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Investigations - Cooperating With The Government Without Waiving Privilege

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In response to a government investigation, the company has conducted a comprehensive internal investigation, taking steps necessary to establish and maintain applicable privileges and protections. The company now wants to cooperate with the government by providing information learned during its investigation, but it wants to avoid waiving privilege in doing so. Even more, it wants to avoid broad subject matter waiver over the investigation. It is axiomatic that facts are not protected by either the attorney-client privilege or the work product doctrine. Instead, the substance of communications, and related notes and summaries, may be protected by both the attorney-client privilege and the work product doctrine.[1] Distilling non-privileged facts from privileged communications to prepare a presentation for the government can be challenging. If the company discloses the substance of identifiable privileged communications, there is a risk of waiver.

A second rule of the road for communicating with the federal government, Federal Rule of Evidence 502(a)[2], limits the risk that disclosure of some privileged information to the government will result in broad subject matter waiver. The traditional rule is that, where a party waives attorney-client privilege over a communication, the scope of waiver may extend to the entire subject matter of the communication.[3] FRE 502(a), where applicable, overrides federal and state substantive law and significantly restricts courts from imposing subject matter waiver. FRE 502(a) provides that disclosures of privileged or protected information in a federal proceeding, or to a federal office or agency, will not result in subject matter waiver unless the waiver was intentional, and fairness requires consideration of undisclosed privileged information. The Committee Notes to FRE 502(a) explain that fairness requires further disclosures only in "unusual situations" where a party makes "a selective and misleading presentation of evidence to the disadvantage of the adversary."[4]

A third rule of the road is Federal Rule of Civil Procedure 26(b)(3)(B)[5], which directs courts to protect opinion work product even where the court orders production of work product materials. Where a court finds waiver of the attorney-client privilege and work product protections, highly sensitive opinion work product may still be withheld from discovery.

Recent case law addresses unusual situations where fairness requires subject matter waiver.

In *United States v. Coburn*[6], former company employees who had been indicted for violations of the FCPA (defendants), subpoenaed the company, seeking production of all materials regarding the company's internal investigation of the alleged wrongdoing. Defendants argued that the company had effected subject matter waiver by disclosing a summary of its investigation to the DOJ. The court agreed, holding that FRE 502(a) fairness considerations required broad subject matter waiver. "[W]hile under threat of prosecution," the company had disclosed to the government "'detailed accounts of 42 interviews of 19 [company] employees, including [d]efendants.'" Under these circumstances, the court ordered the company to produce: (1) "all memoranda, notes, summaries, or other records of the interviews themselves;" (2) underlying documents and communications directly referenced in the summaries; and (3) "documents and communications that were reviewed and formed any part of the basis of any presentation, oral or written, to the DOJ in connection with [the] investigation."

The court's ruling in *Coburn* is in accord with a limited number of cases where the court found that a company disclosed the substance of individual privileged communications to the government. In *Gruss v. Zwirn*[7], a defamation and breach of contract action brought against plaintiff's former employer, plaintiff moved to compel production of interview notes and summaries of employee interviews conducted by the company during its internal investigation of financial irregularities. The company produced in discovery a PowerPoint presentation that it had presented to the SEC while the company was being investigated by the government. The presentation provided summaries of 21 individual otherwise-privileged interviews. The court held that fairness required broad subject matter waiver where the interview notes and summaries were "deliberately, voluntarily, and selectively disclosed" to the SEC, and that any protection associated with the factual portions of the interview notes and summaries was forfeit. The court noted that plaintiff had not sought opinion work product, so the court did not reach the question whether waiver extended to opinion work product. The court ordered the company to submit the documents to the court for *in camera* review to enable the court to redact opinion work product before the documents were produced to plaintiff.

In *In re: King's Daughters Health System, Inc*.[8], the Sixth Circuit denied a writ of mandamus to vacate the district court's order compelling petitioner (doing business as KDMC) to produce broad categories of documents underlying disclosures to the government. Summarizing a circuitous fact pattern, Dr. Paulus, an employee of KDMC, was convicted of healthcare fraud for performing unnecessary angiograms. During settlement discussions with Dr. Paulus before he was indicted, the government informed Dr. Paulus that the government's consultants concluded that 146 of 496 procedures reviewed were deemed unnecessary (about 30%), and that KDMC's consultants had determined that 75 procedures of a random selection of procedures were unnecessary.

At Paulus' first trial, the government introduced expert testimony from three experts who opined, respectively, that 62 procedures out of a representative sample of 250-300 (20%-25%) were unnecessary; procedures in over half of 11 cases reviewed by a second expert were unnecessary; and all procedures reviewed by a third expert were unnecessary. On remand and in preparation for a new trial, Paulus learned that KDMC, before his first trial, at a time when KDMC was in legal peril and in settlement negotiations with the government, provided the "Shields Letter" to the government. The Shields Letter disclosed that independent experts engaged by KDMC reviewed 1,049 procedures and determined that 75 of the procedures (7%) were unnecessary, a far lower rate than alleged by the government's experts in the first trial. In preparation for the second trial, the government subpoenaed KDMC to produce large categories of documents underlying the Shields Letter. The court held that FRE 502(a) required broad disclosure of the underlying information: "[T]here can be little doubt that the information disclosed in the Shields Letter 'ought in fairness to be considered together' with the undisclosed information regarding the study."

However, disclosures to the government need not result in subject matter waiver. Where a company discloses facts distilled from an aggregation of privileged interviews, does not disclose the substance of individual communications, and does not selectively disclose information in a misleading way, the protections afforded by FRE 502(a) prevent subject matter waiver.

In *In re Weatherford International Securities Litigation*[9], (Weatherford I), and *In re Weatherford International Securities Litigation*[10], (Weatherford II), the court held that narrow waiver was appropriate where a party's disclosures to the SEC did not disclose the substance of individual privileged communications. The presentations to the SEC provided "generalized accounts of 'facts discerned from witness interviews,'" and did not quote any witnesses or disclose any interview notes. The court held that the company waived privilege as to material actually "provided to the SEC, as well as any underlying factual material *explicitly referenced* in it." The court held that subject matter waiver was not appropriate, and ordered production only of factual material "explicitly referenced" in the disclosures to the SEC. In addition, the court allowed the company to redact opinion work product before making its productions.

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[1] *See* David. M. Greenwald & Michele L. Slachetka, Testimonial Privileges, § 1:13, n.2 (West 2021); *Id*, § 2:6, n.4.
[2] FRE 502(a) provides:
(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.
[3] *Testimonial Privileges*, § 1:76, n.1.
[4] *Id*, § 1:76, n.11.
[5] FRCP 26(b)(3)(B) provides: "**Protection Against Disclosure**. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."
[6] Civ. No. 2:19-cr-00120 (KM), 2022 WL 357217 (D.N.J. Feb. 1, 2022). The opinion is available here.
[7] No. 09 Civ. 6441 (PGG) (MHD), 2013 WL 3481350 (E.D.N.Y. July 10, 2013).
[8] 31 F.4th 520 (6th Cir. 2022). The opinion is available here.
[9] No. 11 Civ. 1646 (LAK) (JCF), 2013 WL 12185082 (S.D.N.Y. Nov. 5, 2013).
[10] No. 11 Civ. 1646 (LAK) (JCF), 2013 WL 6628964 (S.D.N.Y. Dec. 16, 2013).