Understanding the boundaries of legal privilege in corporate internal investigations is critical. When counsel, either internal or external, misunderstands these boundaries, the result can be disastrous. In any type of internal investigation, regardless of the subject matter or size, the company’s legal team must understand the rules governing legal privilege of investigations and the materials they create.

We examined all reported US federal and state court cases decided in 2019 (through December 16) that have considered the boundaries of legal privilege that govern corporate internal investigations. The 2019 case law reinforces the following key US legal principles, which any company should seek to fully understand before commencing its next internal investigation in the United States:

• For the privilege to apply, providing legal advice to the company should be a primary purpose of the investigation, including with respect to non-lawyers working at counsel’s direction.

• The privilege may not apply to investigations conducted in the ordinary course of business or those required by company policy or regulation.

• To maximize the ability to claim work product protection, it is important to contemporaneously document the scope and purpose of the investigation.

• Take care not to waive the privilege by allowing investigatory team members to answer substantive questions at depositions, by placing the investigation itself at issue in litigation, or by sharing privileged materials with non-necessary third parties.

The purpose(s) of the internal investigation is the most critical factor in determining the applicability of legal privilege.

Under US law, for the attorney-client privilege to apply, the company generally must perform the investigation for the purpose of obtaining legal advice.

The US District Court for the Eastern District of New York confronted this issue head-on earlier this year in Cicel (Beijing) Science & Technology Co. LTD v.

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Misonix, Inc., 331 F.R.D. 218 (E.D.N.Y. 2019). Specifically, the court had to determine the purpose of an investigation into issues the company had with a distributor. Based on the results of the investigation, which outside counsel conducted, the company terminated the distributor’s contract based on alleged evidence that the distributor’s business practices violated the Foreign Corrupt Practices Act. The distributor, claiming that legal privilege did not cover the investigation, argued that the company retained the investigative, outside counsel to conduct a fact-finding mission that non-lawyers could have performed. The distributor cited the company’s SEC filings, which stated that the company “engaged outside counsel to conduct an internal investigation to review certain matters, that an internal investigation was ongoing, and that the company intended to cooperate with the DOJ and SEC as the investigation continued.

The court concluded that the “primary purpose” of the investigation was to provide legal advice. Id. at 231. Based on an affidavit from the outside counsel leading the investigation, the firm conducted interviews of current and former employees confidentially and offered appropriate Upjohn warnings. The affidavit explained that the company “retained [the law firm] regarding issues surrounding its [distributor], for which government investigations and civil litigation was anticipated,” and that the investigation related to, among other things, “possible violations of laws related to the distribution of [company’s] products in China.” The court reasoned that as long as one of the significant purposes for the investigation is obtaining legal advice, the attorney-client privilege applied. Id. (relying on In re Kellogg Brown & Root, Inc., 756 F.3d 754, 759 (D.C. Cir. 2014)). The court also rejected the distributor’s argument that the company’s hiring of a different law firm to represent the company in the ensuing litigation proved that the internal investigation conducted by the other law firm was merely investigative, and not legal, in nature. The court found the distributor’s argument legally unsupported given that “investigatory and legal work are not mutually exclusive.” Id.

In Parneros v. Barnes & Noble, Inc., No. 18-cv-7834, 2019 WL 4891213 (S.D.N.Y. Oct. 4, 2019), the former CEO of Barnes & Noble challenged the application of the legal privilege to the company’s internal investigation into allegations of his behavior. Specifically, the former CEO claimed that legal privilege should not attach to the General Counsel’s interview notes of the individual who made the allegations and to other investigatory materials. See id. at *4–7. The court disagreed and concluded that legal privilege attached to that initial interview: “Here, the fact that the company’s top executive was being accused of potentially serious misconduct by itself provides some circumstantial evidence to support [the General Counsel’s] claim that his purpose in conducting the investigation was to provide the company with legal advice.” Id. at *7. The court explained that the General Counsel’s retention of external litigation counsel
the same day he conducted the interview with the complainant bolstered the privilege assertion. *Id.* The *Parneros* case is a reminder that even if conducting an investigation exclusively in-house, companies should consider retaining external litigation counsel to bolster the privilege assertion. See *id.* (“Courts have often found the retention of outside litigation counsel to advise an internal investigation to be an important factor in determining whether an internal investigation is being conducted for the purpose of obtaining legal advice for the company.”).

Similarly, the US District Court for the District of Maryland considered whether the privilege applied to a briefing document prepared by outside counsel in response to a company’s request for a presentation to the company’s board of directors. *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prods. Liability Litig.*, MDL No. 2775, 2019 WL 2330863 (D. Md. May 31, 2019). The company ultimately provided outside counsel significant information, including clinical summaries, which outside counsel incorporated into the 62-page briefing document. *Id.* at *1.* The court concluded that the company performed the investigation for the purpose of obtaining legal advice, and thus the attorney-client privilege attached to the briefing document. Importantly, this ruling extended to the clinical, factual information in the document because “the factual information informs the legal strategy and was likely compiled in order to assist in the provision of legal advice and to provide context to facilitate the Board of Director’s understanding of the legal advice.” *Id.* at *3* (finding that the document also was legally protected work product because it detailed pending and anticipated litigation and set forth a litigation strategy).

**Be wary of investigations conducted in the ordinary course of business.**

US legal privilege likely will not apply to internal investigations performed as part of the ordinary course of business or where the investigation is required by state or federal regulation (such as post-incident investigations of operations governed by OSHA’s Process Safety Management Standards). See, e.g., *99 Wall Development Inc. v. Allied World Specialty Ins. Co.*, No. 18-cv-126, 2019 WL 2482356, at *5 (S.D.N.Y. June 14, 2019) (finding no privilege protection for drafts of investigation reports prepared by insurer’s attorneys in investigation required in the insurer’s normal course of business to determine if the underlying policy applied). For example, where materials are prepared in the ordinary course of communicating information to help make employment decisions and not for purposes of rendering legal advice, privilege likely does not attach. See *Miniex v. Houston Housing Auth.*, Civ. No. 4:17-cv-624, 2019 WL 2524918, at *7 (S.D. Tex. Mar. 1, 2019) (finding the labeling of the documents as “privileged and confidential” to be inconsequential to the privilege analysis); see also *Guy v.*
Yusen Logistics (Americas), Inc., No. 2:18-cv-2117, 2019 WL 2465173, at *4–6 (W.D. Tenn. Apr. 11, 2019) (affirming magistrate judge’s ruling that attorney-client privilege did not apply to investigation where purpose of investigation was to provide business advice on how to deal with an employment matter, and not to provide legal advice).

The US District Court for the Eastern District of Louisiana considered the applicability of legal privilege to an internal investigation into a safety incident that occurred on an offshore oil rig. Beasley v. Rowan Cos., Inc., No. 18-cv-365, 2019 WL 1676017, at *2–3 (E.D. La. Apr. 17, 2019). The plaintiff argued that the investigation was not privileged because the company conducted it as part of the company’s ordinary course of business for the primary purpose of safety and regulatory compliance. Id. at *1. The court agreed. The court emphasized that the company conducted the investigation through non-lawyer personnel and that company policy required the “post-accident remedial action investigation.” Id. at *2–3. The court rejected the company’s argument that, at minimum, work product protection should apply because the company prepared the investigation report in anticipation of litigation. The court emphasized that no attorneys were involved, and that the report focused on safety, contained a list of corrective and preventative actions without reference to litigation or potential company exposure, contained no mental impressions or other legal analysis, and was “generically investigative.” Id. at *3. This ruling extended to notes prepared by non-lawyers as part of the investigation given the interviews were not conducted at counsel’s instruction and were not conducted in anticipation of litigation. Id. at *4 (concluding the notes did not contain any mental impressions of the interviewers, were intended to be contemporaneous statements about what happened, and were part of “the ordinary course of business investigation” required by company policy).

Nevertheless, it is certainly possible for legal privilege to apply in an investigation even if a company has a policy that the investigation must occur. For example, even if an investigation has a business benefit or purpose, one of the investigation’s primary purposes still could be the provision of legal advice to the company. In Parneros, discussed above, the former CEO argued that the company’s investigation was not privileged because the company was required to investigate the allegations pursuant to its “No Discrimination & Harassment Policy.” The US District Court for the Southern District of New York, however, explained that “[t]he mere fact that there was a business benefit obtained from conducting the investigation does not detract from the circumstances here indicating that the predominant purpose of the investigation was to gather facts for the General Counsel so he could give legal advice to the corporation.” Parneros, 2019 WL 4891213, at *8. The court emphasized that this conclusion is not changed simply because the General Counsel’s meeting with the complainant may also have advanced the business purpose of responding to her
Companies also sometimes perform a fact-driven, required investigation in connection with a wholly separate, legally privileged investigation.

**Contemporaneously document the scope and purpose of the investigation.**

In the United States, attorney work product protection will not apply to materials created in the ordinary course of business that would be created irrespective of the threat of litigation. The materials must be created in anticipation of litigation to be protected. In *Cicel*, the court concluded the emails and memoranda derived from the company's internal investigation were prepared in anticipation of litigation and thus were protected work product. *Cicel*, 331 F.R.D. at 232. The court, relying on the detailed affidavit provided by the company's outside counsel that conducted the investigation, concluded that the interviews conducted by the investigation team "were plainly shaped by the specter of litigation." *Id.* (quoting *General Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 532 (S.D.N.Y. 2015)).

At the onset of an internal investigation, detailing in writing the scope and purpose of the investigation, as well as the process and terms on which outside counsel conducting the investigation is retained, is helpful for purposes of protecting the legal privilege in any eventual litigation. For example, a federal district court in Massachusetts found work product protection inapplicable to investigatory materials prepared by a third-party consultant. See *SEC v. Navellier & Assoc., Inc.*, Civ. No. 17-11633, 2019 WL 285957, at *3–4 (D. Mass. Jan. 22, 2019) (reconsidering and affirming 2018 WL 6727057 (D. Mass. Dec. 21, 2018)). Although company counsel submitted an affidavit asserting that he hired the consultant to assist in providing legal advice to the company in anticipation of possible litigation with the SEC, the court discounted the affidavit. The court, finding that the company did not reasonably anticipate litigation, cited the lack of contemporaneous communications showing that counsel hired the consultant, the absence of any materials showing why the consultant's retention was necessary to provide legal advice, and the fact that the SEC did not open its investigation of the company until three years later. *Id.*

**Be mindful of investigatory interviews of potentially adverse parties.**
In *Cicel*, the court’s ruling that the investigating attorneys’ interview notes were “entitled to the highest level of work product protection,” because they reflected the questions counsel chose to ask and mental impressions and opinions of the attorneys who took the notes, extended to the notes of interviews with two employees of the distributor, the adverse party in the litigation. See *Cicel*, 331 F.R.D. at 232–33. The court indicated that the factual components of the interview notes were also protected because the distributor had not shown a substantial need for the materials, particularly given that the distributor’s employees should be able to recall their recollection of factual details. *Id.* Importantly, no recordings, transcripts, or verbatim recitations of any interviews with the adverse party’s employees existed, or the company would have had to produce them pursuant to Federal Rule 26(b)(3)(C), which enables a party to obtain the party’s previous statements, including any “contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it— that recites substantially verbatim the person’s oral statement.” *Id.*

Even though work product protection to these interviews in *Cicel*, the attorney-client privilege presumably would not have applied, even if the individuals had been company employees, given the presumable adversarial relationship. For example, an Ohio appellate court recently considered whether the attorney-client privilege extended to interviews undertaken by a company’s outside counsel of the individual that made the underlying complaint being investigated. See *Smith v. Technology House, Ltd.*, No. 2018-P-0080, 2019 WL 2746868 (Court of Appeals, 11th District, Portage County, Ohio June 28, 2019). Even though still an employee, the court concluded the privilege did not apply because a de facto adversarial relationship existed between the worker and the company after she made her complaint. *Id.* at *5 (noting, however, that the documents revealing the investigating attorney’s assessment of the interview would be protected work product).

**Avoid waiver of privileged internal investigation materials.**

When preparing a privilege log that includes privileged materials derived from an internal investigation, consider listing any outside counsel materials, even if the corporate client may not have copies of the materials. In *Cicel*, the court deemed all of the outside counsel’s investigatory materials related to the company’s internal investigation to be within the company’s “control” for purposes of responding to requests for production of documents. *Cicel*, 331 F.R.D. at 236; Fed. R. Civ. P. 34(a)(1). The court indicated that the failure to list these documents could operate as a waiver of privilege, but instead granted the party’s
To the extent attorney-client privilege attaches to investigatory materials, consider the privilege waived if witnesses are allowed to answer specific questions about the communications at depositions. See Miniex, 2019 WL 2524918, at *7 (quoting Nguyen v. Excel Corp., 197 F.3d 200, 206 (5th Cir. 1999) (“The questions asked and [the] answers went beyond the ‘general nature of the legal services provided’ and concerned [the CEO’s] ‘specific requests … and pertinent information related thereto.’”)). Similarly, if a company relies on the contents of the investigation to assert its case, such as a Faragher-Ellerth defense in a harassment case, then waiver of any privilege over investigatory materials is likely. See Martel v. Computer Sciences Corp., No. 17-cv-407, 2019 WL 2030281, at *1 (D. N.Hamp. May 8, 2019) (finding no waiver where company indicated repeatedly that it did not intend to rely on investigation to defend employment discrimination case); Guy, 2019 WL 2465173, at *4–6 & n.6 (affirming magistrate judge’s ruling that even if attorney-client privilege was applicable, company waived any privilege by relying on investigation as part of defense to hostile work environment claim); Barbini v. First Niagara Bank, N.A., No. 16-cv-7887, 2019 WL 1922041, at *6–7 (S.D.N.Y. Apr. 29, 2019) (concluding privilege of investigation into allegations of sexual harassment waived through deposition testimony that went beyond generalized references to counsel’s advice and explaining company had invoked Faragher-Ellerth defense).

When sharing privileged investigatory materials with third parties, they need to be necessary, or at least highly useful, for the provision of legal advice to the company to avoid waiver of the attorney-client privilege. As is generally well known, the disclosure of attorney-client communications to a third party waives the attorney-client privilege. The Kovel doctrine, an exception to the general rule, exists where the third party is “necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.” United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). This principle applies in the investigations context. For instance, in SEC v. Navellier & Associates, Inc., a federal district court considered whether the attorney-client privilege extended to communications a company shared with a third-party consultant as part of an internal investigation into the company’s marketing materials of certain products. 2019 WL 2855957, at *2. The company tasked the consultant with conducting a mock audit. The court concluded the attorney-client privilege did not apply to communications with the consultant or to
the materials shared with the consultant because the consultant was not necessary, or at least highly useful, to the company’s counsel’s provision of legal advice. *Id.* at *3.

However, when company lawyers conducting an internal investigation direct and rely on non-lawyers for purposes of providing legal advice to the company, the attorney-client privilege is not waived simply by virtue of the non-lawyer’s involvement. Even if disclosure of privileged investigatory materials to a third party waives the attorney-client privilege, disclosure would not waive any work product protection as long as the third party shared a common interest with the sharing party. See, e.g., *In re Smith & Nephew Birmingham MDL*, 2019 WL 2330863, at *4–5 (concluding privilege over protected work product shared with third-party consultant not waived where consultant shared common interest with company).

Where a third-party investigator conducts interviews for the purpose of assisting the company’s counsel in providing legal advice to the company, the privilege remains intact. See *Collardey v. Alliance for Sustainable Energy, LLC*, No. 18-cv-486, 2019 WL 3778298, at *3 (D. Col. Aug. 12, 2019) (affirming magistrate judge’s decision to uphold privilege where investigator was “hired by [company] to conduct an investigation under the direction of the [company’s] legal counsel for the purpose of assisting legal advice around anticipated litigation”).

**Conclusion**

Understanding the boundaries of legal privilege prior to commencing an internal investigation can save a company countless headaches. Grasping these issues prior to an unexpected incident or problem is critical to avoid the company’s investigation from making the situation worse.

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