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Privilege and work product considerations when engaging third-party consultants

Companies routinely engage third-party consultants to assist with a variety of regulatory and compliance issues. Oftentimes the issues a consultant is asked to address include highly sensitive matters that the company will prefer not be made public. As a result, companies should consider steps to protect from discovery the communications and work product generated through the consulting arrangement.

It is important to note at the outset that judicial consideration of issues involving both the attorney-client privilege and the work product doctrine are often fact-specific. Nevertheless, a number of themes have emerged over time that form the basis of best practices which companies should consider when engaging third-party consultants.

Background

The attorney-client privilege and work product doctrine provide different scopes of protection. A document may be protected under the work product doctrine if it is prepared in anticipation of litigation, but may not be protected by the attorney-client privilege. Likewise, a confidential communication rendering legal advice prior to anticipated litigation may be protected by the attorney-client privilege, but will not be protected by the work product doctrine.

For the attorney-client privilege to attach, the following elements must be present:

- The person or entity asserting the privilege must be a client;
- The person to whom the communication was made must be an attorney acting in that capacity at the time of the communication;
- The communication must have been made by the client, not a third-party;
- The communication must be made in confidence; and
- The communication must be for the purposes of obtaining legal advice or assistance in a legal proceeding.

When attorneys retain third-party consultants to assist in rendering legal advice, communications with the third-party consultant may still be privileged *as long as the consulting service is rendered for legal rather than business advice* and communications with the consultant are kept confidential.

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

The purpose of the work product doctrine is to allow attorneys to develop theories in connection with litigation without fear that the opponent might someday discover them. The work product doctrine is a qualified immunity from the discovery of an attorney's written statements, private memoranda, and personal recollections that are made in anticipation of litigation. The immunity is qualified in that it is subject to discovery by the opposing party upon a special showing of undue hardship or injustice. However, attorney opinions made in anticipation of litigation are never subject to discovery.

Additionally, work product immunity *generally extends to materials prepared by a party's agent other than an attorney*—such as a third-party consultant. However, reports or statements made by or to the consultant without an attorney's direction or supervision are presumably made in the ordinary course of business and so are not privileged.

The attorney-client privilege is a rule of evidence whereas the work product doctrine is embodied in the court's civil procedure rules. The case law that has arisen around both the privilege and the work product doctrine reflects a tension between the two competing interests of ensuring confidentiality while at the same time promoting the search for truth in litigation.

For example, on the one hand, courts routinely observe that the purpose of the attorney-client privilege is to encourage “full and frank communication” between client and attorney, which the privilege promotes by making communications between client and attorney confidential. Yet, at the same time, courts often remind litigants that the attorney-client privilege is narrowly construed, because the privilege is “an obstacle to the investigation of the truth.”

Similarly, in considering discoverability of work product, courts recognize that our adversary system requires that attorneys should be able to develop their theories without fear that an opposing lawyer may someday seek their discovery in litigation. At the same time, however, courts caution that protection of work product must be “tempered by the basic concepts of our adversary system and the desirable aspects of pretrial discovery.”

Within this framework of competing objectives, companies should keep in mind the following best practices when working with third-party consultants.

Best practices

- When retaining consultants, either in-house or outside counsel should initiate the engagement. The engagement letter/agreement should make explicit that the consultant is being retained to assist counsel in providing legal advice.
- Counsel should emphasize at the outset of each consultant engagement that all communications and documents generated in the engagement should be considered confidential and only shared with individuals within the company who have a need for the information—and never with a third party without approval of counsel.
- Consultants should be advised to communicate only with senior company employees and counsel who are familiar with the legal nature of the consultant's work.
- Written communications relating to the engagement should make explicit—such as through a plain statement in the header of the communication—the author's intent that the communication is confidential and intended to be protected by the attorney-client privilege and/or the attorney work product doctrine.

- In-house or outside counsel and the consultant must regularly consult with each other about the engagement and counsel should oversee the consultant's work. Simply retaining outside counsel to engage the consultant is probably not enough to ensure protection from subsequent discovery. Key meetings and communications should involve counsel.
- With respect to work product, counsel must be mindful that only information prepared in anticipation of litigation will be protected. The anticipated litigation should be easily articulated. A potential regulatory violation and/or enforcement action may not suffice. However, engaging a consultant to assist in responding to a regulator's inquiry or official agency request may be enough to support the conclusion that litigation is anticipated.
- If the company anticipates litigation, the company should circulate a "litigation hold" memorandum to appropriate personnel to ensure the preservation of potentially relevant records. Indeed, if the company does not distribute such a memorandum, this could be used as evidence by an opponent seeking discovery in future litigation that the company did not anticipate litigation and, therefore, the work product doctrine should not apply.

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About Government Investigations, White Collar & Compliance

The Government Investigations, White Collar and Compliance Team at Godfrey & Kahn regularly counsels clients on matters involving government investigations and compliance issues. In this context, we advise clients on best practices when retaining the consulting expertise often necessary for a legal engagement while preserving that consultant's work from ultimate disclosure to third parties.

Godfrey & Kahn knows how to conduct a confidential, effective, and efficient investigation to obtain credible results without unnecessarily disrupting your business. In the event that a company suspects—or the government alleges—that the company has run afoul of the law, Godfrey & Kahn has unparalleled experience to ferret out the facts and, if necessary, to mount a vigorous defense for its clients in the criminal, regulatory, and civil proceedings that often follow.