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Privilege Pitfalls: Preserving the Privilege in Investigations

CLE CONTINUING LEGAL EDUCATION

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Presenters (Placeholder-Marketing to Insert)



William J. Stellmach

Bill Stellmach chairs Willkie's global Investigations & Enforcement Practice and co-chairs the White-Collar Defense Group. A distinguished former federal prosecutor and regulator, he focuses on internal and government-facing investigations, criminal and regulatory enforcement defense, and corporate compliance and governance, with experience spanning federal, state, and foreign authorities. Clients turn to Bill for their most sensitive, high-stakes—often existential—matters, backed by his record of resolving crises across a wide range of industries.

Prior to joining Willkie, Bill served in the Enforcement Division at the U.S. Securities and Exchange Commission (SEC), as an Assistant U.S. Attorney for the Southern District of New York (SDNY), and as head of the Fraud Section at the U.S. Department of Justice (DOJ). Drawing on that deep background, he advises a diverse array of corporations, financial institutions, and their boards and executives in matters involving securities and commodities fraud, foreign bribery, economic sanctions, the False Claims Act, antitrust, ESG, international money laundering, and compliance issues and investigations related to artificial intelligence (AI) and other emerging technologies.



Sonali D. Patel

Sonali D. Patel is a partner in Willkie's Litigation Department. She is based in the Firm's Washington, DC office. Her practice focuses on representing multinational corporations and individuals in high-stakes cross-border investigations and enforcement matters involving foreign corruption, fraud, insider trading, money laundering, tax evasion, and national security issues.

Sonali regularly advises *Fortune500* companies and global organizations on internal and government-facing investigations, as well as on corporate compliance programs. She is a trusted advisor on compliance and risk mitigation in the context of mergers and acquisitions, international operations, and emerging technologies. With a distinguished background in both government service and private practice, Sonali offers clients a strategic perspective on complex white-collar matters. Sonali served at the Department of Justice for 10 years, most recently holding the title of Assistant Chief of the Foreign Corrupt Practices Act (FCPA) Unit, and prior to that as a trial attorney in the division. While there, she led more than 50 FCPA-related investigations, working on some of the unit's most significant individual prosecutions. She also served as Assistant U.S. Attorney for the U.S. Attorney's Office for the District of Columbia, focusing on fraud, public corruption, cybercrime and violent crime investigations.

Presenters (Placeholder-Marketing to Insert)



Andrew English

Andrew English, a partner in Willkie's Litigation Department, represents companies and individuals in a variety of criminal and civil investigations and enforcement actions, including enforcement actions brought by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). He has significant experience conducting internal and government-facing investigations, including global cross-border matters in China, Russia, Eastern Europe, Latin America, and the Middle East. He regularly counsels clients on Foreign Corrupt Practices Act (FCPA) and anti-corruption due diligence, and advises corporations on the development of compliance and whistleblower programs, policies, and trainings. Andrew represents companies and individuals across a wide range of industries, including pharmaceutical, telecommunications, entertainment, clean energy, oil and gas, accounting, investment management, medical devices, automotive, insurance, and technology companies.

Andrew was named to the 2026 and 2027 editions of *Best Lawyers* for Criminal Defense: White-Collar. Andrew was recognized by the 2026 *Lawdragon 500 Leading Litigators in America* guide for his work in Litigation, White Collar, and Investigations.



Sean Sandoloski

Sean Sandoloski is a partner in Willkie's Litigation Department. He is based in the Firm's Washington, D.C. and Dallas offices.

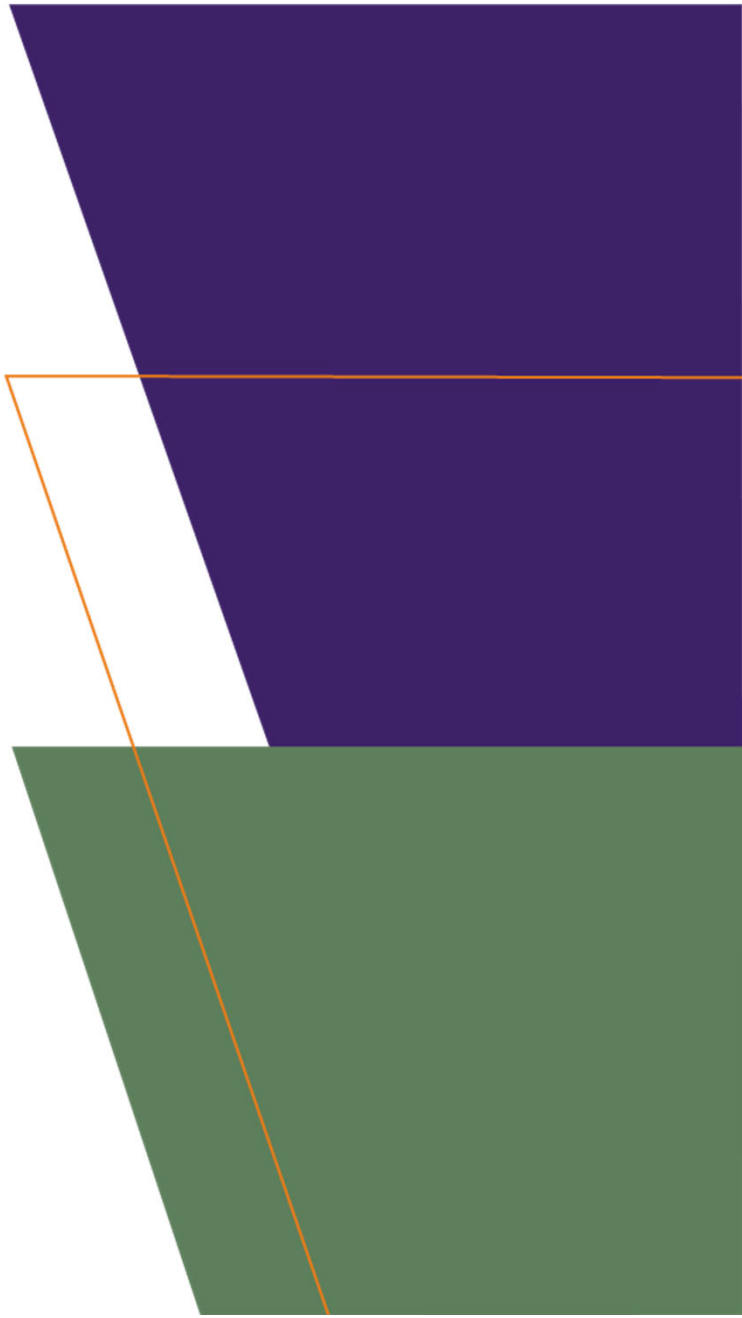
A former law clerk to Justice Brett M. Kavanaugh of the U.S. Supreme Court, Sean focuses on government-facing litigation and investigations, including those involving Congress and State Attorneys General—as well as issues and appeals involving complex commercial litigation and antitrust matters. Sean regularly counsels clients facing government-risk across the full spectrum of federal, state, and foreign authorities, with a focus on providing holistic solutions to clients' complex problems.

Sean previously served as Special Assistant and Associate Counsel to the President in the Office of White House Counsel, where he advised the Executive Branch on a range of matters, including Executive Orders and litigation and policy initiatives, and worked closely with officials from a variety of federal agencies and various congressional committees. Earlier in his career, Sean also served in the Department of Justice as both Senior Counsel in the Office of Legal Policy and in the Appellate Section of the Antitrust Division. In the latter role, Sean represented the United States in the courts of appeals and advised Division leadership on criminal enforcement, civil enforcement, and complex issues of federal and international law.

Agenda

- Overview of Attorney-Client Privilege and Attorney Work Product Protections
- Traditional Privilege Pitfalls
  - Investigation is Non-Legal in Nature
  - Disclosures to the Government or Public Waive Privilege
  - Third Parties Engaged to Assist Lawyers and Non-Lawyers
- AI and its Effects on Privilege
- Best Practices for Protecting Privilege

Overview of Privilege



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Attorney-Client Privilege: Corporations

- Attorney-client privilege for corporations is largely the same as privilege for individuals and covers:
  - Communication;
  - Between an employee/agent of the corporation and an attorney (or his/her agent);
  - Made to obtain or provide legal advice; and
  - Transmitted in confidence.
- Corporations must also maintain the confidence of the communication.
- But given that corporations consist of multiple individuals, this has a somewhat different meaning compared to an individual's privilege. Maintained in confidence for corporations means:
  - Not waived; and
  - **Disclosed only** to employees/agents of the corporation who **reasonably need to know** in order to act for the company.
- NYRPC 1.6 requires attorneys to protect the client's confidential information

Restatement (Third) of Law Governing Lawyers § 73.

Attorney-Client Privilege: Dual Purpose Communications

- If communication contains business and legal advice, is it privileged?
- Second, Fifth, and Sixth Circuits:
  - Was the "predominant purpose" or "primary purpose" of the communication to render or solicit legal advice?[1]
- DC Circuit:
  - "Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?"
- Ninth Circuit:
  - Left "open" whether "the primary purpose" or "a primary purpose" test applied.[3]
  - Supreme Court granted cert., but then dismissed as "improvidently granted."

[1] *Pritchard v. Cnty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007); *United States v. Robinson*, 121 F.3d 971, 974, (5th Cir. 1997); *Alomari v. Ohio Dep't of Pub. Safety*, 626 Fed. App'x. 558, 570 (6th Cir. 2015)

[2] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014)

[3] *In re Grand Jury*, 23 F.4th 1088, 1094 (9th Cir. 2022)

Attorney-Client Privilege: Current Employees

- Communications with current employees for purposes of fact-gathering in aid of providing legal advice are protected by the attorney-client privilege.
  - To maintain the privilege, an *Upjohn*[1] warning is required so that the employee is aware the lawyer is acting on behalf of the company, not the individual
- Often employees are not represented by counsel during interviews. The warning as to the role of lawyer therefore helps clarify any confusion.
- Under NYRPC 4.3, if an individual is confused as to the lawyer's role, the lawyer must make "reasonable efforts to correct the misunderstanding."
- NYRPC 1.13 also requires the lawyer to provide such an explanation.
  - In addition, the rule lays out what to do if an officer or other senior employee is engaged in or intends to engage in conduct that will likely substantially injure the company or is in violation of a legal obligation to the company.
  - Steps may include asking the executive to reconsider and referring the matter to the highest authority within the organization.
  - If the highest authority in the organization insists on acting in a manner that clearly violates the law, the lawyer may resign from the representation.

[1] *Upjohn Co. v. United States*, 449 U.S. 383 (1981),

Attorney-Client Privilege: Former Employees

- Many federal courts protect as privileged communications with former employees related to their conduct and knowledge during employment.[1]
  - But there are some contrary federal and state court decisions treating former employees as akin to a third party.[2]
- Attorney work product protections over interview memos and similar documents could still apply.

[1] *E.g., Better Gov't Bureau v. McGraw (In re Allen)*, 106 F.3d 582, 606 (4th Cir. 1997); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); *Amarin Plastics v. Maryland Cup Corp.*, 116 F.R.D. 36, 41 (D. Mass. 1987); *Krys v. Sugrue (In re Refco Inc. Sec. Litig.)*, No. 08 Civ. 3065 (JSR), 2012 U.S. Dist. LEXIS 27480, at *18–19 (S.D.N.Y. Feb. 27, 2012); *Cool v. BorgWarner Diversified Transmission Prods.*, No. IP 02-960-C (B/S), 2003 U.S. Dist. LEXIS 20137, *6–7 (S.D. Ind. Oct. 29, 2003); *Cyphert v. Scotts Miracle-Gro Co. (In re Morning Song Bird Food Litig.)*, No. 17-CV-80820-MIDDLEBROOKS, 2017 U.S. Dist. LEXIS 198109, at *7 (S.D. Fla. Nov. 29, 2017).

[2] *Clark Equip. Co. v. Lift Parts Mfg. Co.*, No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457 (N.D. Ill. Sept. 30, 1985); *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000); *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1192–93 (Wa. Sup. Ct. 2016).

Attorney Work Product Protection

- Materials and information;
- Prepared by or for a party;
- In anticipation of or in connection with ongoing;
- Litigation or similar adversarial proceedings.[1]



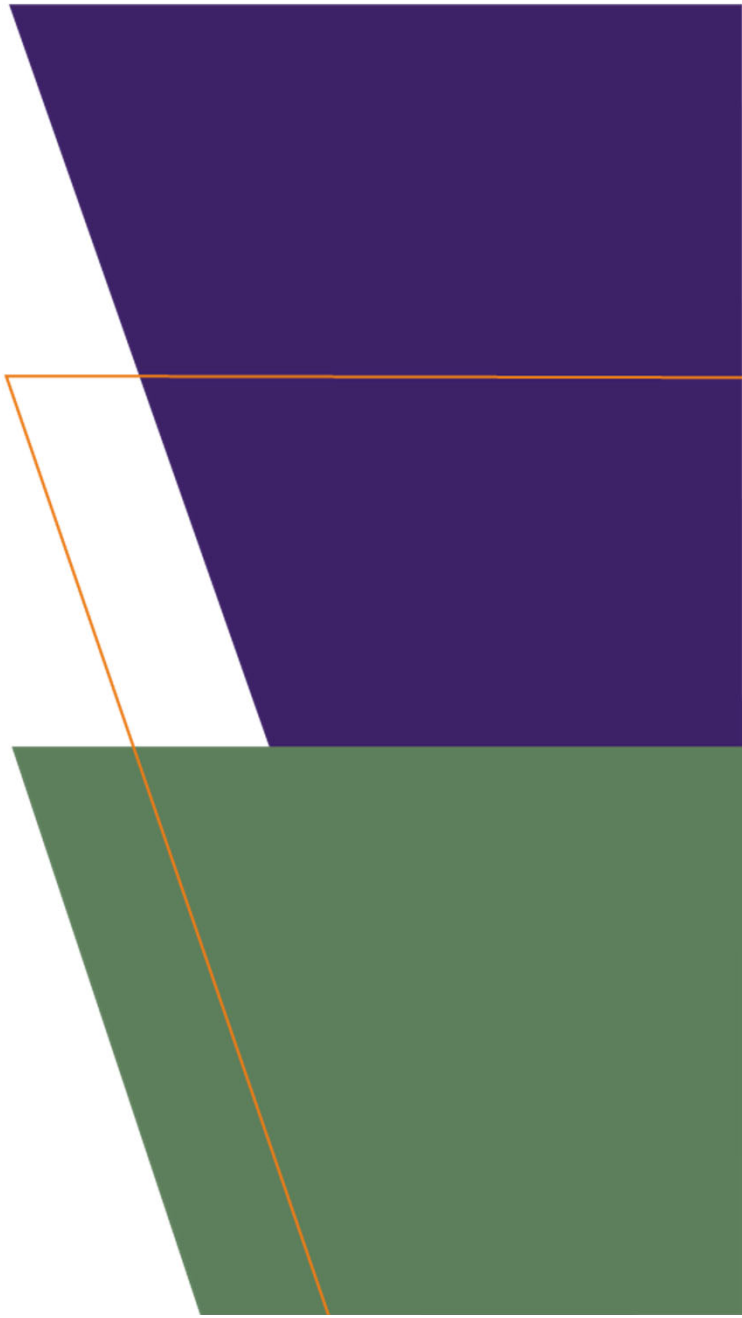
"[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." *Hickman v. Taylor*, 329 U.S. 495, 512 (1947).

[1] Fed. R. Civ. P. 26(b)(3)(A); Restatement (Third) of Law Governing Lawyers § 87.

Attorney Client Privilege v. Attorney Work Product Protection

	Privilege	Work Product
Type of Document/ Communication	Narrower (Communications)	Broader (Any work product meeting other criteria)
(Anticipated) Litigation	N/A	Yes
Protection	Absolute absent waiver	Not absolute for fact work product if demonstrated substantial need and undue hardship
		Absolute for opinion work product absent waiver
Disclosed to Third Party	Waived	Waived if disclosed to adversary

Privilege Pitfalls



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Define Scope and Purpose of Internal Investigations



Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC (2020):

- Outside counsel was hired by Buckley Sandler LLP to investigate allegations of sexual harassment and misconduct by a partner.
- In litigation with its insurer, Buckley sought to withhold communications with outside counsel concerning the investigation as privileged. Insurer moved to compel.
- The Court held that the investigation was required under Buckley's policies and thus was "initiated and pursued in the ordinary course of Buckley's business."
- The "fact that Buckley hired a prominent outside law firm to conduct the investigation [did] not change" the Court's analysis.
- Thus, the Court found that many of outside counsel's investigative materials and communications were **not** covered by the attorney-client privilege.

Buckley LLP v. Series 1 of Oxford Insurance Co. NC LLC, 2020 NCBC 81, 2020 NCBC LEXIS 136 (N.C. Super. Ct. Nov. 9, 2020), *aff'd* 876 S.E.2d 248 (N.C. Sup. Ct. 2022).

Define Scope and Purpose of Internal Investigations (cont'd)



Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC (2020):

- The Court also rejected Buckley's arguments that the documents were protected by the attorney work product protections:
  - "The evidence of record does not suggest that the Buckley Communications were made because of anticipated litigation arising from Sandler's misconduct. None of the [relevant documents] mentions or discusses the prospect of litigation."
- The North Carolina Supreme Court, in affirming, stated:
  - "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."

Buckley LLP v. Series 1 of Oxford Insurance Co. NC LLC, 2020 NCBC 81, 2020 NCBC LEXIS 136 (N.C. Super. Ct. Nov. 9, 2020), *aff'd* 876 S.E.2d 248 (N.C. Sup. Ct. 2022).

Define Scope and Purpose of Internal Investigations (cont'd)

Sec. and Exch. Comm'n v. RPM Int'l, Inc. (2020):

- Outside counsel was hired by RPM's Audit Committee after:
  - The SEC initiated an investigation; and
  - RPM's auditor, EY, stated it would not sign the 10-K without an independent investigation.
- The Court concluded that outside counsel's investigation was conducted "because of" EY's position not "because of" the SEC investigation, meaning interview memos were not covered by the attorney-work product protection.
- The Court also found memos were not work product because they were "completely devoid of legal opinions, thoughts, or mental impressions."
- The Court also held that RPM waived the attorney-client privilege by sharing the contents of the interview memos with EY, who thereafter disclosed the substance to the SEC. Work product protection (to the extent it existed) was also waived by disclosure to the SEC.
- The Court's analysis relied heavily on the company's board minutes, which reflected that outside counsel was hired for business rather than legal purposes. Minutes should clearly reflect that legal advice is being provided/requested.

Transcript of Status Conference, *Sec. and Exchange Comm'n v. RPM Int'l, Inc.,* No. 1:16-cv-01803-ABJ, (D.D.C. Feb. 14, 2020); *In re RPM Int'l Inc.*, No. 20-5052, Order Denying Mandamus (D.C. Cir. May 1, 2020).

Legal Purpose In Practice: *In re First Energy*

In re FirstEnergy Corp., 154 F.4th 431 (6th Cir. 2025)

- In 2020, FirstEnergy retained outside counsel to conduct internal investigations related to a DOJ action involving alleged bribery scheme implicating First Energy.
- In response to the DOJ action, shareholders filed a securities class action lawsuit. During discovery, the shareholders sought access to all materials from outside counsel's investigations.
- The Southern District of Ohio held that the investigative materials were not protected by the attorney-client privilege or work product doctrine because FirstEnergy initiated the investigation for business, rather than legal, advice.
- On appeal, the Sixth Circuit reversed, finding that FirstEnergy's internal investigations were still primarily for legal purposes even if the company used those investigative findings to inform business decisions.
- The Sixth Circuit also held that the materials were protected under the work-product doctrine because they were prepared in anticipation of a wide array of potential civil and criminal litigation.

Pitfall! What Went Wrong in *Buckley* and *RPM*?

- Purposes of the investigation, providing legal advice and establishing legal defenses in anticipation of litigation, were not clearly defined.
- Aspects of the investigation establishing privilege were not documented:
  - To the extent the purpose was legal advice, that was not documented
  - Litigation or potential litigation not mentioned in work product
  - Work product “completely devoid” of legal opinions



Balancing Disclosure vs. Waiver in Disclosure to Auditors

Courts are Split

- **Majority**: *United States v. Deloitte, LLP (2010):*
  - In litigation between IRS and Dow Chemical Company, IRS subpoenaed Dow's auditor, Deloitte, seeking various documents.
  - Court found no wavier of work product protection as auditors' duty of confidentiality precluded any significant risk of disclosure to an adversary.
- **Minority**: *Medinol v. Boston Sci. Corp. (2002)*:
  - Boston Scientific engaged counsel to perform an investigation.
  - Counsel reported to the Special Litigation Committee of the Board.
  - Minutes of the meetings where counsel presented were shared with company's outside auditors.
  - Court found disclosure to auditors waived work product protections.

U.S. v. Deloitte, LLP, 610 F.3d 129 (D.C.Cir. 2010); *Medinol v. Boston Sci. Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002)

Balancing Disclosure vs. Waiver in Government Investigations



- The DOJ's Corporate Enforcement and Voluntary Self-Disclosure Policy sets forth guidance for receiving cooperation credit.
- "[E]ligibility for benefits under [the] policy is not in any way predicated upon waiver of the attorney-client privilege or work product protection…."
- But, DOJ requires that a company "[t]imely, truthfully, and accurately discloses all facts and non-privileged evidence relevant to the conduct at issue, including:

  i. facts and evidence gathered during a company's internal investigation, if the company chooses to conduct one;

  ii. facts and evidence about all individuals involved in or responsible for the misconduct at issue, . . . regardless of their position, status, or seniority;

  iii. attribution of facts to specific sources rather than a general narrative of the facts;

  iv. timely updates on a company's internal investigation, if the company chooses to conduct one, including but not limited to rolling disclosures of information;

  v. identification of all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, … and all non-privileged information relating to the misconduct and involvement by those individuals."

Balancing Disclosure vs. Waiver in Government Investigations (cont'd)





United States v. Coburn (2022):

- Cognizant hired outside counsel in connection with DOJ and SEC investigations of FCPA violations. Outside counsel provided "detailed accounts of 42 interviews" to DOJ.
- DOJ brought charges against two former Cognizant executives, who subpoenaed the interview memos and other investigative work product.
- The Court held that the interview "downloads" waived attorney-client and attorney work production protections over:
  - Interview memoranda, notes, summaries, or other records of the interviews;
  - Underlying documents discussed in any interview memoranda/summary;
  - Documents and communications reviewed that formed "any part of the basis of any presentation" to the DOJ.
- On April 2, 2025, the DOJ voluntarily dismissed the charges.

United States v. Coburn, No. 2:19-cr-00129 (KM), 2022 WL 357217 (D.N.J. Feb. 1, 2022)

Balancing Disclosure vs. Waiver via Publicizing Findings

Doe v. Baylor Univ. (2020):

- Baylor University engaged a law firm "to conduct an independent and external review of Baylor University's institutional responses to Title IX and related compliance issues though the lens[] of specific cases."
- Baylor published a 13-page summary of findings and 105 recommendations on the law firm's letterhead, then a 755-page external report authored by outside counsel.
- Plaintiffs brought Title IX lawsuits against Baylor and sought documents from the law firm's investigation.
- The Court found Baylor was "clearly . . . seeking legal advice."
- BUT, the Court held that publication of the factual findings "reveal[ed]" what facts Baylor provided to outside counsel, effectively publishing Baylor's confidential communications and waiving privilege.
- Waiver was over the entire investigation and advice on implementation of recommendations.
- Attorney work product protection was also waived because Baylor's litigation defense relied on the investigation conducted and reforms implemented by outside counsel.

***Doe v. Baylor Univ.*, 320 F.R.D. 430 (W.D. Tex. 2017); *Doe v. Baylor Univ.*, 335 F.R.D. 476 (W.D. Tex. 2020)**

Pitfall! What Went Wrong in *Baylor University*?

- The information made public covered the entire scope of the investigation
- Baylor disclosed all of the key factual findings and the legal conclusions/advice made in response to those findings
- Baylor tried to have its cake and eat it too:
  - Baylor's legal defense was based on the facts and advice it received from outside counsel
  - Baylor nonetheless tried to shield that information from plaintiffs



Third Parties Assisting Litigation



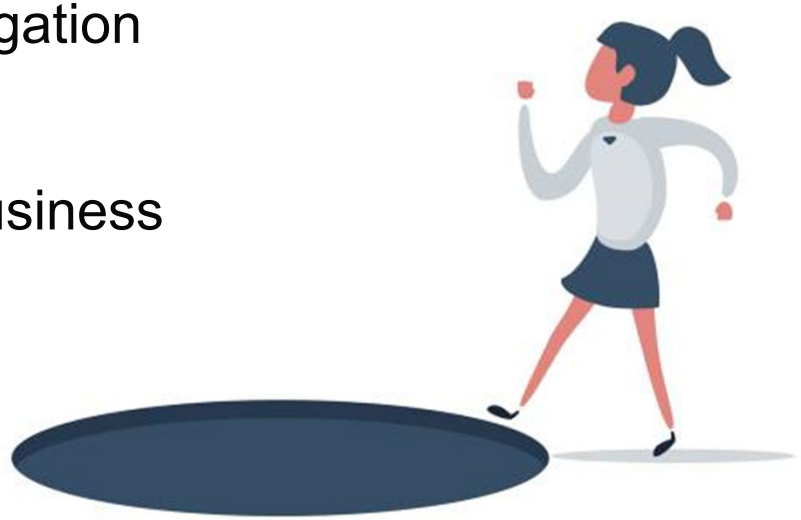
Capital One Consumer Data Security Breach Litigation (2020)

- Capital One entered into an MSA with Mandiant (Nov. 2015) and a subsequent SOW (Jan. 2019).
- In July 2019, Capital One experienced a data breach and retained outside counsel.
- Capital One and outside counsel then signed a Letter Agreement with Mandiant, under which Mandiant would provide services "as directed by counsel."
- Plaintiffs brought suit against Capital One and sought Mandiant's report on the data breach.
- Court held that if a document may be used for both litigation and business purposes, the Court must determine the "driving force behind" the document's preparation.
- Court determined that the Mandiant report would have been created in essentially the same form in the absence of litigation. Court's analysis turned substantially on:
  - Letter Agreement and SOW had identical scopes of services.
  - Report distributed to ~50 employees, 4 regulators, the Board, and an outside accountant.

In re: Capital One Consumer Data Security Breach Litigation, No. 1:19md2915 (AJT/JFA), 2020 WL 3470261 (E.D. Va. June 25, 2020)

Pitfall! What Went Wrong in *Capital One*?

- Vendor engaged for business reasons years before the start of legal work
- Amendment to that engagement did not distinguish between work in support of litigation and in support of the business
- Work product had dual uses: legal and business



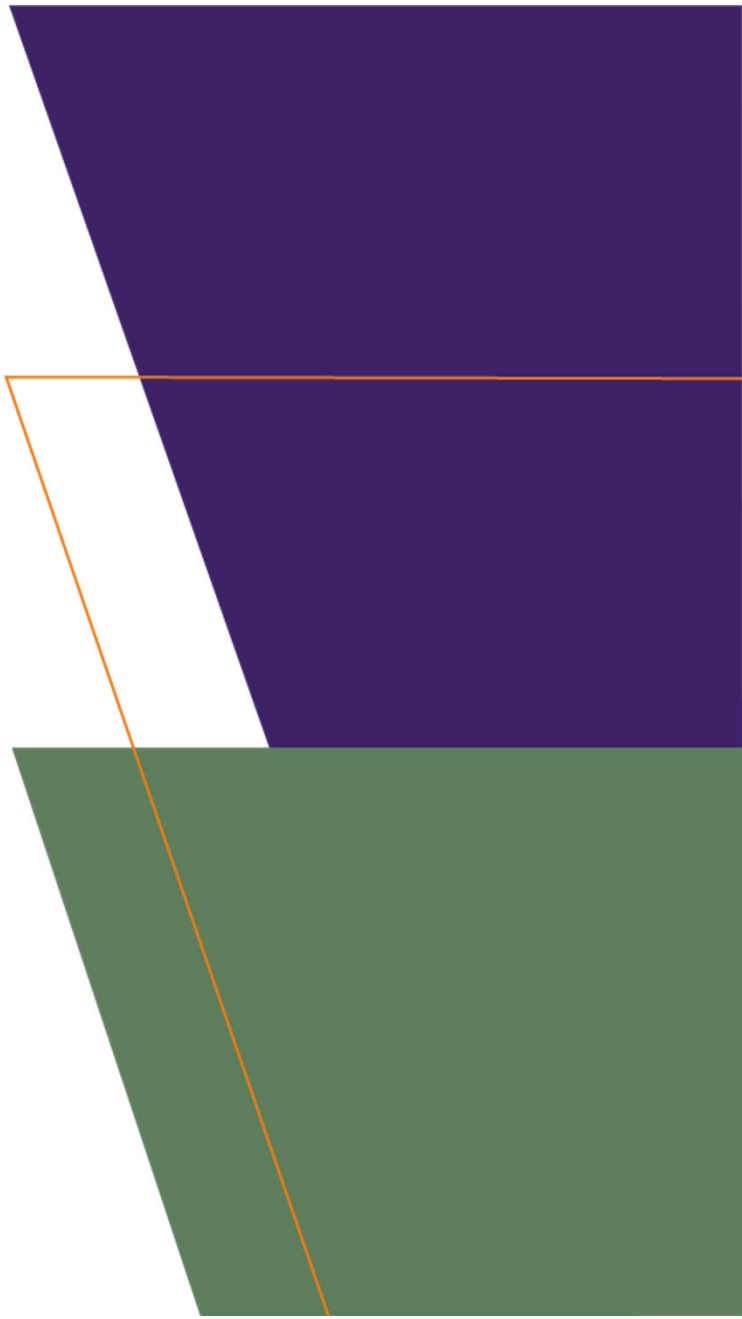
NYRPC Rule 5.3: A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate.

Sum-Up: Common Practices that Led to Privilege Pitfalls

- Initiating an investigation as a routine review to determine compliance with company policy.
- Initiating an investigation at the urging of an independent auditor.
- Sharing investigatory materials with third parties.
- Providing “read outs” or over-disclosing to government regulators or the public.
- Retaining non-lawyers who will help the investigation directly, instead of through an outside law firm.
- Mixing business and legal communications, work, and advice.

AI and Privilege in Investigations

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AI Communications Not Privileged

United States v. Heppner (2026):

- Criminal defendant ran queries through Claude (Anthropic's AI) while under investigation, without counsel's direction.
- Court held AI documents not protected by attorney-client privilege:
  - AI is not an attorney; privilege requires a "trusting human relationship" with a licensed professional.
  - No reasonable expectation of confidentiality:
    - Anthropic's privacy policy reserves the right to disclose user data to third parties, including government authorities.
  - Defendant did not communicate with Claude for the purpose of obtaining legal advice.
- Court also denied work product protection:
  - Documents prepared by defendant "on his own volition," not at counsel's direction.
  - Documents did not "reflect" counsel's strategy at the time of creation.
  - Non-privileged communications are not "alchemically changed into privileged ones upon being shared with counsel."
- Significant dictum: If counsel had directed the AI use, Claude might have functioned "akin to a highly trained professional who may act as a lawyer's agent."

United States v. Heppner, 820 F. Supp. 3d 292 (S.D.N.Y. 2026)

AI Work Product Protection Recognized



Warner v. Gilbarco, Inc. (2026):

- *Pro se* plaintiff in employment dispute used ChatGPT to draft filings and answer legal questions.
- Defendants moved to compel production of all AI interactions.
- Court held plaintiff's ChatGPT queries and responses were protected work product:
  - AI materials reflected plaintiff's mental impressions and litigation strategy prepared in anticipation of litigation.
  - AI programs "are tools, not persons, even if they may have administrators somewhere in the background."
- No waiver:
  - Work product waiver requires disclosure to an adversary or in a manner likely to reach an adversary.
  - Disclosure to ChatGPT was not disclosure to an adversary.
- Compelling production would "nullify work-product protection in nearly every modern drafting environment."

Warner v. Gilbarco, Inc., 820 F. Supp. 3d 629 (E.D. Mich. 2026)

AI Prompts as Opinion Work Product

Tremblay v. OpenAI (2024) and *Concord Music Group v. Anthropic* (2025):

- In *Tremblay*, plaintiffs in copyright suit used ChatGPT to test for infringement during pre-suit investigation.
  - Court held ChatGPT prompts crafted by counsel constituted opinion work product because they "contain counsel's mental impressions and opinions about how to interrogate ChatGPT."
  - Reversed magistrate judge's order compelling production.
- In *Concord Music Group*, court followed *Tremblay*, agreeing that AI prompts and outputs from pre-suit legal investigation constitute attorney work product.
  - Denied motion to compel approximately 5,000 undisclosed prompt-output pairs.
  - Court held any waiver must be "closely tailored" to the needs of the opposing party.
  - Broad subject-matter waiver denied.

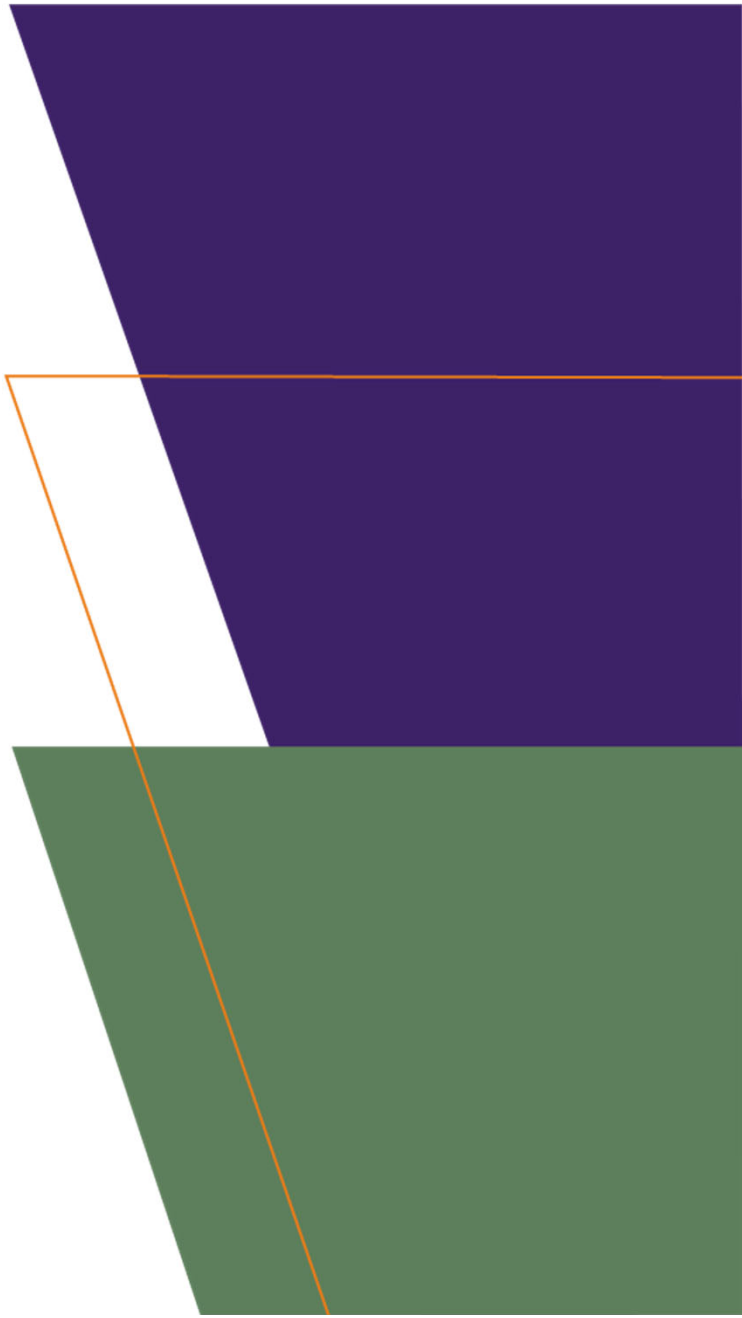
Tremblay v. OpenAI, Inc., No. 23-cv-03223-AMO, 2024 U.S. Dist. LEXIS 141362 (N.D. Cal. Aug. 8, 2024);
Concord Music Grp., Inc. v. Anthropic PBC, No. 24-cv-03811-EKL (SVK), 2025 U.S. Dist. LEXIS 99068 (N.D. Cal. May 23, 2025)

Pitfall! What Went Wrong and Best Practices for AI Use

- Direction of counsel is the key differentiator: AI use directed by counsel is more likely protected (*Heppner* dictum) vs. unilateral use by client (*Heppner* holding).
- Public AI platforms carry confidentiality risk:
  - Privacy policies permitting third-party disclosure may defeat privilege.
  - Use enterprise AI tools with negotiated confidentiality protections.
- Adopt internal AI-usage policies governing the handling of privileged and confidential information.
- NYRPC 1.1 requires a lawyer to have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
  - Commentary to the rule makes clear that this includes "keep[ing] abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."



Best Practices



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General Best Practices

- Clearly Identify and Define the Client
  - *Particularly important in-house*
  - *Corporate counsel represents the company*
- Be Mindful in Crafting Documents
  - *Be intentional in creating documents containing legal advice; for each document, weigh the pros and cons of oral versus written advice*
- Distinguish “Legal Advice” from “Business Advice”
  - *Ensure documents and communications reflect they are being performed by a lawyer or at the direction of a lawyer to obtain legal advice*
- Use Proper Legends for Legal Documents
  - *“Confidential – Attorney-Client Privileged”*
  - *“Prepared at the Direction of Counsel”*

General Best Practices (cont'd)

- If Document is Intended to be Protected as Work Product, Consider if it Meets Criteria
  - *Is there actual or potential litigation causing the document creation?*
  - *Does the document contain legal analysis, legal strategy, attorney thoughts, or mental impressions?*
- Avoid Waiver
  - *Copy or forward only on a need-to-know basis*
  - *Do not discuss or disclose privileged information in a public place*
  - *Avoid using personal communication platforms*
- Consider Relevant Parties
  - *Consider whether use of external lawyers bolster privilege*
  - *Consider the actual role and duties of any in-house personnel working on the investigation*

General Best Practices (cont'd)

- Clearly Define and Document the Scope and Purpose of the Investigation
  - *Make it clear intent is to provide legal advice; work product must then reflect that*
  - *Document the purpose of interviews at all stages*
  - *Involve outside counsel early*
  - *Investigation should be carried out with direct and ongoing involvement of lawyers*
  - *Identify applicable jurisdictions and laws*
- Government Disclosures
  - *Provide presentations as factual as possible and as promptly as possible*
  - *Rely on non-privileged documents for presentations as much as possible*
  - *Create separate and clear presentations to be shared with government versus internal work product*
  - *Avoid, if possible, full read-outs of interviews*