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Overview and Summary of Recent Developments Regarding Attorney-Client and Work Product Privileges for In-House Counsel January 27, 1999

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I. THE ATTORNEY-CLIENT PRIVILEGE

A. **Purpose.** "[T]o encourage 'full and frank communications between lawyers and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2084 (1998) (*quoting Upjohn Co. v. United States*, 499 U.S. 383, 389 (1981)). At the same time, the privilege serves as an obstacle to the investigation of the truth.

B. **Federal Definition.** The essential elements of the attorney-client privilege were set forth by Judge Wyzanski in *United States v. United Shoe Mach.*, 89 F. Supp. 357 (D. Mass. 1950). Under the *United Shoe* definition, the privilege applies only if "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.* at 358-59. Once established, the attorney-client privilege is absolute with respect to the content of the communication, although the fact that a communication took place is not protected from disclosure.

C. **D.C., Maryland, and Virginia.** The District of Columbia, Maryland, and Virginia *all* recognize a definition of the attorney-client privilege similar to the *United Shoe* formulation, although there are some subtle distinctions in the case law that has developed in the different jurisdictions. *See Carl v. Children's Hosp.*, 657 A.2d 286 (D.C.), *vac'd on other grds*, 665 A.2d 650 (D.C. 1995), *on reh'g en banc*, 702 A.2d 159 (D.C. 1997); *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 718 A.2d 1129 (Md. Oct. 8, 1998); *Owens-Corning Fiberglass Corp. v. Watson*, 243 Va. 128, 141,

8, 1998); *Owens-Corning Fiberglass Corp. v. Watson*, 243 Va. 128, 141, 413 S.E.2d 630 (1992). In addition, Section 9-108 of the Maryland Code provides that, "[a] person may not be compelled to testify in violation of the attorney-client privilege."

D. **Nuances in Privilege**

1. **Application to communications *from* attorney *to* client.**

   a. **D.C. Circuit.** In *Athridge v. Aetna Cas. and Surety Co.*, 1998 WL 823787 (D.D.C. 1998), decided on November 30, the D.C. Circuit "narrowly circumscribed" the attorney-client privilege "to shield from disclosure only those communications from a client to an attorney made in confidence and for the purpose of obtaining legal advice." The court acknowledged that the D.C. Circuit is one of the judicial circuits that construes the privilege strictly, and continued, the attorney-client privilege "protects what the attorney says to the client only if it will reveal what the client told the lawyer." (Emphasis added.) *See also Carl v. Children's Hosp.*, 657 A.2d 286 (D.C.), *vac'd on other grds*, 665 A.2d 650 (D.C. 1995), *on reh'g en banc*, 702 A.2d 159 (D.C. 1997) (privilege also protects communications from attorney to client if they "rest on confidential information obtained from the client"; or (2) if the party invoking the privilege demonstrates with reasonable certainty that "the lawyer's communication rested in significant and inseparable part on the client's confidential disclosure."); *In re Pepco Employment Litig.*, No. 86-0603, 1992 WL 310781 (D.D.C. Oct. 2, 1992) (for privilege to attach to an attorney to client communication, attorney's communication must rest "in significant and inseparable part" on a privileged communication of information from the client, and attorney must have intended the communication to be confidential, and maintained that confidentiality.)

   b. **Fourth Circuit.** By contrast, the Fourth Circuit has held that the privilege attaches not only to communications by the client to the lawyer, but also to advice from the attorney to the client. *See United States v. (Under Seal)*, 748 F.2d 871, 874 (4th Cir. 1984).

2. **"Confidential"** nature of communication. In order to be privileged, information must be conveyed with the *expectation* that it will be held in confidence, *and* the confidentiality must be maintained. In the context of communications *within* a company, privileged communications "retain their privileged status if the information is related from a non-lawyer employee or officer to other employees or officers of the corporation on a need to know basis." *F.C. Cycles Int'l, Inc. v. Fila Sport, S.P.A.*, No. 96-107, 1998 WL 901571 (D. Md. Nov., 12, 1998). The privilege is lost, however, if the communications "are relayed to those who do not need the information to carry out their work or make effective decisions on the part of the company." *Id.; see also In re Pepco Employment Litig.*, No. 86-0603, 1992 WL 310781 (D.D.C. Oct. 2, 1992) (otherwise privileged communication will remain privileged, despite circulation to a limited group of individuals who have a need to know).

3. **Who is the "client"?** In its *Upjohn* decision, the Supreme Court explicitly rejected a "control group" test for determining who, in fact, is a client. Under such a test, the attorney-client privilege only protects communications directed to or from employees who play a substantial role in corporate decision-making. Although not explicitly adopting a "subject matter" test, the Court utilized a functional mode of analysis whereby employees at *any* level of the company can be "clients" so long as the communication was made at the direction of corporate superiors, and the subject matter of the communication is

corporate superiors, and the subject matter of the communication is within the scope of the employee's corporate duties.

4. **Posthumous application of privilege.** In *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998), the Supreme Court reversed the D.C. Circuit in a 6-3 decision, and held that the attorney-client privilege survives the death of the client. The Court did not reach the question of whether the work product privilege also survives. (ACCA filed an *amicus* brief, joined by other organizations, arguing in favor of the posthumous application of the privilege.)

E. **Application to In-House Counsel.** Theoretically, confidential communications between in-house lawyers and corporate employees are privileged to the same extent as communications between outside counsel and a client. *See Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981) . At the same time, because the privilege acts as an absolute bar to the discovery of relevant information, one court has noted that "in the corporate context, given the large number of employees, frequent dealings with lawyers and masses of documents, the 'zone of silence grows large.'" *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 256-57 (Ill. 1982) (*quoting* Simon, "The Attorney-Client Privilege as Applied to Corporations," 65 Yale L.J. 953, 955 (1956).) In response to these and similar concerns, a trend has developed whereby courts appear to be treating in-house counsel *differently* in making determinations regarding the attorney-client privilege.

1. **"Legal" vs. "business" advice.** The attorney-client privilege only applies in the context of providing legal advice, and does *not* apply to business advice. In *Boca Investerings Partnership v. United States*, No. 97-0602, 1998 WL 911701 (D.D.C. Dec. 29, 1998), the court acknowledged that "[c]ommunications made by and to in-house lawyers in connection with representatives of the corporation seeking and obtaining legal advice may be protected by the attorney-client privilege just as much as communications with outside counsel." In noting the distinction between outside and in-house counsel, however, the court stated that "[b]ecause an in-house lawyer often has other functions in addition to providing legal advice, the lawyer's role on a particular occasion will not be as self-evident as it usually is in the case of outside counsel." Accordingly, "[a] court must examine the circumstances to determine whether the lawyer was acting as a lawyer rather than as a business advisor or management decision-maker." *Id., see also, du Pont* ("[w]hen the attorney-client privilege is invoked with regard to communications with in-house counsel, the courts will look particularly closely at whether the counsel was providing business advice, rather than legal advice or services.")

2. This distinction raises several significant issues for corporate counsel.

    a. Company will bear burden of "clearly showing" that in-house attorney gave advice in legal capacity, not in capacity as business advisor. E.g., *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) ("We are mindful ... that [the witness, who was a vice president and general counsel] was a Company vice president, and had certain responsibilities outside the lawyer's sphere. The company can shelter [the witness's] advice only upon a clear showing that [the witness] gave it in a professional legal capacity."); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 514 (M.D.N.C. 1986) (client's communication "must be for the primary purpose of soliciting legal, rather than business, advice").

    b. **Dual roles.** Courts justify requirement of finding that communication is "primarily legal" and that in-house counsel's

b. **Dual roles.** Courts justify requirement of finding that communication is "primarily legal" and that in-house counsel's advice was offered in a "professional legal capacity" because dual role of legal and business adviser, courts must ensure role in communications claimed to be privileged. There is also a concern that companies *may* abuse privilege by routing non-privileged, but otherwise confidential information to in-house lawyers with the purpose of shielding it from discovery. See Weiss, "In-House Counsel Beware: Wearing the Business Hat Could Meaning Losing the Privilege," 11 Geo. J. Legal Ethics 393 (1998).

(1) **Attorney board members.** *See* Harris & Valihura, "Outside Counsel as Directors: The Pros and Potential Pitfalls of Dual Service," 53 The Business Lawyer 479 (1998). Another layer of complication is introduced when a company's lawyer (in-house or outside) serves on its board of directors. *First*, it may be difficult for the company to demonstrate that the "advice" in question was "legal" rather that "business-related." Indeed, the advice may be understood by the recipients as "business-related," and they may not treat it with the confidentiality necessary for the attorney-client privilege to remain. *E.g.*, the information may be disclosed to other corporate employees beyond those who "need to know" the information. *Second*, a court may take an "all or nothing" approach and determine that the lawyer is primarily a business person, such that no privilege attaches to any communications with the company -- *i.e.*, the court focuses on the relationship between the "attorney" and the "client" rather than on the nature of any specific conversation. The preferred approach, however, appears to involve a case-by-case analysis in which each communication is reviewed for the type of advice being sought.

3. The following cases reflect this trend of subjecting privilege issues involving in-house counsel to greater scrutiny:

a. In *Marten v. Yellow Freight Sys., Inc.*, No. 96-2013, 1998 WL 13244 (D. Kan. Jan. 6, 1998), the court granted a motion to compel production of the minutes of an employee review committee that was drafted by an in-house attorney who served as a voting member on the committee. The court began its inquiry by examining the function of the committee and the attorney's role at the committee meeting in question. The court concluded that the primary function of the committee was to determine what, if any, employment action should be taken against a given employee. The court acknowledged legal implications of employment actions, but found that "the business purposes of such a decision predominate the legal issues," and that legal advice sought and received "appears to be incidental to considerations of what is most prudent for the successful operation of the business." The court found that, when an attorney serves in a non-legal capacity, *e.g.*, as a member of such a committee, there is an inference that he was acting in a non-legal capacity, at least in part, and that the inference is stronger when the attorney is a voting member.

The court also found that the work-product privilege would not protect the minutes from disclosure after concluding that the company "did not carry its burden of showing that the minutes in question were created 'primarily' to assist in pending or impending litigation. The court found that the attorney's business role as a voting member predominates over any vote he may have had as an attorney giving legal advice and concluded that the work-product privilege "does not protect summaries of business meetings, even when an attorney

summaries of business meetings, even when an attorney creates the summary."

b. The court in *Ames v. Black Entertainment Television*, No. 98CIV0226 (S.D.N.Y. Nov. 18, 1998), reached a different result. In Ames, the plaintiff in a sexual harassment and hostile work environment lawsuit against BET and one of its officers moved to compel the production of deposition answers from BET's president, Debra Lee, who served as both the company's general counsel and the publisher of one of the company's magazines at the time of the events at issue. Plaintiff claims that Ms. Lee was acting in her role as publisher when she investigated rumors that the officer was mismanaging the company's sales staff and that he had an affair with an employee. BET argued that the investigation of the rumors regarding an alleged affair were conducted in Ms. Lee's capacity as general counsel. The court began its analysis by noting that , "[b]ecause an in-house attorney, particularly one who holds an executive position in the company, often is involved in business matters, in order to demonstrate that the communication in question is privileged, the company bears the burden of 'clearly showing' that the in-house attorney gave advice in her legal capacity, not in her capacity as a business advisor."

   The court found that the defendant carried its burden in this instance, although BET was required to submit additional proof in this regard, including explaining how Ms. Lee knew that she was acting as general counsel. Ms. Lee submitted an affidavit stating that the two investigations were separate and distinct, although they occurred at the same time and involved the same officer. She further stated that her inquiries into rumors of the alleged affair were conducted to determine whether the rumors had a substantive basis, or constituted a violation of BET's policy against sexual harassment, and whether the company should take any remedial action. The court found this distinction to be both logical and consistent with her testimony in deposition where she responded to questions about the investigation into allegations of mismanagement, but declined to respond to questions regarding the investigation into rumors of an affair.

c. Similarly, in *Carl v. Children's Hosp.*, 657 A.2d 286 (D.C.), *vac'd on other grds*, 665 A.2d 650 (D.C. 1995), *on reh'g en banc*, 702 A.2d 159 (D.C. 1997), the court upheld the trial court's ruling that a meeting between in-house counsel and its client to discuss employment issues was privileged. The court noted that in-house counsel's "uncontradicted affidavit established that the purpose of the meeting was to obtain legal advice concerning Carl's employment and that everyone present at the meeting participated in the discussion. During these communications, Children's management relayed confidential information to the in-house counsel, and the attorneys, in giving legal advice, relied upon information they had received from their client and other sources including their previous experiences, backgrounds, and prior professional relationship with the client. Whatever the attorneys conveyed to Children's was intimately related to the information received from the client and was therefore privileged."

d. In *Boca Investerings*, discussed above, the court identified the place of the lawyer on the company's organizational chart, although not dispositive, as "[o]ne important indicator" of the attorney's function; "[t]here is a presumption that a lawyer in the legal department or working for the general counsel is

the legal department or working for the general counsel is most often giving legal advice, while the opposite presumption applies to a lawyer [who works for] some other seemingly management side of the house." The lawyer in *Boca Investerings* was the Vice President for Taxes for American Home Products Corporation ("AHP"), whose position was organizationally within AHP's Financial Group, rather than within its Legal Department. The lawyer testified that the purpose of the document in question was "to give tax advice to [AHP] . . . They requested that I advise them on the tax consequences of entering the Investment Partnerships." The court upheld the magistrate's finding that the lawyer's advice on certain financial transactions and the "consequences of certain transactions" was privileged, but that the portions of a memorandum setting forth his opinion as to the "technical soundness of the contemplated transaction" did not.

e. A recent decision from Maryland highlights the distinction between legal and business advice in the context of business negotiations. In *F.C. Cycles Int'l, Inc. v. Fila Sport, S.P.A.*, No. 96-107, 1998 WL 901571 (D. Md. Nov., 12, 1998), plaintiff moved to compel production of an allegedly privileged memorandum, arguing , *inter alia*, that the document was not privileged because it provides business rather than legal advice. Echoing a popular refrain, the court noted that , "[w]hile legal advice provided in the context of business negotiations is protected under the attorney-client privilege, business information provided in the context of business negotiations does not acquire protection under the privilege merely because it has been provided by an attorney." The court then reviewed the memorandum in question on a paragraph-by-paragraph basis to determine whether legal advice was communicated or whether information was requested to render further legal advice.

   In concluding the certain portions of the memorandum in question *were* privileged because they contained legal advice provided in the context of business negotiations, the court noted that "[t]he memorandum plainly states that the purpose of the meeting was to *garner* legal advice . . . . Moreover, the memorandum is replete with references to legal possibilities [], adjustments being 'solid *legally*' [], the *legal* concepts of 'collusion and fraud' [], whether a strategy is '*legally* questionable' [], legal strategy relating to suing [the corporation's] accounting firm [], and libel." (Emphasis added.)

f. In *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, 1996 U.S. Dist. Lexis 671 (S.D.N.Y. Jan. 25, 1996), decided under New York law, the court found that conversations between an in-house lawyer and his company's management were not privileged because the attorney was acting in a business capacity as a negotiator for the company.

   Michael Scott, inside environmental counsel for GAF, negotiated the environmental provisions of a contract with his counterparts in Georgia-Pacific's legal department. Scott identified issues that might arise in connection with certain properties GAF was considering acquiring, made recommendations to his senior management, and received direction as to how to proceed.

   After the transaction cratered, Georgia-Pacific sued GAF and questioned Scott regarding his role in negotiating the environmental liability provisions and the advice he provided to GAF. Counsel permitted him to testify that he advised

GAF. Counsel permitted him to testify that he advised management that there were gaps in GAF's environmental coverage, but asserted privilege with respect to the details. (By contrast, Georgia-Pacific did *not* claim privilege with respect to communications between its in-house attorneys and senior management during the same negotiations.) The court found that Scott's advice was not privileged because he was not performing "a lawyer's traditional function." Rather, the court found that Scott was acting as a "negotiator" on behalf of management and "his conversation with [senior management] in regards to the status of the negotiations, the trade-offs that [counsel] perceived [Georgia-Pacific] was willing to make, and GAF's options, involved business judgments of environmental risk. Such reporting of developments in negotiations, if divorced from legal advice, is not protected by the privilege under New York law." In reaching this decision, the court noted that "[in house counsel's] averment that he rendered legal advice to management, although considered, does not overcome the nature of his role in the transaction."

F. **Waiver of Attorney-Client Privilege**

1. **Voluntary disclosure.** If strategic considerations dictate a disclosure of documents, e.g., the results of an internal investigation, special care must be exercised to limit disclosure as much as possible to reduce the risk of a court subsequently ordering the disclosure of broader materials.

2. **Inadvertent disclosure.** As one court noted, "[t]he inadvertent production of a privileged document is a specter that haunts every document intensive case." *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 479-80 (E.D. Va. 1991). In order to mitigate the consequences of any inadvertent production in the context of a document production, a litigant should consider entering into a confidentiality agreement that provides remedies for inadvertent disclosures such as provisions requiring that the request for return be made within a specified period after the date of discovery, and identify the basis for the request and the date the inadvertent discussion was discovered.

   a. **D.C. Circuit.** *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), sets forth a strict approach to the question of how an inadvertent disclosure affects the attorney-client privilege. Although the company asserted that the disclosure in question was inadvertent -- a "bureaucratic error," the D.C. Circuit concluded, "we do not think it matters whether the waiver is labeled 'voluntary' or 'inadvertent." *Id.* at 980. The court continued, "[t]he confidentiality of communications covered by [a] privilege must be jealously guarded by the holder of the privilege lest it be waived." *Id.* If the holder wishes to preserve its privilege, "it must treat the confidentiality ... like jewels--if not crown jewels." *Id.* Otherwise, "[t]he courts will grant no greater protection to those who assert the privilege than their own precautions warrant." *Id.* Thus, the holder must zealously protect the privileged materials, taking all reasonable steps to prevent their disclosure as any document produced, intentionally or otherwise, loses its privileged status. The only exception to this rule is a situation where "all possible precautions" were taken. *Id.* at 980, n.5.

   b. Fourth Circuit. Although the Fourth Circuit has not expressly addressed the question, a number of district courts have embraced an intermediate "balancing" test that requires a court to make a case-by-case determination of waiver based on a number of factors. *See, e.g., McCafferty's, Inc. v. Bank of*

on a number of factors. *See, e.g., McCafferty's, Inc. v. Bank of Glen Burnie*, 179 F.R.D. 163 (D. Md. 1998) (a private investigator engaged in what counsel described as "the lawful art of dumpster diving" and obtained a memo which had been torn up into 16 pieces and thrown out; court examined both the subjective intent of the party and the objective reasonableness of the efforts to preserve the privilege, found that "[a]lthough the precautions taken in this case were not perfect, they were sufficient to preserve the attorney-client privilege against the clandestine assault by the 'dumpster diver.'").

(1) Under the "balancing" approach, relevant factors include (i) the reasonableness of the precautions taken to prevent inadvertent disclosure; (ii) the number of inadvertent disclosures; (iii) the extent of the disclosure; (iv) any delay in measures taken to rectify the disclosures; and (v) overriding interests of justice. *FDIC v. Marine Midland Realty Furniture*, 138 F.R.D. 979, 982 (E.D. Va. 1991). Under this approach, disclosure may constitute waiver "where the circumstances of the disclosure reflect gross negligence or a failure to take reasonable precautions to avoid the disclosure." *Id*. at 482.

(2) A recent decision from the United States District Court for the District of Maryland suggests that the Fourth Circuit favors a more "strict" approach of full waiver upon disclosure, be it inadvertent, voluntary, or implied. *See F.C. Cycles Int'l, Inc. v. Fila Sport S.P.A.*, No. 96-107, 1998 WL 901571 (D. Md. Nov. 12, 1998).

3. **Scope of Waiver.** Generally, waiver as to a specific communication constitutes a waiver as to all other communications on the same subject matter. *See In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989) , *Harrison v. State*, 276 Md. 122, 345 A.2d 830 (1975).

    1. **D.C. Circuit.** The *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), decision holds that, once a waiver has occurred, it extends "to all communications relating to the same subject matter." 877 F.2d at 981 (*quoting In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

    2. **Fourth Circuit.** The Fourth Circuit similarly has rejected the proposition that a waiver by disclosure is limited either to the party to whom the material is disclosed or to the material actually revealed. *See In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989). In so ruling, however, the Fourth Circuit articulated the scope of waiver two different ways. First, the court defined a "subject matter waiver" as including "all information related to the same subject matter." *Id*. Later in the same discussion, however, the court describe a the same waiver as extending to "the details underlying the data" which was disclosed. *Id*.

    Subsequent district court decisions have interpreted *Martin Marietta* as mandating a broad subject matter waiver. *See United States v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1252 (D. Md. 1995); *Vaughan Furniture Co. v. Featureline Mfg.*, 156 F.R.D. 123, 128 (M.D.N.C. 1994); *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 563 (E.D. N.C. 1993) ("To the extent that [the plaintiff] has inadvertently or deliberately disclosed attorney client communications, it has waived attorney client privilege as to all communications on all subjects covered by these communications."); *In re Grand Jury Subpoenas*, 734 F. Supp. 1207, 1213 (E.D. Va.), *aff'd in pt. & rev'd. in pt. on other grounds*, 902 F.2d 244 (4th Cir. 1990)

("This circuit adheres to a full subject-matter waiver rule as to the attorney-client and non-opinion work product privileges. Disclosure of a privileged communication waives the privileges as to 'all information related to the same subject matter.'").

II. **THE ATTORNEY WORK PRODUCT DOCTRINE**

A. **Purpose.** To "provide a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case and prepare legal theories." *Hickman v. Taylor*, 329 U.S. 495 (1947).

B. **Definition.** The work-product doctrine protects from disclosure in litigation documents and tangible things prepared *in anticipation of* litigation by or for a party, or by or for that party's representative, including their attorney. Fed.R.Civ.P. 26(b)(3).

1. "in anticipation" -- *See In re Sealed Case*, 146 F.3d 881 (D.C. Cir. 1998). The protection applies to materials prepared for the prospect of litigation, even if no claim has arisen yet. If no such claim exists, (1) the lawyer must subjectively believe litigation was a real possibility, and (2) the belief must be objectively reasonable. Thus, a court will look at the totality of circumstances, with the absence of a specific claim only one relevant factor.

2. "of litigation" -- No protection for materials prepared in the regular course of business or for non-litigation purposes.

3. The D.C. Circuit, the Fourth Circuit, and recently the Second Circuit have held that a document should be deemed prepared "in anticipation of litigation" if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998) (emphasis added). In so ruling, the court rejected a formulation that would have extended the protection only to documents prepared "primarily or exclusively to assist in litigation." The protection does not extend, however, to documents that would have been created in essentially similar form irrespective of the litigation. *Id*. at 1202.

4. Again, for in-house counsel, focus will be on whether materials were prepared for business or legal considerations and companies should document, at the outset of such an investigation, the predominance of litigation-related motivations for the review. *See In re Subpoena Duces Tecum Served on Willkie Farr & Gallagher*, (S.D.N.Y. March 14, 1997) (court found that notes of employee interviews and memoranda to Audit Committee prepared during course of internal investigation were not protected by the work-product privilege where the "primary motivation" for the company's authorization of the the investigation were business, as opposed to legal, considerations. The Court also found that the otherwise applicable attorney-client privilege was waived when summaries of the interviews were provided to the company's outside auditors in connection with the auditor's rendering of an unqualified audit opinion.)

III. **Scope of Protection.**

1. **Ordinary work product.** Qualified immunity from discovery. Ordinary work product may only be obtained if opponent can show a substantial need for the materials in the litigation and no ability to obtain the substantially equivalent material by other means.

2. **Opinion work product.** The mental impressions, conclusions, opinions, or legal theories of an attorney are immune from discovery unless the attorney's mental impressions/legal theories are "at issue" or a crime is involved.

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IV. **Waiver.** Disclosure to third party, which constitutes a waiver of the attorney-client privilege, does not necessarily waive the work product privilege. *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981). Waiver is found only if disclosure is made in a manner inconsistent with maintaining secrecy against litigation opponents.

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