Getting Your Hands on the Internal Investigation: Use of the Criminal Discovery Rules to Obtain Material Critical to Trial Preparation

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I. Introduction

An indicted corporate executive should make every effort to obtain any internal investigation report and underlying materials prepared on behalf of the corporation because these materials often contain a wealth of exculpatory information and can be critical to trial preparation. This article discusses how to use the criminal discovery rules to go about getting your hands on internal investigation materials once they have been disclosed (at least in part) by the corporation to the government.

When faced with allegations of criminal wrongdoing, corporations frequently commission an outside law firm to conduct an internal investigation. In many cases, the corporation elects to disclose the report of the internal investigation to the government in order to demonstrate its cooperation and attempt to avoid prosecution. These internal investigation reports often act as "roadmaps" for prosecutors because they summarize voluminous documents, highlight significant witness interviews, and draw conclusions as to the culpable corporate executives. In some cases, the corporation will disclose not only the report itself, but also the underlying interview memoranda and other privileged material or work product created during the course of the investigation in its effort to avoid an indictment. These internal investigation materials frequently play a significant role in the government's charging decisions.

These same internal investigation materials are extremely useful to a former executive who has been indicted in the wake of a corporate fraud investigation. To the extent that the internal investigation report defends the corporation's actions and the policies or practices under review, the internal investigation materials are likely to contain exculpatory information that will assist in the preparation of the defense. In addition, the internal investigation materials will help defense counsel identify the likely trial exhibits among the millions of pages of documents that may be available in discovery and the relevant witnesses among the numerous corporate employees interviewed during the investigation.

In a few recent cases, the government has agreed to disclose internal investigation materials in its possession pursuant to a liberal "open file" discovery policy. In other cases, the government has produced internal investigation materials with criminal discovery only after the materials had been disclosed previously in parallel civil proceedings. In many cases, however, a defendant will need to fight to obtain early disclosure of

internal investigation materials. For instance, in some corporate fraud cases, the government has taken the position that internal investigation interview memoranda are covered by the Jencks Act, producing only the memoranda of government witnesses shortly before trial with the other Jencks materials. In still other cases, the government has contended that internal investigation materials in its possession are not discoverable at all.

Where the government refuses to turn over any internal investigation materials, or agrees to produce only a select portion thereof, the defendant's ability to obtain these materials as part of the criminal discovery process will depend on the nature of the disclosure by the corporation. If the corporation has not disclosed any documents associated with the internal investigation to the government, the investigation report and related materials will almost certainly be privileged and/or work product and protected from disclosure to a defendant. If, however, a corporation has disclosed an internal investigation report and underlying materials to the government, a defendant has strong arguments to obtain the materials directly from the government pursuant to Rule 16 discovery and/or *Brady.* If a corporation has disclosed only the internal investigation report to the government but not the underlying materials, a defendant should seek to obtain those materials from the corporation itself pursuant to a Rule 17(c) subpoena.

II. Obtaining Internal Investigation Materials That the Corporation Has Disclosed to the Government

If the corporation has shared the entire internal investigation with the government—not just the report of the investigation, but the underlying documents as well—a defendant should argue that the government is required to produce those investigation materials pursuant to its discovery obligations under Federal Rule of Criminal Procedure 16 or *Brady v. Maryland,* 373 U.S. 83 (1963). The defendant should also be prepared to address the corporation's claim that the materials remain privileged or work product notwithstanding their disclosure to the government. At core, such an argument is best refuted based on a notion of fairness: once a corporation has shared the results of an internal investigation with the government (often to its own advantage and the former employee's detriment), it is only fair that those materials be turned over to the defense as well.

A. Rule 16 and *Brady*

In order to gain access to an internal investigation report and supporting documents under Rule 16, a defendant must demonstrate that the documents are "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E). Under Rule 16, the defendant may obtain such documents even if the government does not intend to use them in its case-in-chief, as may often be the case with the report of the investigation itself. The defendant bears the burden of demonstrating the materiality of the documents sought under Rule 16, but only a prima facie showing must be made. *See United States v. Mandel,* 914 F.2d 1215, 1219 (9th Cir. 1990); *United States v. McGuinness,* 764 F. Supp. 888, 894 (S.D.N.Y. 1991) (collecting cases). The materiality requirement "'is not a heavy burden,' rather, evidence is material as long as there is a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'" *United States v. Lloyd,* 992 F.2d 348, 351 (D.C. Cir. 1993) (quoting *United States v. George,* 786 F. Supp. 56, 58 (D.D.C. 1992)) (citation omitted); *see also United States v. Gaddis,* 877 F.2d 605, 611 (7th Cir. 1989) (same). Put another way, material evidence is that which "could be used to counter the government's case or to bolster a defense." *United States v. Stevens,* 985 F.2d 1175, 1180 (2d Cir. 1993); *see also United States v. Marshall,* 132 F.3d 63, 67–68 (D.C. Cir. 1998) (even damaging inculpatory evidence can be material if it enables the defendant to prepare a strategy to confront the damaging evidence, conduct an investigation to discredit the damaging evidence,

or present a defense that would not be undercut by the damaging evidence). Given this broad standard, in theory a defendant should have little difficulty in successfully arguing that the government is required to produce internal investigation materials in its possession under Rule 16.

In addition to moving for disclosure under Rule 16, a defendant should also argue that the government has a duty to disclose internal investigation documents as part of its *Brady* obligation. *See, e.g., United States v. Bergonzi,* 216 F.R.D. 487, 490 (N.D. Cal. 2003) (moving for disclosure of documents under both Rule 16 and *Brady*); *United States v. Uphoff,* 907 F. Supp. 1475, 1477 (D. Kan. 1995) (same); *United States v. NYNEX Corp.,* 781 F. Supp. 19, 23 (D.D.C. 1991) (same). Under *Brady,* the government is required to turn over any evidence in its possession that is favorable to the defendant and material either to guilt or punishment. *Brady,* 373 U.S. at 87. "Favorable evidence" refers both to evidence that is exculpatory and evidence that could be used to impeach a government witness. *United States v. Bagley,* 473 U.S. 667, 676 (1985). Although both Rule 16 and *Brady* use the term "material" to describe the documents that must be disclosed to the defense by the government, *Brady* is not a rule of discovery but one of fairness, *see Kyles v. Whitley,* 514 U.S. 419, 491 (1995), and is properly understood as more narrow than Rule 16. *See United States v. W.R. Grace,* 401 F. Supp. 2d 1069, 1074 (D. Mont. 2005) ("[t]he government's discovery obligations under Rule 16 and its constitutional obligations under *Brady* are separate and distinct"); Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions,* 15 Ga. St. U. L. Rev. 601, 619 (1999) ("the difference between the post-trial due process analysis [of *Brady*] and the Rule's requirement of adequate disclosure before trial make the standard for what is 'material' significantly different").

Because the Rule 16 materiality standard is less stringent than that under *Brady,* a defendant is well-advised to rely primarily on Rule 16 in seeking internal investigation documents. The issue of timing also weighs in favor of basing a motion primarily on Rule 16, as discovery under Rule 16 must be produced upon the defendant's request, whereas the government is only obligated to disclose *Brady* material in sufficient time for the defense to "use the favorable material effectively in the preparation and presentation of its case." *United States v. Pollack,* 534 F.2d 964, 973 (D.C. Cir. 1976); *see also United States v. Garrett,* 238 F.3d 293, 302 (5th Cir. 2000) (Fish, J., concurring) ("Rule 16 . . . explicitly requires **pre-trial** discovery and production of the material described in the rule, while *Brady,* because it is not a discovery rule, contains no such timing requirements.") (emphasis in original).

One case that serves as a helpful illustration of the use of Rule 16 and *Brady* to obtain internal investigation documents from the government is *United States v. Bergonzi,* 216 F.R.D. 487 (N.D. Cal. 2003), in which the defendants successfully moved for the production of such materials provided to the government by McKesson HBOC, their former employer.[1] After McKesson publicly disclosed that its auditors had discovered accounting irregularities, the company's board of directors authorized the audit committee to conduct an internal investigation. The audit committee retained outside counsel and an accounting firm to assist in the review, and those entities eventually prepared a report of the investigation, which was disclosed to both the SEC and the U.S. Attorney's Office, along with various back-up materials, such as interview memoranda and oral summaries of the internal review's progress.

In concluding that the internal investigation documents were discoverable under Rule 16, the court noted that the documents included descriptions of the accounting processes at issue in the case, detailed the conduct of the parties involved, and had the potential to shed light on the relative culpability of those individuals. *Id.* at 501. The report of the investigation was also described by the government as a "useful initial roadmap that concisely summarized the basic facts" at issue, which the court found indicative of its materiality. *Id.*

The court also agreed with the defendants' position that the internal investigation documents were material under *Brady,* in part

because the company claimed that it was a victim of the defendants' misdeeds and had a "common interest" with the government in finding out who was responsible for the conduct at issue, which "point[ed] persuasively toward a finding that both the Report and the Back-up Materials would provide Defendants with exculpatory information that is either admissible or reasonably likely to lead to admissible evidence." *Id.* at 499. Moreover, the court held that "[t]he Report is not just a regurgitation of the interviews conducted by the Company," but rather an important and useful document that would undoubtedly assist the defense in its preparation. *Id.*

Using *Bergonzi* and other cases as a roadmap, a defendant should make as many of the following points as possible in seeking the disclosure of internal investigation documents under Rule 16 or *Brady:*

- the report or interview memoranda may contradict and/or corroborate other statements by witnesses on key issues
- the documents will lead to other admissible evidence
- the documents may provide exculpatory evidence regarding the corporate policies and practices at issue
- the report and back-up materials will likely outline the roles various officers and employees played in the conduct at issue
- the report will bear directly on certain defenses, such as lack of criminal knowledge or intent, because it will contain information regarding the process by which the relevant decisions were made

In addition, if the government itself has made any statements about the import or usefulness of the report in preparing its own case against the defendants, the defense should bring this to the court's attention, as it will likely weigh in favor of disclosure of the investigation materials.

A motion for disclosure under Rule 16 or *Brady* should describe the materiality of the information sought as specifically as possible, because "a defendant must offer more than the conclusory allegation that the requested evidence is material." *United States v. Ashley,* 905 F. Supp. 1146, 1168 (E.D.N.Y. 1995) (internal quotation marks omitted). However, as already discussed, the Rule 16 materiality standard does not place a heavy burden on the defendant. While "[n]either a general description of the information sought nor conclusory allegations of materiality suffice," a defendant need only "present facts which would tend to show that the Government is in possession of information helpful to the defense." *Mandel,* 914 F.2d at 1219. Thus, in order to demonstrate materiality, a defendant should argue that the internal investigation documents will provide a roadmap to other admissible evidence, allow the defense to sift through discovery documents and identify relevant witnesses, assist with the preparation of witnesses, or provide information to strengthen possible defenses. *See Lloyd,* 992 F.2d at 351 ("evidence is material as long as there is a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal'"). Although a few courts have indicated that internal investigation documents are not discoverable under Rule 16 simply because they may be "useful" to trial preparation, *see United States v. Rigas,* 258 F. Supp. 2d 299, 307 (S.D.N.Y. 2003) (denying motion to compel disclosure of internal investigation documents under Rule 16 because "at bottom Defendants attempt to equate 'material' with 'useful' in order to meet their burden," and citing *United States v. Reddy,* 190 F. Supp. 2d 558, 573 (S.D.N.Y. 2002)), these cases are at odds with the well-established principle that a defendant need only make a prima facie showing of materiality in order to satisfy the requirements of Rule 16.

The defense should be prepared to counter the government's likely argument that internal investigation interview memoranda and notes are covered by the Jencks Act and therefore not subject to disclosure under Rule 16. Rule 16 does not "authorize the discovery or inspection of statements made by prospective government witnesses

except as provided in 18 U.S.C. § 3500 [the Jencks Act].” Fed. R. Crim. P. 16(a)(2). The Jencks Act, in turn, does not require production of a witness’ statement—defined in relevant part as a “written statement made by said witness and signed or otherwise adopted or approved by him”—until after he has testified on direct examination. 18 U.S.C. § 3500(e) (2000). Thus, the government may argue that interview memoranda, for example, are witness statements that do not need to be disclosed until the Jencks deadline, typically on the eve of trial.

This argument was rejected by the court in *Bergonzi* because the government failed to demonstrate that the interview memoranda were “statements” as defined by the Jencks Act or that all of the interviewees were actual or prospective government witnesses. 216 F.R.D. at 500. Another court, however, concluded without any analysis of the definition of “statement” under the Jencks Act that internal investigation interview memoranda were subject to disclosure only under the Jencks Act, not Rule 16. *See Reddy,* 190 F. Supp. 2d at 573 (“To the extent statements from potential witnesses in the . . . investigatory file were obtained from persons the Government intends to call as witnesses, they are outside the scope of Rule 16(a)(2) and subject to the disclosure requirements of 18 U.S.C. § 3500.”). The outcome of this issue may be guided by the contents of the memoranda themselves. Many internal investigation interview memoranda contain disclaimers by the attorneys who draft them that the memorandum contains the attorney’s recollection only and is not intended to be a substantially verbatim account of the witness’ testimony. Such memoranda are less likely to be deemed “statements” within the meaning of the Jencks Act. In making this point, however, defense counsel should be sensitive to the fact that FBI 302 summaries of witness interviews bear similarities to internal investigation interview memoranda, and avoid making arguments that might jeopardize the defendant’s ability to obtain 302s as part of the government’s Jencks production.

B. Overcoming Any Claim That Internal Investigation Materials Are Privileged or Work Product

Once a defendant moves for production of internal investigation documents from the government, the corporation may seek to intervene in the case, arguing that the documents are protected from disclosure by the attorney-client privilege or work product doctrine. *See Bergonzi,* 216 F.R.D. at 492 (“Third parties may intervene in a criminal trial to challenge the production of subpoenaed documents on the ground of privilege.”) (citing *United States v. Cuthbertson,* 651 F.2d 189, 193 (3d Cir. 1981) (“*Cuthbertson II*”)). A defendant has several strong arguments to overcome any such privilege claim, however, including that (1) internal investigation documents created by a corporation with the intent of sharing them with the government are not privileged or work product in the first instance, (2) the disclosure of such documents to the government constitutes a waiver of any applicable privileges, and (3) there is no doctrine of selective waiver that can serve as the basis for shielding documents previously produced to the government.

When a corporation conducts an internal investigation with the intent from the outset to share its report and other investigation materials with the government, the defense should argue that no privilege ever attached to those documents in the first instance. In *Bergonzi,* for example, the court concluded that the internal investigation documents were not protected by the attorney-client privilege, because the report and back-up materials were prepared with the intent to share them with the government and not with the intent that they remain confidential. 216 F.R.D. at 494; *see also In re Syncor ERISA Litig.,* 229 F.R.D. 636, 645 (C.D. Cal. 2005) (finding that neither attorney-client privilege nor work product doctrine applied to documents prepared during internal investigation because they were created with the intent to disclose them to the government, if necessary, to benefit the company).

To support this argument, the defendant should identify any examples of the corporation making public statements regarding its intent to publish the results of the internal investigation. Moreover, in some instances, law enforcement personnel may even have attended the interviews of corporate employees during the internal investigation. If so, the defendant has an even stronger argument that the internal investigation interviews did not involve confidential communications for the purpose of facilitating legal advice.

Even if the internal investigation documents are deemed to be privileged or work product, however, the defendant should argue that the corporation waived any such protection when it disclosed those documents to the government. Again, in *Bergonzi,* although the court found that the report and back-up materials fell within the protection of the work product doctrine because they were prepared in anticipation of litigation, 216 F.R.D. at 495, it went on to hold that the company waived that protection when it disclosed the materials to the government, stating "[i]t is inherently unfair to permit an entity to choose to disclose materials to one outsider while withholding them from another on grounds of privilege." *Id.* at 497.

The corporation may argue that even if a waiver of privilege occurred when it produced the internal investigation documents to the government, the court should invoke the doctrine of selective waiver to prevent disclosure of the same documents to the defense. The selective waiver doctrine, which was first announced by the Eighth Circuit in *Diversified Indus., Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1977) (en banc), provides that a corporation may waive the attorney-client privilege as to government agencies conducting an investigation without waiving the privilege to others. However, outside of the Eighth Circuit, every other circuit court to consider the issue has rejected the doctrine. *See, e.g., In re Qwest Comm. Int'l, Inc.,* 450 F.3d 1179, 1201 (10th Cir. 2006) (rejecting selective waiver even with general confidentiality agreement); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,* 293 F.3d 289, 302–04, 306–07 (6th Cir. 2002) (disclosure of documents to government effectively waived attorney-client and work product privilege for those documents); *Genentech, Inc. v. U.S. Int'l Trade Comm'n,* 122 F.3d 1409, 1417–18 (Fed. Cir. 1997) (rejecting selective waiver for attorney-client privilege); *United States v. Mass. Inst. of Tech.,* 129 F.3d 681, 686 (1st Cir. 1997) (rejecting selective waiver for both attorney-client and work product privileges); *Dellwood Farms, Inc. v. Cargill, Inc.,* 128 F.3d 1122 (7th Cir. 1997) (rejecting selective waiver in absence of explicit confidentiality agreement); *In re Steinhardt Partners, L.P.,* 9 F.3d 230, 235 (2d Cir. 1993) (rejecting selective waiver argument); *Westinghouse Elec. Corp. v. Republic of Philippines,* 951 F.2d 1414, 1424–25 (3d Cir. 1991) (rejecting selective waiver for both attorney-client and work product privileges); *In re Martin Marietta Corp.,* 856 F.2d 619, 623–24 (4th Cir. 1988) (rejecting selective waiver of the attorney-client privilege); *In re Subpoenas Duces Tecum,* 738 F.2d 1367, 1372 (D.C. Cir. 1984) (disclosure to SEC waived work product protection in absence of confidentiality agreement).

There are several persuasive arguments against application of the selective waiver doctrine, which nearly ensure that it will not be adopted by more courts in the future, except perhaps in circumstances involving a confidentiality agreement between the corporation and the authorities to whom the documents were disclosed. First, because a corporation acts in its own interest "to gain tactical or strategic advantage" in voluntarily disclosing internal investigation documents to the government, *In re Columbia/HCA Healthcare Corp.,* 293 F.3d at 302 (internal quotation marks omitted), it is only fair that other adversaries, such as individual defendants, should get the benefit of those same documents. *See In re Subpoenas Duces Tecum,* 738 F.2d at 1372 ("Fairness and consistency requires that [companies] not be allowed to gain the substantial advantages accruing to voluntary disclosure of work product to one adversary—the SEC—while being able to maintain another advantage inherent in protecting that same work product from other adversaries."); *Permian Corp. v.*

United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (a corporation "[should] not be permitted to pick and choose among [its] opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality [it] has already compromised for [its] own benefit."). Second, the doctrine of selective waiver "does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the [attorney-client] privilege beyond its intended purpose." *Westinghouse Elec. Corp.,* 951 F.2d at 1425. Third, the doctrine is not necessary to encourage cooperation with the government, because companies have other incentives to cooperate. *In re Steinhardt,* 9 F.3d at 236 ("Voluntary cooperation offers a corporation an opportunity to avoid extended formal investigation and enforcement litigation by the SEC, the possibility of leniency for prior misdeeds, and an opportunity to narrow the issues in any resulting litigation. These incentives exist regardless of whether private third party litigants have access to attorney work product disclosed to the SEC."). Finally, "[g]overnmental agencies 'have means to secure the information they need' other than through voluntary cooperation achieved via selective waiver." *In re Columbia/HCA Healthcare Corp.,* 293 F.3d at 303 (quoting *Mass. Inst. of Tech.,* 129 F.3d at 685).

A few courts, particularly in the Second Circuit, have indicated that the existence of a confidentiality agreement may justify adopting the doctrine of selective waiver. This is largely the result of the Second Circuit's decision in *In re Steinhardt Partners, L.P.,* 9 F.3d 230 (2d Cir. 1993), in which the court rejected the selective waiver doctrine but "decline[d] to adopt a *per se* rule that that all voluntary disclosures to the government waive work product protection," specifically reserving judgment on "situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials." *Id.* at 236.

Following the *Steinhardt* decision, some district courts in the Second Circuit have considered the presence of a confidentiality agreement to be an important, although perhaps not a dispositive, factor that may justify application of the selective waiver doctrine. For example, in *In re National Gas Commodity Litigation,* No. 03 Civ. 6186VMAJP, 2005 WL 1457666, at *1 (S.D.N.Y. June 21, 2005), the court denied a motion to compel the production of certain data analyses created as part of a company's internal investigation where the company had entered into confidentiality agreements with the government before producing the work product. *Id.* at *9. However, the court treated the confidentiality agreement as merely one factor to be considered on the issue of whether waiver had occurred and also relied on the fact that the data underlying the analyses had already been provided to the plaintiffs seeking production. *Id.* at *8–9. *See also In re Leslie Fay Cos. Sec. Litig.,* 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (company did not waive privilege by disclosing its audit committee report to the U.S. Attorney's Office and the bankruptcy examiner because such disclosures "were made pursuant to confidentiality agreements intended to preserve any privilege applicable to the disclosed documents"); *Maruzen Co. v. HSBC USA, Inc.,* No. 00 Civ. 1079, 2002 WL 1628782, at *1–2 (S.D.N.Y. July 23, 2002) (work product protection not waived by disclosure to U.S. Attorney's Office with oral confidentiality agreement).

In the majority of courts, however, even a confidentiality agreement does not prevent a disclosure to the government from operating as a waiver as to all third parties. *See In re Qwest Comm. Int'l Inc.,* 450 F.3d at 1179 (rejecting selective waiver even with general confidentiality agreement); *In re Columbia/HCA Healthcare Corp.,* 293 F.3d at 302 ("any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage"); *Westinghouse Elec. Corp.,* 951 F.2d at 1414 (finding waiver of work product protection despite disclosure pursuant to confidentiality agreement). In

the *Bergonzi* case, for example, the court did not apply the selective waiver doctrine despite the fact that McKesson had entered into confidentiality agreements with both the SEC and the U.S. Attorney's Office shortly after the investigation began, under which the company agreed to provide the report of the internal investigation and the back-up materials upon the investigation's completion. The company's agreement with the SEC provided that in turning over the report and back-up materials, the company did not intend to waive any work product or attorney-client privilege, and the SEC would not argue that the disclosure constituted a waiver of any privilege. The SEC also agreed to maintain the confidentiality of the documents "except to the extent that the [SEC] determines that disclosure is otherwise required by federal law." 216 F.R.D. at 491 (internal quotation marks omitted) (alteration in original). The company's agreement with the USAO stated that the government could use the documents in any criminal proceeding, including prosecution of the company.

In rejecting McKesson's argument that the attorney-client privilege protected the investigation documents, the court found that because the so-called confidentiality agreements gave the government "full discretion to disclose the Report and Interview Memoranda in certain circumstances, the terms of the Agreements run counter to the Company's assertion that the communication was intended to remain confidential." *Id.* at 494. Similarly, the court found that the common interest exception to the waiver of the work product doctrine did not apply because "[a]lthough McKesson entered into what it fashions to be confidentiality agreements . . . , the agreement made by the Government to keep the documents was not unconditional." *Id.* at 496.

This general trend disfavoring the selective waiver doctrine will change if proposed Federal Rule of Evidence 502 is adopted. Subsection (c) of proposed Rule 502 provides as follows:

> (c) **Selective waiver.**—In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by state law.

Proposed Fed. R. Evid. 502(c). The advisory committee note to the proposed Rule states that the justification for this subsection is that "[a] rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations." *Id.* (advisory committee note (c)). The note also states that the advisory committee rejected the idea of conditioning waiver on the presence of a confidentiality agreement because such an agreement "has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule." *Id.*

As noted above, several courts have rejected the very justification relied on by the advisory committee in drafting the proposed Rule—that is, that selective waiver is necessary to encourage cooperation with the government—and therefore it is unclear whether the selective waiver provision will stand. Counsel who regularly represent corporations will certainly welcome proposed Rule 502 as a significant improvement over the current state of the law on selective waiver. Indeed, it seems likely that proposed Rule 502 would make it very difficult for plaintiffs in parallel private securities class actions to gain access to internal investigation documents that a corporation has disclosed to federal law enforcement. It remains to be seen, however, how significant an impact proposed Rule 502 would have on a criminal defendant's ability to obtain internal

investigation materials in the possession of the government. For example, it is difficult to believe that a corporation's privilege assertion would trump the government's obligation to disclose documents material to the preparation of the defense under Rule 16, exculpatory evidence under *Brady,* or witness statements within the scope of the Jencks Act. A defendant certainly would have strong arguments that the government must continue to disclose internal investigation documents pursuant to the criminal discovery rules notwithstanding proposed Rule 502.[2]

III. Obtaining the Underlying Internal Investigation Materials Where the Corporation Has Disclosed Only the Report to the Government

If the corporation has turned over only the report of the internal investigation to the government, and has not previously disclosed any of the investigation's underlying documents (or only a select portion thereof), the defendant should issue a subpoena to the corporation under Federal Rule of Criminal Procedure 17(c) to obtain the remainder of the documents.

A. Rule 17(c)

Rule 17(c) provides:

> (1) *In General.* A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.
>
> (2) *Quashing or Modifying the Subpoena.* On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

Fed. R. Crim. P. 17(c).

Courts have consistently stated that Rule 17(c) should not be used as a general discovery tool, because Rule 16 governs pretrial discovery. *See Bowman Dairy Co. v. United States,* 341 U.S. 214, 220 (1951); *United States v. Cuthbertson,* 630 F.2d 139, 146 (3d Cir. 1980) ("*Cuthbertson I*") ("Courts must be careful that rule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases found in Fed. R. Crim. P. 16."); *United States v. Haldeman,* 559 F.2d 31, 75 (D.C. Cir. 1976) (Rule 17(c) "is not a discovery device"). Thus, in order to obtain documents pursuant to a Rule 17(c) subpoena, the defense's requests must meet certain requirements.

In *United States v. Nixon,* 418 U.S. 683 (1974), the Supreme Court outlined the showing required for production prior to trial under Rule 17:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the [defendant] cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 699 (citing *United States v. Iozia,* 13 F.R.D. 335, 338 (S.D.N.Y. 1952)). These factors were further refined by the *Nixon* Court to require the party seeking production pursuant to a Rule 17(c) subpoena to satisfy the three-part test of (1) relevancy, (2) admissibility, and (3) specificity. 418 U.S. at 700.

While the majority of courts apply the test set forth in *Nixon* to evaluate the enforceability of a Rule 17(c) subpoena, a few courts have suggested that a less stringent standard should apply to a defendant's subpoena to a third party, a situation that the *Nixon* Court did not address. *See Nixon,* 418 U.S. at 699 n.12 (passing on the issue of whether the evidentiary requirement applies "in

its full vigor when the subpoena duces tecum is issued to third parties rather than to government prosecutors"). In *United States v. Nachamie,* 91 F. Supp. 2d 552 (S.D.N.Y. 2000), for example, the court questioned "whether it makes sense to require a defendant's use of Rule 17(c) to obtain material from a non-party" to meet the *Nixon* standard, because "[u]nlike the Government, the defendant has not had an earlier opportunity to obtain material by means of a grand jury subpoena." *Id.* at 562–63. The *Nachamie* court instead proposed that the more appropriate test for a defense subpoena of documents from third parties may be "whether the subpoena was: (1) reasonable, construed using the general discovery notion of 'material to the defense;' and (2) not unduly oppressive for the producing party to respond." *Id.* at 563.

This reasoning echoes that of a few other district courts, although none have actually applied the test suggested in *Nachamie* rather than the *Nixon* test. *See, e.g., United States v. King,* 194 F.R.D. 569, 573 n.3 (E.D. Va. 2000) ("Although district courts are admonished that their discretion in issuing Rule 17(c) subpoenas is circumscribed by the responsibility to prevent Rule 17(c) from being improperly used as a discovery alternative to Fed. R. Crim. P. 16, where, as here, the subpoena is directed to a third party, that precise problem is not presented because Rule 16 regulates the discovery obligations of the United States and the defendant, and does not address how the United States or the defendant may secure evidence in the possession of third-parties."); *United States v. Tomison,* 969 F. Supp. 587, 593 n.14 (E.D. Cal. 1997) ("The notion that because Rule 16 provides for discovery, Rule 17(c) has no role in the discovery of documents can, of course, only apply to documents in the government's hands; accordingly, Rule 17(c) may well be a proper device for discovering documents in the hands of third parties.").

At least one commentator has also argued for a less stringent standard, noting:

> [While] *Nixon* is a reasonable standard to apply to prosecutors who seek additional evidence to bolster their case, having already gathered sufficient information to decide to seek an indictment and commence the process leading to a criminal trial[,] . . . [a]pplying the identical standard for Rule 17(c) subpoenas to defendants is wrong because they have none of the investigatory advantages of the Government, nor the means to compel the production of items about which they may not have a significant amount of information.

Henning, *supra,* at 640–41.

Defense counsel should assume that courts will apply the *Nixon* standard in evaluating the defendant's Rule 17(c) subpoena requests, but it is worth arguing that a less stringent test is appropriate where the defendant has issued the subpoena to a third party.

Under the stringent *Nixon* standard, a defendant may face difficulty in obtaining internal investigation interview memoranda, as opposed to purely factual documents. Such interview memoranda are typically not signed or adopted by the witness and are arguably not independently admissible at trial. As a result, a defendant's ability to obtain interview memoranda by subpoena depends in part on whether the "evidentiary" requirement of Rule 17(c) and *Nixon* requires the documents sought to be themselves admissible or merely likely to lead to admissible evidence.

A number of courts have prohibited defendants from using a Rule 17(c) subpoena to obtain material likely to lead to discoverable evidence. As one court noted, "Rule 17(c) can be contrasted with the civil rules which permit the issuance of subpoenas to seek production of documents or other materials which, although not themselves admissible, could lead to admissible evidence." *United States v. Cherry,* 876 F. Supp. 547, 553 (S.D.N.Y. 1995); *see also United States v. Shinderman,* 432 F. Supp. 2d 157, 159 (D. Me. 2006) ("Rule 17 applies only to admissible **evidence**, not to materials that

might lead to discovery of exculpatory evidence.") (emphasis in original); *United States v. Burger,* 773 F. Supp. 1419, 1425 (D. Kan. 1991) ("the documents sought cannot be **potentially** relevant or admissible, they must meet the test of relevancy and admissibility at the time they are sought") (emphasis in original).

However, other courts have allowed a defendant to meet the *Nixon* "evidentiary" standard merely by showing that a document is "arguably relevant and admissible under the Rules of Evidence." *United States v. Libby,* 432 F. Supp. 2d 26, 31 (D.D.C. 2006) (collecting cases). Another court appears to have required even less of a showing, stating: "While Rule 17(c) is limited to evidentiary materials, that is not to say that the materials subpoenaed must actually be used in evidence. It is only required that a good faith effort be made to obtain evidence." *In re Martin Marietta Corp.,* 856 F.2d 619, 622 (4th Cir. 1988). Applying this standard, the court in *Martin Marietta* concluded that interview notes and transcripts of witness interviews during an internal audit were of sufficient "evidentiary value" to be obtained by a Rule 17(c) subpoena. *Id.; see also United States v. Orena,* 883 F. Supp. 849, 868 (E.D.N.Y. 1995) (permitting a defendant to obtain surveillance reports pursuant to a Rule 17(c) subpoena because they were "potentially admissible" and "might also form the basis for eliciting certain testimony at trial").

Another problem a defendant may face in seeking interview memoranda is that many courts prohibit the use of a Rule 17(c) subpoena to obtain solely impeachment evidence. *See Nixon,* 418 U.S. at 701 ("[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."); *United States v. Hughes,* 895 F.2d 1135, 1146 (6th Cir. 1990) (quashing subpoena of documents sought for impeachment purposes); *United States v. Cherry,* 876 F. Supp. 547, 553 (S.D.N.Y. 1995) ("documents are not evidentiary for Rule 17(c) purposes if their use is limited to impeachment."). In *United States v. Weissman,* No. 01 CR. 529 (BSJ), 2002 WL 31875410, at *1 (S.D.N.Y. Dec. 26, 2002), for example, the court quashed a subpoena seeking internal investigation interview memoranda on the grounds that the material sought had only potential impeachment value that was not obtainable under Rule 17(c).

However, other courts have held that a district court has the discretion to allow the pretrial production of impeachment evidence to prevent unfairness and trial delays. *See United States v. Liddy,* 478 F.2d 586, 587–88 (D.C. Cir. 1972); *see also United States v. LaRouche Campaign,* 841 F.2d 1176, 1180 (1st Cir. 1988) (disclosure of impeachment evidence under Rule 17 left to "the sound discretion of the district court"). Still other courts permit defendants to obtain impeachment material pursuant to a Rule 17(c) subpoena as long as the witnesses to whom the material relates are certain to testify. While recognizing that "Rule 17(c) subpoenas usually are not to be used as a means of procuring purely impeachment material in advance of trial," such courts have nevertheless held "that where it is known with certainty before trial that the witness will be called to testify, the admissibility determination, within the meaning of *Nixon,* can be made before trial, and the statements properly may be considered evidentiary." *King,* 194 F.R.D. at 574. *See also LaRouche,* 841 F.2d at 1180 ("where a putative key witness, whose general testimony is already known, is scheduled to testify, we cannot hold it an abuse of discretion to compel the pretrial production of a substantial interview of that witness"). *But see United States v. Fields,* 663 F.2d 880, 881 (9th Cir. 1981) (impeachment materials need not be produced until the relevant witness testifies); *Cuthbertson II,* 651 F.2d at 195 (same). Thus, whether a court grants a defendant's request for pretrial production of such material may depend on the likelihood that the individuals whose statements are sought will testify at trial.

In addition to meeting the "evidentiary requirement," the defendant's Rule 17(c) requests must be specific in order to demonstrate that the subpoena is being issued in good faith and not as a fishing expedition. In fact, "[i]f the moving party cannot reasonably specify the information contained or believed to be contained in the documents sought

but merely hopes that something useful [may] turn up, this is a sure sign that the subpoena is being misused." *United States v. Noriega,* 764 F. Supp. 1480, 1493 (S.D. Fla. 1991).

"[C]ourts will not approve a subpoena for documents based upon requests for disclosure from broad categories of documents." *Libby,* 432 F. Supp. 2d at 31 (citing *United States v. North,* 708 F. Supp. 402, 404 (D.D.C. 1989)). *See, e.g., United States v. Mays,* 246 F.3d 677 (9th Cir. 2000) (unpublished table decision) (subpoena seeking documents relating to "**any and all** disciplinary action . . . without any time limitation" properly quashed) (emphasis in original); *United States v. Louis,* No. 04-cr-203, 2005 WL 180885, at *5–6 (S.D.N.Y. Jan. 27, 2005) (quashing subpoena seeking "'any and all' documents relating to several categories of subject matter . . . , rather than specific evidentiary items"). Rather, the required level of specificity is met only if there is a "'sufficient likelihood,' demonstrated through rational inferences, that the documents being sought contain relevant and admissible evidence." *Libby,* 432 F. Supp. 2d at 31 (citing *Nixon,* 418 U.S. at 700).

Thus, in framing requests for a Rule 17(c) subpoena, a defendant should be as specific as possible, keeping the following points in mind:

- Avoid including language such as "any and all documents relating to" a broad topic, without any further specificity
- Include a specific time frame whenever possible
- Avoid seeking a wide variety documents relating to a large group of individuals, many of whom may not even appear as witnesses in the case
- Frame requests for documents as bearing on a valid defense or having a demonstrable nexus to the defendant

A narrowly tailored Rule 17(c) subpoena directed at the materials underlying an internal investigation, such as interview memoranda, is not likely to be deemed an improper "fishing expedition" because there is only a limited universe of such materials in the corporation's possession. For example, the court in *Martin Marietta* concluded that requests for the results of an internal audit, including interview notes, transcripts, recordings, and correspondence relating to a settlement between the corporation and federal regulators, were "described with sufficient specificity" to meet the Rule 17(c) / *Nixon* requirements. 856 F.2d at 622. As long as a defendant does not seek "any and all" documents relating in any way to the internal investigation, but rather limits the requests to specific categories of documents such as interview memoranda or correspondence with law enforcement, the subpoena is likely to meet the specificity requirement.

B. Disclosure of an Internal Investigation Report Arguably Waives the Privilege As to Underlying Materials on the Same Subject Matter

The corporation is likely to resist a Rule 17(c) subpoena seeking material underlying an internal investigation by contending that the requested documents are protected by the attorney-client privilege or work product doctrine. In response, a defendant should argue that once the corporation disclosed the report of the internal investigation to the government, it impliedly waived any applicable privilege or work product protection over the underlying internal investigation materials relating to the same subject matter.

"Most courts continue to state the rule of implied waiver in absolute form—any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to all information related to the same subject matter." *In re Martin Marietta,* 856 F. 2d at 623; *see also Nguyen v. Excel Corp.,* 197 F.3d 200, 208 (5th Cir. 1999) (the "[d]isclosure of any significant portion of a confidential communication waives the privilege as to the whole"). Thus, for example, in *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.,* No. 95 Civ. 8833 (RPP), 1997 WL 801454, at *1 (S.D.N.Y. Dec. 31, 1997), the court found that the disclosure of a report to an adversary during litigation waived the protection for "any and all documents" relating to the report

and the conclusions it drew. *Id.* at *3. Other courts have similarly held that disclosure of an investigative report to either the public or an adversarial government agency waives the privilege for any documents underlying the report, including the investigators' interview notes and memoranda. *See In re Sealed Case,* 676 F.2d 793, 812–22 (D.C. Cir. 1982); *Granite Partners, L.P. v. Bear, Stearns & Co.,* 184 F.R.D. 49, 55 (S.D.N.Y. 1999); *In re Kidder Peabody Sec. Litig.,* 168 F.R.D. 459, 470–72 (S.D.N.Y. 1996).

Waiver of the attorney-client privilege, however, does not necessarily mean a waiver of the work product doctrine as to those same documents, at least with respect to core opinion work product. *See Freeport-McMoran Sulphur, LLC v. Miken Mullen Energy Equip. Resource, Inc.,* No. Civ.A. 03–1496, Civ.A. 03–1664, 2004 WL 1237450, at *8 (E.D. La. June 2, 2004); *In re Broadcom Corp. Sec. Litig.,* No. SACV 01275GLTMLGX, 2005 WL 1403513, at *3 (C.D. Cal. Apr. 7, 2005). Indeed, "the cases approach uniformity in implying that work-product protection is not as easily waived as the attorney-client privilege." *Mass Inst. of Tech.,* 129 F.3d at 687 (citing *Westinghouse,* 951 F.2d at 1428–29; *In re Steinhardt,* 9 F.3d at 234–35; *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.,* 860 F.2d 844, 846–47 (8th Cir. 1988)). Courts have held that subject matter waiver may not apply to opinion work product for two reasons: (1) "opinion work product is to be accorded great protection by the courts" and (2) "the underlying rationale for the doctrine of subject matter waiver has little application in the context of a pure expression of legal theory or legal opinion." *In re Martin Marietta,* 856 F.2d at 626.

Thus, in order to overcome a corporation's work product assertion with respect to interview memoranda, a defendant may need to contend that the interview memoranda do not constitute opinion work product. Some courts have held that attorney notes and memoranda summarizing witness interviews are opinion work product because they "contain mental impressions." *SEC v. Brady,*—- F.R.D.—-, 2006 WL 3301865, at *12 (N.D. Tex. Oct. 16, 2006) (citing *Dunn v. State Farm,* 927 F.2d 869, 875 (5th Cir. 1991) and *Baker v. General Motors Corp.,* 209 F.3d 1051, 1054 (8th Cir. 2000)). However, other courts have held that "purely factual material embedded in attorney notes may not deserve the super-protection afforded to a lawyer's mental impressions." *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP,* 124 F.3d 1304, 1308 (D.C. Cir. 1997). Still another court has held that internal investigation interview memoranda containing "a fairly straightforward recitation of the information provided by the witness rather than a 'pure mental impression' or legal theory of counsel" are not opinion work product. *In re Royal Ahold N.V. Sec. & ERISA Litig.,* 230 F.R.D. 433, 436 (D. Md. 2005) (concluding that any work product protection over such memoranda had been waived by the corporation's disclosure of the internal investigation report regarding the same subject matter); *see also United States v. Graham,* No. Crim. 03-CR-089-RB, 2003 WL 23198792, at *7 (D. Colo. Dec. 2, 2003) (if "contemporaneous notes which purport to report or record, either in whole or in part by direct quote or paraphrase, statements made by [the witness], then those statements constitute 'fact' work-product subject to discovery, as opposed to 'opinion' work product which consists of the mental or thought processes of an attorney").

IV. Conclusion

An indicted corporate executive has, as the saying goes, "a tough row to hoe," in successfully preparing for trial in a complex fraud case involving a large corporation. Such cases are very document-intensive and typically involve dozens of relevant witnesses, which makes adequate trial preparation critically important. Use of the criminal discovery rules to gain access to key internal investigation documents can provide an extremely effective tool in preparing the defense case, and may in some cases make the difference between failure and success at trial.

Endnotes

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1. McKesson appealed the district court's decision to the Ninth Circuit, but subsequently conceded that the defendants were entitled to use the materials in their defense, and the appeal was dismissed as moot. *United States v. Bergonzi,* 403 F.2d 1048, 1049–50 (9th Cir. 2005).

2. However, proposed Rule 502 would make it far more difficult for a criminal defendant to obtain internal investigation documents directly from the corporation pursuant to a Rule 17(c) subpoena, because a defendant could no longer contend that the corporation's disclosure of an internal investigation report operated as an implied subject matter waiver as to the underlying investigation materials.