The Attorney-Client Privilege and the Work Product Immunity Doctrine for the Corporate Client

Nancy C. Cody
Dinsmore & Shohl LLP

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Corporate counsel are charged with the task of protecting information relayed to them or compiled at the behest of a client. This article examines problems encountered by corporate counsel attempting to invoke the attorney-client privilege or work product immunity doctrine to protect information. The author recommends that corporate counsel implement procedures designed to retain confidentiality and remain abreast of modifications in case law pertaining to attorney-client privilege and work product immunity. The confidentiality of corporate information is best preserved by adherence to an organized system of procedures for gathering information.

I. INTRODUCTION

In the day-to-day activities of corporate counsel, the attorney-client privilege and the work product immunity doctrine are seldom of more than peripheral concern. Attorneys for corporations, whether corporate employees or outside counsel, communicate freely with company directors, officers, and employees under the assumption that the contents of such communications, resulting memoranda, and reports will remain confidential. Should the matters under discussion become the subject of litigation, however, application of the attorney-client privilege and the work product immunity doctrine is not as automatic or comprehensive as counsel might expect.

Court rulings concerning the attorney-client and work product privileges identify recurring pitfalls for counsel when these doctrines are invoked in corporate litigation. Avoidance of these pitfalls requires awareness and advance planning. Counsel should establish procedures for obtaining information and providing legal services that maximize the client’s ability to protect confidential communications from disclosure in subsequent litigation. This article examines the status of the attorney-client privilege and the work product immunity doctrine in the corporate setting and offers practical suggestions to assist corporate counsel in their efforts to avoid loss or waiver of the protections these legal principles afford corporate clients.

† B.A., College of Mount St. Joseph, 1978; J.D., University of Cincinnati College of Law, 1981; Associate, Dinsmore & Shohl, Cincinnati, Ohio.
II. OVERVIEW OF THE ATTORNEY-CLIENT AND WORK PRODUCT IMMUNITY PRIVILEGES

Reliance on the advice of counsel enables both corporations and individuals to conform their conduct to the requirements of the law. When legal proceedings arise, the adversary system anticipates that attorneys for each side will prepare their cases thoroughly and independently, without taking unfair advantage of their opponent's trial preparation. The attorney-client privilege and the work product immunity doctrine are intended to advance these legal and social aims. In practice, both the attorney-client privilege and the work product immunity doctrine protect the privacy between a client and his attorney, which promotes the candid exchange of information that is necessary to develop a comprehensive litigation strategy.

A. Attorney-Client Privilege

Confidentiality for attorney-client communications is one of the oldest testimonial privileges recognized at common law.\(^1\) Modern development of this rule in case law reflects the practical purpose of the attorney-client privilege: to promote clients' freedom of consultation with legal advisors.\(^2\) In order to provide their clients with competent representation, attorneys must be advised fully regarding their clients' circumstances. Clients, on the other hand, cannot entrust their problems to their attorneys without some assurance against compulsory disclosure of such information.

Although the attorney-client privilege originated in the common law,\(^3\) it is codified in specific statutes in numerous jurisdictions.\(^4\) The classic formulation of the attorney-client privilege is set forth in United States v. United Shoe Machinery Corp.:\(^5\)

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communica-

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tion is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In short, where legal advice is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at the instance of the client permanently protected from disclosure, unless the protection is waived. 6

B. Work Product Immunity Doctrine

In the landmark case of Hickman v. Taylor, 7 an action for the wrongful death of a seaman in a tug boat accident, the United States Supreme Court established a qualified immunity from discovery for materials prepared by or for an attorney in anticipation of litigation or in preparation for trial. 8 The plaintiffs in Hickman attempted to compel the production of statements that the tug owners' attorney, with an eye toward future litigation, had taken from witnesses shortly after the accident. 9 The Supreme Court, interpreting the discovery provisions in the Federal Rules of Civil Procedure, 10 held the statements privileged, citing the general policy against invading the privacy of an attorney's trial preparation, 11 absent compelling reasons that justify such invasion. 12

8. Id. at 507-08.
9. Id. at 498.
10. In 1938, the Federal Rules of Civil Procedure expressly limited discovery in only two instances: 1) where the deposition was conducted in bad faith or in such a manner as to annoy, embarrass, or oppress the person subject to the inquiry, FED. R. CIV. P. 30(b); and 2) where the requested information touched upon irrelevant matters or encroached upon the recognized domains of privilege, FED. R. CIV. P. 26(b). The Supreme Court, however, found that "the memoranda, statements, and mental impressions in issue in [Hickman fell] outside the scope of the attorney-client privilege and hence [were] not protected from discovery on that basis." 329 U.S. at 507-08.
11. The Court stated:
Proper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop
As presently codified in the Federal Civil Rules, the work product immunity doctrine is broader in scope than the attorney-client privilege. Federal Rule of Civil Procedure 26(b)(3) provides:

A party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Although the work product immunity doctrine and the attorney-client privilege are closely related, there are significant differences in application. For example, although "work product" may be that of an attorney, the concept of "work product" is not confined to information or materials gathered or assembled by a lawyer. Furthermore, "a communication may be immune from discovery as work product even though it was not made to or by a client of an attorney." Unlike the attorney-client privilege, however, work product immunity applies only to documents prepared in anticipation of litigation, not to documents prepared for ordinary business purposes. In addition, the work product immunity doctrine may be defeated by a showing that the protected information is crucial to the case and the same or substantially equivalent information cannot be obtained by the other side without undue hard-

in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing and the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511.
12. Id. at 512-14.
13. The work product immunity doctrine also can apply to material such as deposition summaries prepared by paralegals, reports of private investigators hired by the attorney, indices to documents prepared by clerical personnel at the attorney's request, and similar items. See generally M. Larkin, Federal Testimonial Privileges § 11.02 & n.47 (1985).
14. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977) (en banc).
15. Cf. Janicker v. George Washington Univ., 94 F.R.D. 648, 650 (D.D.C. 1982) (safety records of minor accidents kept as a routine business matter to reduce risks to employees or to satisfy an insurance carrier may be considered ordinary business records, rather than work product, particularly if the records are not made upon advice of counsel or are not kept confidential). As is evident from Janicker, the distinction between documents prepared in anticipation of litigation and documents prepared for an ordinary business purpose is not always an easy one to make.
Moreover, like the attorney-client privilege, the protection afforded to work product documents can be waived.\(^\text{17}\)

Rule 26(b)(3) of the Federal Rules of Civil Procedure states that if a court orders production of work product materials, the court “shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of the attorney or other representative of a party concerning the litigation.”\(^\text{18}\) Some courts have held that such material enjoys a new absolute privilege;\(^\text{19}\) other courts, however, simply have required a stronger showing of need and hardship to overcome the privilege.\(^\text{20}\) Because the Supreme Court has declined to resolve this conflict,\(^\text{21}\) work product containing such information as that ostensibly protected by Rule 26(b)(3) remains at risk of disclosure.

The application of Rule 26(b)(3) to work product generally requires \textit{in camera} review of the documents sought to determine the applicability of the immunity doctrine and to protect privileged material from unwarranted scrutiny. Even states that restrict the scope of work product immunity provide a privilege for “mental impression” work product.\(^\text{22}\) Often, when work product documents are ordered disclosed pursuant to a finding of substantial need and undue hardship, it has been suggested that courts should permit material reflecting the attorney’s thought processes to be redacted before the documents are produced to the oppo-

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16. \textit{In re} Sealed Case, 676 F.2d 793, 809 n.59 (D.C. Cir. 1982). “Undue hardship” generally is considered something more than mere inconvenience or expense; it is found only when opposing counsel cannot obtain substantially equivalent information elsewhere. \textit{Id.}

17. Western Fuels Ass’n \textit{v.} Burlington N.R.R., 102 F.R.D. 201, 203 (D. Wyo. 1984); \textit{see infra} notes 36-39 and accompanying text.


20. \textit{See, e.g., In re} Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (government unable to meet higher burden of need and hardship to compel corporation to produce employee interview memoranda); Harper & Row Publishers, Inc. \textit{v.} Decker, 423 F.2d 487 (7th Cir. 1970) (good cause shown by plaintiffs seeking document prepared by defendant’s counsel following his client’s testimony before a grand jury), \textit{aff’d}, 400 U.S. 348 (1971) (Court equally divided); Xerox Corp. \textit{v.} I.B.M., 64 F.R.D. 367, 377-81 (S.D.N.Y. 1974) (plaintiff made sufficient showing of good cause where 23 key witnesses in trade secrets case were interviewed by defendant but were not available for plaintiff to examine).


nent. For a communication or document to be privileged, it must remain confidential. Generally, when an attorney-client communication or trial preparation material is shared with an outsider the privilege is destroyed.

III. SPECIAL PROBLEMS IN APPLYING THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT IMMUNITY DOCTRINE IN THE CORPORATE SETTING.

In the corporate setting, unique problems arise regarding the application of the attorney-client privilege and work product immunity doctrine. Questions that are relatively simple in the context of individual representation often become much more complex in corporate practice. For example, in the representation of a corporation, the determination of who is the "client," is not always clear; nor is it always certain from whom confidential material may be withheld. Furthermore, the distinction between privileged legal advice or work done "in anticipation of litigation" and unprivileged ordinary business communications is often quite subtle. Moreover, various actions engaged in by corporations are deemed to waive these protections, and such actions may affect the assertion of the attorney-client privilege and the work product immunity doctrine by individual officers or directors regarding their communications with corporate counsel. The corporation also is faced with the dilemma of maintaining forthright and cooperative relationships with federal regulatory agencies, while contemporaneously attempting to preserve the confidentiality necessary for the attorney-client privilege and work product immunity doctrine. These concerns generally do not arise during the representation of individual clients. The interests of individual clients usually are identified easily and are not complicated by the involvement of numerous officers, employees, and agents. Moreover, privileges as-

23. See In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (government agreed to redaction of opinion work product); see also Hodgson v. Keller Brass, 56 F.R.D. 126 (1972) (extent to which attorney work product will be protected must be judged by court on an ad hoc basis).
26. See infra notes 78-91 and accompanying text.
27. See infra notes 115-21 and accompanying text.
asserted by individual clients generally do not implicate fiduciary relationships such as those between a corporation and its shareholders.

Courts are reluctant to shield information from discovery and generally require a clear showing that the requirements of the privilege, including absence of waiver, have been met. It is important to remember that evidentiary privileges are strictly construed, and that the burden of asserting and establishing the privileged nature of a document or communication falls upon the party resisting discovery. Hence, protecting clients from the consequences of an adverse ruling on privilege is not an easy task. Corporate attorneys must acquaint themselves with the legal principles governing the attorney-client privilege and the work product immunity doctrine and adhere to practices that are most likely to result in maintaining privileged status for sensitive information. Because of the lack of concrete standards and direction from the Supreme Court, attorneys also need to keep abreast of changes in their jurisdiction's case law in this area.

Successful assertion of the privilege for attorney-client communications and work product in the corporate setting requires attention to the factual circumstances surrounding the communications in question. If a district court finds that a privilege is being asserted in furtherance of a crime or fraud, for example, the privilege will not be upheld. If the communication sought to be protected appears to involve only ordinary business matters, as opposed to legal advice, assertion of privilege will not be upheld. Disclosing privileged material to outside parties ordinarily waives the privilege. Any "testimonial use" of the material, such as providing privileged material to an expert witness during preparation for his deposition or trial testimony, also will result in a waiver. Often, if a privilege applicable to certain subject matter is waived, courts will require disclosure to the opponent of all information relevant to that subject matter.

30. In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979). "Because the privilege obstructs the search for the truth and because its benefits are, at best, 'indirect and speculative,' it must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" 559 F.2d at 1224 (quoting 8 J. WIGMORE ON EVIDENCE § 2291, at 554 (McNaughton rev. ed. 1961)).
33. See infra notes 40-54 and accompanying text.
34. In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984); In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982).
ramifications beyond the corporation itself. For example, waiver of the attorney-client privilege by the corporation may be held to waive the privilege as to individual employees’ communications with corporate counsel. The eventual result of waiver in subsequent civil or criminal litigation, of course, can have substantial impact on corporate liabilities and, ultimately, on the value of corporate shares and debt instruments.

IV. CURRENT STATUS OF THE CORPORATE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES IN CASE LAW

A. The Supreme Court

In Upjohn Co. v. United States, the Supreme Court reaffirmed application of the attorney-client privilege and work product immunity doctrine to the rendition of legal services in the corporate setting. The Supreme Court held that the attorney-client privilege did not apply solely to communications between corporate counsel and the so-called “control group” of key corporate officers and executives authorized to act upon counsel’s advice, a rule that had been adopted by a number of federal courts. Instead, the Court held that the attorney-client privilege encompasses communications between corporate counsel and lower level employees when the employees are aware that the communication is undertaken to allow the corporation to obtain legal advice. Under Upjohn, a corporate employee’s communication to corporate counsel, made at the direction of his superior regarding matters within the scope

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40. 449 U.S. 383 (1981). Upjohn involved a pharmaceutical firm’s internal investigation of alleged overseas bribes to foreign governments. During the course of the investigation, undertaken at the behest of the company’s general counsel, low-level managerial employees were required to answer questionnaires concerning such payments. The IRS issued a summons demanding production of both the questionnaires and memoranda concerning employee interviews. Id. at 386-89.
42. Upjohn, 449 U.S. at 391-97.
of the employee's job responsibilities, constitutes a privileged attorney-client communication. The *Upjohn* decision similarly affirmed that the work product immunity doctrine, set forth in *Hickman v. Taylor* and codified in Federal Rule of Civil Procedure 26(b)(3), applies to documents generated by or on behalf of corporate counsel. The *Upjohn* decision makes it clear that "work product" refers not only to documents prepared by an attorney, but also to work done by others at counsel's direction in preparation for litigation. Work product materials that reflect an attorney's mental impressions, theories, and strategy concerning impending litigation may be withheld from discovery, despite the opponent's asserted need for such materials or the hardship resulting from nondisclosure.

Although clearly helpful to corporate counsel seeking to invoke the attorney-client privilege or the work product immunity doctrine, the *Upjohn* decision left a number of questions unanswered. In rejecting the "control group" standard, the majority refused to articulate a test for application of the corporate attorney-client privilege. Instead, the *Upjohn* majority expressly called for a case-by-case approach consistent with the ground rules set forth in *Hickman*, Federal Rule of Civil Procedure 26, and the *Upjohn* opinion. Moreover, the Court did not indicate what type or degree of "substantial need" or "undue hardship" must be shown to overcome a valid claim of work product protection for trial preparation materials. Although the majority opinion suggests that attorney work product reflecting mental impressions, theories, opinions, and litigation strategy is absolutely privileged, the Court also left this issue open to further debate.

In summary, the *Upjohn* decision leaves corporate attorneys in an uncertain position. Communications with corporate employees and trial preparation efforts sought by the other side may or may not be discoverable, depending upon the attending circumstances and case law in individual jurisdictions.

Since *Upjohn*, the Supreme Court has not refined the flexible stan-

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43. 329 U.S. 495 (1947).
44. 449 U.S. at 387-88.
45. *Id.* at 401. The type of work product material subsumed under this general description is subject to considerable dispute. A distinction has been made between an attorney's mere recordation of observed facts and the "opinions of the attorney." *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1218-19 (4th Cir. 1976); *see also United States v. Capitol Serv.*, Inc., 89 F.R.D. 578, 585 (E.D. Wis. 1981).
46. 449 U.S. at 396-97.
47. *Id.* at 401-02.
48. *Id.*
49. For example, under Maryland case law, communications made by the client to a psychiatrist for the purpose of seeking legal advice are within the scope of the attorney-client privilege if the psychiatrist is retained to assist the attorney in rendering legal advice. *Pratt v. State*, 39 Md. App. 442, 387 A.2d 779 (1978). This privilege does not apply if the psychiatrist is consulted for treatment rather than to assist the attorney. *Id.* Such communications may not be considered within the attorney-client privilege in other jurisdictions.
dards for application of the attorney-client privilege to corporations. In a recent decision, however, the Court limited the scope of work product immunity for materials generated in preparation for litigation. In United States v. Arthur Young & Co., the Court held that a corporate taxpayer could not assert a privilege for the work product of an outside accounting firm employed by the corporation to assure compliance with federal securities laws. The Second Circuit had given work product immunity to tax accrual papers that were prepared by the corporation's independent auditors and sought pursuant to an IRS subpoena. The Court of Appeals for the Second Circuit held that the public interest in promoting full disclosure to public accountants, which in turn promoted the integrity of the securities market, required that work such as that performed by independent auditors be protected.

The United States Supreme Court reversed, holding that no accountant-client privilege or work product immunity attached to the tax accrual work papers. The special duties undertaken by certified public accountants to protect the general public were found to transcend their employment relationship with the client. The Court noted that should the SEC or a private litigant seek access to such documents, "they would surely be entitled to do so." The Court therefore held that the IRS also should have access to the material because the need for full disclosure to the government outweighed the interest in encouraging corporate clients to disclose to their independent accountants.

The Arthur Young decision leaves corporations without work product protection for "compliance assurance" audits conducted by public accountants. The decision leaves open the possibility, however, that the privilege will be preserved if such audits are conducted by in-house auditors under the supervision of the corporations' general counsel. An alternative course of action that would preserve the privilege is for the corporation to hire an outside law firm to supervise the investigation and allow the law firm to retain its own accounting consultants. Use of these types of alternatives demonstrates more emphatically the litigation-related purpose of the accounting services and the nexus between the audits and the rendition of legal advice. Neither of these courses of action, however, will render the results of such audits confidential unless litigation is

52. Id. at 220-21.
53. 465 U.S. at 820; see Securities Act of 1933, § 19, 48 Stat. 85, 15 U.S.C. § 77s(b) (For purposes of "all necessary and proper" investigations, the Securities and Exchange Commission is empowered to "require the production of any books, papers, or other documents which the commission deems relevant or material to the inquiry.").
54. 465 U.S. at 821. The court stated that, "[b]eyond question it is desirable and in the public interest to encourage full disclosure by corporate clients to their independent accountants; if it is necessary to balance competing interests, however, the need of the government for full disclosure . . . must also weigh in the balance." Id.
foreseeable; routine audits for business unrelated to present or prospective legal actions will not be privileged.

B. Recent Lower Court Decisions

Lack of Supreme Court guidance has left the lower federal courts in disagreement as to the application of the attorney-client privilege and work product immunity doctrine in the corporate setting. Attempts by the lower federal courts to apply *Upjohn* to cases concerning the application of the attorney-client privilege and work product immunity doctrine to corporate parties have produced divergent results.

1. Shareholder and Derivative Suits

A controversial issue in recent years has been whether corporate managers can assert the attorney-client privilege or work product immunity doctrine in shareholder and derivative suits. In these suits, typically one or more shareholders sue the corporation directly or institute proceedings against corporate management individually or "derivatively" as representatives of the corporation itself, challenging decisions that affect the company or the value of its stock. At first blush, it seems anomalous that the management of a corporation should have an evidentiary privilege to withhold from the corporation's shareholders information from attorneys who ostensibly are acting on the corporation's behalf. As a practical matter, however, both shareholder and derivative suits pit corporate management and the majority shareholders against an individual shareholder or a disgruntled minority of shareholders in a confrontation where mutuality of the parties' interests has been destroyed. In view of this adversarial relationship, a corporation ordinarily is entitled to assert attorney-client privilege and work product immunity against the plaintiff shareholders.

In *Garner v. Wolfinbarger*, the Fifth Circuit created a significant loophole in the corporate attorney-client privilege. The United States Court of Appeals for the Fifth Circuit held that if shareholders charge that corporate management is acting inimically to those shareholders'...
interests, the availability of the attorney-client privilege is subject to the shareholders’ right to show cause why the privilege should not be upheld.\textsuperscript{58} The Garner court reasoned that it was anomalous to allow the privilege automatically under all circumstances, because the corporation’s attorneys ultimately are supposed to act on the shareholders’ behalf.\textsuperscript{59} In ruling on privilege claims in derivative or shareholder suits, the Garner court found these factors relevant:

1) the colorable nature of the shareholder’s claim;
2) the shareholder’s good faith;
3) the necessity or desirability for the shareholder to have the information;
4) whether the information is available elsewhere;
5) whether the claim alleges activity that is criminal, illegal, or of merely doubtful legality;
6) whether the communication relates to past or prospective actions;
7) whether the communication sought is related to the shareholder’s suit;
8) the specificity of information sought (no fishing expeditions); and
9) the risk of revealing trade secrets or other information the corporation seeks to keep confidential for reasons extraneous to the litigation.\textsuperscript{60}

Courts attempting to apply Garner have reached conflicting results, largely due to differing views on the weight that should be given to the competing interests and policies involved in such disputes. On occasion, lower courts deny application of the attorney-client privilege, only to have the privilege reinstated on appeal. In Ohio-Sealy Mattress Manufacturing Co. v. Kaplan,\textsuperscript{61} a class action and derivative antitrust suit, the district court reversed the magistrate’s decision that the plaintiffs had established grounds for depriving the defendants of their attorney-client privilege.\textsuperscript{62} In its decision, the district court relied upon the following facts: 1) plaintiffs’ representation of fewer than one percent of Sealy’s shares; 2) the information sought by the plaintiffs pertained to past conduct, not to the shareholder litigation; and 3) the disclosure of the information could be used against the corporation in individual litigation between the plaintiffs and Sealy.

\textsuperscript{58} Id. at 1103-04.
\textsuperscript{59} Id. at 1101.
\textsuperscript{60} Id. at 1103-04.
\textsuperscript{61} 90 F.R.D. 21 (N.D. Ill. 1980), aff’d sub nom. Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 669 F.2d 490 (7th Cir.), cert. denied, 459 U.S. 943 (1982). The plaintiff shareholders in Sealy, who held only 0.7 percent of Sealy shares, filed a class action antitrust suit challenging certain corporate actions involving corporate licensees. Id. at 23-25.
\textsuperscript{62} Id. at 30-31.
Similarly, in *In re International Systems & Controls Corp. Securities Litigation*, shareholders' derivative and class action suits were brought against International Systems and Controls and its board of directors, alleging fraud and violations of federal securities laws. The United States District Court for the Southern District of Texas attempted to extend the good cause exception of *Garner* by ruling that plaintiffs could have access to certain work product materials produced by ISC attorneys in connection with an internal corporate investigation of questionable overseas payments. On appeal of the discovery order, the Fifth Circuit reversed, holding that once there is sufficient anticipation of litigation to trigger work product immunity, the mutuality of interest between dissident shareholders and corporate management is destroyed. Under such circumstances, the plaintiff shareholders cannot discover work product of corporate attorneys absent a showing of substantial need, undue hardship, or both.

In the *International Systems* decision, the Fifth Circuit expressly declined to extend the *Garner* holding to work product immunity. Failure to recognize that the "mutuality of interest" between shareholder and management ceases to exist in shareholder litigation, the court observed, "would be to ignore modern corporate realities." Two parties anticipating litigation against each other do not have a common interest. It is not reasonable to indulge in the fiction that counsel, hired by management, also is hired constructively by the party against whom counsel is expected to defend. Furthermore, because the shareholders had not provided prima facie proof that fraudulent or criminal activity was underway in connection with preparation of the work product materials sought to be discovered, the United States Court of Appeals for the Fifth Circuit refused to require disclosure.

Other courts also have limited the scope of *Garner*. In *Weil v. Investment/Indicators, Research & Management, Inc.* the Ninth Circuit held that *Garner* did not apply to a class action, other than a derivative suit, brought by someone other than a current corporate shareholder.

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63. 693 F.2d 1235 (5th Cir. 1982). The case was a shareholder derivative suit alleging that company representatives paid illegal bribes in the form of "commissions" to foreign officials to secure contracts in the Middle East. Independent directors, an outside law firm, and the accounting firm of Arthur Young & Co. (the company's regular outside auditor) formed an internal "special audit committee" to investigate the payments. *Id.* at 1237.

64. 693 F.2d at 1237.


66. 693 F.2d at 1239.

67. *Id.* at 1239-40.

68. *Id.* at 1240.

69. *Id.* at 1239.

70. *Id.*

71. *Id.* at 1242-43.

72. 647 F.2d 18 (9th Cir. 1981).

73. *Id.* at 23. In *Weil*, a mutual fund shareholder who had suffered substantial losses
The United States Court of Appeals for the Ninth Circuit reasoned that where former rather than present stock owners are involved, the Garner holding and policy rationale do not apply. Likewise, in In re Dayco Corp., the United States District Court for the Southern District of Ohio, following the Fifth Circuit's lead, required a showing of substantial need, undue hardship, or both before plaintiffs in a derivative action could obtain access to the work product of the corporation's attorneys. Nevertheless, courts continue to pay lip service to Garner, while finding in most cases that the requirements for application of the Garner rationale have not been met.

Although the Garner decision remains viable, corporate counsel must be alert to the possibility that, in an appropriate case, a trial court will refuse to recognize an attorney-client privilege for communications between the corporation and its attorneys in shareholder or derivative suits. This possibility should be anticipated, particularly if the circumstances favoring disclosure, as set forth in Garner, are present. To maximize the corporation's chances of prevailing on a claim of privilege, careful documentation of the involvement of counsel and the litigation-related purposes must be maintained.

2. Corporate Housekeeping

Another area of controversy in recent years has been the extent to which the fruits of in-house corporate investigations into suspected employee wrongdoing are discoverable. During the 1970's, allegations of improper payments for overseas contracts, political "slush funds," and other types of sub rosa conduct among corporate employees led to the widespread practice of retaining outside counsel or accounting firms, or establishing an in-house committee, to determine the nature and extent of wrongdoing. Such committees often confidentially interview employees, review corporate records, and issue reports or memoranda summarizing their findings and conclusions. In subsequent litigation, filed suit against the fund and certain of its officers and directors, alleging violations of numerous securities laws. During the course of discovery, the plaintiff attempted to obtain answers to interrogatories concerning communications between officers of the fund and corporate counsel retained to assure compliance with state "Blue Sky" laws. Id. at 21-22.

74. Id. at 23. The court reasoned that Garner was inapplicable in cases where former shareholders sought damages on their own behalf, because corporate attorneys act for the corporation and its present shareholders.

75. 99 F.R.D. 616 (S.D. Ohio 1983). This case involved a shareholders' derivative action alleging securities violations in the form of phantom commissions paid to a broker on the basis of nonexistent overseas contracts. The plaintiffs moved to compel production of a "Report of Counsel to the Special Review Committee of the Board of Directors of the Dayco Corporation," prepared by the committee and retained counsel in anticipation of litigation. Id. at 618 n.1.

76. Id. at 621.

corporations have attempted, with varying degrees of success, to claim that the attorney-client privilege shields these materials from discovery.\textsuperscript{78}

In \textit{Upjohn Co. v. United States},\textsuperscript{79} the Supreme Court held that the attorney-client privilege protected the reports of an in-house corporate committee from IRS subpoena. \textit{Upjohn} has been followed by the lower federal courts. In \textit{Baxter Travenol Laboratories, Inc. v. Lemay},\textsuperscript{80} the plaintiff corporation hired a litigation consultant to investigate violations of employment contracts and wrongful appropriation of business information allegedly perpetrated by former employees. The defendants sought a ruling that would have allowed them to depose the consultant about his conversations with in-house counsel. Applying \textit{Upjohn}, the United States District Court for the Southern District of Ohio held that the consultant's conversations with in-house counsel were protected from discovery by the corporation's attorney-client privilege.\textsuperscript{81} The court made it clear, however, that the attorney-client privilege did not preclude discovery of the consultant's knowledge of the underlying facts; only the contents of conversations or other communications with counsel are protected.\textsuperscript{82}

\textit{In re Dayco Corp.}\textsuperscript{83} similarly involved the proposed discovery of a report by an in-house committee investigating improper employee conduct.\textsuperscript{84} A "Special Review Committee" comprised of the corporation's board of directors and outside counsel conducted an investigation into Dayco's involvement with improper payment of commissions for nonexistent overseas contracts. The United States District Court for the Southern District of Ohio held that the report containing the committee's findings and conclusions was protected by the attorney-client privilege, the work product immunity doctrine, or both.\textsuperscript{85} Furthermore, the court held that despite persuasive arguments to the contrary, the privileges had not been waived or overcome by a showing of substantial need and undue hardship pursuant to Federal Rule of Civil Procedure 26(b)(3).\textsuperscript{86} The court noted that the individuals interviewed by the committee were available for the plaintiffs to depose and that discovery procedures insured the


\textsuperscript{80} 89 F.R.D. 410 (S.D. Ohio 1981).

\textsuperscript{81} Id. at 415.

\textsuperscript{82} Id.

\textsuperscript{83} 99 F.R.D. 616 (S.D. Ohio 1983). For a discussion of the facts involved in \textit{In re Dayco Corp.}, see \textit{supra} notes 75-76 and accompanying text.

\textsuperscript{84} Id. at 618.

\textsuperscript{85} Id. at 621.

\textsuperscript{86} Id. at 620-21. The court found that because the report was protected by the attorney-client privilege and the work product immunity doctrine, the \textit{Garner} good cause balancing test should be replaced by the stricter substantial need test. Id. at 621.
production of company documents underlying the report.\footnote{87}

In \emph{In re International Systems \& Controls Corp. Securities Litigation},\footnote{88} a corporation established a "special audit committee" of independent directors who hired a law firm and an accounting firm to investigate alleged "sensitive payments" to foreign nationals in connection with contract negotiations. The Fifth Circuit held that binders containing information developed during the committee's special review were \textit{prima facie} protected under the work product immunity doctrine.\footnote{89} The United States Court of Appeals for the Fifth Circuit refused to extend \textit{Garner} to work product materials and held that there had been no showing of an ongoing crime or fraud sufficient to overcome the immunity accorded work product.\footnote{90} The court of appeals remanded the case to the district court, noting that for the binders to be produced the plaintiff must make a particularized showing that the equivalent of the subpoenaed work product materials could not be obtained elsewhere.\footnote{91}

\textbf{C. Disclosures to the SEC}

As noted previously,\footnote{92} conversations and documents must be kept confidential if the client wishes to preserve its right to assert the attorney-client privilege or work product immunity for such communication. In the context of publicly held corporations, this principle poses a question that has been the subject of considerable litigation and dispute: To what extent does voluntary disclosure of privileged information to government agencies waive the privilege in subsequent litigation?

Courts ruling on this question have reached conflicting decisions regarding the effect of agency disclosure on evidentiary privileges. One line of cases, citing the overriding public policy of encouraging full cooperation with and disclosure to federal agencies, holds that a party's voluntary disclosure of privileged information to the SEC does not constitute a waiver of the privilege in subsequent litigation.\footnote{93} The trend in recent cases, however, is for courts to find that disclosure to federal agencies...
waives the privilege. Courts that find waiver under these circumstances cite the unfairness of permitting a corporation selectively to waive its privilege, disclosing the information when it is in the corporation’s interest to do so, and withholding that information when it is not. 94 Still other decisions have attempted to find a middle ground, permitting a corporation to “reserve” the privilege or to make a “limited waiver” in its disclosures to federal agencies by express reservation of rights. 95

A few representative decisions illustrate these positions. In Schnell v. Schnall, 96 the defendant in a derivative suit appealed a magistrate’s ruling that compelled it to produce the transcript of its attorney’s voluntary testimony before the SEC. The United States District Court for the Southern District of New York, citing the “paramount” value of cooperation with the SEC, refused to enter a disclosure order and held that the corporation had not waived its attorney-client privilege. 97

Similarly, in In re LTV Securities Litigation, 98 shareholders sued the corporation, certain officers, and the corporation’s accountants alleging accounting manipulations. The United States District Court for the Northern District of Texas held that materials generated by a “special officer” and committee appointed by the corporation to implement an SEC consent decree, as well as materials generated by corporate attorneys in the course of an internal investigation, were privileged under both the attorney-client privilege and the work product immunity doctrine. 99

94. In re Subpoenas Duces Tecum to Fulbright & Jaworski, 99 F.R.D. 582, 588-89 (D.D.C. 1983), aff’d, 738 F.2d 1367 (D.C. Cir. 1984); see also In re Sealed Case, 676 F.2d 793, 807, 817-18, 822-23 (D.C. Cir. 1982) (investigative counsel’s compliance with voluntary disclosure program through submission to the SEC of its reports waived work product immunity); Maryville Academy v. Loeb Rhoades & Co., 559 F. Supp. 79 (N.D. Ill. 1982) (disclosure of privileged information sought in subpoena constituted a complete waiver). In the Fulbright & Jaworski case, the corporation voluntarily released the product of its law firm’s investigation of illegal overseas payments to the SEC “in confidence.” The court nevertheless found waiver based on the SEC’s refusal to accept the law firm’s unilateral designation of the material as “confidential.” 99 F.R.D. at 585. In re Sealed Case involved the investigative counsel’s report of a company’s illegal overseas payments. Citing the disclosure of the report pursuant to the SEC’s voluntary disclosure program, the court of appeals held that any privilege had been waived. 676 F.2d at 824. The plaintiffs in Maryville were granted access to documents prepared by Loeb Rhoades & Co.’s counsel that had been turned over to the SEC. The district court emphasized that confidentiality had not been sought for the documents, despite the SEC’s specific warning that the documents would be subject to public release under the Freedom of Information Act. 559 F. Supp. at 8-9.


97. Id. at 652-53.


99. Id. at 601-02, 614-18. Acknowledging that special investigative counsel are an “in-
In *Byrnes v. IDS Realty Trust*, the United States District Court for the Southern District of New York held that a corporation’s disclosures to the SEC for purposes of a nonpublic informal investigation did not waive the privilege as to a plaintiff not a party to the SEC proceeding. More recent decisions, however, have reached the opposite result. In *In re Subpoena Duces Tecum to Fulbright & Jaworski*, the District of Columbia Circuit upheld a trial court’s ruling that voluntary disclosure to the SEC constitutes a complete waiver of the attorney-client privilege and work product immunity doctrine. The defendants in shareholder class action and derivative suits had disclosed to the SEC, pursuant to the agency’s voluntary disclosure program, the results of an outside law firm’s investigation of improper overseas payments. The investigators’ final report, as well as notes taken by lawyers during the course of the investigation, were submitted to the SEC in an effort to secure leniency and to forestall formal SEC investigation and litigation. Disclosure to the SEC resulted in the waiver of both the attorney-client privilege and the work product immunity.

The *Fulbright & Jaworski* decision rested on three grounds: (1) disclosure to the SEC was inconsistent with maintaining the privilege; (2) the defendants in the shareholder class action and the derivative suit had no reasonable basis for believing the SEC would keep the data confidential; and (3) a finding of waiver was consistent with the policies behind evidentiary privileges. The “selective waiver” the defendants sought to assert would abuse the privilege unfairly. This rationale has been followed in other recent decisions including *In re Sealed Case*, in which the District of Columbia Circuit held that waiver of the privilege occurs when a corporation participates in the SEC’s voluntary disclosure program.

A compromise position was outlined by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*. The court held that disclosure of the results of an in-house “slush fund” investigation pursuant to subpoena in a separate, nonpublic SEC investigation constituted only a limited waiver of the attorney-client privilege. To hold otherwise, the court observed,
would thwart the use of independent counsel to investigate matters on behalf of the corporation and produce a result that is at odds with the corporation's interest in obtaining advice that may help it protect the interests of its investors and customers.\textsuperscript{110}

The ramifications of such a "limited waiver" are set forth in \textit{Teachers Insurance & Annuity Association v. Shamrock Broadcasting Co.},\textsuperscript{111} which contains an explicit exposition of the limited waiver doctrine. The issue in \textit{Teachers} was whether a corporate pension fund waived the right to assert the attorney-client privilege with respect to documents turned over to the SEC in response to an agency subpoena. The United States District Court for the Southern District of New York stated that it would hold that the pension fund had waived its attorney-client privilege only if the documents had been provided to the SEC without reservation.\textsuperscript{112} The court noted that an express, contemporaneous reservation or stipulation indicates that the disclosing party has made "some effort" to preserve the privacy of the privileged communication. The stipulation also would show that the privilege was not being abused through a knowing decision to waive the rule's protection in one set of circumstances and later to retract the decision when it becomes disadvantageous in subsequent litigation. The court therefore concluded that if documents were provided to the SEC under a protective order, stipulation, or other express reservation of the producing party's claim of privilege, no waiver would be implied.\textsuperscript{113}

\textit{Teachers} represents a well reasoned compromise position on waiver of privilege in the context of regulatory agency disclosures. It has not gained a following outside the jurisdiction of the Southern District of New York. In the \textit{Fulbright & Jaworski} case, the District of Columbia Circuit refused to find that the corporation maintained its privilege despite disclosure of confidential data to the SEC. The court held that letters exchanged between the Fulbright firm and the SEC warranted no decisions, Bucks County Bank & Trust Co. v. Stork, 297 F. Supp. 1122, 1123-24 (D. Hawaii 1969) (testimony of client at hearing seeking return of illegally seized property not a "general waiver" of attorney-client privilege) and United States v. Goodman, 289 F.2d 256, 259 (4th Cir.), vacated on other grounds, 368 U.S. 14 (1961) (waiver of privilege against self-incrimination by disclosure to federal agents did not constitute waiver of privilege asserted by witness in subsequent tax court proceeding brought by employer seeking redetermination of tax deficiencies). Neither of the cases cited provide a principled explanation of the concept of limited waiver of testimonial privileges. The \textit{Diversified} court supported its limited waiver finding with the comment that "Diversified disclosed these documents in a separate and nonpublic SEC investigation." 572 F.2d at 611.

\textsuperscript{110} Id.
\textsuperscript{111} 521 F. Supp. 638 (S.D.N.Y. 1981). \textit{Teachers} involved an action by a corporate pension fund, which held certain stock warrants, for damages arising from an insurance company's failure to honor the warrants. The insurance company moved to compel the pension fund to produce documents it had turned over to the SEC in response to an agency subpoena. \textit{Id.} at 639.
\textsuperscript{112} \textit{Id.} at 646.
\textsuperscript{113} \textit{Id.}
expectation of confidentiality for the materials made available to the agency. The mere assertion by the Fulbright firm that the submissions were made in confidence, without a waiver of any privilege against disclosure, did not protect the privilege, at least absent evidence that the SEC had agreed to these terms.

In light of the Teachers opinion, when disclosure of confidential materials to the SEC is anticipated, counsel for corporations should assert the attorney-client privilege and, in instances where it is applicable, the work product immunity doctrine, and obtain assurances of confidentiality from the SEC before turning over attorney-client or work product materials. Otherwise, the corporation runs a serious risk of waiving the privilege when client confidences or work product material are voluntarily submitted. When a corporation is deciding whether to participate in voluntary disclosure programs, corporate counsel should consider this risk.

1. Disclosure to Outside Auditors

Under the Supreme Court's case-by-case approach, corporations generally have not fared well in their attempt to shield legal advice incorporated in their tax and accounting records. This has been particularly true with respect to litigation with the Internal Revenue Service.

In United States v. El Paso Co., the United States Court of Appeals for the Fifth Circuit upheld an IRS request for a corporate taxpayer's "tax-pool" analysis of contingent liability for additional taxes. The analysis was prepared to insure that the corporation had set aside on its balance sheet a sufficient amount to cover contingent tax liability. The corporate taxpayer claimed that the analysis was protected by the attorney-client privilege. The Fifth Circuit rejected this contention, noting that the tax-pool analysis was revealed to outside corporate auditors as part of the outside auditors' annual audit for verification of the corporation's financial statements. The court therefore concluded that the analysis lacked the requisite confidentiality of privileged attorney-client communications.

The corporate taxpayer's contention that the work product immunity doctrine also shielded the information similarly was dismissed. The Fifth Circuit observed that the tax-pool analysis did not appear to have been prepared in anticipation of litigation, noting that the function of the auditors' work product was simply to support a figure on a financial bal-

114. 738 F.2d 1367 (D.C. Cir. 1984).
115. Id. at 1372-74.
116. 682 F.2d 530 (5th Cir. 1982).
117. A "tax pool" is a noncurrent tax account charged to a corporation's balance sheet to cover contingent, deferred tax liability, generally constituting the spread between maximum corporate tax rates and the actual rate at which the corporation's taxes have been calculated. Id. at 534-35.
118. Id. at 540.
119. Id. at 542.
The purpose of the tax-pool analysis—to comply with SEC regulations—struck the court as carrying “much more the aura of daily business than . . . of corporate combat.”

Similar results have been reached in other cases. The United States Supreme Court appears to have endorsed the El Paso approach in United States v. Arthur Young & Co. As in El Paso, the Supreme Court found that a “compliance assurance” audit by an independent accounting firm did not enjoy work product protection. In light of Arthur Young and El Paso, the utility of the work product provided by a public accounting firm must be considered carefully before a decision is made to retain the accounting firm for investigatory work or otherwise to assist counsel at trial.

2. Inadvertent Disclosure

Considerable litigation has developed concerning the issue of whether “waiver” of the attorney-client privilege or of work product immunity results from the inadvertent or accidental disclosure of protected information. In the context of corporate litigation, large-scale document production sometimes results in the accidental delivery of a privileged document to an opponent. Under such circumstances, the issue becomes whether a waiver occurred and, if so, the extent to which the attorney-client privilege or work product immunity is waived.

In Chubb Integrated Systems v. National Bank, the United States District Court for the District of Columbia recently held that the inadvertent disclosure of privileged information during an overseas document production constituted a complete waiver of evidentiary privilege. Voluntary disclosure to an adversary, although unintentional, was held to waive both the attorney-client privilege and work product immunity. The court observed that the attorney-client privilege and work product immunity “should be available only at the traditional price: a litigant must maintain genuine confidentiality.”

In an attempt to avoid an unduly harsh result under similar circumstances, the court in Champion International Corp. v. International Paper Co. found a waiver, but limited the scope of the waiver. The plaintiff in a patent infringement action inadvertently produced documents reflecting attorney-client communications. Defendants then filed a motion to compel production of all other documents related to the infringement action that were withheld by the plaintiff on the basis of attorney-client

120. Id. at 544.
121. Id.
123. Id. at 1504; see supra notes 50-54 and accompanying text.
125. Id. at 67-68.
126. Id. at 67.
128. Id. at 1330-31.
privilege, arguing that the privilege had been waived.\textsuperscript{129} The court acknowledged that the voluntary disclosure of a privileged communication ordinarily operates as waiver of the privilege as to other privileged communications concerning the same subject.\textsuperscript{130} The court, however, citing overriding considerations of fairness, found that the accidental release of a small number of privileged documents "in the course of exhaustive discovery and in the spirit of openness, cooperation and reason" constituted a waiver only as to the documents actually produced, not to other privileged material.\textsuperscript{131}

Document production during the course of litigation presents an obvious risk of inadvertent production of privileged material. Attorney control and supervision of such document production is essential to avoid inadvertent waiver of important evidentiary privileges. If, however, a document is inadvertently disclosed, counsel must rely on the public policy underlying the \textit{Champion} decision and argue that an accidental act performed in a good faith attempt to comply with discovery should not carry the penalty of a complete subject-matter privilege waiver.

V. EFFECTIVE PRESERVATION AND ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT IMMUNITY DOCTRINE

The key to successful assertion of the attorney-client privilege and the work product immunity doctrine in the corporate setting lies in anticipating and avoiding problems. Corporate counsel must establish appropriate policies regarding employees' contacts with in-house and outside counsel concerning matters that may lead to litigation. Records of contacts between corporate employees and corporate counsel must reflect that the purpose of a particular conference was to seek legal, as opposed to business, advice.

A. Confidentiality

In-house counsel's records and files must remain confidential. Memoranda should be distributed only on a need-to-know basis, and under no circumstances should sensitive information be disseminated to persons outside the privilege.\textsuperscript{132} When counsel anticipates litigation during the preparation of a memorandum, record, or report, the document should reflect that fact. Information gathered for use by attorneys should indicate on its face that the information was gathered at counsel's request. At

\textsuperscript{129} Id. at 1329-30.
\textsuperscript{130} Id. at 1332.
\textsuperscript{131} Id. at 1333.
least one court has refused to hold sensitive corporate memoranda immune under the work product immunity doctrine merely because the litigation-related purposes of the memoranda were not apparent on their faces.\(^\text{133}\)

\subsection*{B. Early Assertion}

The SEC cases teach that evidentiary privileges should be asserted at the outset of contact with governmental agencies and investigators and reiterated on a frequent basis, even if cooperation with the agency is anticipated. If possible, commitments of confidentiality should be obtained in writing from the agency prior to disclosure of confidential information. Litigants should seek a protective order or a written stipulation reserving the privileges in the event that privileged information is communicated to regulatory agencies. If such an agreement is unavailable, the corporation may wish to reevaluate the benefits of voluntary cooperation in light of potential subsequent evidentiary ramifications.

\subsection*{C. Internal Investigations}

If a corporate "housekeeping" committee needs to interview corporate employees concerning possible violations of law, all the employees interviewed must be made aware of the litigation-related purposes of their contacts with inside and outside counsel. Through the use of this procedure, a corporation will be able to meet the requirements of \textit{Upjohn} for asserting the attorney-client privilege. In the process of conducting an in-house investigation, the corporation must avoid publicizing or making testimonial use of the details of the investigation; otherwise, such actions may constitute waiver.\(^\text{134}\) Attorneys must not provide expert or other witnesses with copies of work product material or attorney-client communications in preparation for their testimony. Any such evidentiary use of privileged material is apt to result in a finding of waiver.

\subsection*{D. Fraud or Misconduct}

Finally, an attorney must be alert to the possibility that a client is involved in fraud or other criminal misconduct. Corporate attorneys should be aware that any communications involved in the perpetration of ongoing fraud or criminal activity will not be privileged. If the existence of such communications becomes known to the government or to an opponent in civil litigation, the communications will not be protected.\(^\text{135}\) An attorney's lack of awareness regarding a criminal purpose underlying a corporation's contacts with him makes no difference in applying the

\footnotesize{\begin{itemize}
  \item \textsuperscript{133} Mobil Oil Corp. v. Department of Energy, 102 F.R.D. 1, 9 (N.D.N.Y. 1983).
  \item \textsuperscript{135} \textit{In re} Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032 (2d Cir. 1984); United States v. King, 536 F. Supp. 253 (C.D. Cal. 1982).
\end{itemize}}
attorney-client privilege and the work product immunity doctrine.\textsuperscript{136} Neither the attorney-client privilege nor the work product immunity doctrine protects communications made in pursuit of a crime or fraud.

\textbf{E. Appellate Review of Privilege Rulings}

To protect the interests of a client in the confidentiality of materials, obtaining appellate review of an adverse privilege ruling is essential. Refusal to produce the material without seeking appellate review subjects the attorney and his client to significant punishment, including contempt of court.\textsuperscript{137} In addition, failure to seek precompliance appellate review of a disclosure order may prevent any effective review. Once privileged material is disclosed, its confidentiality as a practical matter irretrievably is lost.

Discovery orders are interlocutory in nature.\textsuperscript{138} In federal courts, orders denying the application of a privilege can be appealed only through certification of the question by the trial court or by means of an extraordinary writ.\textsuperscript{139} Prompt and consistent assertion of a privilege and maintaining the confidentiality of the privileged material pending appellate review are necessary prerequisites to obtaining appellate review of discovery orders. Even if appellate review is obtained, reviewing courts are reluctant to overturn the reasonable exercise of a trial court's discretion in applying the privileges.\textsuperscript{140} Thus, invoking the jurisdiction of a court of appeals to protect confidential material must be viewed as a "last ditch" measure which, despite counsel's best efforts, is not likely to succeed.

The standard for granting a writ of mandamus is a strict one. Unless the trial court's discovery order exceeded its jurisdiction or amounted to an abuse of discretion, mandamus will not lie.\textsuperscript{141} Some appellate courts, such as those in California, refuse to allow immediate review of decisions granting discovery.\textsuperscript{142} Only refusals to permit discovery generally are

\textsuperscript{136} In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984); United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977).

\textsuperscript{137} See Fed. R. Civ. P. 37(b)(1); see also Southern R.R. v. Lanham, 403 F.2d 119 (5th Cir. 1968) (corporation refusing compliance with court order to produce allegedly privileged documents was held in contempt).


\textsuperscript{140} See Grinnell Corp. v. Hackett, 511 F.2d 595 (1st Cir. 1975) (discovery order did not involve such "clear usurpation" of judicial power to justify writ of mandamus), cert. denied, 423 U.S. 1033 (1976).

\textsuperscript{141} EEOC v. Carter Carburetor Div., 577 F.2d 43 (8th Cir. 1978), cert. denied sub nom. ACF Indus., Inc., Carter Carburetor Div. v. EEOC, 439 U.S. 1081 (1971).

\textsuperscript{142} See, e.g., Brown v. Superior Court, 137 Ariz. 327, 670 P.2d 725 (1983) (trial court
considered appealable before trial. Other courts require a discovery issue to have significant effects beyond the immediate litigation before they will grant review pursuant to a writ of mandamus. It is therefore clear that an attorney's best efforts to protect the privilege must be made early, at the trial court level, in view of appellate court reluctance to review discovery orders.

VI. CONCLUSION

Attorneys for corporations have a duty to protect the attorney-client privilege and work product immunity on behalf of their corporate clients. In the corporate setting, protecting the attorney-client privilege and work product immunity is not always a simple matter. Confusion and unpredictability are reflected in court rulings on attorney-client privilege and work product immunity. Furthermore, the Upjohn case-by-case analysis of the attorney-client privilege and the work product immunity doctrine has not provided clear standards to guide corporate counsel. Cases finding waiver of the attorney-client privilege and work product immunity similarly should affect significantly corporate decisions to voluntarily comply with governmental investigations. It therefore is impossible to guarantee a client favorable decisions with respect to the attorney-client privilege and work product immunity when these protective devices are asserted in civil litigation and enforcement proceedings. Nevertheless, by utilizing basic principles of confidentiality and documentation in all contact with corporate directors, officers, and employees, an attorney can improve greatly the odds that a claim of attorney-client privilege or work product immunity asserted with respect to efforts on behalf of his corporate client will be upheld.

has broad discretion as to discovery which will not be overturned absent clear abuse); Colonial Life & Accident Ins. Co. v. Superior Court, 31 Cal. 3d 785, 647 P.2d 86, 183 Cal. Rptr. 810 (1982) (appellate court must conclude that answers sought by a given line of questions cannot as a reasonable possibility lead to discoverable information); Pacific Tel. & Tel. Co. v. Superior Court, 2 Cal. 3d 161, 171, 465 P.2d 854, 861, 84 Cal. Rptr. 718, 725 (1970) (liberal policies underlying discovery counsel against overturning the trial court's discretion granting discovery).
