warrants litigation settled several months prior, in December 2005.

[3] At the evidentiary hearing the Irell attorneys testified that they provided Ruehle a so-called *Upjohn* or corporate *Miranda* warning. Such warnings make clear that the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company's attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure. *See* Upjohn Co. v. United States, 449 U.S. 383, 393-96, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Ruehle testified that he did not recall receiving any such warnings. As discussed *infra,* the district court seems to have disbelieved the Irell lawyers who took no notes nor memorialized their conversation on this issue in writing, and it apparently credited Ruehle's testimony that no such warnings were given. We cannot say that this finding is clearly erroneous on the record before us.

[4] On June 8, 2006, Irell filed a Status Conference Report on behalf of all defendants in the *Jin* class action and shortly thereafter accepted service of the amended complaint in order to avoid the need for service of legal process on each person named therein, including Ruehle.

[5] The order also directed the government to return all privileged documents within 14 days. That order is stayed pending the outcome of this appeal.

[6] The district court and the parties label this a matter of "suppression." We will do so as well for the sake of consistency. However, analytically, the court's order is more accurately characterized as an order directing the exclusion of privileged evidence—akin to the grant of a motion *in limine.* Though courts in the past have used terms such as "suppress" and "exclude" interchangeably in similar contexts, *see, e.g.,* United States v. Plache, 913 F.2d 1375, 1377, 1379-81 (9th Cir.1990), "suppress" is better confined to a narrower meaning that would not apply here. "The attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer." *United States v. Rogers,* 751 F.2d 1074, 1077 (9th Cir.1985). In contrast, "suppression" is generally understood to concern invocation of the judicially created exclusionary rule, which is intended to operate as a deterrent to governmental misconduct and, as a necessary corollary, may be invoked to exclude other evidence discovered as the "fruit of the poisonous tree." *See* Herring v. United States, ___ U.S. ___, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009). There is no allegation of government misconduct in the instant case as the record reveals there was no governmental participation in the acts of Broadcom, the Audit Committee, or Irell's conduct of the Equity Review. Thus, the exclusionary rule does not apply here and "suppression" in that sense is not at issue.

[7] The government urges that the special problems presented by joint representation of a corporation and its individual officers counsel adoption of particularized requirements before the individual officer could assert an attorney-client privilege. The Third Circuit in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.,* 805 F.2d 120, 123-24 (3d Cir.1986), adopted a five-factor test intended to clarify that "any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer." Several other circuits have adopted some form of tailored test for joint-representation scenarios. *See* Ross v. City of Memphis, 423 F.3d 596, 605 (6th Cir.2005); *In re Grand Jury Subpoena (Newparent),* 274 F.3d 563, 571-72 (1st Cir.2001); *In re Grand Jury Subpoenas,* 144 F.3d 653, 659 (10th Cir.1998); *United States v. Int'l Bhd. of Teamsters,* 119 F.3d 210, 215-16 (2d Cir.1997). We do not decide the propriety of adopting the specialized test of *Bevill* because, given Irell's longstanding representation of Ruehle as an individual before the instant case arose and in light of the planned disclosure of facts gained in the Equity Review investigation to the third-party independent auditor, this case can be resolved using our usual eight-part test. Accordingly, we leave for another day consideration of the extraordinary requirements of the *Bevill* five-prong test for establishing attorney-client privilege in a situation where both the executive and the corporation assert that they are dually represented. Similarly, we need not reach and decide in this case whether our circuit should adopt the rule of *Newparent:* that the corporation, without consent of an executive asserting privilege, can waive the attorney-client privilege in a dual-representation context where the subject matter of the waiver concerns matters of interest to the corporation. 274 F.3d at 572-74. We also need not reach *Newparent*'s further holding that the executive can control the assertion of attorney-client privilege only as to matters segregable from those of concern to the corporation. *Id.* at 573.

[8] Ruehle insists that federal privilege law also creates a *prima facie* presumption of privilege, citing *Chen,* 99 F.3d 1495. He misreads that opinion. At issue in *Chen* was whether the defendants' attorneys were acting in the capacity of professional legal advisors—that is, whether the attorneys were providing legal advice, which is privileged, or non-legal business advice, which is not protected. *Id.* at 1500-01 (noting that "[i]f a person hires a lawyer for advice, there is a rebuttable presumption that the lawyer is hired `as such' to give `legal advice'"). Ruehle extrapolates from the unremarkable and narrow principle in *Chen* to argue that "[w]here an attorney-client relationship exists, communications made in the context of that relationship are *prima facie* subject to the privilege." This argument directly conflicts with our case law.

[9] At the evidentiary hearing, Ruehle's counsel acknowledged that suppression was *not* a remedy for a breach of counsel's duty of loyalty. Ruehle reversed course and argued otherwise in his briefs on appeal. He appears to have abandoned the position at oral argument.

[10] We stress that our holding today should not be interpreted as carte blanche approval of all foreseeable testimony by the Irell attorneys as we read the proffer summarized in the FBI Form FD-302 reports. The district court remains responsible for determining the admissibility of any testimony that may extend beyond factual information, and, to the extent consistent with our opinion, appropriate evidentiary objections, of course, remain viable.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

-v-

No. 22-CR-276-LTS

GREGOIRE TOURNANT,

Defendant.

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OPINION AND ORDER

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LAURA TAYLOR SWAIN, Chief United States District Judge

Before the Court is Defendant Gregoire Tournant's Motion to Dismiss the Indictment, or in the Alternative for a Hearing (docket entry no. 53 (the "Motion")), in which Mr. Tournant asserts that the indictment should be dismissed because the Government allegedly unlawfully intruded on his attorney-client privilege during the investigation of this case. The Government opposes the Motion, contending that Mr. Tournant has waived any privilege claims and representing that, even if Mr. Tournant's communications were privileged, the Government did not intrude upon his privilege. The Court has reviewed thoroughly the parties' submissions and arguments and, for the following reasons, the Motion is denied in its entirety.

BACKGROUND

The following facts are drawn from the parties' motion papers, declarations, and exhibits, and are undisputed unless otherwise noted. In May 2022, Mr. Tournant was indicted on a number of charges alleging that he engaged in a scheme to defraud investors while he was employed at Allianz Global Investors U.S. LLC ("AGI"), a company which was a subsidiary of Allianz SE ("Allianz"), one of the world's largest financial services firms. (Docket entry no. 61 ("Gov. Opp.") at 3; docket entry no. 2 ("Indct.").) Mr. Tournant worked as a portfolio manager at AGI, overseeing a number of high-profile investment funds worth billions of dollars. (Id.)

Most notably, Mr. Tournant oversaw the management of a group of funds known as the Structured Alpha Funds (the "Funds"), a series of private investment funds that employed bespoke investment strategies which were "marketed . . . as providing broad market exposure while maintaining specific risk protections to safeguard against losses in the event of a market crash." (Indct. ¶¶ 10-16.) The Indictment alleges that Mr. Tournant, as manager of this funds group, engaged in a scheme to deceive and defraud investors by essentially "understating the risk

to which investors' asserts were exposed, and therefore how the returns they touted were actually generated." (Id. ¶ 1.) This scheme was allegedly carried out by Mr. Tournant (and his employees) in three ways: (1) by "overstat[ing] the level of independent oversight that AGI US and its parent company Allianz were exercising over the Funds' strategy," (2) by "misrepresent[ing] the hedging and other risk-mitigation strategies they were undertaking to protect investor funds," and (3) "fraudulently alter[ing] documents" that AGI provided to investors and failing to "disclose relevant risk information" to investors. (Id. ¶¶ 2-3.) In March 2020, following the onset of the pandemic, the Funds lost more than $7 billion in market value, and were eventually shut down. (Id. ¶ 7.) The indictment alleges that Mr. Tournant personally benefited from this fraudulent scheme, earning over $60 million during the relevant time period. (Id. ¶ 7.)

The Securities and Exchange Commission ("SEC") began investigating the Funds' closure, notified Allianz of its civil inquiry in August 2020, and filed its civil complaint against Allianz in September 2020. (Gov. Opp. at 4; see also *In re Allianz GI Structured Alpha Class Action Litigation*, 20-cv-7154-KPF.) Allianz also initiated its own internal investigation into the circumstances surrounding the Funds' collapse. (Gov. Opp. at 4.) The United States Attorney's Office for the Southern District of New York (the "Government") began a separate criminal investigation into the Funds around the same time. (Id.) The Government's investigation, however, remained covert for some time, and was not formally announced to Allianz until June 10, 2021. (Id. at 4-6.)

In the fall of 2020, Mr. Tournant and other Allianz employees retained counsel in connection with the SEC's investigation. (Docket entry no. 54, Defense Motion ("Mtn.") at 6.) First, Mr. Tournant retained Milbank LLP ("Milbank") as his personal counsel to represent him

in connection with the internal investigation and the SEC investigation. (Id.; docket entry no. 74, Oral Argument Transcript ("Tr.") at 24, 46.) Second, two different law firms, Sullivan & Cromwell ("S&C") and Ropes & Gray (collectively, the "Firms"), began a joint representation of Allianz and Mr. Tournant, in connection with the internal investigation and the SEC civil matter. (Mtn. at 6.) The Firms also assisted Allianz in conducting its internal investigation. Mr. Tournant signed an engagement letter with S&C on November 17, 2020, which set out the terms and scope of the joint representation. (Mtn., Exhibit A (the "Agreement").) In the Agreement, Mr. Tournant acknowledged that he understood both the "benefits and the risks involved" with proceeding with a joint representation and stated that, should S&C conclude that a conflict of interest had arisen between Mr. Tournant and Allianz, S&C would "discuss the situation" with Mr. Tournant "with a view to arriving at a mutually agreeable solution." (Id. at 1-2.) The Agreement also provided that, if Allianz deemed it appropriate, Allianz could release Mr. Tournant's confidential information to the Government and could waive any applicable claim of privilege, which would "mean that the protections of the attorney-client privilege that [Mr. Tournant] may have for such [confidential materials] would no longer apply." (Id. at 3.)

The investigations continued throughout the winter and spring of 2021. On May 5, 2021, Allianz (together with S&C) presented the preliminary findings of Allianz's internal investigation to the SEC. (Mtn. at 8; Gov. Opp. at 4.) Allianz denied any wrongdoing and maintained that "the collapse [of the Fund] had been caused by the unforeseeable market downturns" of the early pandemic. (Mtn. at 8; Gov. Opp. at 4.) On May 20 and 21, 2021, Stephen Bond-Nelson, another Allianz portfolio manager who worked on the Funds alongside Mr. Tournant, testified before the SEC. (Mtn. at 8.) During his testimony, Mr. Bond-Nelson was represented by his individual counsel, as well as by the Firms (who appeared on behalf of

both Mr. Bond-Nelson and Allianz). (Gov. Opp. at 4-5.) Mr. Bond-Nelson was questioned extensively about the Funds and certain alterations that had been made to documents sent out to investors, and he initially maintained that "any alterations had not been fraudulent but had instead been attempts to make investor documents more accurate." (Gov. Opp. at 5; Mtn. at 9.) During the second day of questioning, however, Mr. Bond-Nelson abruptly adjourned his testimony and refused to answer further questions. (Mtn. at 9.) His individual counsel then communicated to the SEC that Mr. Bond-Nelson wished to cooperate with the SEC's investigation and with any parallel criminal investigation, and Mr. Bond-Nelson disengaged the Firms as his counsel. (Gov. Opp. at 5.) Mr. Bond-Nelson thereafter began cooperating[1] with both the SEC and the Government, implicating Mr. Tournant as the "mastermind" who had "directed the fraud" behind the Funds collapse.[2] (Id.)

Mr. Tournant maintains that this event was a key "inflection point in the Firms' strategy in representing Allianz"—namely, that Mr. Bond-Nelson's testimony and cooperation caused the Firms to shift from their initial strategy of denying any wrongdoing by Allianz and Mr. Tournant, to a new strategy of "shift[ing] the blame" to Mr. Tournant in order to "serve him up as a scapegoat to avoid the worst sanctions for Allianz." (Mtn. at 9.)[3] As an example of this

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1 The Government represents that its "understanding [is] that Bond-Nelson's counsel did not tell Allianz that Bond-Nelson was cooperating," and that "no one but the Government, Bond-Nelson, and the SEC" was aware of the cooperating interview proffers that Bond-Nelson subsequently made on June 3 and 4, 2021. (Gov. Opp. at 5-6.)

2 Mr. Bond-Nelson later pled guilty to several criminal charges in connection with his role in the alleged fraudulent scheme at Allianz. See *US v. Bond-Nelson*, 22-CR-137-PAE.

3 The defense further asserts that this change in strategy was "necessitated" by certain cooperation policies maintained by the Government, which applied "enormous pressure" on Allianz to implicate individual employee wrongdoers in order to avoid the "corporate death penalty" of a guilty plea by Allianz. (Mtn. at 10-11.) Under the Investment

shift in strategy, the defense points to presentation materials prepared by S&C which expressly state that, "[i]mmediately after Bond-Nelson's SEC testimony," Allianz "assumed control and pledged full cooperation in connection with the investigations" and "[c]ommissioned a forensic review" of the suspected fraud issues involving the Funds. (Mtn., Exhibit H, slide 35.)[4] The defense asserts that, at this point in May 2021, the Firms should have realized that the interests of Allianz and Mr. Tournant had diverged to such an extent that joint representation was no longer ethical, and that they should have apprised Mr. Tournant of this potential conflict before continuing the representation.

After Mr. Bond-Nelson's testimony, S&C arranged to meet with Mr. Tournant on June 3, 2021, for the dual purposes of continuing Allianz's internal investigation and helping Mr. Tournant to prepare for his anticipated SEC testimony.[5] (Mtn. at 11-12; Gov. Filter Ltr. at 2.)[6] At the time the meeting took place, the Government's criminal investigation was still covert and had not been announced to Allianz. (Id.) Two days before the meeting, S&C re-sent Mr.

Advisers Act, a guilty plea by Allianz to a felony conviction would result in the company "los[ing] its ability to manage money within the United States." (Gov. Opp. at 10.)

4 This quote is taken from written materials comprising a presentation that S&C and Allianz made to the Government on January 20, 2022, in which Allianz summarized the results of its internal investigation, discussed the extent of its cooperation, and advocated for the prosecution of Tournant and other individual employees in lieu of Allianz. The presentation slides state that Allianz' forensic review was initiated on May 22, 2021, the day after the Bond-Nelson SEC testimony ended. (Mtn., Exhibit H, slide 35.)

5 Mr. Tournant did not ultimately provide any testimony to the SEC. (Mtn. at 13.)

6 The Government submitted two separate briefs in opposition to Mr. Tournant's Motion—one prepared by the main prosecution team (docket entry no. 61); and a shorter supplemental brief prepared by a "filter team" which had access to Mr. Tournant's allegedly privileged materials that were set aside by the Government. (See infra page 9-10.) The filter team brief was filed under seal due to its discussion of the allegedly privileged materials.

Tournant (through his individual counsel) a copy of his engagement letter with S&C, and reminded him that, "under the terms of Mr. Tournant's engagement letter with [S&C], AllianzGI could decide to disclose Mr. Tournant's statements to the Firm" to third parties if it so chose. (Mtn., Exhibit R at 2.) During the meeting, S&C attorneys engaged in a mock cross-examination of Mr. Tournant and asked him about various topics relating to his role in overseeing the Funds, including detailed questions about the altered documents that were sent to investors, and about Mr. Tournant's communications with Mr. Bond-Nelson. (Mtn., Exhibit F.)

Toward the end of the meeting, the S&C attorneys "ambushed" Mr. Tournant by questioning him about whether he had used a second cell phone, what the phone was used for, and why he had failed to disclose his use of a second phone during prior interviews. (Id. at 45-48; Mtn. at 12-13.) They confronted Mr. Tournant with previously undisclosed documents relating to the second cell phone. (Id.) The meeting concluded shortly after this questioning. The defense asserts that the true purpose of this June 3 meeting was to elicit incriminating information from Mr. Tournant that could be used against him in the Government's criminal proceeding, in an effort to secure cooperation credit for Allianz. (Mtn. at 12-13.) After this meeting, Mr. Tournant cut off direct contact with the Firms and, on June 5, 2021, the Firms informed Mr. Tournant that they would be terminating their representation of him, explaining in their termination letters that Mr. Tournant's interests had "potentially diverged from those of the Allianz Entities." (Mtn., Exhibits L, M.) The Firms continued to represent Allianz.

On June 10, 2021, the Government contacted Allianz and several employees directly to inform them of the criminal investigation into the collapse of the Funds, and began making document requests to Allianz. (Gov. Opp. at 6.) Over the next several months, the Government engaged in an intensive investigation into Allianz, an effort which involved

"reviewing thousands of documents, engaging subject-matter experts, and interviewing more than 20 individuals, including 10 AGI employees," and in the meantime Allianz continued its own internal investigation into the misconduct. (Id. at 4-6.) At various points during the Government's investigation, Allianz made presentations to the Government to report on the findings of its internal investigation. (Id. Exhibit H.)

During the course of the criminal investigation, the Government began to suspect that Mr. Tournant had engaged in obstructive conduct with regard to the SEC investigation—specifically, that Mr. Tournant had directed Mr. Bond-Nelson to lie when responding to SEC inquiries about alterations to investor documents. (Gov. Opp. at 7.) The Government informed Allianz in October 2021 that it was "looking into efforts by Allianz employees to obstruct the SEC investigation," and asked Allianz to "provide the Government with any facts Allianz had learned during its internal interviews regarding the purported rationale for altering risk reports." (Gov. Opp. at 8.) In November 2021, in response to this inquiry, Allianz provided the Government with "partial summaries" of several interviews conducted during the internal investigation, including the June 3 interview of Mr. Tournant. (Gov. Opp. at 8-9; Mtn., Exhibit R at 4, Exhibit F.) Further, in January 2022, Allianz provided the Government with a full oral summary of the June 3 interview. (Gov. Opp. at 9; Mtn., Exhibit R at 4.)

On January 20, 2022, S&C made a presentation to the Government which expressly advocated for the prosecution of Mr. Tournant and others in lieu of charging Allianz. (Mtn. at 14-16; Mtn., Exhibit H.) For example, S&C stated that "Tournant, Taylor, and Bond-Nelson engaged in serious misconduct intended to understate [the] risk of the SA Funds," that there was no "knowledge or involvement in the misconduct" by Allianz management, and that a

guilty plea by Allianz/AGI was "unnecessary because DOJ action against individuals will satisfy the goals of federal prosecution." (Mtn., Exhibit H, slides 17, 92.)

The parties dispute when, precisely, the Government became aware of S&C's prior joint representation of Mr. Tournant and Allianz. The defense asserts that the Government should have "understood that Mr. Tournant was personally represented by the Firms" sometime in 2021 based on several events that occurred during the investigation. (Mtn. at 20.) The defense states that the SEC was clearly aware of the Firms' joint representation, because the SEC sent legal documents directly to Ropes & Gray as Mr. Tournant's counsel in April 2021, and the Firms appeared as counsel for Mr. Bond-Nelson and Allianz during Bond-Nelson's SEC testimony in May 2021. (Mtn. at 20.) The defense also notes that, based on the notes summary of the June 3 interview that was provided to the Government in November 2021, it was "clear that the Firms were acting as Mr. Tournant's counsel" during that meeting. (Mtn. at 20-21.)

The Government asserts that it did not become aware of the joint representation until January 2022. The Government notes that, during the multiple meetings it had with Mr. Tournant during the fall of 2021 and winter of 2022, Mr. Tournant was either represented by his individual counsel (Milbank) or his present counsel.[7] (Gov. Opp. at 11-12.) The Government also notes that, when Allianz shared the June 3 interview materials with the Government, "counsel for Allianz did not disclose that the company had shared counsel with Tournant, a fact that remained unknown to the Government." (Gov. Opp. at 9.) Shortly after Mr. Tournant's new counsel entered the case (on January 28, 2022), Mr. Tournant's new counsel informed the Government that, during the June 3 interview, Mr. Tournant had been represented by the

[7] Tournant's present counsel (Levine Lee LLP, and Orrick Herrington & Sutcliffe LLP) replaced Milbank sometime in January 2022. (Gov. Opp. at 12.)

Firms—which the Government asserts was "the first time the Government learned of the joint representation." (Id. at 12.) It was also during this time that Mr. Tournant's new counsel first raised the defense claims of privilege violations, informing the Government that Allianz's disclosure of Mr. Tournant's confidential information to the Government may have tainted the Government's investigation. (Gov. Opp. at 12-13.)

Upon receiving this information, the Government "promptly and carefully evaluated the issue," and concluded that, based on the engagement letters that Mr. Tournant had signed with the Firms, S&C acted "within its rights to provide information to the Government" and that "Tournant's privilege had not been breached by [S&C's] recounting of the [June 3] interview to the Government." (Gov. Opp. at 12-15.) Nevertheless, "in an abundance of caution" the Government elected to treat the disputed materials as "potentially privileged." (Id. at 14-15.) The specific categories of materials (the "disputed materials") that the Government set aside encompassed: "notes of Tournant's statements to [S&C] during the [June 3] interview; references to those statements in Allianz's presentations to the Government; and documents that were (i) produced by Allianz pursuant to the non-waiver agreement, (ii) created during the period that Tournant was jointly represented, and (iii) included Tournant." (Id. at 15.) The disputed materials were segregated by a filter team and made unavailable to the main prosecution team. (Id.) On Feb 25, 2022, the Government informed Mr. Tournant's counsel that, in bringing any criminal case against Mr. Tournant, it would not rely on any of the disputed materials. (Id. at 16.)

On March 1, 2022, S&C made a final presentation to the Government regarding Allianz's internal investigation, in which S&C strongly advocated for a resolution to the criminal case that would allow Allianz/AGI to continue doing business in the United States. (Mtn.,

Exhibit G.) During this presentation, S&C again described the cooperation and assistance that Allianz had provided during the Government's investigation as significant (including an assertion by S&C that "we were basically the back office of the USAO"); S&C advocated for the prosecution of Tournant in lieu of Allianz; and an S&C attorney even recognized that "Tournant may file [a] disciplinary claim against us because we gave [the Government] info, even though [Tournant] was represented by [Milbank]" at the time. (Mtn., Exhibit G at 5-8.) The Government, however, "did not find this advocacy persuasive" and "concluded that criminal charges were appropriate" against both Mr. Tournant and AGI. (Gov. Opp. at 10-11.)

On May 16, 2022, a grand jury returned the Indictment against Mr. Tournant, charging him with five felony counts: conspiracy to commit securities fraud, investment adviser fraud, and wire fraud; securities fraud; two counts of investment adviser fraud; and conspiracy to obstruct justice. (See Indct.) The indictment in this case was unsealed on May 17, 2022, and the SEC filed its civil complaint against Mr. Tournant on the same day. (See SEC v. Tournant et al., 22-cv-4016-LLS.) Also in May 2022, AGI U.S. was indicted for securities fraud and pled guilty, as a result of which AGI U.S. lost its ability to manage money within the United States and was forced to sell off its components. (See United States v. Allianz Global Investors US, LLC, 22-cr-279-CM; Gov. Opp. at 10.)

Mr. Tournant filed the instant Motion in January 2023, contending that the indictment should be dismissed because the case against him was built upon privileged information that was improperly provided to the Government and is the product of manifestly corrupt Government conduct that violates his constitutional right to due process, and requesting that the Court hold an evidentiary hearing to determine the extent to which the Government's evidence was tainted by the allegedly improper disclosure. The Government opposes the

Motion, asserting that Mr. Tournant cannot claim privilege over the disputed materials and that the Government did not, in any event, rely on any of the disputed materials in building its case or otherwise engage in conduct violative of Mr. Tournant's constitutional rights. The Court heard oral argument on the Motion on April 19, 2023.

DISCUSSION

The attorney-client privilege is a fundamental aspect of our justice system. Out of respect for this privilege, constitutional principles dictate that the Government cannot obtain access to a defendant's privileged attorney-client communications and use them against him in a criminal case to his disadvantage. The attorney-client privilege, however, is not absolute—a defendant can waive his privilege in a variety of ways, including by signing an agreement with his attorney that permits others to grant access to his confidential information. In such cases, the defendant loses the right to assert unilaterally a privilege claim over his communications with his attorney, and the law does not prevent the Government from using such materials against him in a criminal case.

Waiver is precisely what occurred in this case. Although, absent a delegation of waiver authority to another entity, Mr. Tournant would ordinarily have maintained control over the privileged status of his communications with his attorneys at S&C, he signed a retainer agreement with S&C that clearly and expressly granted Allianz authority to waive the privilege. Consequently, he has not demonstrated that the Government had access to materials that were privileged at the time they were provided to the Government, and he has failed to demonstrate that the Government has violated his constitutional rights by dealing with his former counsel in any manifestly corrupt way. Because his claims of privilege and constitutional violations lack

merit, Mr. Tournant is not entitled to dismissal of the Indictment, discovery, or the requested evidentiary hearing.

The Court's analysis will proceed in three steps, addressing (1) Mr. Tournant's claim that the Government has improperly secured access to Mr. Tournant's privileged material, (2) his claim that the indictment should be dismissed because the Government has engaged in conduct violative of his constitutional rights, and (3) whether an evidentiary hearing is warranted.

Privilege Invasion Claim

The attorney-client privilege protects communications that are "(1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011). Here, there is no dispute that, barring waiver, Mr. Tournant's communications with his attorneys—including, most notably, his communications with S&C during the June 3, 2021 interview—would be protected by the attorney-client privilege. These communications occurred between Mr. Tournant and his counsel, were intended to be confidential, and were designed, at least from Mr. Tournant's perspective, to provide legal advice.

The attorney client privilege can be waived, either expressly or impliedly. See In re Grand Jury Proc., 219 F.3d 175, 182 (2d Cir. 2000). "It is well settled that 'the burden of establishing the existence of an attorney-client privilege, in all of its elements, rests with the party asserting [the privilege].'" Id. (citation omitted). "The party claiming privilege also carries the burden of showing that it has not been waived." Hollis v. O'Driscoll, No. 13-CV-

01955-AJN, 2013 WL 2896860, at *1 (S.D.N.Y. June 11, 2013). Because "enforcement of a claim of privilege acts in derogation of the overriding goals of liberal discovery and adjudication of cases on their merits . . . privileges are disfavored and generally to be construed narrowly." Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 473 (S.D.N.Y. 1993). The attorney-client privilege can be expressly waived by the client, including through a contract. See Lugosch v. Congel, 219 F.R.D. 220, 235 (N.D.N.Y. 2003) (noting that a client may waive privilege when "the client's communication(s) or the legal advice given [are] shared, in some form or fashion, with a third party," and that a "waiver such as this may be done explicitly or implicitly, or conversely, intentionally or inadvertently").

Here, Mr. Tournant signed an engagement letter with S&C on November 17, 2020, that set out "the terms of S&C's joint representation of you [Tournant] and the Allianz Entities." (Mtn., Exhibit A ("the Agreement")). The Agreement stated, in relevant part, as follows:

> By execution of this Letter Agreement, **you acknowledge that you understand the implications of this joint representation, including the benefits and the risks involved.** Such benefits include, but are not limited to, the efficiencies from avoiding duplicative efforts by different lawyers and the advice of counsel who has been engaged in the matter and is familiar with its facts, circumstances, and issues. The risks or potential disadvantages of such joint representation may include, but are not limited to, the possibility that if a conflict of interest arises, you may need to proceed solely with Milbank LLP (or another counsel of your choosing) . . .
> The mutual interests of the Allianz Entities and you may be best served by **sharing oral or written confidential information ("Materials")**. Some or all of the Materials may be protected from disclosure to anyone else as a result of the attorney-client privilege, the work-product doctrine, or other applicable privileges. You agree that S&C may share such Materials (when and if S&C deems it appropriate) with the Allianz Entities, representatives of the Allianz Entities, third parties retained by S&C, and other persons. **You agree that if management of the Allianz Entities deems it appropriate, the Allianz Entities may decide to release Materials to the government** and to other persons outside of the Allianz Entities who agree to keep such Materials confidential, to release Materials in response to legal process, and **to waive any applicable privileges to**

> **the disclosure of such Materials**. ***You understand that such disclosure may mean that the protections of the attorney-client privilege that you may have for such Material would no longer apply***.

(Mtn., Exhibit A at 2-3) (emphasis added) (the "Advance Waiver" provision).

The Government argues that this Agreement effectuated a clear and valid waiver of any claim of privilege Mr. Tournant might hold over the disputed materials, and that Mr. Tournant has not met his burden of showing a lack of waiver. The defense, however, argues that the Advance Waiver provision was invalidated by the conflict of interest that arose between Allianz and Mr. Tournant during the course of the joint representation. According to the defense, once this conflict of interest arose, S&C had an obligation to either disclose the conflict to Mr. Tournant and obtain a new written waiver; or to terminate the joint representation. The defense points to two bases for this alleged duty to disclose: (1) the provisions of the Agreement that set out S&C's obligations to Tournant; and (2) the basic ethical duties that apply to all attorneys. The Court addresses these arguments in turn.

First, the defense contends that S&C was obligated to disclose the conflict of interest to Mr. Tournant based on the provisions of the Agreement. In general, retainer agreements are interpreted according to basic principles of contract law, and courts are obligated to enforce a clear and valid retainer agreement according to its terms. See Judd Burstein, P.C. v. Long, 180 F. Supp. 3d 308, 312 (S.D.N.Y. 2016) ("A clear and unambiguous retainer agreement will be enforced according to its terms.") (citation omitted); Caceres v. Brentwood Farmers Market, Inc., No. CV-20-3476-AKT, 2021 WL 3276637, at *2 (E.D.N.Y. May 4, 2021) ("A Court is bound to observe the provisions of a retainer agreement."). In particular, the defense argues that S&C failed to abide by the following provision of the Agreement:

> **In the event we [S&C] conclude**, as the facts concerning the Structured Alpha Matter and the positions of you and the Allianz Entities develop**, that the interests of the Allianz Entities and/or other individuals whom we may represent in the Structured Alpha Matters are in conflict with your interests** (including, for example, because the Allianz Entities of are the view that the joint representation imposes constraints on its ability to cooperate with any government investigation) such that it may become inadvisable or improper for us to continue to represent you, ***we will discuss the situation with you*** **with a view to arriving at a mutually agreeable solution**. You agree that, if there is such a conflict that we cannot otherwise resolve to our mutual satisfaction, [S&C] may terminate its relationship with you.

(Mtn., Exhibit A at 2) (emphasis added) (the "Conflict Disclosure provision").

The defense asserts that, during the course of S&C's joint representation of Mr. Tournant and Allianz, it became clear that the interests of Mr. Tournant were in conflict with the interests of Allianz, but S&C failed to "discuss the situation with [him]" as required by the Agreement. The defense asserts that this conflict of interest arose "no later than" May 22, 2021—the time at which Allianz "changed their entire approach and started cooperating" with the Government. (Tr. at 21.) In support of this position, the defense notes that, according to S&C's own documents, "immediately after Bond-Nelson's [May 21, 2021] SEC testimony," Allianz "[a]ssumed control and pledged full cooperation in connection with the [Government and SEC] investigations." (Mtn., Exhibit H., slide 35.) On May 22, 2021, Allianz initiated a large-scale internal forensic review, a "primary goal of which," according to the defense, was to "build the Government's case against Mr. Tournant and serve him up as a scapegoat." (Id., Mtn. at 9.) Moreover, in the weeks leading up to the June 3 interview, S&C investigated and developed evidence regarding Mr. Tournant's second cell phone, without his knowledge and with the intent to "ambush" him with this evidence at the interview. (Mtn. at 12.)

The defense argues that, after these events, it was objectively clear that a conflict had developed between the interests of Allianz and the interests of Mr. Tournant, which triggered S&C's contractual obligation to "discuss the situation with [Mr. Tournant] with a view to arriving at a mutually agreeable solution." (Mtn., Exhibit A at 2.) According to the defense, S&C's subsequent failure to discuss the conflict with Mr. Tournant resulted in a material breach of the Agreement. See Barbagallo v. Marcum LLP, 925 F. Supp. 2d 275, 287 (E.D.N.Y. 2013), aff'd, 552 F. App'x 102 (2d Cir. 2014) (noting that a breach of contract is considered "material" when it is "so substantial that it defeats the object of the parties in making the contract," or when it "goes to the root of the agreement between the parties") (citations omitted). Relatedly, the defense, pointing to a portion of the Agreement in which "S&C and the Allianz Entities" confirmed that they were "not presently aware of any such conflict" of interest at the time the letter was signed (Mtn., Exhibit A at 2), argues that the Agreement "premised S&C's joint representation on the absence of a conflict between Allianz and Mr. Tournant" (Def. Rply. at 25), such that the Advance Waiver provision ceased to be effective at the time that a conflict developed. In other words, the defense appears to argue that the Advance Waiver provision was conditioned on S&C's promise to provide Mr. Tournant with warning of conflicts of interest that could later arise, and that S&C's failure to provide such warnings when needed invalidated the Advance Waiver provision.

The Government asserts that Mr. Tournant has shown no breach because it "does not appear that [S&C] was aware of an actual conflict between Tournant and Allianz prior to June 5, 2021," when S&C terminated the representation, and thus there would have been no reason for S&C to alert Mr. Tournant about a potential conflict (or to terminate the representation) any earlier than it did, and that no events prior to the termination of the

representation undermined the disclosure and waiver rights allocated to Allianz by the Agreement. (Gov Opp. at 23.)

The Court concludes, based on the plain language of the Agreement, that, whether or not the provision requiring discussion of a conflict was breached, S&C's failure to apprise Mr. Tournant of the potential conflict did not vitiate the Agreement's Advance Waiver provision. First, the Court notes that it is unclear whether the Agreement's Conflict Disclosure provision was even triggered in this case—the Agreement provides that S&C will "discuss the situation" with Tournant "*in the event [S&C] conclude[s]* . . . that the interests of the Allianz Entities . . . are in conflict with [Tournant's] interests." (Mtn., Exhibit A at 2) (emphasis added). The defense argues that the events of late May 2021 *should have* indicated to S&C that a conflict had arisen between Allianz and Mr. Tournant. However, the Agreement does not impose an obligation on S&C to act when it *should have* perceived a conflict. Rather, the Conflict Disclosure provision sets a subjective standard, requiring action when S&C itself *actually concludes* that a conflict exists. Although the defense has presented facts that, in hindsight, may suggest that S&C could or should have concluded earlier that there was a potential conflict, there is no indication that S&C was truly aware of an actual conflict between Allianz and Mr. Tournant, or had reached a conclusion that such a conflict existed, at any time prior to the day that S&C terminated the representation.

Second, and more to the point, nothing in the Agreement indicates that the two provisions the defense cites—the Advance Waiver provision and the Conflict Disclosure provision—were interdependent. The two provisions are located in different paragraphs on different pages of the Agreement, deal with different topics, and discuss the rights and the conduct of different actors. The Advance Waiver provision grants *Allianz* unilateral control over

the disclosure of privileged materials should Allianz determine that such disclosure is appropriate, while the Conflict Disclosure provision deals with the status of the attorney-client relationship between Mr. Tournant and S&C. The latter provision obligated S&C to engage in discussion with Mr. Tournant in aid of seeking a mutually acceptable resolution if it concluded that there was a conflict and provides that, if no such mutually acceptable resolution were reached, S&C had no further obligations to Mr. Tournant and could "terminate its relationship" with him. (Mtn., Exhibit A. at 3.) Nothing in the Conflict Disclosure provision purports to limit Mr. Tournant's grant of disclosure authority to Allianz.

Finally, the record indicates that Mr. Tournant entered into this Agreement knowingly, intelligently, and with the benefit of the advice of his independent counsel. At the time that Mr. Tournant signed the Agreement, he was represented by his own independent counsel from Milbank, who would have been available to advise him fully of the risks, benefits, and implications of signing the joint representation Agreement. See, e.g., Callahan v. Unisource Worldwide, Inc., 451 F. Supp. 2d 428, 434 (D. Conn. 2006) (in determining whether the plaintiff had validly waived certain rights via a contract, finding it relevant that the plaintiff was "represented by counsel throughout" the negotiation of the contract and had "discussed particular aspects of the agreement" with his attorney). In fact, the Agreement expressly advised Mr. Tournant that he "may wish to consult with a lawyer prior to entering into this Agreement," and "encourage[d] [him] to consult with separate counsel" if he had "questions concerning . . . any other matters in this letter." (Mtn., Exhibit A at 4.) Mr. Tournant is a sophisticated businessman and a well-educated individual, and he does not argue that he did not understand the terms of the Agreement. See United States v. Blau, 159 F.3d 68, 74-75 (2d Cir. 1998) (concluding that a client's significant "business and professional background . . . leave us confident in our decision

that [his] decision to hire" a potentially conflicted attorney was "both knowing and intelligent"). The Agreement also made a thorough disclosure of the risks and benefits that were posed by the joint representation, and included an express acknowledgement that Mr. Tournant understood

> [t]he implications of this joint representation, including the benefits and the risks involved. Such benefits include, but are not limited to, the efficiencies from avoiding duplicative efforts by different lawyers and the advice of counsel who has been engaged in the matter and is familiar with its facts, circumstances, and issues. The risks or potential disadvantages of such joint representation may include, but are not limited to, the possibility that if a conflict of interest arises, you may need to proceed solely with Milbank LLP (or another counsel of your choosing).

(Mtn., Exhibit A at 3.)

As noted in the Agreement, Mr. Tournant's choice to proceed with S&C as his counsel was not without benefit to him—courts have recognized that "joint defense agreements present a pooling of resources, a healthy exchange of vital information, a united front against a common litigious foe, and the marshaling of legal talent and advice." See Lugosch, 219 F.R.D. at 238. Thus, there is no basis to conclude that the Agreement's Advance Waiver provision was invalid for lack of knowing and voluntary consent to the risks and benefits offered to Mr. Tournant; nor has the defense proffered any legal or factual basis for its assertion at oral argument that the Agreement was a "contract of adhesion."[8]

[8] During oral argument, the defense stated in passing that the Agreement was "basically a contract of adhesion" (Tr. at 46), but failed to explain this position further or cite any legal authority in support of it. The Court declines, in any event, to engage a theory that was raised in passing for the first time at oral argument. See US Airways, Inc. v. Sabre Holdings Corp., No. 11-CV-2725-LGS, 2015 WL 997699, at *3 (S.D.N.Y. Mar. 5, 2015) (concluding that the court need not consider the plaintiff's theory raised for the first time at oral argument because it would be "unwarranted and unfair to Defendant, which had no advance notice of Plaintiff's new argument and no opportunity to brief its opposition").

The defense further argues that S&C's conduct invalidated Mr. Tournant's waiver of the attorney client privilege because S&C violated professional ethical rules. Specifically, Mr. Tournant argues that (1) the events of late May 2021 (prior to the June 3 interview)[9] created an un-waivable conflict of interest between Allianz and Mr. Tournant; and (2) in the alternative, even if the conflict was waivable, in order to ethically continue the representation after the events of late May 2021, S&C was required to make full disclosures to Mr. Tournant and obtain his updated consent in writing. As a consequence of this conflict of interest, the defense contends, the Advance Waiver provision "does not apply" and "was not enforceable" following S&C's failure to obtain updated informed consent from Mr. Tournant. (Mtn. at 7; Def. Reply at 29.)

As an initial matter, this defense argument appears to be based on a conflation of two different types of advance waivers—advance confidentiality waivers, and advance conflict waivers. In an advance *conflict* waiver, a client agrees to waive "the firm's potential future conflicting engagements" as to other clients, so that he may hire the attorney of his choosing despite those potential future conflicts. See First NBC Bank v. Murex, LLC, 259 F. Supp. 3d 38, 65 (S.D.N.Y. 2017); see also Blau, 159 F.3d at 74 ("A defendant who is faced with the possibility that his attorney might become conflicted may waive the potential conflict of interest 'in order to retain the attorney of his choice.'") (citation omitted). Although such conflict waivers are permitted, courts often "take a fairly critical view of blanket future conflicts waivers," and require attorneys to obtain specific and detailed informed consent from clients. Murex, 259 F. Supp. 3d at 75 n. 18 (citation omitted); see also United States v. Hatfield, No. 06-

[9] These events included: the beginning of Bond-Nelson's covert cooperation with the Government investigation; Allianz pledge of its cooperation with the Government investigation and commencement of a full forensic review; and the alleged inflection point in S&C's representation strategy, in which S&C began attempting to shift the blame to Mr. Tournant in order to protect Allianz. (Def. Reply at 29 – 30.)

CR-0550-JS, 2009 WL 3806300, at *13 (E.D.N.Y. Nov. 13, 2009) ("[A]lthough courts appear to disfavor prospective [conflict] waivers, they are not per se invalid.").

In contrast, in an advance *confidentiality* waiver, a client agrees to waive future claims of attorney-client privilege, thus allowing his attorney to share his otherwise-confidential information with third parties. See generally New York City Bar Association's Professional Ethics Committee, *Formal Opinion 2004-02: Representing Corporations and Their Constituents in the Context of Governmental Investigations* (Feb. 2, 2004) ("2004 NY Bar Op."), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2004-02-representing-corporations-and-their-constituents-in-the-context-of-governmental-investigations [https://perma.cc/7H4Z-28PQ] (discussing "prospective waivers and advance permission to reveal confidential information," wherein an attorney enters into a "written understanding [with the client] with regard to confidential information learned during the representation"). Such prospective confidentiality waivers are not analyzed with a high degree of scrutiny, both because a client has a lesser expectation of privacy in confidences that the client knows could be shared with co-clients, see Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 137, 674 N.E.2d 663 (1996) ("Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other."); and because in general the attorney-client privilege is "readily waived" and can even be waived unknowingly or inadvertently. See Bowne, 150 F.R.D. at 479 ("Waiver [of attorney-client privilege] does not require that the privilege holder 'intentionally relinquish a known right.'") (citation omitted). The New York City Bar Association recognizes that advance confidentiality waivers are prudent when an attorney undertakes joint representation of a

corporate client and an employee. See 2004 NY Bar Op. (noting that an advance waiver of confidentiality "can be done in an engagement letter that sets out the understandings and agreements between the corporate client and the employee client with regard to sharing and control of confidential information").

The Agreement at issue here features an *advance confidentiality waiver*, under which Mr. Tournant agreed that Allianz would control the privilege, and that in the future Allianz might decide to release Mr. Tournant's confidential materials to third parties, including government authorities, in which case Mr. Tournant would "waive any applicable privileges to the disclosure of such Materials." (Mtn., Exhibit A at 3.) The Agreement does not, however, contain an advance conflict waiver regarding the joint representation—Mr. Tournant never agreed to waive any future conflicts of interest by S&C that might later develop during the representation. Instead, the Agreement simply provides that, if an unresolvable conflict of interest should later arise, S&C "may terminate its relationship" with Mr. Tournant. (Id. at 2-3.)

The defense has made a variety of arguments concerning the actions that S&C should have taken during late May 2021 with respect to the joint representation. For example, the defense argues that S&C was required to apprise Mr. Tournant of the potential conflict "the moment that [the] conflict arose" (i.e., the moment that Allianz shifted its strategy and decided to begin cooperating with the Government investigation), because "once the circumstances change, no blanket waiver is valid," and the attorney must make a "full disclosure of the entire set of [new] information" to the client and obtain a new waiver "in writing." (Tr. at 17-22.) In support of these arguments, the defense relies on portions of an ethics opinion dealing with advance *conflict* waivers, which suggest that a lawyer engaging in joint representation should "revisit the issues at the time the actual or potential conflicts arise" because, even if an initial

conflict waiver is valid, in some cases it may be necessary for the lawyer to secure a "second waiver from [the] client" for a later-arising conflict. (2004 NY Bar Op.)

The defense does not, however, explain how the existence of a conflict of interest (whether waivable or un-waivable) or a breach of state ethical rules could invalidate the wholly separate portion of the Agreement dealing with the waiver of confidentiality. The Court has found no legal authority supporting the defense's position that an attorney's later-arising conflict of interest would undermine the terms of a preexisting, valid retainer agreement that includes a provision granting the other party to the joint representation access to and control of privileged information. Even if this Court were to conclude that S&C violated state ethical rules in connection with the potential conflict between Allianz and Mr. Tournant (a topic on which the Court expresses no opinion), the remedies that the defense requests to cure this alleged breach—which include invalidation of the waiver, disqualification of the Government's prosecution team, and dismissal of the indictment—are novel and unsupported in law.

When a court determines that an attorney is laboring under an actual conflict of interest, the typical remedy is to disqualify the conflicted attorney from the case—however, disqualification is an extreme measure, and "[e]ven a violation of disciplinary rules 'may not warrant disqualification.'" In re Corp. Res. Servs., Inc., 595 B.R. 434, 442 (S.D.N.Y. 2019) (citation omitted); see also In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., 438 F. Supp. 2d 305, 307 (S.D.N.Y. 2006) ("Not every violation of a disciplinary rule will necessarily lead to disqualification."); U.S. Football League v. Nat'l Football League, 605 F. Supp. 1448, 1463 n.31 (S.D.N.Y. 1985) (noting that an attorney's "potential violation of the provisions of the [New York Code of Professional Responsibility] is not in itself a reason to disqualify" the attorney from the case). Moreover, courts in this circuit have expressed hesitance to acting as

enforcers of the rules of professional conduct, especially when the alleged ethical violation did not directly affect the case before the court. See U.S. Football League, 605 F. Supp. at 1463 n.31 ("Courts are not policemen of the legal profession; that is a matter for the disciplinary arm of the bar."); Tylena M. v. Heartshare Hum. Servs., No. 02-CV-8401-VM-THK, 2004 WL 1252945, at *2 (S.D.N.Y. June 7, 2004) ("Generally, courts are reluctant to resolve disputes over ethical violations that arise during the course of litigation."); W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) ("The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it . . . [i]f [counsel] is guilty of professional misconduct . . . the appropriate forum is the Grievance Committee of the bar association."). Mr. Tournant's request that the Government's prosecution team in effect be disqualified, and the indictment dismissed, based on its receipt of information from Mr. Tournant's former lawyers following the termination of Mr. Tournant's relationship with those lawyers, appears to be unprecedented. Such relief is, in any event, unwarranted here because Mr. Tournant undertook the risk of disclosures advantageous to Allianz when he knowingly entered into the joint representation pursuant to the Agreement, including its Advance Waiver provision.

Moreover, the rule that the defense asks the Court to adopt—under which the Government could be held to account for, and its ability to prosecute alleged criminal activity impeded by, an attorney's failure to apprise joint clients of every potential conflict during the course of the representation prior to the commencement of prosecution of a former client—would be unworkable and highly impractical. As the Government commented at oral argument, such a rule "would require the Government to impermissibly wade into attorney-client relationships on a massive scale" by requiring it to "engage with corporate counsel" in detail

about "the status of their joint representation" every time the Government asked "for a voluntary production of documents." (Tr. at 34.)

Based on all of these considerations, the Court concludes that the defense has not met its burden of demonstrating that the Advance Waiver provision was invalid and has failed to establish grounds for dismissal of the indictment or further inquiry into the Government's use of the material provided to it by Allianz's counsel on the basis of invasion of Mr. Tournant's attorney-client privilege. When presented with "a clear and unambiguous retainer agreement" governing the relationship between a client and his attorney, a court must enforce the agreement "according to its terms." Judd Burstein, P.C., 180 F. Supp. 3d at 312. The terms of the Agreement here were clear, and Mr. Tournant has made no argument that its language was in any way ambiguous. Mr. Tournant agreed at the outset of the joint representation that, "if management of the Allianz Entities deems it appropriate, the Allianz Entities may decide to release" confidential or privileged materials obtained during the course of the joint representation "to the government . . . and to waive any applicable privileges to the disclosure of such materials." (Mtn., Exhibit A at 3.) Mr. Tournant specifically acknowledged that he "underst[ood] that such disclosure [by Allianz] may mean that the protections of the attorney-client privilege that [he] may have for such Material would no longer apply." (Id.) He also acknowledged that "the Allianz Entities and others may give S&C access to confidential information," but that, due to "applicable privileges or other legal or strategic considerations, S&C may determine not to disclose this information to [him]." (Id. at 4.)

Thus, according to the clear terms of the Agreement, Allianz had unilateral control over the privileged status of information developed during the joint representation. When Allianz and S&C decided to share the disputed materials with the Government, Allianz

waived any applicable claim of privilege over the materials, including Mr. Tournant's privilege claim. Based on this valid waiver provision and Allianz's decision to disclose this information, the Court concludes that Mr. Tournant's attorney-client privilege with respect to the information that Allianz or S&C provided to the Government during the course of the investigation was waived upon such disclosure. The Court further concludes, for the reasons explained above, that Mr. Tournant's argument that S&C's alleged ethics violation impeded the Government's ability to utilize the information provided to it by S&C and Allianz is unavailing.

Constitutional Violation Claims

The Court next addresses the defense argument that the Government obtained improper access to privileged materials under circumstances that would render the continued prosecution of this case violative of Mr. Tournant's constitutional rights. This argument fails because (1), as explained above, Mr. Tournant had granted Allianz control over waiver of his claim of privilege with respect to his confidential communications from the outset of the joint representation; (2) the defense has not shown that the Government's interaction with S&C in this case was of a manifestly corrupt character; and (3) the defense has not shown that the Government's general encouragement of cooperation by corporate defendants is of so coercive a character as to be manifestly corrupt and require dismissal of the indictment.

Under the due process protections of the Fifth Amendment to the Constitution of the United States,[10] if the government "violates a protected right of the defendant, due process

[10] Mr. Tournant has also asserted that the allegedly improper conduct of the Government violated his Sixth Amendment right to effective assistance of counsel. See United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985) ("[G]overnment interference in the relationship between attorney and defendant may violate [the defendant's] right to

principles may bar the government from invoking the judicial process to obtain a conviction if the government's conduct 'reached a demonstrable level of outrageousness.'" United States v. Cuervelo, 949 F.2d 559, 565 (2d Cir. 1991) (citations omitted). "[T]he existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it 'shocks the conscience.'" United States v. Chin, 934 F.2d 393, 398 (2d Cir. 1991) (citation omitted). In the case of violations of the attorney-client privilege that occur pre-indictment, a defendant must show that "the conduct of the government has been manifestly and avowedly corrupt." United States v. Schwimmer, 924 F.2d 443, 447 (2d Cir. 1991); see also United States v. Voigt, 89 F.3d 1050, 1070 (3d Cir. 1996) (noting that a defendant claiming outrageous government misconduct "bear[s] both the burden of production and persuasion").

"When the government *intentionally* intrudes into the attorney-client privilege, such conduct 'warrants careful scrutiny.' However, even in cases of intentional intrusion, the Second Circuit has 'never gone so far as to adopt' a per se rule requiring . . . dismissal of an indictment." United States v. Weissman, No. 94-CR-760-CSH, 1996 WL 751386, at *12 (S.D.N.Y. Dec. 26, 1996) (quoting Schwimmer, 924 F.2d at 447) (emphasis added). Such an

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effective assistance of counsel.") However, as the Government correctly noted during oral argument (and the defense did not dispute), "the Sixth Amendment doesn't apply to this situation" because "the Sixth Amendment does not attach until indictment." (Tr. at 29); see United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982) ("For a Sixth Amendment right to counsel to attach, adversarial proceedings must have commenced against an individual, 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'") (citation omitted). Here, the alleged privilege violations by the Government all occurred prior to the initiation of any criminal proceedings against Mr. Tournant—thus the Sixth Amendment is largely inapplicable. To the extent that some cases (such as United States v. Stein, 541 F.3d 130 (2d Cir. 2008)) recognize that pre-indictment behavior can underlie a violation that can be asserted post-indictment, there are no facts that can sustain such a claim here. (See infra pages 34-37.) Accordingly, the Court focuses primarily on Defendant's Fifth Amendment constitutional argument.

exacting degree of scrutiny is not required, however, in cases where "the government's intrusion into territory protected by [the defendant's] attorney client privilege *cannot be characterized as intentional*." Id. at *13. (emphasis added).[11] If a defendant meets the "very heavy burden" of showing "outrageous governmental misconduct," the remedy is dismissal of the indictment. United States v. Walters, 910 F.3d 11, 27 (2d Cir. 2018). Dismissal of an indictment is "an 'extraordinary remedy' reserved only for extremely limited circumstances implicating fundamental rights." United States v. De La Pava, 268 F.3d 157, 165 (2d Cir. 2001) (citation omitted); see also United States v. Sabri, 973 F. Supp. 134, 146 (W.D.N.Y. 1996) ("Dismissal of an indictment for outrageous government conduct, although rare, is permissible . . . when 'the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'") (citation omitted).

Here, the defense argues that the Government's conduct was manifestly corrupt in two respects. First, the defense alleges that the Government intruded on the attorney-client relationship by inducing Mr. Tournant's counsel to "switch sides" and help build the criminal case against him, and by obtaining access to Mr. Tournant's privileged communications (including, most notably, the notes from the June 3 meeting). Second, the defense alleges that the Government's cooperation policies encouraged S&C to act unethically in its representation of Mr. Tournant, such as by including what the defense characterizes as unethical provisions in Mr.

[11] In applying the "manifest corruption" standard, some courts also take into account whether the government's conduct prejudiced the defendant. However, the Fifth Amendment standard does not expressly require a showing of prejudice—if the intrusion upon privilege rises to the level of manifestly corrupt, it is considered to be presumptively prejudicial. See United States v. Hoey, No. 15-CR-229-PAE, 2016 WL 270871, at *6 (S.D.N.Y. Jan. 21, 2016) (noting that these types of "particularly flagrant and sweeping violations of attorney-client privilege may justify dismissal of an indictment based on an assumed but not a concrete showing of taint").

Tournant's retainer agreement. The Government argues that Mr. Tournant cannot meet the high bar of showing that its conduct was manifestly corrupt, because there is no evidence that the government *intentionally* intruded upon his attorney client privilege, and because the mere existence of the policies that encourage cooperation does not constitute outrageous misconduct.

The Court concludes that Mr. Tournant has not demonstrated any manifest corruption or violation of his constitutional rights by the Government. First, as explained above, there has been no disclosure of materials as to which Mr. Tournant retained the ability to assert his claim of privilege. It is elementary that a defendant cannot sustain a claim for unconstitutional intrusion into his attorney-client privilege when he has made no showing that his communications were privileged when the government received them. See Voigt, 89 F.3d at 1070 (finding that the defendant's claim of manifest corruption failed because the defendant "failed to demonstrate that any of the information [his attorney] provided the government . . . was in fact privileged"). Second, even if the communications had been privileged, nothing in the proffered evidence indicates that the Government improperly intruded into the attorney-client relationship, or that the Government otherwise took any corrupt or outrageous actions with regard to its relations with S&C and Allianz.

The Court first addresses Mr. Tournant's argument that the Government acted in a manifestly corrupt way when it accessed his allegedly privileged information and intruded on his relationship with S&C. In cases which have found manifest corruption, the record showed a clear, intentional, and flagrant intrusion by the government into the realm of attorney-client privilege. For example, in United States v. Marshank, 777 F. Supp. 1507 (N.D. Cal. 1991), an indictment was dismissed after the government had essentially used the defendant's attorney as a confidential informant—the government "investigated [the defendant] using information

received from his own attorney," it "actively collaborated with [the attorney] to build a case against the defendant," and it "facilitated" the attorney's "unethical behavior . . . by hiding it from the defendant" and the court. Id. at 1523-24. Likewise, in United States v. Sabri, 973 F. Supp. 134 (W.D.N.Y. 1996), an indictment was dismissed due to the government's "manipulation of the attorney-client relationship" where the government instructed the defense attorney to call her client and to then "direct[] the conversation" to incriminating topics, all while surreptitiously recording the conversation—the "attorney-client relationship was the vehicle used . . . to obtain admissions from the defendant" that were then used in the prosecution against him. Id. at 138, 147; see also People v. Joly, 336 Mich. App. 388, 405-06 (2021) (finding manifest corruption where government agent inadvertently came across a privileged email containing key incriminating evidence, but then intentionally "used the privileged information to further his investigation of defendant").

In contrast, in cases which have concluded that the government's actions were not manifestly corrupt, the government either did not commit any intentional intrusion into the attorney-client relationship, or its actions (even if intentional) did not rise to a level of egregious misconduct that prejudiced the defendant.[12] For example, the court in United States v. Schwimmer, 924 F.2d 443 (2d Cir. 1991), found no manifest corruption where the government expressly directed the defendant's accountant to turn over privileged workpapers because, "although the agents obviously obtained the workpapers intentionally, [defendant] suffered no

[12] The Third Circuit has articulated a helpful three-factor test for such situations: "in order to raise a colorable claim of outrageousness pertaining to alleged governmental intrusion into the attorney-client relationship, the defendant's submissions must demonstrate an issue of fact as to each of the three following elements: (1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice." Voigt, 89 F.3d at 1067. No such circumstances are presented here.

prejudice as a result"—the government did not obtain any "preview of defense strategy" from the workpapers, and "any influence on the government's case by information obtained" from the workpapers "was wholly conjectural and insubstantial." Id. at 446-47. Similarly, the court in United States v. Voigt, 89 F.3d 1050 (3d Cir. 1996) found no manifest corruption where the government was essentially relying on the defense attorney as an informant during the investigation, because there was no evidence that the government "was or should have been aware" of the attorney-client relationship during the relevant time period; the government "did nothing to solicit the calls" from the defense attorney; the government's "efforts to steer clear of privileged information" demonstrated "that the government was attentive to ethical constraints;" and the defendant had not "suffered any ill effects flowing from the government's allegedly improper investigative activity"—although the attorney was "violating her ethical obligation to avoid a conflict of interest," there was no basis for imputing this violation to the government. Id. at 1069-70; see also United States v. Sanin, 113 F.3d 1230, 1997 WL 280083, *4 (2d Cir. 1997) (concluding that there was no government intrusion because "not only was the [intrusion upon attorney client privilege] unintended by the government . . . [the defendant] has been unable to point to any prejudice he has suffered"); United States v. Dunham, No. 20-2686, 2021 WL 3045372, at *3 (3d Cir. July 20, 2021) (finding no government intrusion where the government's behavior was "more akin to passive tolerance [of a conflict]" than "active encouragement of impropriety," as the government has "[no] affirmative duty . . . to inform a suspect that he has a potential conflict of interest with his attorney") (citation omitted).

Further, in determining whether the government has intruded upon privilege, courts often consider whether the prosecution took reasonable precautions to avoid exposure to privileged materials. See, e.g., United States v. Scozzafava, 833 F. Supp. 203, 210-11

(W.D.N.Y. 1993) (finding no intrusion where the prosecution "took steps . . . to avoid invading the zone of privilege established for attorney-client communications," and because there "was no deliberate effort [by the prosecution] to learn defense strategy or tactics, to invade the defense camp, or otherwise to interfere with the ability of [defendant's] retained attorney to advise and assist him"); United States v. Sharma, No. 18-CR-340-LGS, 2019 WL 3802223, at *3-4 (S.D.N.Y. Aug. 13, 2019) (finding no privilege violation where the defendants had "not shown that the Government intentionally intruded on the attorney-client privilege," the parties "agreed to a protocol for segregating the potentially privileged materials" and there was "no evidence that the Government intentionally diverged from the protocol," and "the Government took reasonable precautions to avoid exposure to privileged materials").

Here, unlike in Marshank or Sabri, there is no indication that the Government actively aided or encouraged S&C to disclose information in violation of any privileged relationship with Mr. Tournant. Each of those cases involved a narrow set of facts in which the government affirmatively requested or encouraged the defendant's personal attorney to disclose incriminating information about the defendant, which was gleaned during privileged communications, leading to the attorney essentially acting as an "undercover informant" on behalf of the government. See United States v. Longo, 70 F. Supp. 2d 225, 270 (W.D.N.Y. 1999) (noting that, in both Sabri and Marshank, a constitutional violation occurred "based on a finding of outrageous official conduct in the government's misuse of the defendant's attorney . . . as an informant to gather evidence against the defendant"). Here, although S&C assisted the Government by providing information and records, and S&C encouraged the Government to prosecute Mr. Tournant, there is no indication in the record that any *Government agent* improperly requested or encouraged S&C to gather information about Mr. Tournant to pass on to

the Government for use in a criminal prosecution. In other words, any misconduct here was solely on the part of S&C, not the Government.

Moreover, unlike in Joly, there is no indication that the Government used Mr. Tournant's allegedly privileged information to further its investigation or to bring the case against him. Indeed, once the Government was made aware of Mr. Tournant's claim of improper disclosure of privileged material, it took reasonable steps to segregate the disputed material pending a determination of the privilege claim. The Government proffers that it did not use the disputed material in its presentation to the grand jury or in fashioning the Indictment, and nothing in the record indicates otherwise. At most, some of the Government's pre-indictment actions—such as continuing to attend presentations by S&C even after being made aware of the defense's claim of privilege violations and S&C's potential conflict of interest—may have constituted "a passive tolerance" of a conflict, but none rose to the level of an unconstitutional "active encouragement of impropriety." Dunham, 2021 WL 3045372, at *3. Furthermore, although prejudice is not a necessary element of the "manifestly corrupt" standard which is applicable here, the Court also concludes that has not shown that he would be able to establish that he was prejudiced by the Government's exposure to his allegedly privileged materials.[13]

The Court next addresses Mr. Tournant's argument that the Department of Justice's ("DOJ") promulgation of general guidelines encouraging corporate cooperation induced S&C to engage in unethical conduct (e.g., inclusion of the unusual Advance Waiver provision in

[13] To the extent the defense argues that the prosecution has been tainted simply due to the prosecution's exposure to potentially privileged information (despite the filtering efforts that were undertaken), such argument is unavailing, as such reasoning has been rejected by the Second Circuit. See Schwimmer, 924 F.2d at 446 (explaining that a defendant cannot show an intrusion into attorney-client privilege based on "the mere tangential influence that [exposure to] privileged information may have on the prosecutor's thought processes"—rather, there must be a concrete "improper use" of privileged materials).

the retainer agreement). Specifically, the defense argues that S&C's conduct was legally attributable to the Government because the Government's cooperation guidelines incentivize corporations to provide information regarding the misconduct of individual employees. These arguments are insufficient to raise a material issue regarding improper government conduct.

The actions of a private entity "are attributable to the State if 'there is a sufficiently close nexus between the State and the challenged action of the entity, so that the action of the latter may be fairly treated as that of the State itself.'" See United States v. Stein, 541 F.3d 130, 146-148 (2d Cir. 2008) (citation omitted). For example, in Stein, the government was investigating a potential tax fraud perpetuated by a company and certain of its employees. Id. at 136-38. The company had a longstanding policy of covering legal fees for its employees during any criminal investigation. Id. When the company later began cooperating with the government investigation, its fees policy came into conflict with governmental cooperation principles which stated that a prosecutor should weigh "the extent and value of a corporation's cooperation" by looking to whether the corporation is "protecting its culpable employees . . . through the advancing of attorneys fees." Id. Responding to specific pressure from the government, the firm informed its employees that it would cover their fees only if they cooperated fully with the government investigation. Id. When certain employees were later indicted, the Second Circuit affirmed the district court's determination that the government had exerted such undue influence on the company decision-making that dismissal of the indictment was required. Id. at 145-46. The company's action was attributable to the government because the government essentially "forced [the company] to adopt its constricted fees policy"—the government had "intervened in [the company's] decision-making" by "expressing their disappointment" with the prior fees policy; by "mak[ing] plain their strong preference as to what

[the company] should do"; and by steer[ing] [the company] toward their preferred fee advancement policy and then supervis[ing] its application." Id. at 148. In contrast, this Stein test is not satisfied when "the state merely approves of or acquiesces in the initiatives of the private entity, or when an entity is merely subject to governmental regulation." Id. at 146 (citations omitted).

Here, the defense argues that the Government encouraged S&C to betray its clients' confidences by the publication of the DOJ's "Principles of Federal Prosecution of Business Organizations" (the "Principles"), a set of guidelines which, according to the defense, "apply enormous pressure on corporations under investigation to meet strict and burdensome requirements to obtain cooperation credit" and avoid criminal penalties. (Mtn. at 10.) The specific Principle cited by the defense provides that, in order to receive cooperation credit, a corporation must "identify all individuals substantially involved in or responsible for the misconduct at issue" and "provide to the [government] all relevant facts relating to that misconduct." (Mtn., Exhibit I at 8.) The defense asserts that the Principles "left S&C little choice but to turn on its own client," putting S&C in a situation wherein "the only safe course . . . was for S&C to switch sides and betray Mr. Tournant"—an outcome so egregious that it allegedly violated his constitutional rights. (Mtn. at 28-30.) Defendant's dramatic depiction of the termination of the joint representation and S&C's proffer of information and assistance to the Government ignores Mr. Tournant's knowing and voluntary entry (while represented by individual counsel) into a retainer agreement which gave his employer control over the disposition of privileged communications. It also disregards the inescapable logic that any target of a government investigation would find it in its own interests to be forthcoming with information in a manner that might help it to avoid indictment.

The defense has not demonstrated that the mere existence of the Principles is sufficient to render the Government responsible for any action taken by S&C during the investigation. As noted by the Government, the Second Circuit recently addressed and rejected a similar argument in Gilman v. Marsh & McLennan Companies, Inc., 826 F.3d 69 (2d Cir. 2016). There, a company became the subject of an investigation by the state attorney general ("AG"), and it later began cooperating. Id. at 71-72. The company asked two of its employees to sit for interviews with the AG, and "warned that failure to comply would result in termination"; the employees refused the interviews and were fired. Id. The employees argued that, because of the company's cooperation, the company's actions were attributable to the AG under the principles enunciated in Stein. Id. at 76. The Second Circuit rejected this argument, noting that, in Stein, the government had wielded "overwhelming influence" on the company's conduct, and had "steered [the company] to adopt a policy it otherwise would not have adopted." Id. In contrast, in the facts before the Gilman court, there was no evidence that the AG had "forced" the company to take any particular action, "intervened" in its decision-making, or "supervised" its interview requests, and "government compulsion" was not the "but-for reason" that the company had undertaken the interviews. Id. at 76-77. Instead, as the Gilman court explained, "a company is not prohibited from cooperating, and typically has supremely reasonable, independent interests for conducting an internal investigation and for cooperating with a governmental investigation, even when employees suspected of crime end up jettisoned." Id. at 77.

Here, as in Gilman, there is no indication that a government policy forced Allianz or its counsel to take any particular action, or directly intervened in its decision-making. The decision to include the Advance Waiver provision in the retainer agreement for joint representation was consistent with Allianz's interest in facilitating both its employees' ability to

obtain legal services and its own ability to develop its knowledge of the relevant circumstances. Allianz' decision to invoke the Advance Waiver provision when it perceived that its interests had diverged from Mr. Tournant's (and that it would be in a better position under the Principles if it provided information to the Government) was consistent with Allianz' self-interest and with the express language of the Advance Waiver provision to which Mr. Tournant had agreed.[14]

The Court accordingly concludes that Mr. Tournant has failed to provide a plausible basis for any inference that the Government's actions in this case were manifestly corrupt and his motion to dismiss the indictment on constitutional grounds must be denied.

Evidentiary Hearing Request

Finally, the defense asserts that Mr. Tournant is entitled to an evidentiary hearing (preceded by discovery) so that the Court may determine the extent to which the Government had access to and utilized his privileged materials, and the extent to which exposure to his privileged materials tainted the prosecution team and the indictment.

Mr. Tournant asserts that he is entitled to a hearing of the type contemplated by the U.S. Supreme Court's decision in Kastigar v. United States, 406 U.S. 441 (1972), a case that concerned the prosecution of persons who had earlier been granted immunity. Id. at 460. Kastigar held that, when a witness is compelled to give incriminating testimony under a grant of immunity and is thereafter prosecuted for a matter relating to the compelled testimony, the Government bears "the heavy burden of proving that all of the evidence it proposes to use was

[14] "You agree that if management of the Allianz Entities deems it appropriate, the Allianz Entities may decide to release [privileged or confidential material] to the government . . . . You understand that such disclosure may mean that the protections of the attorney-client privilege that you may have for such Material would no longer apply." (Mtn., Exhibit A, at 3.)

derived from legitimate independent sources." Id. at 461-62. Courts have subsequently interpreted Kastigar to establish a specialized type of proceeding, called a "Kastigar hearing," in which the Court can determine whether the Government's evidence was derived from legitimate sources. Holding a Kastigar hearing is appropriate when the defendant "raises a distinct, non-speculative possibility of taint" in the Government's evidence. See United States v. Helmsley, 726 F. Supp. 929, 933-34 (S.D.N.Y. 1989). While some courts in this circuit have applied the Kastigar standard to a defendant's claim of intrusion upon the attorney-client privilege by the government, see, e.g., United States v. Sharma, No. 18-CR-340-LGS, 2019 WL 3802223, at *5 (S.D.N.Y. Aug. 13, 2019), as the Government correctly notes, there is no binding Second Circuit authority on the question of whether a Kastigar hearing is required in all such cases. See United States v. Landji, No. 18-CR-601-PGG, 2021 WL 5402288, at *20 (S.D.N.Y. Nov. 18, 2021) (noting that there is "a dearth of law in the Second Circuit" on the issue of "a Kastigar claim premised on access to privileged materials").

Even if the Second Circuit had firmly recognized the right to a Kastigar hearing in such cases, Mr. Tournant would not be entitled to one here because he has not made a threshold showing that the government's evidence is tainted. See Sharma, 2019 WL 3802223, at *5 ("To warrant a [Kastigar] taint hearing," a defendant has "the burden of showing a factual relationship between the privileged information and the prosecution.") (citation omitted); United States v. Connolly, No. 16-CR-0370, 2019 WL 2120523, at *19 (S.D.N.Y. May 2, 2019) ("'An insubstantial and speculative possibility of taint' does not trigger Kastigar.") (citation omitted); Hoey, 725 F. App'x at 61 (to warrant a hearing, the defendant must show a "factual connection between" the content of "the allegedly privileged information and the charges in [the] case."). Here, as explained above, Mr. Tournant held no enforceable privilege claim over the disputed

materials, because he had signed a valid advance confidentiality waiver providing that Allianz would control the privilege and acknowledging that any privilege claim he held would be waived upon Allianz's disclosure. Nor has Mr. Tournant shown any specific factual relationship between his allegedly privileged information and the Government's case against him. Accordingly, Mr. Tournant is not entitled to an evidentiary hearing or to related discovery on his claims.

CONCLUSION

For the reasons explained above, the Motion is denied insofar as it seeks dismissal of the indictment, and Mr. Tournant's alternative request for an evidentiary hearing and discovery is also denied. This Opinion resolves docket entry no. 53.

The next pretrial conference in this case is scheduled to take place on September 19, 2023, at 11:30 am.

SO ORDERED.

Dated: New York, New York
August 3, 2023

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
Chief United States District Judge

About NLRB

Weingarten Rights

Traducir página al español

The Right to Request Representation During an Investigatory Interview

Section 7 of the National Labor Relations Act (NLRA) protects employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection"

Among the rights protected by Section 7 is the right of *union-represented employees*, upon request, to have their representative present during an interview that the employee reasonably believes could lead to discipline. This right was first articulated by the Supreme Court in the case, NLRB v. J. Weingarten, Inc. In that case, the Court found that Section 7 of the NLRA protects employees who refuse to submit to certain interviews without a requested representative present.

An employee's requested representative, which may be a union steward, business agent or officer, or fellow employee, is often referred to as a "Weingarten representative." Weingarten representatives are entitled to provide advice and active assistance to employees during investigatory interviews. Employees' right to request their representatives are frequently referred to as "Weingarten rights."

Employers violate the NLRA if they proceed with an investigatory interview while refusing an employee's request or retaliate against them for making the request. Depending on the circumstances of each case, the Board may order that the employer cease and desist, post a remedial notice, require the employer to repeat the interview with a union member present, or rescind and remedy discipline resulting from a Weingarten violation.

When do employees have a right to request a union representative?

An employee's right to request a representative arises during an investigatory interview. A useful comparison is an individual's Miranda right to an attorney when questioned by law enforcement. However, unlike the right to counsel in a Miranda setting, employers are not required to inform union members of their rights under Weingarten.

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Any meeting may be an "investigatory interview" provided that the following occurs:

- A manager, representative of management, or supervisor is seeking to question an employee.
- The questioning is part of an investigation into the employee's performance or work conduct. During an investigatory interview, a representative of management may require an employee to defend, explain, or admit misconduct or work performance issues that may form the basis for discipline or discharge.
- The employee reasonably believes that the investigation may result in discharge, discipline, demotion, or other adverse consequence to their job status or working conditions.
- The employee requests a union representative. Employers are not required to advise employees of their right to representation and third parties (including union representatives) may not make the request on behalf of the employee.

When making a request for a representative, the Board does not require that the employee specify that they need a "Weingarten" representative. Once an employee requests their representative, they are not required to repeat that request.

At times, it is not clear whether a meeting is investigatory or could lead to discipline. In those cases, the National Labor Relations Board (NLRB) looks to the conduct of the meeting and the surrounding circumstances to determine if there was an investigatory purpose. The Board will consider such factors as the identity/status of the participants, the parties' collective-bargaining agreement and disciplinary practices, whether there was a confrontational tone to the meeting, any notices or warnings issued prior to the meeting, or whether employees had been disciplined for similar misconduct.

What types of meetings are not covered by the Weingarten rule?

If the above conditions are met, any meeting between an employer and employee could trigger an employee's Weingarten rights. However, not every meeting or employer questioning satisfies those conditions. For example, employers need not grant an employee's request for a representative in the following situations:

- Instructional meetings where an employee receives training or correction on work techniques. Meetings of this nature generally do not lead to discipline.
- Meetings in which an employer informs an employee (or employees) of personnel policies. Often these meetings do not require questioning of employees and do not lead to discipline.
- Meetings in which the employee is informed in advance that no discipline or adverse employment action will result from the interview.
- Meetings about disciplinary decisions that have already been made. If an employer has made a final decision on a disciplinary action, a meeting with an employee to inform them of that decision is not considered investigatory. In the same vein, if an employee initiates a meeting to discuss a disciplinary action that they have experienced, that meeting is not investigatory in nature because any discipline that the employee has experienced has already occurred.

- Meetings in which an employee is questioned as part of an investigation of another employee's conduct or performance. For example, an employee who witnesses another employee's misconduct is not entitled to Weingarten representation if they are questioned about what they observed.

Even in the above examples, however, the nature of a meeting may change as it progresses. If an employee reasonably believes that a meeting that commenced for some other purpose has become an investigatory interview, the Board will look to the above factors to determine if an employee's request for a representative should have been honored.

Who may serve as an employee Weingarten representative?

An employee may choose their own representative, who may be a representative of the union or a fellow employee. Employers are required to honor that request, so long as that choice does not unduly interfere with the employer's ability to conduct its investigation. Employees may not request a non-employee representative unless that individual is an officer or business agent of the employee's union. For example, an employee may not request a private attorney or a family member as their Weingarten representative if that individual has no affiliation with the employee's union.

How should an employer respond to an employee's request for representation?

When an employee requests a representative during an investigatory interview, an employer may lawfully take one of three courses of action:

1. The employer may grant the employee's request and delay the interview until a representative is available.
2. The employer may deny the request and immediately end the interview, or
3. The employer may allow the employee to choose whether to proceed with the meeting without a representative or to end the interview.

If the employer denies the request and continues to ask questions, this could constitute an unfair labor practice. Also, it is an unfair labor practice for an employer to discipline an employee for refusing to answer questions without their union representative present.

What may a union representative do during an employee interview?

- Union representatives serve as advisors and witnesses during employee interviews. Employers are required to inform union representatives as to the subject matter of the interview and allow time for that representative to meet with the employee prior to questioning.
- During the interview, a union representative may ask the employer to clarify questions, give the employee advice on how to answer questions (within limits), and provide additional information to the employer after the questioning. A union representative may also object to questions if they are badgering, intimidating, or offensive.

What are the limitations on union representation during an employee interview?

- When representing an employee during an investigatory interview, a union representative must remain civil and may not interfere with an employer's legitimate efforts to conduct an investigation. An employer may lawfully remove a union representative from a meeting if they engage in disruptive or hostile behavior.
- A union representative may not tell an employee what to say and may not advise employees to give false answers.

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222 F.3d 633 (2000)

UNITED STATES of America, Plaintiff-Appellee/Cross-Appellant,

v.

Steven J. HENKE, Defendant-Appellant/Cross-Appellee.

United States of America, Plaintiff-Appellee/Cross-Appellant,

v.

Chan M. Desaigoudar, Defendant-Appellant/Cross-Appellee.

Nos. 99-10015, 99-10023.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 10, 2000
Filed August 25, 2000

635 *634 *635 Nina Wilder, Weinberg & Wilder, San Francisco, CA, and Sanford Svetcov, Landels Ripley & Diamond, LLP, San Francisco, CA, for the defendants-appellants.

Laurie Kloster Gray, Assistant U.S. Attorney, San Francisco, CA, for plaintiff-appellee.

Before: SCHROEDER, BEEZER, and TROTT, Circuit Judges.

Per Curiam Opinion; Concurrence by Judge BEEZER.

PER CURIAM.

Chan Desaigoudar and Steven Henke, former executives of California Micro Devices, Inc. ("Cal Micro"), appeal their convictions for conspiracy to make false statements to the Securities Exchange Commission (18 U.S.C. § 371), making false statements (18 U.S.C. § 1001), securities fraud (15 U.S.C. §§ 78m(a), 78ff(a)), and insider trading (15 U.S.C. §§ 78j(b), 78ff(a)). The government cross-appeals the defendants' sentences.

The defendants claim that their convictions must be set aside because a conflict of interest prevented their counsel from cross-examining a key government witness and because there was insufficient evidence to support their insider trading convictions. They also argue that the district court erred in admitting lay opinion testimony and an out-of-court statement into evidence, and in failing to conduct an *in camera* review of government notes from an interview with a key government witness to ensure that the notes did not contain information that the government was required to disclose to the defense. Finally, they claim that the prosecutor committed misconduct in forcing Desaigoudar to testify that various government witnesses were lying. We agree with the defendants that a new trial is necessary because their lawyers' ability to conduct their defense was impaired by a conflict of interest. We also agree that the district court erred in admitting lay opinion testimony on the key issue of knowledge. We disagree, however, that the evidence was insufficient to support their insider trading convictions. We therefore remand the case to the district court for a new trial. While we address the defendants'
636 remaining claims because they present issues that may recur on re-trial, because we vacate the convictions *636 and sentences, we do not address the government's sentencing appeal.

BACKGROUND

This case arises from a false revenue reporting conspiracy carried out by Cal Micro executives in order to preserve the appearance that the company was a good investment option when in fact it was struggling financially. Cal Micro designs, manufactures, and markets electronic components and semiconductor products for the defense and electronics industries. The company was purchased in 1980 by Desaigoudar, who turned it into a multi-million dollar company during the 1980s. In addition to being Cal Micro's largest shareholder, Desaigoudar served as its Chief Executive Officer and Chairman of the Board until he was removed in 1994.

In 1993, Cal Micro had two objectives. It hoped both to attract a strategic outside partner to invest in the company and to raise about $40 million in outside capital through a second public offering. Making the company an attractive investment option for outside companies and private investors was crucial to achieving these objectives and Desaigoudar instituted an incentive-based stock option plan to motivate officers and managers to meet revenue goals. These goals became increasingly difficult to meet, however, because Apple Computers, one of the company's largest customers, substantially reduced its orders.

Unable to close the widening gap between revenue targets and actual sales, some Cal Micro executives devised a plan to make it appear on paper that the company was meeting its financial goals. Under Cal Micro's stated revenue recognition policy, revenue was recognized when an order was shipped. These Cal Micro executives began to deviate from this practice in several ways. They started: (1) recognizing revenue when some orders were received, rather than when shipped; (2) shipping orders earlier than requested in order to recognize the revenue during a certain fiscal period; (3) sending unwanted shipments; (4) creating false orders; and (5) executing "title transfers" falsely reflecting that products stored at Cal Micro had been purchased by a client.

While this was occurring, Cal Micro successfully negotiated an agreement with Hitachi under which Hitachi would purchase two million shares of Cal Micro stock at $23 a share. Cal Micro and its investment bankers also put in motion plans for a second public offering.

Things then took a turn for the worse. Those involved began to worry about the implications of the revenue scheme. Moreover, the company's plan to write off several million dollars in "bad debts" caused Cal Micro's investment bankers to balk at a second public offering. The Board eventually instituted an investigation and ultimately ousted Desaigoudar.

Desaigoudar and Henke, a former Chief Financial Officer, Vice President, and Treasurer of Cal Micro, were indicted on charges of conspiracy, making false statements, securities fraud, and insider trading. Surendra Gupta, Cal Micro's President during the revenue reporting scheme, was also indicted, but reached a plea agreement with the government shortly before trial was to begin. The central issue at trial was whether the defendants had early knowledge of the false revenue reporting scheme and whether they traded their stock because of this inside information. Several of Cal Micro's executive officers, including former co-defendant Gupta, testified that the defendants did have such early knowledge. The jury believed the government's witnesses and convicted the defendants.

CONFLICT OF INTEREST

The defendants' principal claim is that they are entitled to a new trial because their attorneys worked under an actual conflict of interest that prohibited them from cross-examining one of the government's key witnesses, Gupta.

637 *637 Before trial, Desaigoudar, Henke, and Gupta participated in joint defense meetings during which confidential information was discussed. Communications made during these pre-trial meetings were protected by the lawyers' duty of confidentiality imposed by a joint defense privilege agreement. Before trial was to begin, Gupta accepted a plea agreement and promised to testify for the government.

Desaigoudar's attorney then moved for a mistrial and to withdraw because his duty of confidentiality to Gupta under the joint defense agreement prevented him from cross-examining Gupta on matters involving information he learned as a result of the privileged pre-trial meetings. Henke's lawyer was also present at the joint defense meetings and felt that his duty to Gupta impaired his ability to adequately represent Henke.

The district court denied the motion to withdraw. It reasoned that any privileged impeaching information counsel learned about Gupta would not be known to new counsel and the defendants were therefore no worse off for being represented by their original attorneys. The court granted the motion for a mistrial to allow defense counsel to regroup after Gupta's plea.

Once the new trial began, Gupta testified for the government. Defense counsel conducted no cross-examination for fear that the examination would lead to inquiries into material covered by the joint defense privilege.

The issue for our decision is whether the government's use of a former defendant, with whom both Henke's and Desaigoudar's attorneys had an attorney-client relationship arising from a joint defense agreement, as a key witness at trial created a conflict of interest that impaired defense counsel's ability to defend their clients.

The joint defense privilege is an extension of the attorney-client privilege. It has been recognized by this Circuit since at least 1964. *Waller v. Financial Corp. of America*, 828 F.2d 579, 583 n. 7 (9th Cir.1987). A joint defense agreement establishes an implied attorney-client relationship with the co-defendant, here between Henke's and Desaigoudar's attorneys and Gupta. *See United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir.1977). The government concedes in its brief the existence of this privilege in this case.

This privilege can also create a disqualifying conflict where information gained in confidence by an attorney becomes an issue, as it did in this case. As the court said in *Abraham Construction,*

> Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.

559 F.2d at 253; *see also Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir.1978) (defense attorney breaches fiduciary duty if he uses information obtained in a joint defense meeting). Here, what Gupta allegedly said in confidence during pre-trial joint defense meetings about the defendants' presence at a critical meeting of Cal Micro executives was claimed to be at odds with his trial testimony for the government. This evidence put the two defense attorneys in a difficult position. Had they pursued the material discrepancy in some other way, a discrepancy they learned about in confidence, they could have been charged with using it against their one-time client Gupta. In fact, Gupta's lawyers
638 had threatened *638 Henke's and Desaigoudar's attorneys with legal action if they failed to protect Gupta's confidences. Here is the text of the letter received by defense counsel:

> June 26, 1998
>
> Re: *U.S. v. Desaigoudar and Henke*
>
> Dear [attorneys for defendants Desaigoudar and Henke]:
>
> It has come to our attention you may be contemplating filing an ex parte in camera submission to Judge Walker outlining what you contend are the contradictory statements made by Mr. Gupta in what you have conceded was a joint defense privileged meeting.
>
> Please be advised that we do not, waive, and at no point ever have waived the joint defense privilege. Please be further advised that we are aware of no legal basis upon which you have any right to breach the privilege and that we reserve Mr. Gupta's right to pursue any and all appropriate legal remedies for any unauthorized breach of the privilege.
>
> Please consider this letter as a formal objection to any ex parte in camera submissions to Judge Walker of any joint defense privileged information.
>
> Yours very truly,
>
> [Signed]
>
> Attorneys for Suren Gupta

Under these circumstances, the district court erred in not fully acknowledging the conflict and then acting on its implications.

Nothing in our holding today is intended to suggest, however, that joint defense meetings are in and of themselves disqualifying. We stress that it was defense counsel in this case that timely moved for disqualification. As the Supreme Court said in *Holloway v. Arkansas,* the attorney "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." 435 U.S. 475, 485, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). There may be cases in which defense counsel's possession of information about a former co-defendant/government witness learned through joint defense meetings will not impair defense counsel's ability to represent the defendant or breach the duty of confidentiality to the former co-defendant. Here, however, counsel told the district court that this was not a

situation where they could avoid reliance on the privileged information and still fully uphold their ethical duty to represent their clients. There is nothing in this record to suggest that the attorneys were doing anything other than attempting to adhere to their ethical duties as lawyers.

Few aspects of our criminal justice system are more vital to the assurance of fairness than the right to be defended by counsel, and this means counsel not burdened by a conflict of interest. Here, because of that conflict, the appellants' lawyers were constrained to impair yet another primary right of their clients: the right to cross-examine a witness who testified against them. By choosing to convert Gupta into a prospective witness shortly before the trial was scheduled to start, the government—which may not have anticipated this complication when it made a deal with Gupta—caused this problem, and should not now be heard to complain.

SUFFICIENCY OF THE EVIDENCE

The defendants also challenge the sufficiency of the evidence supporting their convictions for insider trading under Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (West 2000). Each contends that the evidence established that he sold his Cal Micro stock for innocent reasons and not because of information about the company's false revenue reporting.

We may reverse a jury conviction for insufficient evidence only if, viewing the evidence in the light most favorable to the
639 government, no rational jury could have found the essential elements of the crime beyond a reasonable doubt. *See* *639 *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In this case, we look to whether the evidence supports a finding that the defendants traded stock on the basis of material nonpublic information with an intent to deceive, manipulate, or defraud. *See United States v. Smith,* 155 F.3d 1051, 1068-69 (9th Cir. 1998), *cert. denied* 525 U.S. 1071, 119 S.Ct. 804, 142 L.Ed.2d 664 (1999).

With respect to Desaigoudar, the jury heard evidence that he sold a portion of his stock after learning of Cal Micro's false revenue reporting scheme and that his sudden decision to "diversify" his portfolio came after receiving this information. Moreover, Desaigoudar's financial adviser had been advising Desaigoudar to diversify since 1986, but Desaigoudar only sold his stock in 1994 after the revenue reporting scheme surfaced. This evidence permits the inference that Desaigoudar traded on the basis of inside information and acted with the requisite scienter. Although Desaigoudar sold only a small portion of his Cal Micro stock, *cf. In re Worlds of Wonder Sec. Litig.,* 35 F.3d 1407, 1427 (9th Cir.1994), his overall pattern of trading Cal Micro stock, when viewed in the light most favorable to the government, supports the jury's verdict.

Henke relies on our law that when there is evidence that an investor had a preexisting pattern or plan of trading and continued to execute that plan even after coming into possession of material nonpublic information, such evidence negates an inference that the investor acted with the scienter required for an insider trading conviction. *See Smith,* 155 F.3d at 1068; *In re Worlds of Wonder,* 35 F.3d at 1427-28. In Henke's case, however, the "preexisting pattern" of trading consisted of only two stock sales. Moreover, these sales netted him a relatively small return. The sale made after knowledge of the revenue scheme enabled him to avoid hundreds of thousands of dollars of loss in the stock's value. In addition, Desaigoudar's executive assistant testified that Henke told her that she would be stupid not to sell her own stock. When viewed in the light most favorable to the government, these circumstances permitted the jury to infer that the sales were the result of Henke's insider knowledge and not an earlier plan. We therefore conclude that sufficient evidence supports both Henke's and Desaigoudar's insider trading convictions.

Desaigoudar also contends that some of the evidence the government presented as to when he obtained inside information varied from one of the dates alleged in the indictment. There is no material variance or even inconsistency. *See United States v. Tsinhnahijinnie,* 112 F.3d 988, 991 (9th Cir.1997) (noting that a variance is immaterial where it is not of a character which could have misled the defendant at trial and there is no danger of double jeopardy). The government proved that Desaigoudar had inside information on the date alleged in the indictment.

LAY OPINION TESTIMONY

The defendants argue that the district court erred in admitting lay opinion testimony on the issue of the defendants' knowledge. Proving that Desaigoudar and Henke had knowledge of the false revenue reporting scheme was critical to the government's case. Without establishing this knowledge, it could not carry its burden of proving beyond a reasonable doubt

that the defendants knew that financial statements they made were false, or that they possessed material nonpublic information before trading their stock.

One of the witnesses the government used to prove knowledge was Wade Meyercord, Desaigoudar's replacement as Chairman of Cal Micro's Board of Directors. Over the defendants' objections, the prosecutor systematically and repeatedly asked Meyercord about the reasons for terminating the defendants and other officers of Cal Micro. This questioning was
640 done in order to elicit Meyercord's conclusion that the defendants "must have *640 known" about the revenue reporting
641 scheme.[1] The defendants claim that it was *641 error to admit this testimony. We agree.

Under Federal Rule of Evidence 701, a lay witness's testimony in the form of an opinion is permissible only when it is helpful to understanding the witness's testimony or to the determination of a fact in issue. If the jury already has all the information
642 upon which the witness's opinion is based, the opinion is not admissible. *See* United States v. Skeet, 665 F.2d 983, *642 985 (9th Cir.1982) ("If the jury can be put into a position of equal vantage with the witness for drawing the opinion, then the witness may not give an opinion."); Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 701.05 (2d ed. 2000) ("[L]ay testimony generally is not helpful on matters that are essentially a jury question, such as credibility issues."); *see also* United States v. Anderskow, 88 F.3d 245, 251 (3d Cir.1996) (holding that a witness's testimony that a defendant "must have known" fails to meet the helpfulness requirement); United States v. Rea, 958 F.2d 1206, 1219 (2d Cir.1992) (same).

Here the jury was in the best position to determine whether the defendants knew about the revenue scheme. Unlike Meyercord and the Board of Directors, the jury had the benefit of several years of discovery, investigation, and litigation to flesh out the facts. Moreover, it heard testimony from all of the key actors in the scheme. While Meyercord testified that the Board formed a special committee of independent directors to investigate the false revenue reporting scheme, he was not questioned about the facts that the investigation turned up or how those facts were discovered. Meyercord was simply asked about the Board's conclusion that the defendants "must have known" about the scheme-a conclusion that went to the primary question for the jury. Because the jury was in a superior vantage point to decide this issue, Meyercord's testimony that the defendants must have known about the revenue scheme was not helpful. Its admission was therefore error.

OTHER ISSUES THAT MAY RECUR ON RETRIAL

In the event of retrial, there are three remaining issues that may recur. The defendants claim that the district court erred in admitting an out-of-court statement and refusing to review interview notes with a key government witness *in camera* to ensure that the notes did not contain information the government would be constitutionally or statutorily obligated to disclose. They also contend that prosecutorial misconduct occurred when the prosecutor required Desaigoudar to testify that government witnesses were lying. We address each in turn.

1. Out-of-court statement

The first issue is whether the court properly admitted Desaigoudar's out-of-court response—"next question please"— to an accusation in a press conference that the defendants were "cooking the books." The district court found that the response was not unduly prejudicial and that, under the circumstances, the natural response to such an accusation would be to address or deny it. It therefore admitted the statement as an adoptive admission. *See* Fed. R.Evid. 801(d)(2)(B). It was within its discretion to do so. *See* United States v. Schaff, 948 F.2d 501, 505 (9th Cir.1991).

2. *In camera* review of interview notes

The defendants also contend that the district court erred in failing to conduct an *in camera* review of the government's notes from interviews with Ron Romito, a key witness, to ensure that the notes did not contain information that should be produced as exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), as impeachment material under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), or as witness statements under the Jencks Act, 18 U.S.C. § 3500 (West 2000). The government provided the defendants with a substantial amount of information about Romito, including FBI reports, declarations, and a copy of his plea agreement, but invoked the work-product privilege as to its pre-trial interview notes. The defendants made no showing that they might

discover something exculpatory or impeaching. Nor did they show that the notes were used or adopted by the witness.
643 Accordingly, the defendants did not trigger the *643 district court's obligation to review the privileged notes *in camera. See United States v. Boshell,* 952 F.2d 1101, 1104-05 (9th Cir.1991) (finding that the defendants failed to make a showing that notes were read or adopted by the witness and that the notes were therefore not subject to the Jencks Act production requirements).

3. Alleged prosecutorial misconduct

Finally, the defendants claim that the government acted improperly in forcing Desaigoudar to testify on cross-examination that the government's witnesses were lying. During Desaigoudar's cross-examination, the prosecutor repeatedly forced him to say that several of the government's witnesses lied on the stand. After the judgments were entered in this case, we made clear that forcing a defendant to comment on the veracity of another witness's testimony is inappropriate. *See United States v. Sanchez,* 176 F.3d 1214, 1219-20 (9th Cir.1999). In light of *Sanchez,* this line of questioning by the prosecutor was improper and must be avoided on retrial.

CONCLUSION

The judgments of conviction are reversed, the sentences vacated, and the matters remanded for new trial or other proceedings consistent with this opinion.

REVERSED and REMANDED.

BEEZER, Circuit Judge (Concurring):

I join the court's opinion only with respect to the sections entitled BACKGROUND and LAY OPINION TESTIMONY. Because the district court's error prejudiced both defendants and was not harmless, I would reverse the defendants' convictions and remand for a new trial. Because this ground is sufficient to order such relief, I would not address the other issues raised on appeal.

[1] In relevant part, the testimony was as follows:

Q. [by the prosecution]: What happened next ... ?

A. [Meyercord]: There was another Board meeting in October of '94, so that the—later that month. I don't recall the exact date. At which time, if I recall correctly, we removed Mr. Desaigoudar as Chairman of the company, and I was elected Chairman.

Q. Why did you remove—yeah, why did you remove Mr. Desaigoudar?

[Defense counsel]: Objection, your Honor.

The court: You can rephrase that counsel.

Q. [Prosecution]: If you know, what—how did the Board reach that decision?

[Defense counsel]: Your honor, that's simply an opinion that they reached—conclusion that they reached.

The court: Well, no. I think the witness can testify as to the understanding that he has of the reason that the Board took that action. That's, I think, the appropriate question. All right? With that in mind, Mr. Meyercord, what is your understanding of the reason that the Board took the action which you did in removing Mr. Desaigoudar as Chairman of the Board?

A. Because we felt there was—*we removed Mr. Desaigoudar as Chairman because we felt there was a high probability that he knew that the revenues had been misstated* and that we could not in good conscience leave him in that position.

. . . . .

Later, the prosecutor was permitted to elicit the following testimony from Meyercord concerning the Board's decision to fire Desaigoudar and to reject Henke's severance agreement.

Q. [Prosecution]: ... December 1st . . . was a decision made to terminate certain employees of the company?

A. Yes.

Q. And was that made at a Board meeting?

A. Yes....

Q. Do you remember who was terminated?

A. We terminated Mr. Desaigoudar. Mr. Henke had already resigned at that point. We terminated Mr. Gupta. I believe Mr. Chalaka, Mr.—who—am I missing somebody else?

Q. Was it Mr. Romito?

A. Yes, Mr. Romito.

Q. And why were these people all terminated?

[Defense counsel]: Objection, your honor.

The court: I think the witness can testify as to what is his understanding of the reason that the Board took this action.

[Meyercord]: It was our belief at that time—

[Defense counsel]: Can I just state the grounds for the objection? Relevance and opinion.

The court: Very well. Overruled.

Q. [Prosecution]: You can answer.

A. *It was our belief at that time based on the evidence that we had that all of those individuals had—must have known about the misstatement of revenue.*

. . . . .

Q. And directing your attention to the last paragraph on the first page [of minutes from the Board meeting]—

A. Yes.

Q. Is the second sentence there—is that the reason these people were terminated?

A. (Reviewing document.) Yes.

Q. And is it because of reported financial irregularities? Do you see that?

A. As stated in the minutes *because of his apparently active participation in the previously reported financial irregularities, because [he] apparently intentionally withheld information from the Board and provided the Board with false and misleading information,* the company would not advance Mr. Desaigoudar's costs and expenses in connection with any litigation or investigation in which he was or is named a defendant.

Q. What does that mean?

A. That meant that we were reasonably sure that—

[Defense counsel]: Same objection, your honor. It's not relevant, particularly not relevant what this witness's opinion was. [Co-defense counsel]: And it's very prejudicial, opinion of a Board—your honor.

The court: Well, the objection's overruled. It is relevant. It, obviously, is reflective of the conclusions drawn by the—by the Board of Directors at the time and—

[Defense counsel]: That's right.

The court: And, Ladies and Gentlemen [of the jury], you understand that that's what this evidence is, that you're going to have to make up your own mind with respect to the evidence that is submitted to you. All right.

Q. [Prosecution]: Could you explain that last sentence, what that was about?

A. That sentence says that the company would not provide money to Mr. Desaigoudar to defend himself in any action that might ensue here in any—any legal proceedings.

Q. And did you also—was—*was a finding made that he had intentionally withheld information from the Board?*

[Defense counsel]: Oh, this is leading, your honor.

The court: This is leading, Ms. Merchant.

Q. [Prosecution]: Does this document refer to a finding that was made—you know why—

[Defense counsel]: It's the same—

Q. [Prosecution]:—why the Board made this decision, Mr. Meyercord?

[Defense counsel]: That's exactly the same thing, and it's opinion—calling for opinion and conclusion.

The court: You've got the minutes in. You've got the witness's testimony. I think that's sufficient.

Q. [Prosecution]: There's a reference— you made a reference earlier to the fact that Mr. Henke had resigned sometime earlier. Do you remember that?

A. Yes.

Q. And do you remember the circumstances of his resignation from your perspective as a Board member?

[Defense counsel]: Irrelevant, your honor, his perspective as a Board member.

The court: Well, why don't you rephrase the question.

Q. [Prosecution]: Did Mr. Henke resign around this time period?

[Defense counsel]: Did Mr. Henke do what?

[Prosecution]: Resign around this time period.

[Defense counsel]: That's been asked and answered.

The court: She's setting the stage for the question. All right.

A. [Meyercord]: Yes, he did.

Q. And was—were you aware of the fact that he had negotiated a severance package?

A. I became aware later, yes.

Q. And do you know who he negotiated it with? Did you learn that?

A. Yes. With Mr. Desaigoudar.

. . . . .

Q. . . . [C]ould you describe the nature of the compensation package that had been negotiated?

A. (reviewing document). Yes. It says here that he would have had a consulting agreement for one year at 5,400-and-some-odd dollars per month.

Q. Well, Mr. Meyercord, did the Board accept this severance packet?

A. No, we did not.

Q. Why not?

[Defense counsel]: Well, I object to it, your honor, on the same grounds that we've objected to the other documents, that it's prejudicial, and it's—actually this is testimony.

The court: Well, now, no speaking objections, Mr. Hallinan. What's the basis of the objection?

[Defense counsel]: Well, first of all, under the circumstances, it's so prejudicial. That's one. Second of all, there's no basis for it, doesn't show any special knowledge. And third of all, it calls for an opinion of this witness.

The court: Overruled. The witness may testify as to his understanding of the reason that the Board took the action which it did.

A. [Meyercord]: The Board—the Board did not feel that a severance package for Mr. Henke was appropriate given the evidence we had in front of us.

Q. What evidence was that?

[Defense counsel]: Well, there, your honor. Object to that.

The court: Objection overruled.

A. The evidence that the revenue had been misstated.

Q. Did you have an understanding as a Board—did you learn as a Board member what Mr. Henke's role was in that?

A. I'm sorry?

[Defense counsel]: Your honor, what relevance—

[Meyercord]: I don't understand the question.

[Defense counsel]: is that?

The court: Objection overruled.

[Meyercord]: Could you—I don't understand the question.

Q. Did you learn in the investigation—

The court: What was the witness's understanding of the facts?

[Prosecution]: Right.

Q. What was your understanding of the facts as they concerned Mr. Henke?

A. *My understanding of the facts were [sic] that Mr. Henke must have known about this—about the revenue misstatements.*

[Defense counsel]: Well, I'll move to strike that. That is just an opinion, he "must have known." That shouldn't even be before the jury, your honor.

The court: Objection overruled.

[Prosecution]: No further questions, your honor.

9-28.710 - ATTORNEY-CLIENT AND WORK PRODUCT PROTECTIONS

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

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

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

[updated March 2023]

9-28.720 - COOPERATION: DISCLOSING THE RELEVANT FACTS

Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is timely disclosure of the relevant *facts* concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must timely disclose the relevant facts of which it has knowledge. [1]

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

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others' misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the

corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected. [2] On this point the Report of the House Judiciary Committee, submitted in connection with the attorney-client privilege bill passed by the House of Representatives in 2007 (H.R. 3013), comports with the approach required here:

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

H.R. Rep. No. 110-445 at 4 (2007).

In short, the corporation may be eligible for cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it timely provides all relevant facts about the individuals who were involved in the misconduct. But if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation.

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

(b) Legal Advice and Attorney Work Product

Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege. Such

communications can naturally have a salutary effect on corporate behavior—facilitating, for example, a corporation's effort to comply with complex and evolving legal and regulatory regimes. [3] Except as noted in subparagraphs (b)(i) and (b)(ii) below, a corporation need not disclose, and prosecutors may not request the disclosure of, such communications as a condition for the corporation's eligibility to receive cooperation credit.

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

(i) Advice of Counsel Defense in the Instant Context

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

(ii) Communications in Furtherance of a Crime or Fraud

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

[cited in JM 9-47.120]

[updated March 2023]

[1] This section of the Principles focuses solely on the disclosure of facts and the privilege issues that may be implicated thereby. There are other dimensions of cooperation beyond the mere disclosure of facts, such as providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records.

[2] By way of example, corporate personnel are usually interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product. To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the interviews conducted by counsel for the corporation. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents.

[3] These privileged communications are not necessarily limited to those that occur contemporaneously with the underlying misconduct. They would include, for instance, legal advice provided by corporate counsel in an internal investigation report. Again, the key measure of cooperation is the timely disclosure of factual information known to the corporation, not the disclosure of legal advice or theories rendered in connection with the conduct at issue (subject to the two exceptions noted in JM 9-28.720(b)(i-ii)).

9-28.730 - OBSTRUCTING THE INVESTIGATION

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

In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law.[1] Neither is it intended to limit the otherwise applicable reach of criminal obstruction of justice statutes such as 18 U.S.C. § 1503. If the payment of attorney fees were used in a manner that would otherwise constitute criminal obstruction of justice—for example, if fees were advanced on the condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false—these Principles would not (and could not) render inapplicable such criminal prohibitions.

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

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

[new September 2008]

[1] Questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, sometimes arise in the course of an investigation under certain circumstances—for example, to assess conflict-of-interest issues. This guidance is not intended to prohibit such limited inquiries.

9-28.740 - OFFERING COOPERATION: NO ENTITLEMENT TO IMMUNITY

A corporation's offer of cooperation or cooperation itself does not automatically entitle it to immunity from prosecution or a favorable resolution of its case. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents. Thus, a corporation's willingness to cooperate is not determinative; that factor, while relevant, needs to be considered in conjunction with all other factors.

[new August 2008]

9-28.750 - **OVERSIGHT CONCERNING DEMANDS FOR WAIVERS OF ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT PROTECTION BY CORPORATIONS CONTRARY TO THIS POLICY**

The Department underscores its commitment to attorney practices that are consistent with Department policies like those set forth herein concerning cooperation credit and due respect for the attorney-client privilege and work product protection. Counsel for corporations who believe that prosecutors are violating such guidance are encouraged to raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General. Like

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Re: RYAN, et al.
v.
GIFFORD, et al.

Civil Action No. 2213-CC.
|
Submitted: Nov. 23, 2007.
|
Decided: Nov. 30, 2007.

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Opinion

WILLIAM B. CHANDLER III, Chancellor.

***1** Dear Counsel:
I have before me the motions listed below. I have ruled on each of these motions, in brief form, as follows.

1. The motion to compel of defendants Frederick Beck, Tunc Doluca, Pirooz Parvarandeh, Richard Hood, Vijaykumar Ullal, Charles Rigg, Michael Byrd, James Bergman, B. Kipling Hagopian, Frank Wazzan, Eric Karros, M.D. Sampels, and Alan Hale (the "individual defendants")

By this motion, the individual defendants seek to compel plaintiffs to respond to interrogatories seeking to ascertain the factual basis for plaintiffs' claims against the individual defendants. Because this motion appears to have been mooted or eclipsed by other circumstances, I deny this motion without prejudice. Should individual defendants determine the need still exists for the discovery sought in this motion, they may refile this motion at that time.

2. Plaintiffs' July 3, 2007 motion to compel production from defendants, including nominal defendant Maxim Integrated Products, Inc.

Plaintiffs seek an order compelling: (1) nominal defendant Maxim Integrated Products, Inc. ("Maxim" or the "Company") to respond to plaintiffs' document requests in native file format, with original metadata, but without a separate production of metadata; (2) all defendants (and Maxim) to produce non-privileged documents involving discussions or negotiations relating to defendant Jasper's and defendant Gifford's employment termination from Maxim, including notes or minutes taken at meetings concerning their termination from the Company; and (3) all defendants (and Maxim) to provide copies of communications between any defendant and the Securities and Exchange Commission (the "SEC") concerning stock option backdating at the Company, including transcripts of testimony provided to the SEC regarding this subject. Maxim insists that these requests are irrelevant, moot or burdensome. The individual defendants contend the requests are burdensome, irrelevant, privileged or not in the possession of the individual defendants.

For the following reasons, I grant plaintiffs' motion to compel. First, metadata may be especially relevant in a case such as this where the integrity of dates entered facially on documents authorizing the award of stock options is at the heart of the dispute. This relevance is further illustrated by the fact that Maxim's special committee, as well as Deloitte & Touche, undoubtedly reviewed metadata as part of their investigation into the backdating problems at Maxim. This latter fact also undermines the asserted burdensomeness of producing documents in native file format. Maxim need not produce metadata separately, but the Court does order the production of documents identified in plaintiffs' July 3rd motion to compel in a format that will permit review of metadata, as

plaintiffs have clearly shown a particularized need for the native format of electronic documents with original metadata.

Second, discussions or negotiations regarding Jasper's and Gifford's termination may be relevant or likely lead to the discovery of relevant information regarding the scope and nature of the stock option backdating that allegedly occurred under their direction. Maxim's assertion that it has already produced all non-privileged documents responsive to this particular request leaves unanswered and unclear precisely which documents have not been produced based on privilege. Thus, Maxim shall provide an updated and complete privilege log (in substitution for the May 15, 2007 privilege log) identifying each document for which it claims privilege (and that has not been produced under this subject request), as well as the document's date, author, recipients, and a brief description of the precise privilege relied upon as a basis for withholding the document. The privilege log shall be submitted to plaintiffs and to the Court. Maxim shall further provide the Court with each of the withheld documents identified in the privilege log for the Court's *in camera* inspection. In order to be explicitly clear, these documents shall include any minutes or notes of meetings (whether in person or telephonically) of discussions or negotiations regarding the Jasper/Gifford terminations. The individual defendants are under the same burden to produce the requested documents concerning the termination. If documents are withheld on the grounds of privilege, the individual defendants must provide plaintiffs and the Court with a privilege log, as above described, identifying each and every document being withheld, together with copies for the Court's *in camera* review.

***2** Third, and finally, the most equitable solution to plaintiffs' request for communications between all defendants (including Maxim) and the SEC, is for Maxim to scan and produce on CD or DVD a complete and unaltered set of all documents (including cover letters and "MXIM-SEC" Bates numbers) actually produced to the SEC, which Maxim has in its possession and which reflect delineations between separate documents easily recognized by electronic discovery software. This will obviate any purported burden from such production because Maxim must have those documents organized in MXIM-SEC Bates number order in its files. Thus, production in the manner described above should not be difficult; it also should eliminate most, if not all, of the problems concerning missing Bates-numbered pages and any question of missing witness binders or transcripts of SEC testimony that plaintiffs contend have been produced to the SEC but withheld from them. Very little of the information should be privileged, as only one defendant has mentioned any form of confidentiality order entered into in connection with the SEC investigation.[1] To the extent any document is purportedly privileged, the claiming party shall provide a privilege log for plaintiffs, and a privilege log and the privileged documents for the Court's *in camera* review. To the extent testimony or other information with the SEC is not in the physical possession of defendants, the appropriate defendant shall make a request of the SEC for the transcript or document.

[1] Defendant Gifford asserts that documents were provided to the SEC on his behalf only under an express oral confidentiality agreement. Gifford contends that he therefore may properly withhold any documents produced to the SEC or communications between his attorney and the SEC about those documents on privilege grounds. To the extent these documents are purportedly privileged, and such privilege has not been waived because of the oral confidentiality agreement, Gifford shall provide a privilege log for plaintiffs and the Court.

Accordingly, consistent with the above-described parameters, I grant plaintiffs' July 3, 2007 motion to compel production from defendants, including nominal defendant Maxim.

3. Plaintiffs' July 3, 2007 motion to compel production from Maxim Integrated Products, Inc. (including its Special Committee), Orrick Herrington & Sutcliffe, LLP and LECG Corporation

Plaintiffs seek to compel Orrick Herrington & Sutcliffe LLP (counsel to Maxim's special committee) and LECG (who was retained by Orrick for forensic accounting assistance) (together "Orrick") and Maxim (including its special committee) (the "Special Committee") to produce all communications between Orrick and the Special Committee and Orrick and Maxim. Specifically, plaintiffs seek, first, discovery concerning the communications between Orrick and the Special Committee that occurred throughout the course of the Special Committee's investigation and, second, Orrick's presentation of the final report to the Special Committee and Maxim's board of directors. Orrick and Maxim assert that the attorney-client privilege applies to the communications sought by plaintiffs and that this privilege has neither been waived nor vitiated by a showing of good cause by plaintiffs. Plaintiffs also seek documents withheld by Orrick on the grounds that they are protected by the

work product doctrine, including notes from its interviews with thirty-two individuals conducted in the course of the investigation and Orrick's forensic analysis of Maxim's computer systems, including metadata. For the reasons that follow, I grant plaintiffs' motion to compel in part.

***3** There appears to be no dispute that, absent waiver or good cause, the attorney-client privilege protects communications between Orrick and its client, the Special Committee. Maxim, however, also asserts attorney-client privilege for its communications with Orrick relating to the Special Committee's findings, reports, presentations, and other communications, contending that, because the Special Committee was formed at its direction in direct response to the litigation challenging Maxim's grants of stock options, Maxim and its Special Committee share a joint privilege. As a result of this purported joint privilege, communications between not only the Special Committee and Orrick, but also Maxim and Orrick would be protected. Maxim further contends that it has not waived this privilege. Even assuming that Maxim can assert the privilege between the Special Committee and Orrick to protect communications between Maxim and Orrick about the investigation and report,[2] I conclude that the privilege does not apply here because plaintiffs' showing of good cause vitiates it. Applying the factors set forth in *Garner v. Wolfinbarger,*[3] and particularly the three identified in *Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.,*[4] I conclude that no privilege has attached to the communications between Maxim and Orrick regarding the investigation and report. Plaintiffs have demonstrated: (1) a colorable claim; (2) the unavailability of information from other sources, including the lack of written final report, the inability to depose witnesses regarding the report or investigation because of assertions of privilege, and the unavailability of witnesses due to invocation of the Fifth Amendment privilege not to testify; and (3) the specificity with which the information is identified. Of particular importance is the unavailability of this information from other sources when information regarding the investigation and report of the Special Committee is of paramount importance to the ability of plaintiffs to assess and, ultimately prove, that certain fiduciaries of the Company breached their duties. Consequently, I conclude that no attorney-client privilege attached to the communications between Maxim and Orrick regarding the investigation and, therefore, these communications must be produced.

2 It is worthwhile to note that the Special Committee formed here to investigate the stock option backdating appears to lack power to assert claims on behalf of Maxim and so is not one formed under the framework of *Zapata v. Maldonado,* 430 A.2d 779 (Del.1981). Such a committee would certainly possess its own independent privilege. *See, e.g., Moore Business Forms, Inc. v. Cordant Holdings Corp.,* Nos. 13911, 14595, 1996 WL 307444, at *6 (Del.Ch. June 4, 1996) (stating that a special committee formed pursuant to 8 *Del. C.* § 141(c) would be free to retain separate counsel and its communications with counsel would be properly protected from disclosure to members of the company's board). Here, it is clear that an attorney-client relationship exists between Orrick and the Special Committee. But, given the nature of the Special Committee as to Maxim, it is at least arguable that the Special Committee is not wholly separate from and independent of Maxim such they may share a joint privilege. Though, as discussed below, I am skeptical that the individual defendants, as directors of Maxim's board, do in fact share a joint privilege, I analyze this issue assuming, but without deciding, that Maxim could properly assert the privilege between the Special Committee and Orrick as to Maxim's communications with Orrick.

3 430 F.2d 1093, 1103-04 (5th Cir.1970), *cert denied,* 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). *See also Deutsch v. Cogan,* 580 A.2d 100, 105 (Del.Ch.1990); *Zirn v. VLI Corp.,* 621 A.2d 773, 782-83 (Del.1993).

4 No. 8853, 1987 WL 12500, at *4 (Del.Ch. June 19, 1987) (identifying three factors as of "particular significance": (i) whether the claim is colorable; (ii) the necessity or desirability of information and its availability from other sources; and (iii) the extent to which the information sought is identified as opposed to blind fishing expedition)).

Even if, however, Maxim and its Special Committee do share a joint privilege, as to certain communications between Orrick and the Special Committee, I conclude that plaintiffs have demonstrated that the privilege has been waived. Plaintiffs appear to seek discovery of all communications between

Orrick and the Special Committee related to the investigation and report, in addition to discovery of the presentation of the Special Committee's investigation and final report to the Special Committee and Maxim's board of directors. Though plaintiffs have demonstrated waiver of the privilege only as to the presentation of the report, this partial waiver operates as a complete waiver for all communications regarding this subject matter.[5] Therefore, I conclude that plaintiffs are entitled to all communications between Orrick and the Special Committee related to the investigation and final report. Communications made in the presence of third persons not for the purpose of seeking legal advice operates as a waiver of the attorney-client privilege.[6] On January 18 and 19, 2007, the Special Committee presented its final oral report to Maxim's board of directors. This report appears to be more than a mere acknowledgement of the existence of the report and instead disclosed such details that, for example, attendees were directed to turn in any notes taken during the presentation at the end of the meeting. In addition to the Special Committee and Orrick, other members of the board of directors and attorneys from Quinn Emmanuel were also in attendance. The presentation of the report constitutes a waiver of privilege because the client,[7] the Special Committee, disclosed its communications concerning the investigation and final report to third parties-the individual director defendants and Quinn Emmanuel-whose interests are not common with the client, precluding application of the common interest exception to protect the disclosed communications.[8] The individual defendants, though directors on the board of Maxim, cannot be said to have interests that are so parallel and non-adverse to those of the Special Committee that they could reasonably be characterized "joint venturers." The Special Committee was formed to investigate wrongdoing and in response to litigation in which certain directors were named as individual defendants. This describes a relationship more akin to one adversarial in nature. Though the presence of counsel that seemingly acts in a dual capacity as counsel for both Maxim (before the SEC) and the individual defendants in this litigation[9] may confuse the issue of whether the director defendants attended the January meetings in a fiduciary-not individual-capacity, any apparent confusion may now be dismissed because the individual director defendants specifically rely on the findings of the report for exculpation as individuals defendants. Thus, there can be no doubt that the common interest exception is inapplicable to extend the protection of the attorney-client privilege to the communications disclosed at the January board meetings. Therefore, those communications relating to the final report, including any materials distributed or collected at meetings between the Board members and the Special Committee, must be produced.[10]

5 *See* *Citadel Holding Corp. v. Roven,* 603 A.2d 818, 825 (Del.1992) (citing Del. R. Evid. 510; *Texaco, Inc. v. Phoenix Steel Corp.,* 264 A.2d 523 (Del.Ch.1970); *Int'l Bus. Machs. Corp. v. Sperry Rand Corp.,* 44 F.R.D. 10 (D.Del.1968)).

6 *See e.g.,* *Westinghouse Elec. Corp. v. Republic of Phil.,* 951 F.2d 1414, 1424 (3d Cir.1991) ("[V]oluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with an assertion of the privilege").

7 The privilege, which is based in Rule 502(b) of the Delaware Rules of Evidence, belongs to the client and may be waived either expressly or implicitly. *See* *Tackett v. State Farm Fire & Cas. Ins. Co.,* 653 A.2d 254, 259 (Del.1995).

8 The common interest doctrine extends the protections of the attorney-client privilege to disclosures of communications among parties who share a common interest. Under this exception, however, for the communication to remain privileged even after its disclosure to others, the "others [must] have interests that are 'so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers.' " *Saito v. McKesson HBOC, Inc.,* No. 18553, 2002 WL 31657622, at *4 (Del.Ch. Nov.13, 2002) (citing *Jedwab v. MGM Grand Hotels, Inc.,* No. 8077, 1986 WL 3426, at *2 (Del.Ch. Mar.20, 1986)).

9 If, in fact, as plaintiffs allege, the same law firm acts in a dual capacity as counsel for both Maxim before the SEC and the individual defendants in this litigation, this is a representational conflict about which the Court anxiously awaits to be enlightened.

10 Of course, all documents and communications related to the underlying factual information upon which Orrick based any legal advice is not within

the ambit of attorney-client privilege protections and should have already been produced

***4** As to the documents for which Orrick claims protection under the work product doctrine,[11] this Court rules as follows: first, because Orrick states that its notes are not transcripts of interviews and do not provide a verbatim account of witness testimony and, instead, characterizes its notes as containing attorney thoughts, impressions, opinions, and conclusions regarding witness credibility and testimony, Orrick's interview notes are protected by the work product doctrine. Plaintiffs contend that the notes are in fact work product, not opinion work product, and so plaintiffs' burden-which plaintiffs assert they have satisfied-is to show both substantial need and undue hardship.[12] Because work product containing attorney thoughts, impressions, opinions, and conclusions is the paradigmatic type of work product that Rule 26(b)(3) operates to protect, this Court will not order their production and risk erosion of the work product doctrine, particularly if the notes are indeed opinion work product. Instead, Orrick must produce its interview notes to the Court for *in camera* inspection. If, after this Court's review of the notes, this Court determines that the notes may be properly produced either in their entirety or in some redacted form, then the notes shall be produced at that time. I, therefore, defer ruling on this aspect of plaintiffs' motion until I have reviewed the notes, which Orrick is directed to promptly produce to the Court. Second, plaintiffs contend that, aside from the interview notes and metadata, they are unable to identify the precise nature and scope of documents withheld by Orrick on the grounds of the work product doctrine. Orrick must, therefore, provide plaintiffs with a privilege log identifying each document it is withholding on this basis. Orrick also must provide the Court with the privilege log, in addition to the documents for which the privilege is claimed, for *in camera* review. Third, this Court compels Maxim to produce metadata, within the parameters described in the Court's reasoning in relation to plaintiffs' other July 3rd motion to compel.

11 *See* Ct. Ch. R. 26(b)(3). *See also* *Saito,* 2002 WL 31657622, at *3 (discussing protection for opinion work product).

12 *See* *Saito,* 2002 WL 31657622, at * 11 ("A party may receive non-opinion work when the party has a *substantial need* for the materials and the party cannot acquire a substantial equivalent of the materials by other means without *undue hardship.*") (citing Ct. Ch. R. 26(b)(3) (emphasis in original). Plaintiffs must satisfy a higher burden for opinion work product, which the courts will protect in all but the most compelling circumstances. *Id.* ("A party may receive opinion work product when it is *directed to the pivotal issue* in the current litigation and the need for the information is *compelling* (citing *Tackett,* 653 A.2d at 262 (emphasis in original)).

4. Plaintiffs' July 5, 2007 motion to compel production from nominal defendant Maxim Integrated Products, Inc. and third party Deloitte & Touche LLP

Plaintiffs seek all documents and communications concerning any determinations as to the correct measurement dates for Maxim stock options. Defendants, however, have not yet reached any conclusions regarding the correct measurement dates, and argue that interrupting the ongoing restatement process to produce these inchoate materials will present an undue burden. Plaintiffs need the correct grant dates only to calculate damages for any backdated options that have been exercised. Because this need is relatively slight compared to the burden that would be placed on the defendants, I deny this motion to compel.[13] Plaintiffs will be able to calculate damages based on the correct measurement date after defendants have completed their restatement.

13 *See* Ct. Ch. R. 26(b)(1)(iii); *Cal. Pub. Employees' Ret. Sys. v. Coulter,* No. 19191-NC, 2004 WL 1238443, at *1 (Del.Ch. May 26, 2004) (denying motion to compel where "the currently pending requests are far too broad and far too burdensome").

5. Plaintiffs' motion for order regarding defendants' and witnesses' invocation of their Fifth Amendment privilege

***5** Plaintiffs seek protections (in the form of advance notice and opportunity to depose) against unfair surprise if either defendant Jasper or other non-party witnesses waive their Fifth Amendment rights before trial.[14] Specifically, plaintiffs' proposed order would require Jasper and any other defendant who invoke his Fifth Amendment privilege and then waives that right before trial to: (1) at least eight weeks before trial, notify all parties of this waiver and respond to interrogatories and document requests previously served upon him by plaintiffs; and (2) at least five weeks before the

start of trial, submit to a deposition in which he does not invoke his Fifth Amendment privilege. Plaintiffs' proposed order would require the similar requirements for non-party witnesses (specifically, no party may call a non-party witness who invokes his or her Fifth Amendment right to testify at trial without providing notice to all other parties at least eight weeks before trial and this witness must submit to a deposition at least five weeks before trial).

14 This motion is moot as to defendant Gifford, who has informed the parties and the Court that he will not assert his Fifth Amendment rights in this case.

Though I am not convinced that there is necessarily a cognizable prejudice to defendants from an order limiting non-party witnesses from testifying unless they have submitted to depositions at least five weeks before trial, I also see no reason why plaintiffs cannot rely on the pre-trial stipulation's identification of all witnesses. This stipulation would provide the basis for moving to depose and seek documents from particular witnesses who have not already had discovery taken as to their testimony. Plaintiffs will have sufficient time to review responses and take any necessary depositions on an expedited basis between the time the pre-trial stipulations must be filed and the beginning of the trial. I, therefore, deny this motion.

6. Plaintiffs' motion for partial summary judgment

Given the resolution of the above motions, I will defer consideration of plaintiffs' motion for partial summary judgment until the close of discovery, at which time the parties are invited to make any final submissions in connection with plaintiffs' motion. As of February 27, 2008, all defendants shall have two weeks to file any final submissions in connection with plaintiffs' motion for partial summary judgment. Plaintiffs shall have one week thereafter to reply. The Court will rule promptly once all submissions have been filed.

7. Individual defendant's motion for summary judgment

The parties have not submitted a briefing schedule for this motion and are directed to confer to develop one.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

All Citations

Not Reported in A.2d, 2007 WL 4259557

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2011 WL 2899082
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

SECURITIES and EXCHANGE COMMISSION, Plaintiff,
v.
VITESSE SEMICONDUCTOR CORPORATION, Louis R. Tomasetta, Eugene F. Hovanec, Yatin D. Mody, Nicole R. Kaplan, Defendants.

No. 10 Civ. 9239(JSR).
|
July 14, 2011.

MEMORANDUM

JED S. RAKOFF, District Judge.

***1** On April 19, 2011, non-party Nu Horizons Electronic Corporation ("NuHo") moved to quash the subpoenas issued by defendants Tomasetta and Hovanec requesting the production of handwritten notes taken during NuHo's internal investigation. Defendants Tomasetta and Hovanec simultaneously filed a motion to compel the production of these notes. On April 29, 2011, the Court heard oral argument on these motions and subsequently conducted an *in camera* review of the notes in question. On May 13, 2011, the Court issued a "bottom-line" Order denying NuHo's motion to quash and granting defendants' motion to compel. This Memorandum explains the reasons for those rulings.

By way of background, the SEC's complaint in this action alleges that during the period from 1995 through April 2006, defendant Vitesse Semiconductor Corporation ("Vitesse") engaged in fraudulent revenue recognition practices and stock options backdating misconduct. Compl. ¶ 1. These fraudulent practices were allegedly orchestrated by the four individual defendants: Vitesse's co-founder and CEO, Louis Tomasetta; its Chief Financial Officer ("CFO") and Executive Vice President, Eugene Hovanec; its Controller and CFO, Yatin Mody; and Manager/Director of Finance, Nicole Kaplan. *Id.* ¶ 2. Among other things, the Complaint alleges that between September 2001 and April 2006, Tomasetta, Hovanec, Mody, and Kaplan materially inflated Vitesse's reported earnings by immediately recording as revenues the shipments made to Vitesse's largest distributor, NuHo, even though the distributor had an unconditional, but undisclosed, right to return the product. *Id.* ¶ 2. The effect of this fraud was to materially inflate Vitesse's revenue in its financial statements.

On September 29, 2006, before the instant complaint was filed, the SEC notified NuHo that it was conducting a confidential investigation entitled *In the Matter of Vitesse Semiconductor Corp* . On April 13, 2007, the SEC issued subpoenas to NuHo for documents relating to Vitesse. Thereafter, NuHo's independent audit committee (the "Audit Committee") hired Gage Spencer & Fleming LLP ("GSF") to conduct an internal investigation into NuHo's relationship with Vitesse. In connection with the internal investigation, GSF interviewed present and former NuHo employees. While conducting these interviews, Laura–Michelle Horgan, an attorney with GSF, took handwritten notes of the interviews. See Affidavit of Laura–Michelle Horgan, dated April 19, 2011 ("Horgan Aff."), ¶ 2. These notes have not been shown or produced to anyone outside GSF, no copies have been made, and the notes have not been reduced to formal interview memoranda. Horgan Aff. ¶ 4. Ms. Horgan also attests that the notes are not a verbatim transcript of the interviews and that the notes have not been shown to any witnesses or endorsed by any witness. *Id.* ¶ 5. On February 12, 2009, GSF concluded its internal investigation and issued a report to the Audit Committee (the "Internal Report")/ which included: (i) a seventy-eight page written summary of GSF and FTI's conclusions; (ii) a Power Point Presentation prepared by GSF summarizing GSF and FTI's conclusions; and (iii) six tables prepared by FTI summarizing its conclusions.

2** On July 28, 2008, the Audit Committee produced to the SEC documents bates numbered NUHD00001*** to NUHD00252 and "an oral summary of the internal investigation's prior interviews of Paul Durando" pursuant to a non-waiver agreement, which stated that the SEC agreed to "maintain the confidentiality of the Confidential Materials pursuant to this agreement" and not disclose them to any third party unless "disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities." Horgan Aff., Ex. C. At the SEC's request, GSF also provided oral interviews—or "downloads"—of other witness interviews to the SEC. These downloads were sought by the SEC in connection with their upcoming depositions of NuHo witnesses. Horgan Aff. ¶ 6.

On January 27, 2011, defendants Tomasetta and Hovanec issued subpoenas to GSF and FTI seeking "[a]ll documents

that you reviewed, prepared, used, sent or received in connection with or concerning the Internal Investigation." Tomasetta and Hovanec issued a subpoena to NuHo with the same request on February 1, 2011. On March 4, 2011, NuHo moved to quash the subpoenas issued by defendants Tomasetta and Hovanec to the extent that they sought disclosure of the Internal Report. On March 15, 2011, the Court denied NuHo's motion and, as a result, the Internal Report was produced to Tomasetta and Hovanec subject to a confidentiality agreement. After receiving the Internal Report, which made reference to certain attorney notes taken by GSF in connection with NuHo's internal investigation, Tomasetta and Hovanec sought production of the handwritten notes taken by Ms. Horgan.

As a general matter, materials containing "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative" that were "prepared in anticipation of litigation" are protected from disclosure to third parties. *United States v. Adlman,* 134 F.3d 1194, 1197 (2d Cir.1998). *See*Fed.R.Civ.P. 26(b)(3). However, the protections of the work product doctrine are not absolute. For example, if a party discloses work product materials to an adversary, the privilege is often deemed waived. *In re Steinhardt Partners, L.P.,* 9 F.3d 230, 235 (2d Cir.1993). In addition, "the disclosure of privileged or otherwise protected materials to the Government may, in certain circumstances, result in a waiver of the privilege or protection." *United States v. Treacy,* No. 08 Cr. 366, 2009 WL 812033, at *1 (S.D.N.Y. Mar. 24, 2009). The Second Circuit, declining "to adopt a *per se* rule that all voluntary disclosures to the government" result in waiver, *see* *In re Steinhardt Partners, L.P.,* 9 F.3d 230, 236 (2d Cir.1993), has held that "rules relating to privilege in matters of governmental investigations must be [crafted] on a case-by-case basis," *id.,* and "applied in a common sense way in light of reason and experience." *In re Six Grand Jury Witnesses,* 979 F.2d 939, 944 (2d Cir.1992).

***3** In connection with their motion to compel the production of the handwritten notes, defendants Tomasetta and Hovanec argued that NuHo waived the work product privilege with respect to these notes when it provided oral summaries of the interviews to the SEC. NuHo argued that it provided these summaries in accordance with a non-waiver agreement and that, in any case, providing oral summaries of interviews did not constitute a general waiver of attorney work product privilege that would require the production of handwritten attorney notes.

As an initial matter, the Court concluded that not all of the oral summaries provide by NuHo to the SEC were actually provided pursuant to a non-waiver agreement. In July 2008, NuHo and the SEC entered into a non-waiver agreement covering the "oral summary of the internal investigation's prior interviews of Paul Durando," Horgan Aff., Ex. C, but other oral summaries were not explicitly covered in that non-waiver agreement. And while on March 19, 2009, NuHo entered into a second non-waiver agreement with the SEC that expressly covered "oral summaries of prior interviews," *see* Marmalefsky Aff., Ex. 6, at least some oral summaries were provided to the SEC before this date. However, even assuming that all the oral summaries were provided pursuant to a non-waiver agreement, that would not end the Court's inquiry into waiver given the absence of a *per se* rule. *See* *In re Steinhardt Partners, L.P.,* 9 F.3d 230, 235 (2d Cir.1993).

After hearing oral argument on NuHo's motion to quash and defendants' motion to compel, the Court concluded that it could not determine whether waiver applied without having a better understanding of the level of detail provided in the oral summaries to the SEC. Specifically, waiver would probably not apply if NuHo merely provided general impressions of the interviews without organizing the presentations "in a witness-specific fashion," but might very well apply if NuHo "orally relayed in substantial part" the contents of witness interviews to the SEC. *See United States v. Treacy,* 08 Cr. 366(JSR), 2009 WL 812033, at *2 (S.D.N.Y. March 24, 2009). Thus, in addition to conducting an *in camera* review of the handwritten notes taken by Ms. Horgan, the Court ordered the SEC to turn over its notes of the "downloads" provided by Ms. Horgan and conducted an *in camera* review of the SEC's notes.

After comparing Ms. Horgan's notes to the SEC's notes, it became clear to the Court that the oral summaries provided to the SEC were very detailed and, indeed, there were many instances where the SEC's notes matched Ms. Horgan's notes almost verbatim. Thus, the Court concluded that NuHo waived work product privilege with respect to the notes by providing very detailed, witness-specific information to the SEC. While it is undisputed that NuHo did not actually produce the notes themselves to the SEC, after reviewing the SEC's notes the Court found that NuHo effectively produced these notes to the SEC through its oral summaries. And, as noted in the Court's Memorandum explaining the denial of NuHo's previous motion to quash, while producing privileged materials to the Government will not constitute waiver in all

cases, in this case, the SEC—the very government agency that received the privileged material—is actually a party to the instant action and thus could use the information produced by NuHo in its case against the defendants. *See* *SEC v. Vitesse Semiconductor Corp.*, —— F.Supp.2d ——, 2011 WL 1142343, at *3 (S.D.N.Y.2011). Moreover, as also noted in the Court's previous Memorandum, many of the key allegations in the SEC's complaint against Tomasetta and Hovanec concern Vitesse's relationship with NuHo, the very topic of the Internal Report and the interviews conducted by GSF. *See id.* Thus, finding that NuHo waived the privilege by providing very detailed oral summaries to the SEC and finding that disclosure was required to "level the playing field," the Court directed NuHo to produce the notes to defendants Tomasetta and Hovanec.

***4** Accordingly, for the foregoing reasons, the Court confirms its May 13, 2011 Order denying NuHo's motion to quash the subpoenas and granting defendants' motion to compel the production of the handwritten notes.

All Citations

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United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article V. Privileges

Federal Rules of Evidence Rule 502, 28 U.S.C.A.

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

Currentness

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

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

(1) the waiver is intentional;

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

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

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

(1) the disclosure is inadvertent;

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

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

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

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

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

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

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

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

(g) Definitions. In this rule:

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

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

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265 F.Supp.2d 321 (2003)

In re GRAND JURY SUBPOENAS DATED MARCH 24, 2003 DIRECTED TO (A) GRAND JURY WITNESS FIRM AND (B) GRAND JURY WITNESS.

No. M11-189.

United States District Court, S.D. New York.

June 2, 2003.

322 *322 ## MEMORANDUM OPINION

KAPLAN, District Judge.

This motion poses the troublesome question whether and to what extent the attorney-client privilege and the protection afforded to work product[1] extend to communications between and among a prospective defendant in a criminal case, her lawyers, and a public relations firm hired by the lawyers to aid in avoiding an indictment. The Court's original opinion in this matter was filed under seal in order to protect the secrecy of the grand jury. In view of the importance of this issues, this redacted version of the opinion,[2] which substitutes pseudonyms for names and omits other identifying information, is being filed in the public records of the Court.[3]

I. Facts

A. The Procedural Context

The United States Attorney's office began a grand jury investigation of Target, a former employee of the Company, in or before March 2003. On March 24, 2003, it served a grand jury subpoena *ad testificandum* on Witness and another *duces tecum* on Witness's firm ("Firm"), a public relations concern. Counsel for Witness and Firm informed the United States
323 Attorney's *323 office that Witness would decline to testify and that Firm declined to produce the subpoenaed documents on the ground that the information sought by the grand jury had been generated in the course of Firm's engagement by Target's lawyers, as a part of their defense of Target, and that it therefore was protected by the attorney-client privilege and constituted work product.

The government moved by order to show cause to compel compliance with the subpoenas, and Target intervened with the government's consent. The Court concluded that the government almost undoubtedly could ask Witness questions as to which there would be no proper objection, even assuming that Target's position were correct, and therefore required Witness to testify before the grand jury while allowing her to assert any objections in response to specific questions and thus to frame the issues more narrowly.

The Court initially required submission of the documents withheld by Firm on grounds of privilege for *in camera* inspection. On May 1, 2003, in an order that remains under seal, it held that certain portions of the documents constituted attorney opinion work product,[4] that the government had not made a showing sufficient to require production of those portions, assuming *arguendo* that such work product ever is discoverable, and directed Target and Firm to indicate whether the privilege objections would be pressed with respect to the remaining portions of those documents. They subsequently informed the Court that they continue to press those objections.

Witness testified before the grand jury. She answered some questions but asserted Target's alleged privilege[5] in response to others.

B. The Hiring of Firm

This is a high profile matter. The investigation of Target has been a matter of intense press interest and extensive coverage for months. Witness claims that Target's attorneys hired Firm out of a concern that "unbalanced and often inaccurate press reports about Target created a clear risk that the prosecutors and regulators conducting the various investigations would feel public pressure to bring some kind of charge against" her.[6] Firm's "primary responsibility was defensive—to communicate with the media in a way that would help restore balance and accuracy to the press coverage. [The] objective ... was to reduce the risk that prosecutors and regulators would feel pressure from the constant anti-Target drumbeat in the media to bring charges ... [and thus] to neutralize the environment in a way that would enable prosecutors and regulators to make their decisions and exercise their discretion without undue influence from the negative press coverage."[7] Witness claims that "a significant aspect" of Firm's "assignment that distinguished it from standard public relations work was that [its] target audience was not the public at large. Rather, Firm was focused on affecting the media-conveyed message that
324 reached the prosecutors and regulators responsible *324 for charging decisions in the investigations concerning ... Target."[8]

C. Firm's Activities

In carrying out her responsibilities, Witness had at least two conversations directly with and sent at least one e-mail directly to Target.[9] On other occasions, Firm interacted with Target's attorneys.[10] On still others, communications involved Firm, Target and the attorneys and, in a few cases, Target's spouse.[11] Some of the documents produced for *in camera* inspection included discussions about defense strategies, and there is no reason to doubt that this was true of many oral communications.[12] And while Target and Witness perhaps do not so admit in these precise terms, the conversations and e-mails exchanged among this group inevitably included discussion of at least some of the facts pertaining to the matters in controversy.

Firm's activities were not limited to advising Target and her lawyers. Firm spoke extensively to members of the media, in some instances to find out what they knew and, where possible, where the information came from.[13] And it conveyed to members of the media information that the Target defense team wished to have disseminated.[14]

II. Discussion

A. Attorney-Client Privilege

As this matter is entirely federal in nature, the scope of the attorney-client privilege is governed by FED.R.EVID. 501, which provides in relevant part 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 the light of reason and experience." In consequence, the Court looks principally to decisions applying the federal common law of attorney-client privilege.

As the government argues, the broad outlines of the attorney-client privilege are clear:

> "(1) where legal advice of any kind is sought (2) from a professional legal advisor 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 advisor, (8) except the protection be waived."[15]

But two qualifications must be made.

First, the privilege protects not only communications by the client to the lawyer. In many circumstances, it protects also communications by the lawyer to the client.[16]

325 *325 Second, the privilege in appropriate circumstances extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services.[17] This principle has been applied universally to cover office personnel, such as secretaries and law clerks, who assist lawyers in performing their tasks.[18] But it has been applied more broadly as well. For example, in *United States v. Kovel*[19] the Second Circuit held that a client's communications with an

accountant employed by his attorney were privileged where made for the purpose of enabling the attorney to understand the client's situation in order to provide legal advice.[20] In language pertinent here, Judge Friendly wrote:

> "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service... or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. We recognize this draws what may seem to some a rather arbitrary line between a case where the client communicates first to his own accountant (no privilege as to such communications, even though he later consults his lawyer on the same matter ...) and others, where the client in the first instance consults a lawyer who retains an accountant as a listening post, or consults the lawyer with his own accountant present. But that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege
> 326 of a client and lawyer under conditions *326 where the lawyer needs outside help."[21]

Kovel helps frame the analysis here. No one suggests that communications between Target and Firm would have been privileged if she simply had gone out and hired Firm as public relations counsel. On the other hand, there is no reason to question the stated rationale for her lawyers' hiring of Firm — that the lawyers viewed altering the mix of public information as serving Target's interests by creating a climate in which prosecutors and regulators might feel freer to act in ways less antagonistic to Target than otherwise might have been the case. Finally, the Court accepts that this was a situation in which the lawyers, in the words of *Kovel,* "need[ed] outside help," as they presumably were not skilled at public relations. The question therefore is whether the problem with which they "need[ed] outside help" related to their provision of what *Kovel* spoke of as "legal advice."

We begin with the obvious. Certainly Firm was not retained to help Target's lawyers understand technical matters to enable the lawyers to advise their client as to the requirements of the law, as was the case in *Kovel.* But it is common ground that the privilege extends to communications involving consultants used by lawyers to assist in performing tasks that go beyond advising a client as to the law. For example, a client's confidential communications to a non-testifying expert retained by the lawyer to assist the lawyer in preparing the client's case—essentially the situation in *Kovel* — probably are privileged.[22] The government in any case concedes that consultants engaged by lawyers to advise them on matters such as whether the state of public opinion in a community makes a change of venue desirable, whether jurors from particular backgrounds are likely to be disposed favorably to the client, how a client should behave while testifying in order to impress jurors favorably and other matters routinely the stuff of jury and personal communication consultants come within the attorney-client privilege, as they have a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body.[23] The ultimate issue therefore resolves to whether attorney efforts to influence public opinion in order to advance the client's legal position—in this case by neutralizing what the attorneys perceived as a climate of opinion pressing prosecutors and regulators to act in ways adverse to Target's interests—are services, the rendition of which also should be facilitated by applying the privilege to relevant communications which have this as their object.

Traditionally, the proper role of lawyers vis-a-vis public opinion has been viewed rather narrowly, perhaps primarily out of concern that extra-judicial statements might prejudice jury pools. Codes of professional conduct, for example, traditionally have limited the extent to which lawyers properly may seek to influence public opinion by proscribing many types of extrajudicial statements concerning pending litigation.[24] More recently, however, there has been a strong tendency to view
327 the *327 lawyer's role more broadly.[25] Nowhere is this trend more clearly recognized than in the plurality opinion by Mr. Justice Kennedy in *Gentile v. State Bar of Nevada,*[26] where he wrote for four justices:

> "An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."[27]

And this statement does not stand alone. Indeed, many courts have compensated lawyers, in making fee awards under civil rights and other statutes, for public relations efforts in recognition of the importance of such work in the clients' interests.[28]

328 But to say that lawyers in fact try *328 to influence public opinion in the interests of their clients—indeed, to say that they properly may do so and, on occasion, are compensated by courts for such services does not alone answer the question before the Court.

The Court's attention has been drawn to two cases that deal in some respect with the issue of public relations services in the privilege context, *Calvin Klein Trademark Trust v. Wachner*[29] and *In re Copper Market Antitrust Litigation.*[30] Both merit study.

In *Calvin Klein,* the plaintiffs' attorneys hired a public relations firm in anticipation of filing what promised to be a high profile civil suit against a licensee and its well known chief executive. They contended that the purpose was defensive, viz. to assist the lawyers in understanding the possible reaction of the plaintiffs' various constituencies to the litigation, rendering legal advice, and ensuring that media interest in the action would be dealt with responsibly.[31] And they subsequently invoked the attorney-client privilege and work product in an effort to block document production by the public relations firm and one of its employees.

Judge Rakoff rejected the attorney-client privilege claim on three grounds. First, after reviewing the documents, he concluded that few if any of them "contain or reveal confidential communications from the underlying client ... made for the purpose of obtaining legal advice."[32] Second, the evidence showed that the public relations firm—which had a preexisting relationship with the plaintiffs—was "simply providing ordinary public relations advice so far as the documents ... in question [were] concerned."[33] Finally, he found no justification for broadening the privilege to cover functions not "materially different from those that any ordinary public relations firm would have performed if they had been hired directly by [the plaintiffs] (as they also were), instead of by [their] counsel."[34]

In *Copper Antitrust,* a foreign company, Sumitomo, that found itself in the midst of a high profile scandal involving both regulatory and civil litigation aspects hired a public relations firm because it lacked experience in dealing with Western media.[35] The public relations firm acted as Sumitomo's spokesperson when dealing with the Western press and conferred frequently with the company's U.S. litigation counsel, preparing drafts of press releases and other materials which incorporated the lawyers' advice.[36] When an adversary served a subpoena calling upon the public relations firm to produce all documents relating to its work for Sumitomo, Sumitomo resisted on attorney-client privilege and work product grounds.[37] Judge Swain upheld the attorney-client privilege claim, reasoning that the public relations firm, in the
329 circumstances of this case, was the functional equivalent of an in-house department of Sumitomo and thus part of the *329 "client."[38] The communications between the firm and the lawyers, she held, therefore were confidential attorney-client interactions.

Although *Calvin Klein* and *Copper Antitrust* both involved situations somewhat analogous to this case, neither resolves the attorney-client privilege problem here. *Copper Antitrust* disposed of the privilege issue by concluding that the public relations firm in substance was part of the client whereas Target makes no similar assertion. *Calvin Klein* was somewhat different from this case because the public relations firm there had a relationship with the client that antedated the litigation, the client was a corporation addressing an array of constituencies including customers and shareholders, and the public relations firm, in Judge Rakoff's words, was "simply providing ordinary public relations advice."[39] Perhaps even more significant, *Calvin Klein,* no doubt in consequence of the arguments made in that case, assumed an answer to the issue now before this Court—whether a lawyer's public advocacy on behalf of the client is a professional legal service that warrants extension of the privilege to confidential communications between and among the client, the lawyer, and any public relations consultant the lawyer may engage to advise on the performance of that function. Answering that question requires consideration of the policies that inform the attorney-client privilege.

As the Supreme Court said in *Upjohn Co. v. United States,*[40] the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[41] In this case, construing the privilege to cover the communications involving the public relations consultants would not materially serve the purpose of promoting observance of law for the simple reason that the
330 current controversy concerns the consequences of Target's past conduct, not an effort to conform her present and future *330 actions to the law's requirements. If justification is to be found for such a construction, it must lie in the proposition that encouraging frank communication among client, lawyers, and public relations consultants enhances the administration of justice.

Target, like any investigatory target or criminal defendant, is confronted with the broad power of the government. Without suggesting any impropriety, the Court is well aware that the media, prosecutors, and law enforcement personnel in cases like this often engage in activities that color public opinion, certainly to the detriment of the subject's general reputation but also, in the most extreme cases, to the detriment of his or her ability to obtain a fair trial. Moreover, it would be unreasonable to suppose that no prosecutor ever is influenced by an assessment of public opinion in deciding whether to bring criminal charges, as opposed to declining prosecution or leaving matters to civil enforcement proceedings, or in deciding what particular offenses to charge, decisions often of great consequence in this Sentencing Guidelines era. Thus, in some circumstances, the advocacy of a client's case in the public forum will be important to the client's ability to achieve a fair and just result in pending or threatened litigation.

Nor may such advocacy prudently be conducted in disregard of its potential legal ramifications. Questions such as whether the client should speak to the media at all, whether to do so directly or through representatives, whether and to what extent to comment on specific allegations, and a host of others can be decided without careful legal input only at the client's extreme peril.[42] Indeed, in at least one case, the Securities and Exchange Commission ("SEC") charged that a company that was the subject of an investigation violated the securities laws because its public statements concerning the pending investigation were misleading.[43]

Finally, dealing with the media in a high profile case probably is not a matter for amateurs. Target and her lawyers cannot be faulted for concluding that professional public relations advice was needed.

This Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions—such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication—would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants. For example, lawyers may need skilled advice as to whether and how possible statements to the press—ranging from "no comment" to detailed factual presentations—likely would be reported in order to advise a client as to whether the making of particular statements would be in the client's legal interest. And there simply is no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at
331 least some non-public facts, as well as the lawyers' defense strategies and tactics, free of the fear that the consultants *331
could be forced to disclose those discussions. In consequence, this Court holds that (1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege. Two points remain however.

As previously noted, Target would not have enjoyed any privilege for her own communications with Firm if she had hired Firm directly, even if her object in doing so had been purely to affect her legal situation. There is a certain artificiality, therefore, in saying that the privilege applies where the lawyers do the hiring and the other requirements alluded to above are satisfied. The justification, however, is found in Judge Friendly's opinion in *Kovel:* "[T]hat is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of a client and lawyer under conditions where the lawyer needs outside help."[44] Precisely the same rationale applies here.

The second remaining issue is the question of Target's communications with the consultants, some of which took place in the presence of the lawyers while others were strictly between Target and Firm. The Court is of the view that both types of communications are covered by the privilege provided the communications were directed at giving or obtaining legal advice. Indeed, in *Kovel,* the Second Circuit recognized that it would be mere formalism to extend the privilege in the former scenario but not the latter, provided the purpose of the confidential communication was to obtain legal advice:

> "[I]f the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary or is interviewed by a clerk not yet admitted to practice. What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."[45]

Witness testified before the grand jury that she recalled only two conversations with Target alone and described their general subject matter.[46] One conversation took place on a day on which there had been substantial media coverage, and Target asked Witness for her view of the coverage.[47] The other concerned a problem with a wire service story.[48] Furthermore, one of the documents the Court reviewed *in camera* is an e-mail from Witness to Target alone concerning a *Wall Street Journal* posting.[49]

332 Neither of the conversations satisfies the standard set forth above—that the communication be made for the purpose of *332 obtaining legal services. Target has not shown that either conversation was at the behest of her lawyers or directed at helping the lawyers formulate their strategy.

This Court previously held that a portion of the Targetr-Witness e-mail is opinion work product.[50] The balance, however, is not covered by the attorney-client privilege because there has been no showing that it has a nexus sufficiently close to the provision or receipt of legal advice. Thus, neither these two conversations nor the non-highlighted portion of the e-mail is protected by the attorney-client privilege. On the other hand, Target's communications with Firm personnel alone, or with both the lawyers and Firm personnel, are privileged to the extent the conversations were related to the provision of legal services.[51]

In sum, then, the Court sustains the attorney-client privilege objections to questions seeking the content of oral communications among Firm, Target and her lawyers, or any combination thereof, which satisfy the standard enumerated above. It overrules the claim of privilege as to the two conversations described in the preceding paragraph.

As all of the documents withheld from production by Firm are communications among Target, her lawyers and Firm, or some combination thereof, for the purpose of giving or receiving legal advice, except for the previously mentioned e-mail from Witness to Target, the Court sustains the attorney-client privilege objections to production of those documents.

B. Work Product

The Court recognizes the possibility that a reviewing court may come to a different conclusion with respect to the attorney-client privilege issue. Accordingly, it deals with the work product objections to the extent they have not been sustained in the May 1, 2003 order.

"The work product doctrine, now codified in part in Rule 26(b)(3) of the Federal Rules of Civil Procedure and Rule 16(b)(2) of the Federal Rules of Criminal Procedure, provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial."[52] Both "distinct from and broader than the attorney-client privilege,"[53] the work product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy `with an eye toward litigation,' free from unnecessary intrusion by his adversaries."[54]

333 Work product falls generally into two categories, which are afforded different *333 levels of protection. Work product consisting merely of materials prepared in anticipation of litigation or for trial is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials ... and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[55] Opinion work product—materials that would reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"[56]—is discoverable, if at all, only upon a significantly stronger showing.[57]

In this case, Firm withheld nineteen documents from production based in whole or in part on the contention that they are protected work product. The government's initial response was to claim that the documents are not work product because the government seeks no "materials that reveal Target's attorneys' mental impressions" and, should the Court conclude otherwise, that it is prepared to make an *ex parte* showing of substantial need.[58] At oral argument, moreover, the government disavowed any effort to obtain production of documents containing attorney opinion work product, stating that its interest is limited to obtaining facts.[59] Accordingly, the Court sustained the work product objection to such portions of the documents in its May 1, 2003 order. There remains for consideration the question whether the remaining portions of the documents are protected and, if so, whether the government has made or should be permitted to seek to make an *ex parte* showing of substantial need.[60]

There is no serious question that the remaining portions of the documents withheld are work product, as the government does not dispute that they were prepared in anticipation of litigation. If doubt there were, it would have been eliminated both by the Court's *in camera* review, which confirms that all of the nineteen documents in fact were prepared in anticipation of litigation, and by *Calvin Klein* and *Copper Antitrust,* both of which held that work product protection covers similar materials in circumstances which, for this purpose, were analogous.[61]

The government implicitly concedes that it has not shown substantial need for the non-opinion work product portions of the documents, requesting instead that it be permitted to attempt such a showing *ex parte*?[62] While *ex parte* proceedings in most circumstances are strongly disfavored by our system, the public interest in grand jury secrecy in some cases may
334 trump that important principle. "[W]here an *in camera* submission is the only way *334 to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure."[63]

This proposition creates something of a chicken-and-egg problem. When the Court pressed the government to explain how making a showing of substantial need in the presence of its adversary would prejudice grand jury secrecy, the government indicated that it feared that it could not do so "in open court without letting the cat out of the bag, so to speak" and acknowledged that this is "[s]omewhat of a Catch 22."[64]

In the absence of any non-conclusory showing that an explanation of the need for an *ex parte* submission itself would compromise grand jury secrecy, there are two obvious alternatives. One is simply to take the government at its word and unconditionally permit an *ex parte* showing. The other is to deny this aspect of the government's motion. But the choice before the Court need not be so stark. The middle ground is to allow the government to make an *ex parte* showing both of substantial need and of the necessity of preserving the confidentiality of its submission in order to protect grand jury secrecy. If the Court concludes that disclosure of the submission would not compromise grand jury secrecy, the government's submission will be disclosed to Target's counsel, who will be permitted to respond before the Court decides whether the government has shown substantial need for the non-opinion work product. If it does not so conclude, it will proceed directly to rule on the sufficiency of the government's showing of need.

III. Conclusion

For the foregoing reasons, the government's motion is granted to the following extent:

1. Witness shall testify further pursuant to the subpoena served upon her and answer all questions relating to the two conversations she recalls having had with Target alone and such other questions as may be put to her in respect of which there is no claim of privilege consistent with this opinion.

2. The government, on or before May 21, 2003, may make an *ex parte* submission as to both its claimed need for the nonattorney opinion work product portions of the withheld Firm documents and the necessity of preserving the confidentiality of its submission in order to protect grand jury secrecy. Any such submission shall be accompanied by a memorandum of law, served on Target's counsel, addressing the question whether the Court should apply Civil Rule 26(b)(3), Criminal Rule 16(b)(2), or some other standard in ruling on the government's motion..[65]

SO ORDERED.

[1] Except where otherwise indicated, "work product" refers to material prepared in anticipation of litigation or for trial, including material that reflects the mental impressions, conclusions, opinions or legal theories of an attorney.

[2] The Court took into account the views of the parties with respect to the redactions that were required.

[3] No inferences should be drawn from the gender of pronouns used to refer to Target and Witness in this redacted version of the opinion.

[4] That is, it reflected the mental impressions, conclusions, opinions or legal theories of counsel.

[5] Although the protection afforded to work product is not, technically speaking, an evidentiary privilege, the Court uses "privilege" to refer both to attorney-client privilege and to work product protection for ease of expression.

[6] Witness Aff. ¶ 8.

[7] *Id.* ¶ 9.

[8] *id.* ¶ 12.

[9] Grand Jury Tr., May 5, 2003, at 18-19, 29-30; Target Priv. 0011.

[10] Grand Jury Tr. at 29.

[11] *Id.* at 18-21, 29.

[12] *See, e.g.,* Witness Aff. ¶ 13.

[13] *See id.* ¶ 17.

[14] Grand Jury Tr., May 5, 2003, at 21-22, 45-47.

[15] *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983,* 731 F.2d 1032, 1036 (2d Cir.1984) (internal citations omitted).

[16] *E.g., United States v. Neat,* 27 F.3d 1035, 1048 (5th Cir.1994) (privilege "`shields communications from the lawyer to the client only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney.'") (citing *Wells v. Rushing,* 755 F.2d 376, 379 n. 2 (5th Cir.1985)); *In re Six Grand Jury Witnesses,* 979 F.2d 939, 944 (2d Cir. 1992) (where the client is a corporation, the attorney-client privilege protects "both information provided to the lawyer by the client and professional advice given by an attorney that discloses such [confidential] information."); *Thurmond v. Compaq Computer Corp.,* 198 F.R.D. 475, 480-82 (E.D.Tex.2000) (cataloging cases applying privilege to communications from lawyer to client and noting divergence among federal courts concerning scope of such privilege); *Fed. Election Comm'n v. Christian Coalition,* 178 F.R.D. 61, 66 (E.D.Va.1998) ("The attorney-client privilege... extends `to protect communications by the lawyer to his client ... if those communications reveal confidential client communications.' ") (citing *United States v. Under Seal,* 748 F.2d 871, 874 (4th Cir.1984)); *Harmony Gold U.S.A., Inc. v. FASA Corp.,* 169 F.R.D. 113, 115 (N.D.Ill.1996) (stating that privilege applies to communications from a lawyer to a client provided "the legal advice given to the client, or sought by the client, [is] the predominant element in the communication"); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.,* 160 F.R.D. 437, 441-42 (S.D.N.Y.1995) ("It is now well established that the privilege attaches ... to advice rendered by the attorney to the client, at least to the extent that such advice may reflect confidential information conveyed by the client."); *United States v. Int'l Bus. Mach. Corp.,* 66 F.R.D. 206, 212 (S.D.N.Y.1974) (privilege applies to communications by a lawyer to a client provided legal advice is the predominant feature of the communication). *Cf. Upjohn Co. v. United States,* 449 U.S. 383, 390, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (attorney-client privilege protects "giving of professional advice to those who can act on it"). *See generally* 24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5491 at 450-54 (1986 & Supp.2003) (noting variation among federal courts in breadth of application of privilege to communications by attorney to client).

[17] *See* SUP.CT, STD, 503(a)(3), 503(b), *reprinted in* 3 JOSEPH M. MCLAUGHLIN, WEINSTEIN'S EVIdence § 503.01 (2d ed.2003) (hereinafter WEINSTEIN) (privilege extends to appropriate communications between and among the client, the lawyer, and a "representative of the lawyer," which is defined as "one employed to assist the lawyer in the rendition of professional legal services.")

[18] 3 WEINSTEIN § 503.12[3][b].

[19] 296 F.2d 918 (2d Cir.1961).

[20] *Id.* at 922.

[21] *Id.* (footnotes and citations omitted).

[22] 3 WEINSTEIN § 503.12[5][b].

[23] Tr., Apr. 30, 2003, at 4-7, 13-15.

[24] *See generally* Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion,* 95 COLUM. L.REV. 1811, 1816-25 (1995) (hereinafter *Spin Control);* Beth A. Wilkinson & Steven H. Schulman, *When Talk Is Not Cheap: Communications With the Media, The Government and Other Parties in High Profile White Collar Criminal Cases,* 39 AM.CRIM. L.REV. 203, 205-06 (2001) (hereinafter *When Talk Is Not Cheap).*

[25] *E.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (1999) (allowing lawyers to comment publicly to the extent necessary to neutralize publicity if the lawyer did not initiate the media attention); *Spin Control,* 95 COLUM. L.REV. at 1828-44; Julie R. O'Sullivan, *The* Bakaly *Debacle: The Role of the Press in High-Profile Criminal Investigations* in *Symposium, Bidding Adieu to the Clinton Administration: Assessing the Ramifications of the Clinton "Scandals" on the Office of the President and on Executive Branch Investigations,* 60 MD. L.REV. 149, 169-82 (2001); S. Bennett, *Press Advocacy and the High-Profile Client,* 30 LOY. L.A.L.REV. 13, 13-20 (1996); *see When Talk Is Not Cheap,* 39 AM.CRIM. L.REV. at 223.

[26] 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991).

[27] *Id.* at 1043, 111 S.Ct. 2720.

[28] *See, e.g., Davis v. City and County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *reh'g denied, vacated in part on other grounds, and remanded,* 984 F.2d 345 (9th Cir. 1993) (affirming district court's award of compensation to prevailing party in civil rights action for attorneys' time spent giving press conferences and performing other public relations work where such work was "directly and intimately related to the successful representation of [the] client."); *Gilbrook v. City of Westminster*, 177 F.3d 839, 877 (9th Cir. 1999) (affirming award to prevailing party in civil rights action for media and public relations activities and noting with approval the district court's finding that public relations work contributed directly and substantially to plaintiffs' litigation goals because "`[l]ocal politics had a potentially determinative influence on the outcome of settlement negotiations and the availability of certain remedies such as reinstatement'"); *Child v. Spillane*, 866 F.2d 691, 698 (4th Cir.1989) (Murnaghan, J., dissenting) (stating that public relations work should be compensated as attorney's fees in exceptional cases "involving issues of such vital public concern that lawyers will find it necessary to spend time responding to reporters' questions"); *United States v. Aisenberg*, 247 F.Supp.2d 1272, 1316 (M.D.Fla.2003) (awarding fees for public relations services and noting that it was appropriate for counsel for suspects in missing child investigation, "consistent with the rules governing professional conduct, not only to procure the assistance of the public in locating the child but to present a public response, to nurture the clients' diminished public image, and *thereby to reduce public pressure on the prosecution to indict")* (emphasis added). *But see, e.g., Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 176 (4th Cir. 1994) (affirming disallowance of attorneys' fees under 42 U.S.C. § 1988 for prevailing party for public relations efforts aimed "not at achieving litigation goals, but at minimizing the inevitable public relations damage to the company for suing the governor and the state police to alter the pro-labor police enforcement policies."); *New York State Ass'n of Career Sch. v. State Educ. Dep't, 762* F.Supp. 1124, 1127 (S.D.N.Y.1991) ("Plaintiffs' direct effect on the legislative process .. . appears to have been the result of lobbying pressure, and thus an award of attorney's fees is clearly not warranted on that basis.")

[29] 198 F.R.D. 53 (S.D.N.Y.2000),

[30] 200 F.R.D. 213 (S.D.N.Y.2001).

[31] 198 F.R.D. at 54.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 55.

[35] 200 F.R.D. at 215.

[36] *Id.* at 215-16.

[37] *Id.* at 216.

[38] *Id.* at 219.

[39] 198 F.R.D. at 54.

The distinction should not be exaggerated. While Witness describes the nature of Firm's engagement as attempting to influence opinion purely for the impact of a more favorable environment on prosecutors and regulators, and the Court does not question her good faith, it would be naive to suppose that the effect of Firm's services or, for that matter, Target's motive in agreeing to pay for them, is so unidimensional. Target is a prominent and, according to press reports, relatively young business person. Whatever the outcome of her present legal exposures, she will have a social and, in all likelihood, business life in the future, both of which stand to be affected by public perceptions of her and her conduct while at the Company. Hence, while the Court assumes that Target's chief concern at the time of these communications was to avoid or limit the scope of any indictment and other legal attacks upon her, Firm's engagement, to the extent it succeeds, is likely to have benefits for Target outside the litigation sphere.

[40] 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

[41] *Id.* at 389, 101 S.Ct. 677.

This reflects a change in the generally accepted view of the privilege's purpose. The privilege, at its inception, belonged to the attorney and was grounded in humanistic considerations, e.g., that it enabled the attorney "to comply with his code of honor and professional ethics." EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 2.3, at 108 (2002); 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961); *see also In re Colton*, 201 F.Supp. 13, 15 (S.D.N.Y.1961), *aff'd,* 306 F.2d 633 (2d Cir. 1962), *cert, denied,* 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963). Some have advocated a heavier reliance on such considerations in determining the scope of the privilege today. *See, e.g.,* IMWINKELRIED § 5.3.

[42] *See, e.g., Spin Control,* 95 COLUM. L.REV. at 1828-42; Bennett, *Press Advocacy and the Heigh-Profile Client,* 30 LOY. L.A. L.REV. at 18-20; *When Talk Is Not Cheap,* 39 AM.CRIM. L.REV. at 203-14.

[43] *In re Incomnet, Inc.,* Exchange Act of 1934 Release No. 40281, 1998 WL 429063, at *6, 1998 SEC Lexis 1614, at *12, *17 (July 30, 1998) (allegedly misleading press statements "essentially denied the Commission's investigation").

[44] *Kovel*, 296 F.2d at 922.

[45] *Kovel*, 296 F.2d at 922.

[46] Grand Jury Tr. May 5, 2003, at 30-31.

[47] *Id.* at 31.

[48] *Id.*

[49] Target Priv. 0011.

[50] Order, *In re Grand Jury Subpoenas Dated March 24, 2003,* May 1, 2003.

[51] That Target's spouse was present during some of these conversations does not destroy any applicable privilege. *See, e.g.,* *Murray v. Board of Educ*, 199 F.R.D. 154, 155 (S.D.N.Y. 2001) ("disclosure of communications protected by the attorney-client privilege within the context of another privilege does not constitute waiver of the attorney-client privilege"); *Solomon v. Scientific American, Inc.*, 125 F.R.D. 34, 36 (S.D.N.Y. 1988) (no waiver of the attorney-client privilege when privileged information was disclosed to client's wife); *see also* 3 WEINSTEIN § 511.07 ("There is no waiver when the disclosure is made in another communication that is itself privileged.")

[52] *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002,* 318 F.3d 379, 383 (2d Cir.2003).

[53] *United States v. Nobles*, 422 U.S. 225, 238 n. 11, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

[54] *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

[55] FED. R. CIV. P. 26(b)(3).

In criminal cases, the doctrine is even stricter, precluding discovery of documents made by a defendant's attorney or the attorney's agents except with respect to "scientific or medical reports." FED. R.CRIM. P. 16(b)(2).

[56] FED. R. CIV. P. 26(b)(3).

[57] *See, e.g., Upjohn Co.*, 449 U.S. at 400-02, 101 S.Ct. 677; *In re Grand Jury Proceedings*, 219 F.3d 175, 190-91 (2d Cir.2000); *Adlman*, 134 F.3d at 1204.

[58] Letter, Assistant United States Attorneys, Apr. 24, 2003, at 11-12; *see also* Letter, Assistant United States Attorneys, Apr. 29, 2003, at 6-7.

[59] Tr., Apr. 30, 2003, at 33.

[60] The Court for convenience uses "substantial need" to refer to the entire requisite showing of substantial need and undue hardship.

[61] *Calvin Klein*, 198 F.R.D. at 55-56; *Copper Antitrust*, 200 F.R.D. at 220-21.

[62] Letter, Assistant United States Attorneys, Apr. 24, 2003, at 12.

[63] *In re John Doe, Inc.*, 13 F.3d 633, 636 (2d Cir.1994); *accord In re Marc Rich & Co.*, 707 F.2d 663, 670 (2d Cir.), *cert, denied,* 463 U.S. 1215, 103 S.Ct. 3555, 77 L.Ed.2d 1400 (1983); *In re Grand Jury Subpoena dated August 9, 2000,* 218 F.Supp.2d 544, 551 (S.D.N.Y.2002), *aff'd,* 318 F.3d 379 (2d Cir. 2003).

[64] Tr., Apr. 30, 2003, at 35.

[65] No such submission was made.