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# Supply Chain Investigations and US Legal Privilege

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Regulators worldwide are increasing their demands that manufacturers and retailers know and understand all aspects of their supply chains as they relate to Environmental, Social, and Governance ("ESG") goals. Keeping the findings, communications, information, and reports generated in connection with supply chain ESG investigations is imperative to ensure full and candid fact-finding and to manage brand integrity effectively. However, maintaining legal confidentiality is challenging when an investigation includes fact-finding of third parties such as suppliers. This Memorandum provides an overview of legal privilege and discusses how companies can maximize legal privilege during and surrounding internal investigations of their supply chains.

## Key Takeaways:

1. Retain outside counsel to lead the internal investigation
2. Frame the internal investigation specifically to obtain legal advice
3. Engage any third-party vendors through outside counsel
4. During fact-finding, always recite the *Upjohn* warnings
5. Keep investigative materials, including reports and interview memoranda, confidential and share them on a need-to-know basis only
6. The work product protection will additionally apply to documents and materials prepared "in anticipation of litigation"
7. Understand all state, federal and international privilege laws to which the company is subject

## General Principles of Legal Privilege

In the US, the attorney-client privilege protects confidential communications between a lawyer and a client relating to legal advice sought by the client. The elements of the attorney-client privilege, "while easy to recite, are often hard to apply." *United States v. Massachusetts Gen. Hosp.,* 475 F. Supp. 3d 45, 63 (D. Mass. 2020). In general, however, the attorney-client privilege will apply so long as these basic elements are met: (1) a communication; (2) made between privileged persons; (3) in confidence; and (4) for the purpose of seeking, obtaining or providing legal assistance to the client. Ultimately, "[t]he critical inquiry is whether, viewing the … communication in its full content and context, it was made in order to render legal advice or services to the client." *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 379, 581 N.E.2d 1055, 1061, 575 N.Y.S.2d 809, 815 (1991).

Thus, the application of legal privilege is not limited to when counsel has been retained to represent a company in active litigation. Rather, it is well settled that the attorney-client privilege "applies to communications between corporate counsel and a corporation's employees, made 'at the direction of corporate superiors in order to secure legal advice from counsel.'" *In re GM LLC Ignition Switch Litig.,* 80 F. Supp. 3d 521, 527 (S.D.N.Y. 2015).

## Legal Privilege and Internal Investigations

Under US law, for the attorney-client privilege to apply, the company must perform its investigation "for the purpose of obtaining legal advice," and not simply in the ordinary course of business.

This rule is the most foundational requirement for protecting a company's internal investigation under the attorney-client privilege. Recently, a US District Court for the Eastern District of New York addressed this issue in *Cicel (Beijing) Science & Technology Co. LTD v. Misonix, Inc.,* 331 F.R.D. 218 (E.D.N.Y. 2019). In *Cicel Science*, the defendant investigated the conduct of a Chinese distributor, the plaintiff, with the assistance of outside counsel. As a result of the investigation, the company terminated its contract with the distributor, who was found to be violating the Foreign Corrupt Practices Act.

The distributor sought to compel production of the defendant's investigatory materials, and asserted that the attorney-client privilege did not apply, because the investigation was a simple fact-finding inquiry that a non-lawyer 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."[1] *Id.* at 224-25.

1 https://www.jdsupra.com/legalnews/legal-privilege-of-corporate-internal-96023/

The court in *Cicel Science* disagreed with the plaintiff, and held that the investigation was privileged because its "primary purpose" was to provide legal advice to the company. According to an affidavit from outside counsel, the firm conducted confidential interviews of current and former employees and recited *Upjohn* warnings in each instance (discussed in detail below). The affidavit also noted 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 the [company's] products in China."[2] Thus, the court held that all communications from the company's internal investigation were privileged.

## Ordinary Course of Business

The attorney-client privilege would not apply, however, to internal investigations performed in the ordinary course of a company's business, or when an investigation was required by state or federal law. *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) (no privilege for drafts of investigation reports prepared by the insurer's attorneys in investigation required in the normal course of business to determine if underlying policy applied).

For example, in *Beasley v. Rowan Cos., Inc.,* a US District Court for the Eastern District of Louisiana considered whether legal privilege applied to an internal investigation of a safety incident that occurred on an offshore oil rig. No. 18-cv-365, 2019 WL 1676017, at *2–3 (E.D. La. Apr. 17, 2019). The injured plaintiff argued that the investigation was not privileged because it was conducted in the ordinary course of the company's business for safety and regulatory compliance reasons, not in anticipation of litigation. The court agreed on the grounds that the investigation was performed by non-attorney employees and focused on safety, not litigation, with "no mental impressions or other legal analysis." *Id.* at *3. The court also held that interview notes prepared by non-lawyers as part of the investigation were also not protected because they contained no mental impressions of the interviewer, were not prepared at counsel's direction, were simply part of the company's ordinary course of business, and were not prepared in anticipation of litigation. *Id.* at *4.

## Third-party Vendors Aiding in ESG Work

In many instances, a company's ESG supply chain investigation may be aided by engaging outside vendors, but then the question arises: Will such vendors be under the privilege umbrella? Under general principles of attorney-client privilege under US law, the answer is yes: The attorney-client privilege applies to communications with third parties if the purpose of the third party's participation is to improve the communication between the attorney and the client. *United States v. Ackert,* 169 F.3d 136, 139-40 (2d Cir. 1999).

This principle was developed in *United States v. Kovel*, where the Second Circuit held that the attorney-client privilege applied to communications with an accountant employed by outside counsel when "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." 296 F.2d 918, 922 (2d Cir. 1961). "Analogizing an accountant to an interpreter who provides foreign language translation for an attorney, the court clarified that the privilege would apply regardless of whether the accountant was present for the consultation with the attorney and the client, or the attorney had directed the client to communicate with the accountant directly; 'What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.'" *Montesa v Schwartz*, 2016 US Dist. LEXIS 80822, at *29 (S.D.N.Y June 20, 2016).

Since *Kovel*, the Second Circuit has noted that the *Kovel* decision "recognized that the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client." *United States v. Ackert,* 169 F.3d 136, 139-40 (2d Cir. 1999).

To ensure communications remain privileged with a third-party technology vendor aiding in the ESG investigation, outside counsel should retain the vendor. Counsel should coordinate the vendor's invoicing, communicate directly with the vendor, and use all information from the vendor for the purpose of providing legal advice to the client.

## Ensuring That Information From Suppliers Is Privileged

Assessing a company's ESG compliance and all aspects of its supply chain also likely means collecting information from third-party suppliers, distributors, and manufacturers. Usually, the voluntary disclosure of privileged communications to a third party waives the attorney-client privilege. *Curto v. Med. World Commc'ns, Inc.*, 783 F.Supp. 2d 373, 378 (E.D.N.Y. 2011). Similarly, information sought from a third party generally would also not be considered privileged.

The attorney-client privilege, however, can extend to third parties beyond the attorney and client when the purpose of the communication is to assist the attorney in rendering advice to the client. *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995). Indeed, in *Cicel Science* (discussed in detail above), as part of the internal investigation by the defendant of its distributor, the defendant's outside counsel interviewed two executives of the plaintiff. The interviews were not recorded, but the defendant's attorneys took notes during the interviews, which "reflect[ed] the questions counsel chose to ask and [their] mental impressions and opinions . . . ." The court held the attorney's notes were privileged – even if they contained simple factual information – because the plaintiff failed to show "that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means."

2 https://www.jdsupra.com/legalnews/legal-privilege-of-corporate-internal-96023/

To keep information obtained from a third party privileged, all interviewers should recite the "*Upjohn* Warnings"[3] to interviewees, which include the following:

1. That the attorney does not represent the interviewee
2. The purpose of the interview is to gather information to assist in providing legal advice to X company
3. The interview is privileged
4. The privilege belongs to X company
5. The interviewee should keep confidential the matters discussed at the interview

*Cicel (Beijing) Science & Tech. Co. v Misonix, Inc.*, 331 F.R.D. 218 (E.D.N.Y. 2019).

Notably, while the plaintiff in *Cicel Science* was a Chinese company, the court did not discuss or address whether obtaining information from companies in countries outside the US, like China, required a different procedure or implicated different privilege rules than if the company was in the US.

## Additional Protections Conferred by the Work Product Doctrine

The attorney work product doctrine is a separate legal protection from the attorney-client privilege and protects from disclosure "documents prepared 'in anticipation of litigation or for trial by or for [a] party or by or for that … party's representative.'" *Ruotolo v. City of New York*, No. 03-cv-5045, 2005 U.S. Dist. LEXIS 5958, 2005 WL 823015, at *1 (S.D.N.Y. Apr. 6, 2005).

To be protected under the work-product doctrine, the material must (1) be a document or a tangible thing, (2) that was prepared in anticipation of litigation, and (3) that was prepared by or for a party, or by their representative. Materials need not be prepared for litigation, only in anticipation of litigation to be protected as work product. *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).


## Limit Disclosure of Investigation Documents

To maintain any applicable privilege, the distribution of any documents prepared during an investigation may be distributed only as broadly as necessarily for the purposes of the investigation. The more broadly distributed, the higher the chance the documents lose their privilege. This is especially important when sharing information with non-attorneys. "Although direct lawyer involvement is not required for the privilege to attach, a lawyer must have 'some relationship to the communication such that the communication(s) between the non-lawyer employees would reveal, directly or indirectly, the substance of a confidential attorney-client communication.'" *Crabtree v. Experian Info. Solutions, Inc.*, 2017 US Dist. LEXIS 173905 (ND Ill Oct. 20, 2017, No. 1:16-cv-10706).

For example, in *Wengui v. Clark Hill, PLC*, 338 F.R.D. 7 (D.D.C. 2021), a law firm was the victim of a cyberattack on its client database. After the attack, the law firm launched an investigation and hired a cybersecurity firm and outside counsel to assist. *Id.* at *9. The cybersecurity firm created an investigative report, which included "specific remediation advice," which was shared with "select members of the leadership and the IT team" of the law firm. *Id.* at *12. In subsequent litigation, a US district court rejected the law firm's assertion of privilege with respect to the investigation report for a number of reasons, including that the report was "not just shared with outside and in-house counsel, but also with [defendant's] leadership and IT teams, as well as the FBI." *Id.* at *12.

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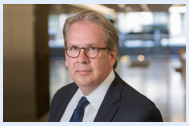

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3 The Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), held that questionnaires and notes drafted during an investigation by an attorney were protected by privilege, and supported the view that fact-finding may constitute legal advice for purposes of attorney-client privilege. The Court stated, "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."