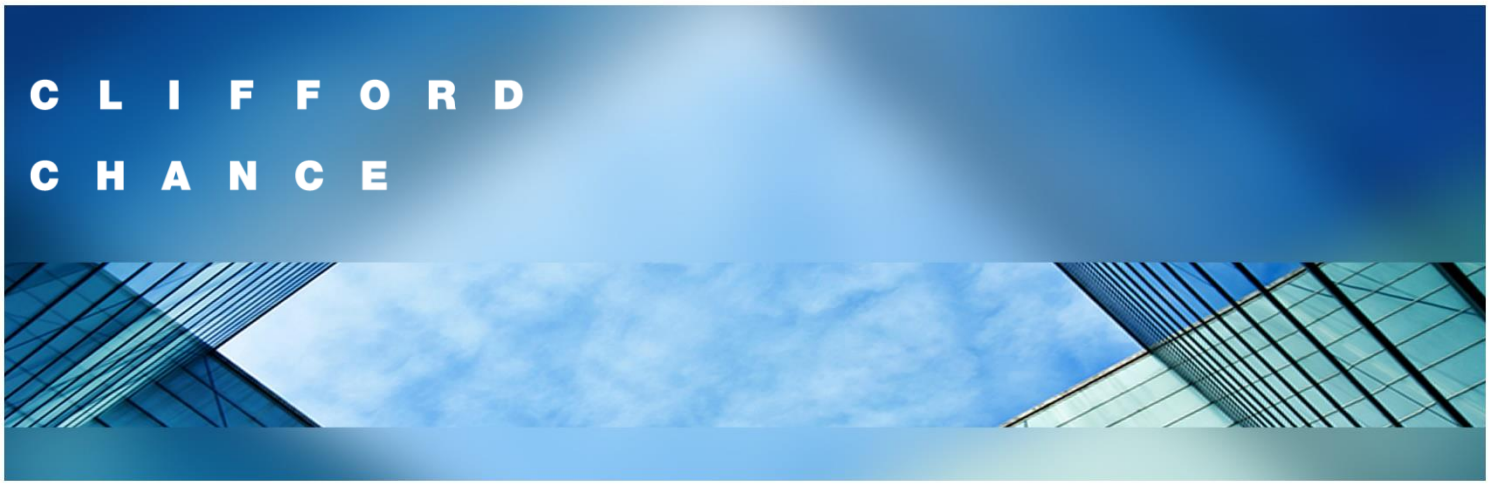

PRIVILEGE UNDER ATTACK: VULNERABILITIES OF LEGAL PRIVILEGE CLAIMS IN CRIMINAL AND REGULATORY INVESTIGATIONS

Recently, a lawyer for former Trump campaign advisor Paul Manafort and his associate Richard Gates was compelled to testify before a grand jury in the Special Counsel's Office ("SCO") investigation.[1] The SCO sought the lawyer's testimony to determine whether Manafort and Gates had "intentionally misled [the Department of Justice] about their work on behalf of a foreign government and foreign officials" when they submitted letters to the DOJ's Foreign Agent Registration Unit.[2] In ordering the attorney to testify, the federal district court determined that the attorney-client relationship had been used to "further a criminal scheme" – making false or misleading submissions to the DOJ – so the attorney's communications with her clients fell within the crime-fraud exception to privilege.[3] While the crime-fraud exception is well established, the district court's decision in the Manafort case is just one example of recent aggressive efforts to pierce attorney-client privilege in criminal and regulatory investigations. Non-lawyers often misconstrue the scope of attorney-client and work-product protections, assuming that the mere presence of an attorney on an e-mail chain or in a meeting serves to cloak an ensuing communication with privilege. In this piece, we summarize the scope of attorney-client and work-product doctrines and discuss several recent U.S. court decisions that have found documents and communications created in connection with internal investigations to be

1 *In re Grand Jury Investigation*, No. 17-2336 (D.D.C. Oct. 2, 2017).
2 *Id.* at 1.
3 *Id.* at 37. Judge Howell also agreed with the SCO that Manafort's attorney could be compelled to testify under the theory of implied waiver; *i.e.*, that the clients' FARA submissions waived privilege and work-product protections as to the subjects they disclosed.

discoverable. Last, we review key privilege-related developments in foreign jurisdiction that will affect many cross-border investigations.

Scope of Attorney-Client Privilege

In the United States, the attorney-client privilege protects: (a) communications (b) made between an attorney and her client (c) in confidence (d) for the purpose of obtaining or providing legal assistance for that client. The attorney-client privilege applies "not only [to] the giving of professional advice to those who can act on it but also [to] the giving of information to the lawyer to enable him to give sound and informed advice."[4]

The work-product doctrine provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation. Under the work-product doctrine, a party is not entitled to obtain discovery of (a) documents (b) prepared in anticipation of litigation, and (c) prepared by or for a party, or by his representative, unless a showing of substantial need and lack of undue hardship is made.[5]

Recent Developments

The following cases illustrate some of the privilege issues practitioners must consider when conducting an internal investigation.

- *Routine filings with U.S. Government agencies may waive privilege if there is a* prima facie *showing of false or misleading statements.*

As discussed above, the SCO successfully compelled testimony from Manafort and Gates's lawyer to establish facts underlying a Foreign Agent Registration Act ("FARA") filing on two grounds: the crime-fraud exception and implied waiver. The SCO argued that Manafort and Gates had made false and misleading submissions through counsel regarding, among other things: (1) their relationship with the Ukrainian government and two U.S. lobbying firms; (2) their communications with certain U.S. contacts; and (3) their relationship with the U.S. lobbying firms.[6] In support of the motion to compel testimony under the crime-fraud exception, the SCO offered evidence ex parte to establish that there was a prima facie showing of a crime or fraud. Judge Howell determined that the SCO met its burden because Manafort and Gates had "likely violated federal law by making … materially false statements and misleading omissions in their FARA Submissions."[7] Given their lawyer's role in making the FARA submissions on behalf of Manafort and Gates, the court ordered her testimony regarding specific questions relating to the creation of the FARA submissions.

Thus, while the SCO's investigation is unusual in many respects, the crime-fraud exception can be a mechanism for prosecutors to pierce privilege whenever the

4 *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).
5 *See In re Veeco Instruments, Inc. Sec. Litig.*, No. 05-MD-01695, 2007 WL 724555, at *4 (S.D.N.Y. Jan. 24, 2007); *see also* Fed. R. Civ. P. 26(b)(3).
6 *In re Grand Jury Investigation*, No. 17-2336, at 9-10 (D.D.C. Oct. 2, 2017).
7 *Id.* at 25.

government can make a showing that a particular government filing, made with the assistance of counsel, contains false or misleading information.

– *Sharing privileged information with government regulators often waives privilege as to third parties; i.e., the selective waiver doctrine is disfavored.*

When entities disclose potentially privileged materials to government regulators, there is a substantial risk that privilege will be waived. In Judge Howell's order compelling Manafort's lawyer to testify, she also relied on the alternative basis that their submissions to the DOJ implied a waiver of attorney-client privilege as to Manafort and Gates's "specific conversations with their lawyer . . . related to the FARA Submissions' contents."[8] In government investigations, entities routinely attempt to avoid such a waiver by entering into non-waiver letter agreements (sometimes referred to as *Steinhardt* letters), which prohibit disclosure of privileged documents to third parties. However, the selective waiver doctrine is increasingly disfavored and is vulnerable to challenge.[9]

Recently, in December 2017, Magistrate Judge Goodman in the Southern District of Florida determined that notes of witness interviews lost privilege protection when counsel provided an oral summary of those interviews to the Securities and Exchange Commission ("SEC").[10] The SEC alleged that the defendants, the CEO and CFO of global manufacturer General Cable Corp. ("GCC"), concealed the manipulation of the company's accounting controls. In preparation of their defense against these claims, the defendants sought access to documents prepared by non-party Morgan Lewis & Bockius, the company's external counsel, on behalf of its client GCC. The defendants contended that privilege and work-product protection had been waived over witness interview notes and memoranda because Morgan Lewis had orally summarized the interviews for the SEC. The court agreed, finding that while the notes had been privileged, privilege had been waived through the SEC presentation because there was "little or no substantive distinction" between the oral summary and physical delivery of the written notes for the purposes of privilege.[11] After Morgan Lewis produced under seal attorney notes from a meeting with the SEC and a portion of a memorandum read at that meeting in a motion for clarification of the discovery order, the magistrate judge scheduled an evidentiary hearing concerning the scope of the waiver in which Morgan Lewis attorneys would be cross examined by the defendants' counsel.[12]

Magistrate Goodman, however, ultimately vacated the orders for the production of interview memoranda and an evidentiary hearing, finding the matter moot after Morgan Lewis and the defendants resolved the discovery dispute without the

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8 *Id.* at 27-28.

9 The Second Circuit does not have a *per se* rule barring application of the selective waiver doctrine, maintaining that the key issue is whether the party making the disclosure to a government regulator with a confidentiality agreement was in an adverse posture with the regulator at the time. District courts within the Second Circuit have been divided on this issue. *See, e.g., Police and Fire Retirement System of the City of Detroit v. Safenet, Inc.*, No. 06 Civ. 5797, 2010 WL 935317, at *2 (S.D.N.Y. Mar. 12, 2010) (holding that documents disclosed to the government pursuant to a *Steinhardt* letter were protected from disclosure to subsequent plaintiffs, and noting that *Steinhardt* letters should be respected due to the "strong public interest in encouraging disclosure and cooperation with law enforcement agencies," and that "violating a cooperating party's confidentiality expectations jeopardizes this public interest"); *but see, e.g., In re Initial Public Offering Sec. Litig.*, 249 F.R.D. 457, 464-66 (S.D.N.Y. 2008) (declining to enforce a *Steinhardt* letter and noting that "selective waiver is not in the long-term best interest of the government, the adversarial system or litigants"). Several other circuits have rejected the selective waiver doctrine, including the Third, Sixth, Ninth, and Tenth Circuits. *See Gruss v. Zwirn*, No. 09-CV-6441, 2013 WL 3481350, at *9-10 (S.D.N.Y. July 10, 2013) (collecting cases).

10 *SEC v. Herrera*, No. 17-20301-CV, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017).

11 *Id.* at 1.

12 *SEC v. Herrera*, No. 17-20301-CV (S.D. Fla. Dec. 19, 2017).

production of the attorney work-product in question.[13] Although Morgan Lewis, in the end, did not produce privileged materials, the firm and its client GCC may have only been saved because it turned out that the materials were not relevant to the defendants' case.

- *Lawyers acting in a legal capacity must direct an internal investigation in order for the results of that investigation to be protected.*

In 2006, members of the Wultz family were killed and injured in a suicide bombing in Tel-Aviv. The Wultz family brought a claim against the Bank of China ("BOC") alleging that the BOC "knowingly and intentionally" provided material assistance to the terrorist group responsible for the bombing by disbursing funds to the terrorist organization used in carrying out the attack.[14] In 2008, BOC received a demand letter from the family's lawyer threatening suit, and in response, BOC began an internal investigation into the claim. The investigation was conducted primarily by its employees in China, pursuant to the Bank's anti-money laundering processes, under the guidance of senior compliance officers. Plaintiffs moved to compel production of documents relating to the investigations conducted by BOC. While BOC argued in response that the investigation had been conducted under the "direction" of U.S. external counsel "with the expectation" that results would be turned over to U.S. counsel, the court held that attorney-client privilege and the work-product doctrine did not cover the requested internal investigation documents.[15] The court found that the BOC individuals leading the investigation were directing the investigation and these employees were not "attorney[s] for purposes of the application of the work-product doctrine or attorney-client privilege."[16]

- *Communications with counsel must clearly focus on legal advice or litigation strategy; courts may consider advice regarding risk mitigation to be non-privileged business advice.*

In *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, the plaintiffs were current and former employees of the defendant, Independent Financial Marketing Group.[17] They brought a claim alleging that defendants had discriminated and retaliated against them.[18] In response, defendants hired external counsel and began an internal investigation into the allegations. Counsel advised defendants on how to conduct their internal investigation and how they should respond to plaintiffs' "ongoing work performance issues and internal complaints."[19] Plaintiff moved to compel the production of certain documents which contained defendant's communications with outside counsel and additionally sought to depose counsel. In 2014, the district judge upheld the magistrate judge's determination that the communications with outside counsel were not protected by privilege and granted the request for the lawyer's deposition. The court held that external counsel's communications primarily constituted business advice to the human resources department and that counsel would have given this advice "regardless of a specific threat of litigation."[20] The district court reasoned that in order for privilege to apply, "obtaining or

13 *SEC v. Herrera*, No. 17-20301-CV (S.D. Fla. Jan. 3, 2018)
14 *Wultz v. Bank of China*, 304 F.R.D. 384, 387 (S.D.N.Y. 2015).
15 *Id.* at 391-92.
16 *Id.* at 387.
17 *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 29 F. Supp. 3d 142 (E.D.N.Y. 2014).
18 *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28 (E.D.N.Y. 2013).
19 *Koumoulis*, 29 F. Supp. 3d 142, 143.
20 *Id.* at 149.

providing such legal advice must be the 'predominant purpose' of a privileged communication."[21]

Recent Developments in Key Foreign Jurisdictions

Since regulatory and internal investigations often involve multiple jurisdictions, companies must also consider foreign privilege laws (or the lack thereof). Foreign courts will often apply the law of the forum when considering discovery disputes and U.S. courts may apply foreign privilege rules in accordance with choice of law principles if the foreign jurisdiction has the predominant interest in the materials at issue. Below we discuss certain recent developments in the U.K. and Germany.

- *English courts have recently narrowed the scope of applicable privileges, diverging from the U.S. approach.*

Recent English rulings have diminished the ability of corporates to claim privilege in internal investigations. In May 2017, the English court in *SFO v. ENRC* ruled that documents, including interview memoranda, prepared by external lawyers as part of an internal investigation were not protected by English legal advice privilege (similar to U.S. attorney-client privilege) or litigation privilege (similar to the U.S. attorney work-product doctrine).[22]

ENRC launched its internal investigation in response to allegations of suspected bribery and corruption made by the media and by a whistleblower, appointing external lawyers to lead the investigation and to advise on potential criminal and civil exposure. When the Serious Fraud Office ("SFO") became involved, it requested that the company produce various documents generated during the internal investigation, including interview memoranda. Notwithstanding that the interview memoranda had been prepared by the company's external lawyers, the English court held that the memoranda were not protected by legal advice privilege because they were communications between a lawyer and an employee outside the "client" group (which English law defines very narrowly to be those individuals within a client entity who are authorized to obtain legal advice on that entity's behalf) and because they were essentially factual communications.

The English court also held that the interview memoranda were not protected by litigation privilege.[23] The court restated the principle that, for litigation privilege to apply, adversarial litigation must be reasonably contemplated or in progress, and the dominant purpose of the relevant communication must have been to conduct the litigation. Notably, when considering the interview memoranda, the court reached the view that a criminal investigation by the SFO on its own did not constitute adversarial litigation for privilege purposes and that only a real likelihood of a criminal prosecution would suffice. Therefore, unless and until this ruling is reversed on appeal, companies will not be able to rely on litigation privilege to protect documents generated during internal investigations unless they can establish that the documents were created for the dominant purpose of defending against a criminal prosecution or conducting other adversarial litigation. Furthermore, English courts will apply their privilege rules to documents created

21 *Id.* at 146.
22 *SFO v. Eurasian Nat. Res. Corp. Ltd.* [2017] EWHC 1017 (Q.B.) (May 8, 2017).
23 *Id.*

by foreign lawyers outside the U.K., even if the jurisdiction in which the documents were created would apply broader privilege protection.

- *German law offers minimal privilege protections to corporations, and German authorities may therefore seize documents from law firms.*

On March 15, 2017, German authorities raided the Munich offices of law firm Jones Day. This "dawn raid" sought documents relating to Volkswagen's alleged installation of a device designed to dupe diesel-emissions tests. While the German Federal Constitutional Court has issued a preliminary injunction preventing prosecutors from examining the information seized from Jones Day while the Court considers a challenge to the search, the raid was originally approved by the courts. A final ruling is expected later this year.

Raids on law firms in Germany may be permissible because corporations have minimal privilege protection. German law does not recognize the concept of "legal privilege" insofar as it provides for comprehensive protection of attorney-client communications. Seizures of documents are only impermissible if counsel was retained for the purpose of defending a corporation against criminal or administrative charges. Although the general scope of protection from seizure has not been clearly defined, German law suggests that documents created or acquired for the purpose of defending a company against an enforcement action may be protected, while documents generated during an internal investigation or compliance review may not.

Conclusion

The cases outlined above illustrate some of the issues companies should consider at the outset of an internal investigation. Organizations and individuals dealing with internal or regulatory investigations, particularly those with cross-border implications, should adopt a strategy to maximize privilege protection early in the process.

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