Providing Competent Legal Counsel in Compliance with Your Ethical Obligations in an Ever-Changing Legal and Regulatory Environment

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Panelists' Biographies

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Laura J. Mitchell Baker is a Government Contracts counsel in Crowell & Moring's Washington, D.C. office. Her practice includes a wide range of administrative, investigatory, litigation, and transactional matters, including: internal and government-facing False Claims Act investigations at both the federal and state levels and mandatory disclosure obligations; contract disputes with federal and state entities; compliance reviews and enhancements of contractor compliance programs; representing clients in suspension and debarment proceedings; and providing government contracts due diligence in transaction matters. Her practice also includes counseling on regulatory and ethics matters at the federal, state, and local levels, including the unique procurement processes and compliance issues at the state/local/education levels.

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Lyndsay Gorton is a Government Contracts partner in Crowell & Moring's Washington, D.C. office. Her practice focuses on government contracts litigation and counseling, including government investigations, fraud matters under the False Claims Act, and federal and state regulatory compliance. In addition to her primary government contracts practice, Lyndsay has federal court litigation experience representing a broad variety of clients in commercial litigation matters, and has led and managed teams at every stage of litigation, including discovery, dispositive motion practice, trial, and settlement. She also uses her litigation experience to assist her clients with internal investigations, risk management, and compliance.

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Sarah Lynn is the General Counsel and Corporate Secretary of Nightwing, a cybersecurity and intelligence company. She leads the team responsible for all legal, compliance, contracts and supply chain activities across the company. Sarah brings a broad experience advising executive leadership on legal issues including government contracting, M&A, corporate governance, cybersecurity and general legal compliance. Prior to joining Nightwing, Sarah was General Counsel of Valiant Integrated Services and held senior roles at Peraton, Perspecta, DXC Technology Company and Hewlett Packard Enterprise.

Agenda

- VA Ethics Rules related to Communications and Confidentiality
- Attorney Client Privilege Refresher
- Work Product Doctrine
- Privilege Considerations for Investigations
- Disclosures to Third Parties
- Developments Affecting Privilege and Ethics
  - Shift in Enforcement Priorities
  - Diversity, Equity, and Inclusion and Healthcare Fraud Examples

Virginia Ethics Rules related to Communications, Confidentiality, and Competence

Virginia Rule of Professional Conduct 1.1: Competence

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

Virginia Rule of Professional Conduct 1.4: Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Virginia Rule of Professional Conduct 1.6: Confidentiality of Information

(a) A lawyer **shall not** reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

Virginia Rule of Professional Conduct 1.6: Confidentiality of Information

(b) To the extent a lawyer reasonably believes necessary, the lawyer **may** reveal:

1) such information to comply with law or a court order;
2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;
7) such information to prevent reasonably certain death or substantial bodily harm.

Virginia Rule of Professional Conduct 1.6: Confidentiality of Information

(c) A lawyer **shall** promptly reveal:

1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or
2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

(d) A lawyer **shall** make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Attorney-Client Privilege Refresher

Elements of Attorney-Client Privilege

Attorney-Client Privilege: Communication

- The communication can be of any of the type sought in discovery
- It also can include advice a lawyer communicated to the client that is passed along to another person within the client (e.g., “Outside counsel said our claim is strong. . . ”)
- It can include notes taken by client or lawyer that memorialize a communication (e.g., notes from a meeting with counsel, or a call with counsel)
- It does not cover communications in which a lawyer is merely present (or copied on an email)
- It does not cover facts (facts themselves are never privileged, but the communication of facts may be depending on circumstance)

Attorney-Client Privilege: Confidentiality

- The client must have an expectation of confidentiality
- For example, statements made in public or disclosed to large groups within the company who are not the “need to know” group can make a communication with a lawyer not privileged
- Furthermore, a client may waive privilege if it shares a privileged document with a third-party (e.g., email from outside counsel forwarded to outside auditor, disclosure to a foreign government)
- Employees must be cautioned to keep privileged communication to the immediate “need to know” group within the company, and to consult with counsel before they expand communications outside that group

Attorney-Client Privilege: Legal Advice Sought or Given

- To be privileged, the communication must be with a lawyer for the purpose of giving or receiving legal advice
- Communication with outside or in-house counsel regarding business decisions (not related to legal issues) are not privileged
- In-house lawyers often wear two hats; they are both legal and *business* advisors
  - Attorney-client privilege covers only communications in furtherance of *legal* advice
  - Generally, legal advice must be the *primary purpose* of the communication in order to be covered
  - It is a good idea to be explicit regarding the legal nature of your inquiry
- Some courts have presumed that lawyers in the general counsel office are acting as legal advisors, while lawyers in other departments, such as compliance, are acting in a business role
- If you are wearing multiple hats, its important to be clear when you are providing counsel in your capacity as counsel

Attorney- Client Privilege: In-House Clients

- Under U.S. law, a communication between corporate employees and in-house counsel is privileged so long as:
  - the communication is made to secure legal advice for the corporation, at the direction of a corporate superior
  - the subject matter of the communication is within the scope of the employee's duties, and
  - the communication is not disseminated beyond those who need to know its contents
- Be careful regarding who is copied on communications or attends meetings where privileged matters are being discussed
- Not every employee is the "client" for every legal matter

Attorney-Client Privilege: Waiver

- Subsequent disclosure to any third party destroys the privilege, with limited exceptions.
  - FRE 502(a): Subject-matter waiver, if:
    - the waiver is intentional;
    - the disclosed and undisclosed communications or information concern the same subject matter; and
    - ought in fairness to be considered together.
  - FRE 502(b): No waiver at all, if:
    - the disclosure is inadvertent;
    - the holder of the privilege took reasonable steps to prevent disclosure; and
    - the holder promptly took reasonable steps to rectify the error.

Attorney- Client Privilege: In-House Clients

- *Kovel* Communications (*United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961))
  - A person retained to assist the lawyer to provide legal advice to the client
  - E.g., lawyer hires CPA to conduct a forensic examination of prior tax returns, so the lawyer can advise the client during a civil examination or criminal investigation whether the returns are false and whether to amend the returns
- Agents
  - Employees of the attorney
  - Employees of the client
  - Interpreters

Common-Interest Doctrine

- Not a separate "privilege" but operates as an exception to the rule of waiver
- Communications with third parties in furtherance of a shared legal interest
  - The shared legal interest must be identical – similar interests are not sufficient
  - E.g., *In re Grand Jury Subpoena #£06-1*, 274 F. App'x 306, 311 (4th Cir. 2008) (quoting *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 362-63 (3d Cir. 2007) (noting that "their legal interests must be identical (or nearly so)")
- Written common-interest or joint-defense agreements are often prudent but not always required

Privilege Best Practices

Privileges To/From:

- Separate legal and business advice
- Think about the “need to know” group and limit privileged communications, including phone calls and meetings AND access to share drives and channel communications, to that group
- Use phone when possible
- Label notes from meetings and mark-ups to attribute statements to particular people
- Be clear when seeking advice, or when passing along advice or request of counsel
- STOP before sharing privileged information or documents with third-parties, including auditors
- Have a centralized workflow for all

Labeling:

- Label subject lines of emails and documents as “Privileged & Confidential/Attorney-Client Communication” as appropriate
- Save “final” versions as “final” and remove “draft” language
- Consider saving documents with dates in title

Communication Hygiene

Pause Before Sending…

- Emails, chats, and texts are informal means of communication that often lead to careless statements
- When read out of context, these statements can lead to serious issues in disputes
- Think of the recipients and what they might do with the communication

Best Practices to Protect Privilege

- Recognize the likelihood that all communications may ultimately be disclosed to government, opposing counsel, etc.
- Carefully consider privilege waivers (and understand the broad scope of a waiver)

Dual Purpose Communications and *In re Grand Jury*

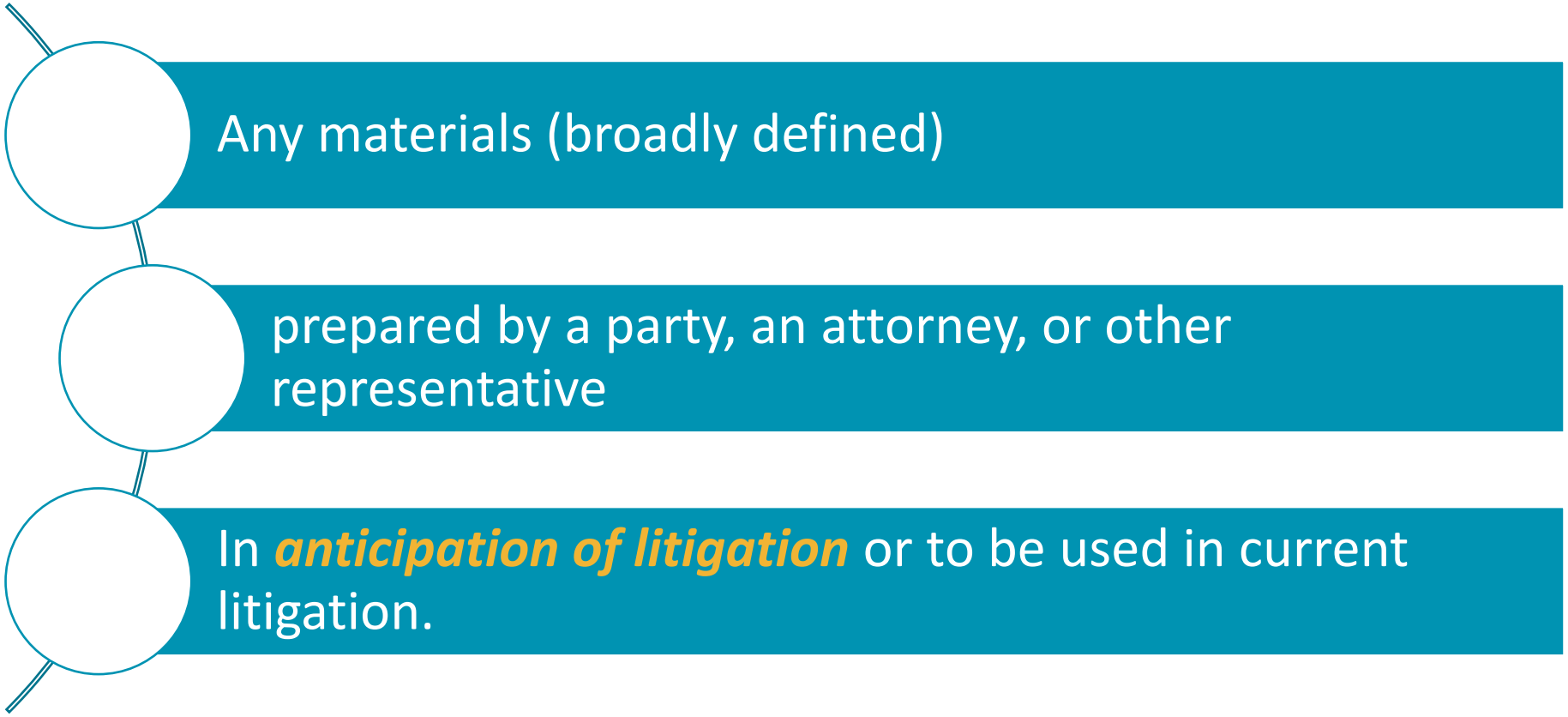
- Under what circumstances should attorney-client privilege protection be denied to dual-purpose communications (seeking attorney advice for both privileged and non-privileged reasons)
- Different tests across the country
  - Majority of Courts (2nd, 5th, 6th and 9th Circuits)- Privileged when "primary purpose" of the communications was legal advice
    - *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2021)
  - Other Courts (i.e. DC Circuit)- Privileged if a "significant purpose" of the communication was legal advice
    - *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014)
- In *In re Grand Jury*, 143 S.Ct. 543, Supreme Court dismissed the case after oral argument, leaving the status quo intact

Dual Purpose Communications - Best Practices

- For any dual-purpose document, label it as privileged and/or work product, as appropriate
- For written advice, ensure that the legal part of any analysis is as robust as possible
- Intertwined motivations and analysis are both problems and opportunities to bolster the attorney-client aspect of the document
- If concerned about risking privilege, attempt to separate legal advice from non-legal business communications
  - Put legal advice in stand-alone communications
  - Avoid lengthy prior email chains
  - Avoid forwarding legal advice

Work Product Doctrine

Elements of the Work-Product Doctrine



Work-Product Doctrine: Limitations

- Work product is a “protection” and not a “privilege”- important but not as strong as the attorney client and other privileges
- Facts embedded in work product may be discoverable if the opposing party shows that:
  - it has substantial need for the materials to prepare its case, and
  - it cannot obtain the substantial equivalent of the materials at issue without undue hardship
- Attorney-client privilege may still apply to the factual portions of those materials

Work-Product Doctrine: In Anticipation of Litigation

- Unlike the attorney-client privilege, anyone may create work product
- Must have been created "because of" litigation
  - Most circuits protect dual-purpose documents (e.g., documents prepared for litigation and for another purpose)
  - Some circuits, however, require litigation to be the "primary purpose"
  - Be clear in purpose of document, including "created at request of counsel"
- Litigation includes court proceedings as well as administrative agency hearings, arbitration or mediation of an adversarial nature
  - Expectation of litigation must be reasonable but does not require a history of litigation

REMINDER: Once a party anticipates litigation (and therefore can create work product), it MUST preserve documents. Therefore, be careful marking documents "WORK PRODUCT" where there is no litigation hold in place

Fact v. Opinion Work Product

- Opinion Work Product
  - Generally, the “actual” thoughts, mental impressions, and opinions of an attorney
  - Nearly absolute protection from disclosure, and can only be discovered in very rare/extraordinary circumstances
- Fact Work Product
  - A transaction of the factual events involved
  - Can be created by anyone
  - Protected, but can be overcome by showing “substantial need” and an inability to discover substantially the same information any other way

Fact Work Product – Factors Showing Substantial Need

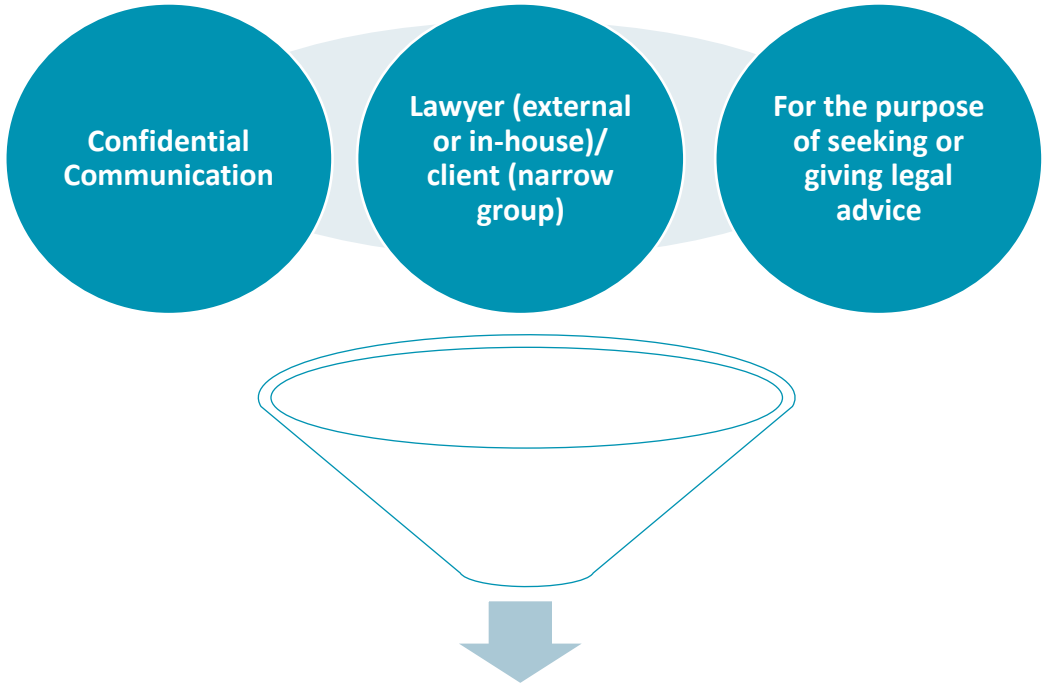
- There are a number of factors to determine whether a party has "substantial need" for fact work product, including:
  - The relevance and importance of the materials to the party seeking them for case preparation;
  - The difficulty the party will have obtaining them by other means; and
  - The likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents he seeks
- Typically, fact work product is protected to prevent a party from running to court on the work and research of another party

Duty to Preserve Evidence

- From the time a party reasonably anticipates litigation, it has a duty to preserve all evidence related to that potential litigation
- Destruction of evidence after that point can result in sanctions and adverse rulings at trial
- Even if the contents of the documents would not have been bad, the court can rule that they are presumed negative where a party intentionally destroyed them
- For that reason, the company (usually General Counsel's office) will send "litigation hold" or "preservation" notices to employees it expects may have relevant information and overrule normal document retention policies for relevant documents

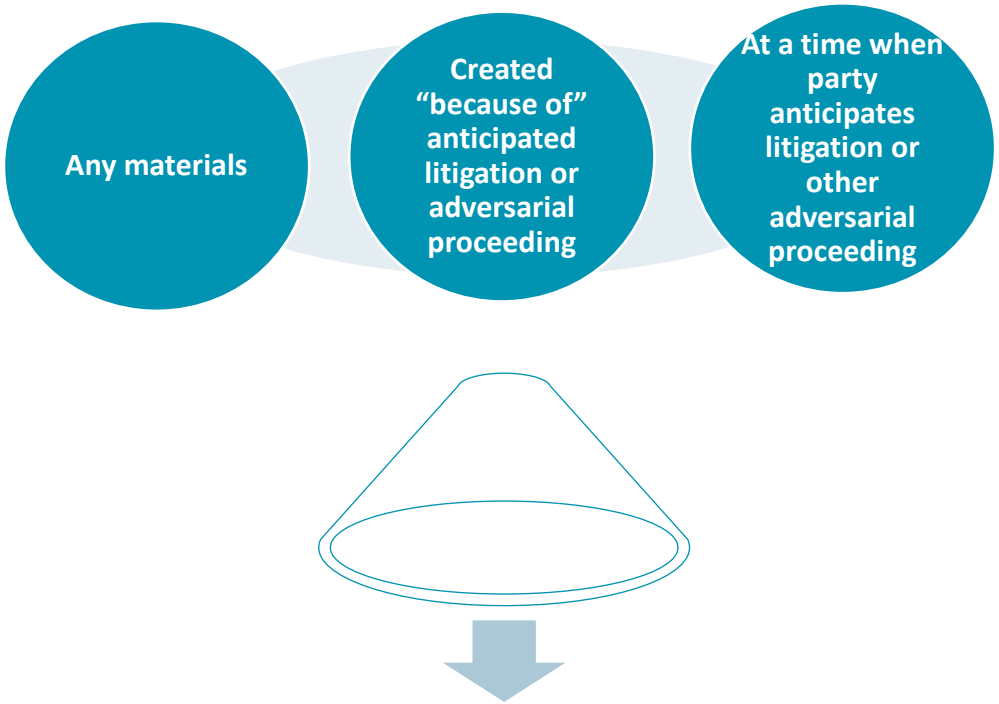
Attorney-Client vs. Work Product

Attorney-Client Privilege



At any time, but only specific persons and purpose

Work Product



Any one can create, but only at specific times and for specific purposes

Practice Points: Work Product

- Do not use the “Work Product” label unless you are clear that the document is being created in anticipation of litigation and a litigation hold is in place
- Instruct non-attorneys preparing documents or developing facts to note as part of their activity that they are doing this because a lawyer asked them to do so
- Instruct non-attorneys to keep these tasks separate from documents created as part of their regular duties

Privilege Considerations for Investigations

Maintaining Privilege During an Investigation

***Who is the investigator*?**

1. Involvement of non-attorney investigators
2. A clear record that counsel is directing work
3. Marking of materials “privileged and confidential”
4. Work product protection?

Maintaining Privilege During an Investigation – A Hypothetical

- Company XYZ's compliance team flags potentially improper time-charging activity and starts investigating the issue. The compliance team consists of non-attorneys and is not in the Legal organization.
- During the investigation, non-attorney compliance investigators review timekeeping records and emails, and begin speaking to employees.
- The non-attorney investigators draft notes and summaries of their interviews of employees.
- A few days into the investigation, the company's in-house counsel is looped in; in-house counsel asks compliance to keep him posted on their findings.

Maintaining Privilege During an Investigation – A Hypothetical

- Questions for Consideration:
  - Is the investigation privileged?
  - Is there a point at which the investigation becomes privileged, if not at the outset?
  - Are the written notes of employee interviews discoverable?
  - Are communications with the General Counsel's Office discoverable?
  - Would any of the answers be different if the compliance function was housed within the Legal department?
  - Would any of the answers be different if an attorney directed the non-attorney investigators?
  - Would the answers be different if an attorney was cc'ed on emails?

Maintaining Privilege During an Investigation

- Best practices for protecting communications by non-lawyers assisting with an internal investigation:
  - Involve legal counsel from the outset
  - Make a clear record that counsel is directing work for purposes of rendering informed legal advice to the company
    - Consistent labeling of written communications and work product
      - Include “Privileged & Confidential” in email subject headers (when merited)
      - Include “Privileged & Confidential” and “Prepared at Direction of Counsel” on all work product (when merited)
  - Maintain confidentiality
    - Segregate files with controlled access
    - Limit communications on need-to-know basis
    - No disclosures to third parties

Maintaining Privilege During an Investigation

- *Upjohn* Notices: preface meetings and interviews with notification that privilege applies, and document that the notice was given
  - Information is being gathered by (or at the direction of) counsel so that counsel can render legal advice to the company
  - The substance of the meeting or interview is therefore subject to the company's attorney-client privilege
  - In order to maintain the privilege, the substance of the meeting or interview must be kept strictly confidential
  - The company is the client, and thus only the company can waive
- If interviewer is a non-attorney, preface meetings and interviews with the correct version of *Upjohn* notice

Maintaining Privilege During an Investigation

- **Memorializing or reporting on results of internal investigation**
  - Written report has advantages (e.g., clear communication, future reference) but may be discoverable if privilege breached
  - Make clear that purpose of written report is rendering legal advice, not a business purpose
  - If waiver is likely, consider separate reports: one on findings of fact, one containing conclusions and recommendations
  - Limit distribution of written report to core group or legal function, orally report on a selective basis to others
  - Consider whether an oral report will be adequate to accomplish goals

Practice Points for Internal Investigations

- Scope out with the other investigative functions in your company the types of matters that are exclusively investigated by legal or which should be escalated to legal at the start of the investigation
- Be clear who is supervising and directing an investigation, even if non-attorney investigators are doing field work
- Consider whether an unprivileged fact memo will be useful
- Think about the potential outcomes of a case when you start, as that may influence whether the matter will be conducted under direction of counsel vs. whether counsel can just be kept apprised of developments during the investigation

Disclosures to Third-Parties

Disclosures to Third Parties: Government

- **Presentations to the Government**
  - Inherent tension between powerful incentives to fully disclose "all relevant facts" and avoiding waiver of privileges
- **Best practices**
  - Limit written disclosures as much as possible
  - Avoid attribution to or quoting from privileged sources
    - *See, e.g.*, S*.E.C. v. Herrera, et al.*, 324 F.R.D. 258 (S.D. Fla. 2017)
  - Attempt to present factual summaries in the form of hypothetical "proffers" of what the government would hear from various fact witnesses
  - Consider confidentiality/non-waiver agreement

Disclosures to Third Parties: Outside Auditors

- **Disclosure to outside auditors will almost always be considered a waiver of the attorney-client privilege if litigated**
  - Best practices to mitigate risk of finding of waiver:
    - Communicate information orally rather than in writing
    - When sharing facts communicated by company personnel to company counsel, do so without attribution (e.g., don't say, "Ms. Jones told me that . . . .")
    - In expressing legal opinions, do not disclose what legal advice has been given to the company (e.g., don't say "I advised senior management that . . .")
    - Confirm that information will be kept confidential to maximum possible extent
    - When possible, disclose work product rather than attorney-client privileged communications, or materials that are protected by both privileges

Disclosures to Third Parties: Outside Auditors

- **Case law on waiver of attorney work product protection isn't uniform, but there is a clear majority rule:**
  - Majority Rule: No waiver because outside auditors aren't adversaries or conduits to adversaries. *See, e.g.*, *United States v. Deloitte*, 610 F.3d 129 (D.C. Cir. 2010)
    - Not an adversary: "[A]ny tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and bookkeeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine."
    - Not a conduit to adversaries: The company "had a reasonable expectation of confidentiality because Deloitte, as an independent auditor, has an obligation to refrain from disclosing confidential client information."
  - Minority Rule: Waiver because auditors are independent, and relationship is inherently adversarial

Developments Affecting Privilege and Ethics

Shifting Enforcement Priorities under the Trump Administration

Mandatory and Voluntary Disclosures

- The Department of Justice has long maintained a carrot and stick approach to disclosure and compliance
  - Justice Manual § 9-47.120, "Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy"
  - United States Attorneys' Offices Voluntary Self-Disclosure Policy
  - Updates and revisions to DOJ Criminal Division's guidance re "Evaluation of Corporate Compliance Programs"
- Under Biden, DOJ announced Criminal Division Corporate Whistleblower Awards Pilot Program
  - Focus on awards for potential whistleblowers
- DOJ's National Security Division revised its "Enforcement Policy for Business Organizations" and announced new Chief Counsel position

Mandatory Disclosure Rule

- Mandatory Disclosure Rule is set forth in FAR contract clause (FAR 52.203-13) and suspension/debarment regulations (FAR 9.406-2)
  - Contractors must disclose in a "timely" fashion "credible" evidence of:
    - Certain violations of criminal law
    - Violations of the False Claims Act
    - Significant overpayments
  - Failure to disclose can be grounds for suspension and debarment, meaning that our ability to contract with the Federal government is put at risk
- Other mandatory disclosure requirements in regulation, e.g., trade compliance violations, human trafficking

New Guidance Under Trump Administration

- Jan. 20, 2025: Executive Order 14157, *Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists*
- Feb. 5, 2025: Memorandum from the Attorney General, *General Policy Regarding Charging, Plea Negotiations, and Sentencing*
- Apr. 7, 2025: Memorandum from the Deputy Attorney General, *Ending Regulation by Prosecution*
- May 12, 2025: DOJ Criminal Division memorandum, *Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime*
  - Revised Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy
  - Revised Criminal Division's monitorship policies
  - Modified Criminal Division's Corporate Whistleblower Awards Pilot program
- June 9, 2025: DOJ Criminal Division memorandum, *Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act (FCPA)*
- June 11, 2025: DOJ Civil Division memorandum, *Civil Division Enforcement Priorities*

The Current State of Play – Trump Administration Priorities

- Diversity, Equity, and Inclusion
  - Anti-DEI Executive Order No. 14173, Jan. 21, 2025
  - Feb. 5, 2025 Memorandum from the Attorney General, *Ending Illegal DEI and DEIA Discrimination Preferences*
- Healthcare and Procurement Fraud, Waste, and Abuse
  - Department of Justice and Health and Human Services False Claims Act Working Group
- Eliminating Transnational Criminal Organizations (TCOs) and Cartels
  - Pursuit of total elimination of cartels and TCOs to eliminate threats to U.S. sovereignty
- China-Facing Issues, including Tariff Evasion
  - Focus on “retaliatory” tariffs and increased tariffs to address the fentanyl crisis
- Immigration
  - First 100 Days: “Protecting from the Worst First”

The “Anti-DEI” Executive Order and the Civil Rights Fraud Initiative

The “Anti-DEI” Executive Order, EO 14173

- On January 21, 2025, President Trump issued the “Ending Illegal Discrimination and Restoring Merit Based Opportunity” Executive Order, No. 14173, which, among other things, revokes Executive Order 11246, and creates new certification requirement that company certify that it “does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

Effects of the "Anti-DEI" Executive Order, EO 14173

- Revokes Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), which created the Office of Federal Contract Compliance Programs (OFCCP)
- The OFCCP within the Department of Labor shall immediately cease: (1) promoting "diversity"; (2) holding contractors responsible for taking "affirmative action"; and (3) allowing contractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin
- Agency heads "shall" include in every contract or grant: (1) a term requiring the counterparty to agree that compliance with anti-discrimination laws are material to payment decisions for the purposes of the False Claims Act; and (2) a term requiring the contractor or grantee to certify that it does not "operate programs promoting DEI that violate any applicable Federal anti-discrimination laws"
- Requires executive departments and agencies to terminate "all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements"
- Requires agencies "to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities"

False Claims Act Refresher – 31 U.S.C. §§ 3729-33

- Since 1986, the FCA has been the Government's primary civil enforcement weapon for combating fraud, waste, and abuse
- Provides for treble damages and penalties up to ~$28,000 per claim
- 700+ cases filed annually (~90% by whistleblowers, known as relators), and rising government actions, investigations, and referrals
- Four Elements of a False Claim
    1. An individual or company presents (or causes to be presented) a "claim" for payment;
    2. The claim is false or fraudulent;
    3. The individual or company knew that the claim was false or fraudulent; **and**
    4. The falsehood was **material** to the decision to pay the claim

Certification Forms Issued under EO 14173

- No Uniform Certification Language Issued Yet by FAR Council – Up to Each Agency

CERTIFICATION REGARDING COMPLIANCE WITH APPLICABLE FEDERAL ANTI-DISCRIMINATION LAW

The Contractor or prospective offeror certifies that -

☐ is in compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 31 USC 3729(b)(4) (False Claims Act);

☐ does not operate any programs promoting Diversity, Equity, and Inclusion that violate any applicable Federal anti-discrimination laws.

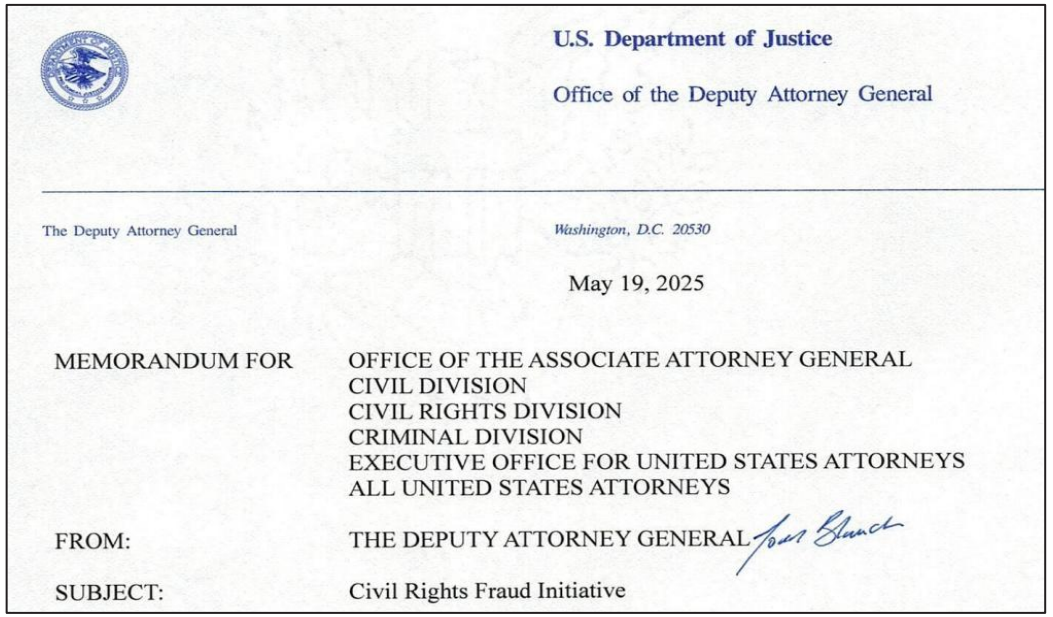
Contractor or Offeror Name: .....

.....	.....	.....
Authorized Representative Name and Title	Authorized Representative Signature	Date

The “Anti-DEI” Executive Order and the Civil Rights Fraud Initiative

- On May 19, 2025, Deputy Attorney General Todd Blanche issued a Memorandum creating the “Civil Rights Fraud Initiative.”
  - Will “utilize the False Claims Act to investigate and . . . pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws.”
- The Civil Rights Fraud Initiative deputizes private individuals as DOJ “alone cannot identify every instance of civil rights fraud.”
  - “Strongly encourages” private individuals to file lawsuits under the False Claims Act
  - Highlights the importance of ensuring compliance in organizations and protecting privilege and work product in internal investigations

The Civil Rights Fraud Initiative



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 19, 2025

MEMORANDUM FOR
OFFICE OF THE ASSOCIATE ATTORNEY GENERAL
CIVIL DIVISION
CIVIL RIGHTS DIVISION
CRIMINAL DIVISION
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

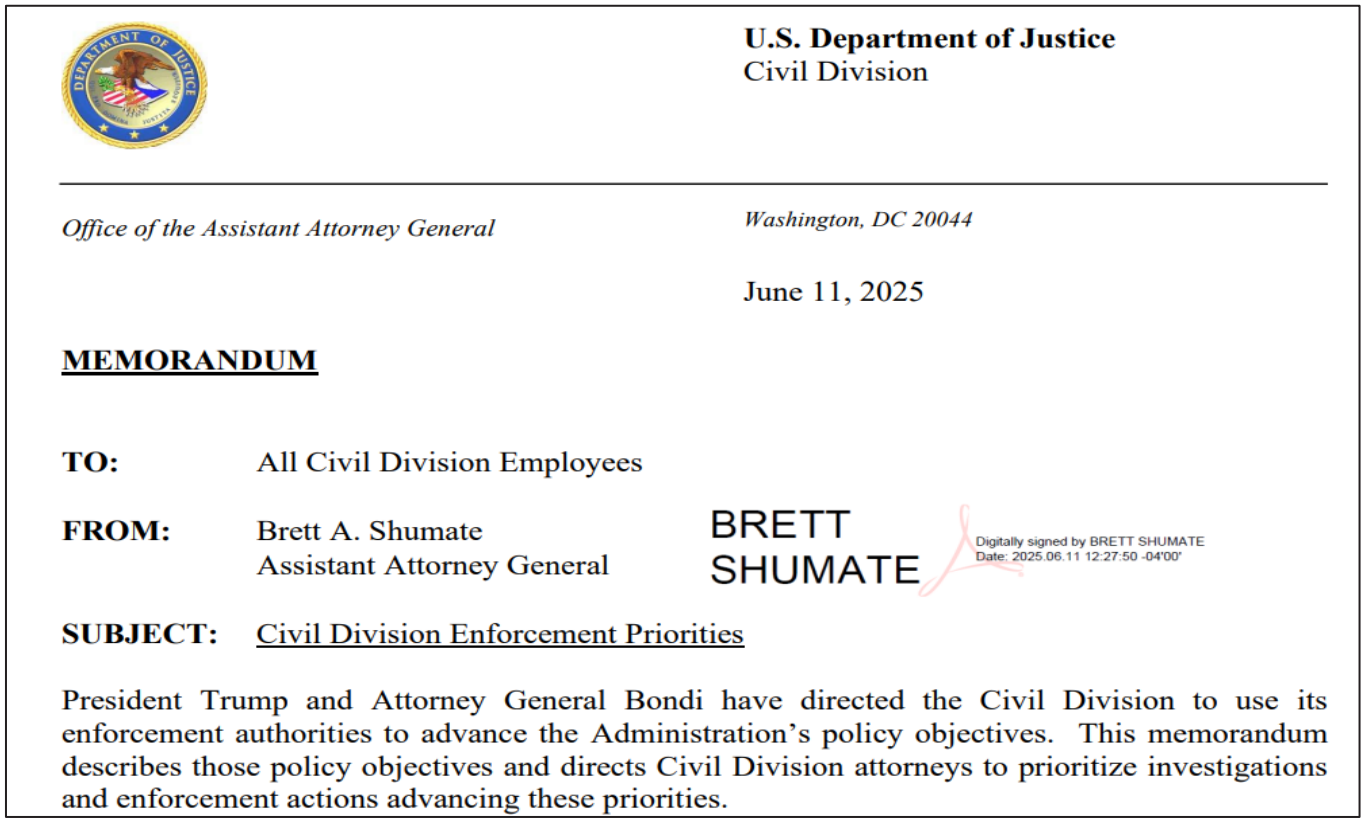
FROM: THE DEPUTY ATTORNEY GENERAL

SUBJECT: Civil Rights Fraud Initiative

The federal government should not subsidize unlawful discrimination. To that end, I am standing up the Civil Rights Fraud Initiative. This Initiative will utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws. This Initiative will be co-led by the Civil Division's Fraud Section, which enforces the False Claims Act, and the Civil Rights Division, which enforces civil rights laws. Each division will identify a team of attorneys to aggressively pursue this work together. Each of the 93 United States Attorney's Offices will identify an Assistant United States Attorney to advance these efforts.

Civil Division Enforcement Priorities

- A couple of weeks later, on June 11, 2025, Assistant Attorney General Brett Shumate announced the Department of Justice's Civil Enforcement Priorities, which follow those announced by the Trump Administration more broadly



U.S. Department of Justice
Civil Division

Office of the Assistant Attorney General

Washington, DC 20044

June 11, 2025

MEMORANDUM

TO: All Civil Division Employees

FROM: Brett A. Shumate
Assistant Attorney General

BRETT SHUMATE
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Date: 2025.06.11 12:27:50 -04'00'

SUBJECT: Civil Division Enforcement Priorities

President Trump and Attorney General Bondi have directed the Civil Division to use its enforcement authorities to advance the Administration's policy objectives. This memorandum describes those policy objectives and directs Civil Division attorneys to prioritize investigations and enforcement actions advancing these priorities.

Civil Division Enforcement Priorities

- Combatting Discriminatory Practices and Policies (DEI)
  - Pursuing affirmative litigation to combat "unlawful discriminatory practices" in the private sector
  - Refers back to EO 14173 and its requirements
- Ending Antisemitism (DEI)
  - Investigating entities that allow or participate in antisemitic activities
- Protecting Women and Children (DEI)
  - Investigating gender affirming care and providers of the same
- Ending Sanctuary Jurisdictions (Immigration)
  - Identifying state and local laws that "impede" federal immigration laws or activities
- Prioritizing Denaturalization (Immigration)
  - Revoking "illegally obtained" naturalization

Risks and Questions Flowing from Anti-DEI Certification and EO

- Express false certification as a predicate for False Claims Act liability
  - What are companies agreeing if they sign a certification?
  - Will there be concerns of privilege waiver or advice of counsel defenses if the certifications are signed?
- Is the certification *false*?
  - Operating programs promoting DEI that violate applicable Federal anti-discrimination laws?
  - What is "promoting DEI"? What is "applicable"?
  - What is "illegal DEI"?
- Is it *knowingly* false?
  - Did the contractor actually know that it was violating anti-discrimination laws when certifying? Did it have a good faith belief of compliance?
- Was it *material* to the Government's payment decision?
  - Would the Government have paid regardless of compliance with applicable anti-discrimination laws?
  - What relationship do the laws in question have to do with the contract or grant?
  - Is a contractor agreeing that compliance is material sufficient to prove materiality?
- Will relators will bring these actions as encouraged by the Civil Rights Fraud Initiative?
- How can entities comply with new federal requirements and conflicting state and international requirements?

DOJ and HHS False Claims Act Working Group

DOJ and HHS False Claims Act Working Group

- On July 2, 2025, the U.S. Department of Justice (DOJ) Civil Division and the U.S. Department of Health and Human Services (HHS) jointly announced the formation of a False Claims Act (FCA) Working Group
- The new initiative underscores a coordinated federal enforcement strategy focused on identifying and addressing fraud in federally funded health care programs, particularly Medicare Advantage and Medicaid managed care
- The announcement came days after Matthew R. Galeotti, Head of DOJ's Criminal Division, announced the results of the "largest coordinated health care fraud takedown in the history of the Department of Justice" and the creation of a "Health Care Fraud Data Fusion Center" comprised of data specialists that will "break down information silos, using coordinated data analysis to enable our investigative teams to quickly identify and dismantle emerging fraud schemes"
- Taken together, these announcements demonstrate the DOJ's effort—in both civil and criminal divisions—to strengthen its collaboration with HHS to investigate and prosecute health care fraud

DOJ and HHS False Claims Act Working Group

- The FCA Working Group is composed of leadership from:
  - HHS Offices of General Counsel and Inspector General
  - Centers for Medicare & Medicaid Services Center for Program Integrity, and
  - DOJ Civil Division and designees from the U.S. Attorney's Offices
- The FCA Working Group is expected to focus on:
  - Medicare Advantage
  - Drug, device or biologics pricing, including arrangements for discounts, rebates, service fees, and formulary placement and price reporting
  - Barriers to patient access to care, including violations of network adequacy requirements
  - Kickbacks related to drugs, medical devices, durable medical equipment, and other products paid for by federal healthcare programs
  - Materially defective medical devices that impact patient safety
  - Manipulation of Electronic Health Records systems to drive inappropriate utilization of Medicare covered products and service

Effects and Impacts of Shifting Priorities

Enforcement Priorities: Impact on Internal Investigations and Disclosure

- Given the shift in priorities, how does this affect allocation of compliance resources?
- When does it make sense to disclose?
  - Mandatory vs. Voluntary
  - What to disclose?
  - What is the benefit of disclosure? What are the risks?
- Potential benefits vs. risks
  - Waiver of privilege?
- Gaps in compliance and training program
  - Ensuring that employees are not making unknown certifications
  - Ensuring that employees are not disclosing privilege information
- Potential remediation
- Adverse publicity

Thank you

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