



Running Internal Investigations Effectively

September 26, 2024

GIBSON DUNN

MCLE Certificate Information

MCLE Certificate Information

- Approved for 1.0 hour General PP credit.
 - CLE credit form must be submitted by **Thursday, October 3rd**
 - Form Link: https://gibsondunn.qualtrics.com/jfe/form/SV_3QPTpF9dxWkl74W
 - Most participants should anticipate receiving their certificate of attendance in four to eight weeks following the webcast.
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- **Please direct all questions regarding MCLE to CLE@gibsondunn.com.**

TODAY'S PRESENTERS



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AGENDA

01 Trigger Points and First Steps

02 Planning an Internal Investigation

03 Protecting Privilege

04 E-Data Review and Interviews

05 Sharing findings with the Government

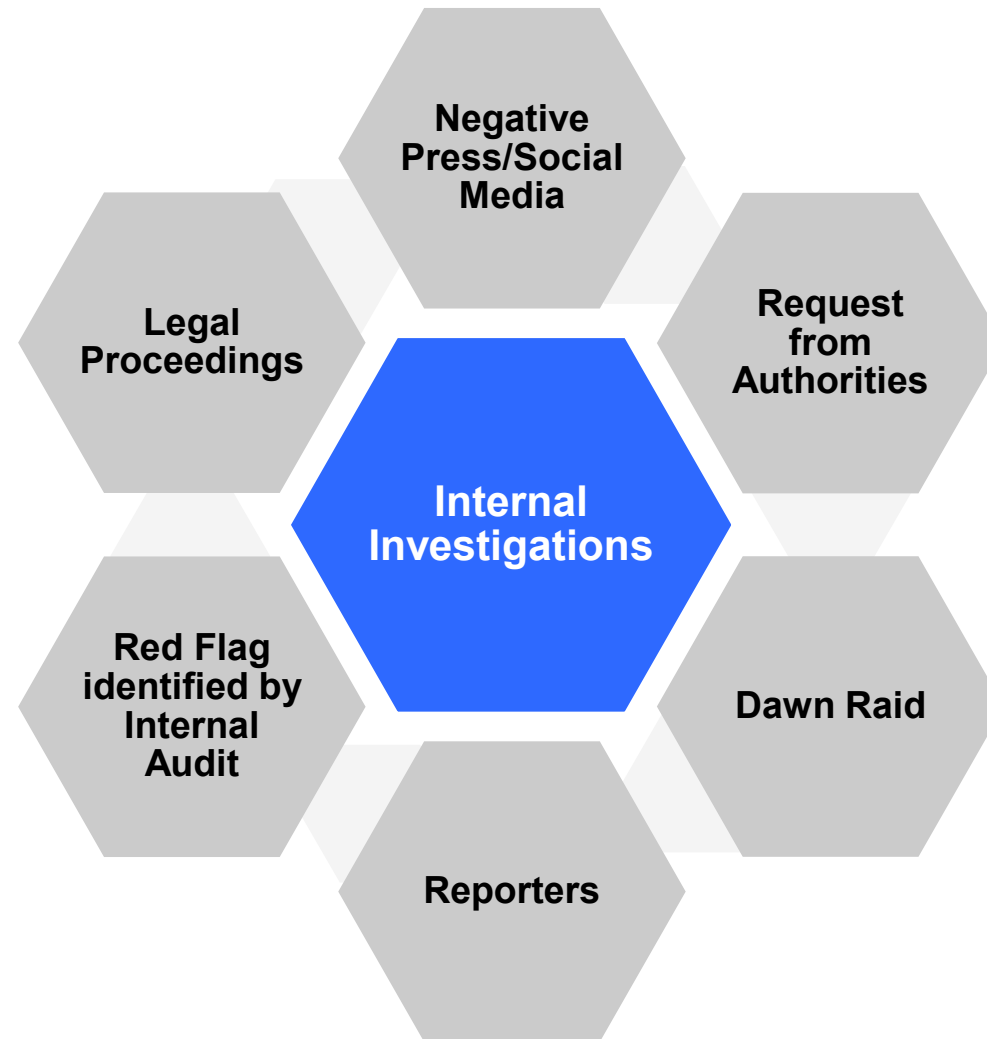
06 Virtual investigations in a post-COVID world

TRIGGER POINTS AND FIRST STEPS

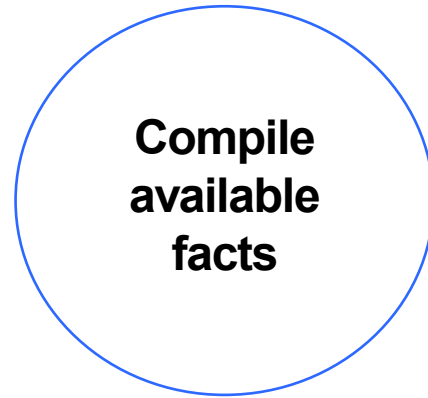
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Trigger Points for Internal Investigations

Internal Investigations can be initiated for a number of reasons.



First Steps: Plausibility Check & Risk Analysis



- Relevant press articles;
- Correspondence with relevant authorities;
- Information provided by reporter;
- Data regarding relevant transactions, etc.



- Plausibility check of allegations
- Identify potential legal violations
- Identify relevant jurisdictions
- Identify relevant enforcement authorities



- Relevant legal provisions and consequences
- National vs. international case
- Capital market relevancy
- Allegations known to the public yes/no

INTERNAL INVESTIGATION

2

Initial Actions for In-House Counsel



Define Goal of the Investigation

- Identify relevant regulatory requirements and potential legal violations
- Define time frame of investigation



Preserve Relevant Data

- Identify relevant custodians
- Suspend IT deletion routines and issue hold notices or use “silent holds” as appropriate



Identify Relevant Jurisdictions

- Analyze and continuously assess nexus points for applicability of foreign jurisdictions
- If applicable, consider particular requirements of applicable jurisdictions (e.g. Attorney Client Privilege / Legal Privilege)



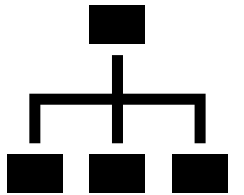
Select Investigation Team and Approve Investigation Work Plan

- Ensure that investigation team has the relevant expertise (legal, financial, forensic, etc.)
- Consider if specific training of investigation team, *e.g.* on regulatory requirements, is required
- Collaborate on Investigation Work Plan

Who at the Company to Involve in Investigation

Companies must determine who should be involved with, and oversee, an investigation.

- Determine early-on whether there is a need for **independence**.
 - Regulators and auditors may afford more deference if investigation is overseen by independent body (e.g. special committee of the board).
 - In some cases, independence may mean limiting the involvement of General Counsel or in-house legal team.
- Depending on the nature of the investigation, it may be appropriate to report findings to **senior management**, the **board of directors**, or both.
 - Where misconduct implicates senior management or critical governance issues, it is important to ensure that directors direct the investigation or receive updates to assist them in fulfilling fiduciary oversight duties.
- Depending on the nature of the investigation and the likelihood of litigation, it may be appropriate to wall-off **percipient witnesses** to maintain integrity of investigation.



Preparing and Maintaining a Work Plan

Key Elements

Allegations triggering the investigation and its potential impacts on the client

- Facts known
- Risks seen
- Legal risks involved

Scope of the investigation

- Which part of the business?
- Which legal entities / accounting areas?
- Which countries / regions?
- Which functions?
- What timeframe?
- Key custodians / roles involved and affected?

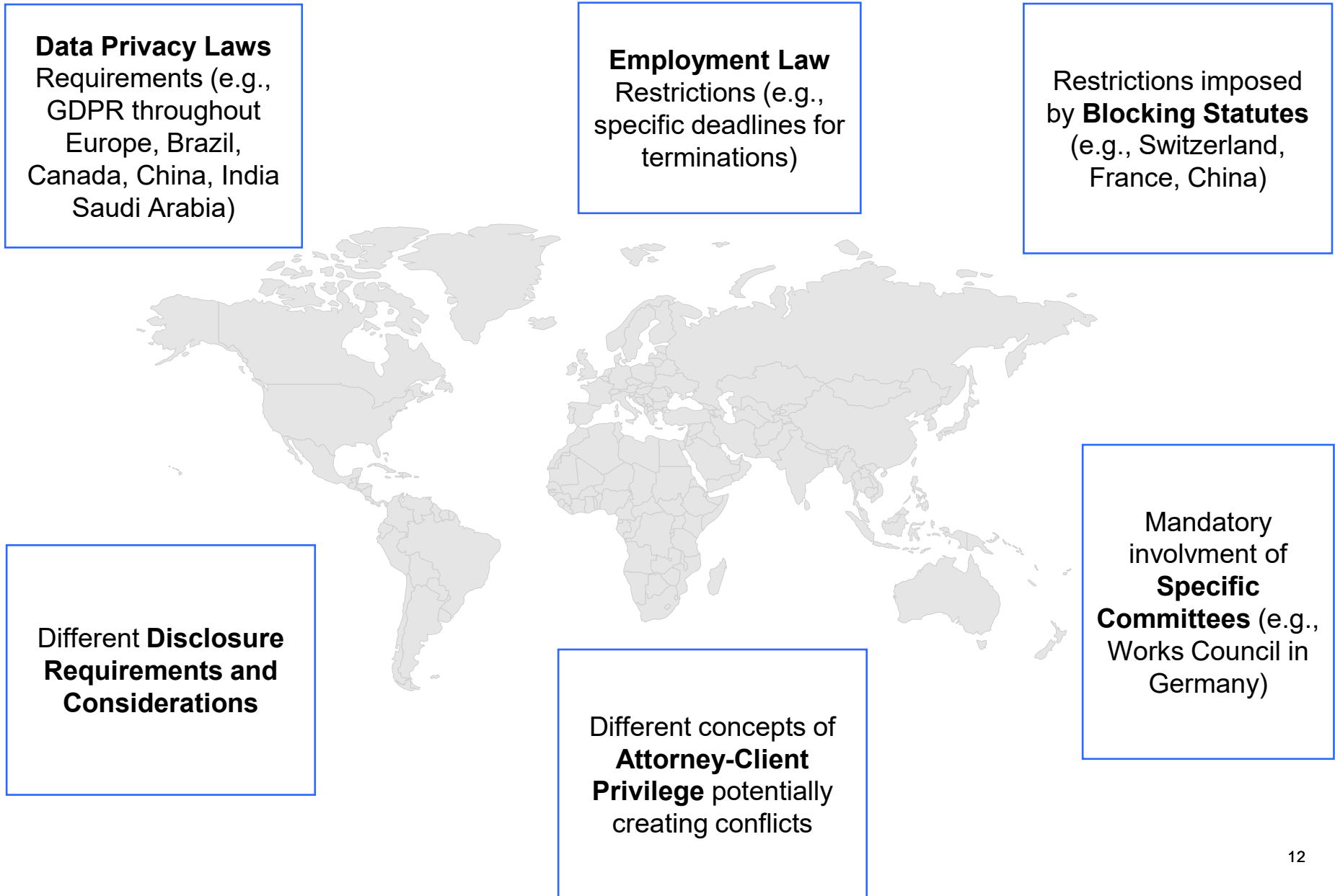
Investigatory Steps

- E-Data preservation, processing and collection
- Document collection
- Forensic accounting / technical review
- Analysis of data
- Interviews

Communication and Reporting

International Considerations

Relevant Factors Impacting International Investigations



Investigation Timeline

Companies must consider the appropriate balance between completing a timely investigation versus thoroughness.

It is imperative to avoid any implication that the investigation was short circuited or that critical facts were missed.

There are important reasons to move quickly:

- If the alleged misconduct puts the company or employees at risk, moving quickly can help ensure the company quickly mitigates risks.
- The government increasingly expects that companies seeking cooperation credit should not delay disclosure of relevant, non-privileged facts.
- Enforcers are emphasizing speed. Some companies have goals and create metrics re investigation duration.

PROTECTING PRIVILEGE

3

Privilege Protections for Internal Investigations

Companies often conduct internal investigations under attorney-client privilege, because this process:

- Permits companies to **evaluate the legal ramifications** of the conduct under review;
- Encourages **full and frank communication** between attorneys and their clients; and
- Prevents **government regulators and private plaintiffs** from inappropriately prying into internal investigations.

Since the Supreme Court's seminal decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), there have been robust attorney-client privilege protections for internal investigations in the United States.

- Communications with counsel
- "Need to know" test

Communications with in-house attorneys in the United States are treated the same as communications with external counsel, but that is not necessarily the case in the rest of the world.

Privilege Protections for Internal Investigations

Attorney-Client Privilege in the United States

- A communication
- Made between an attorney and a client (or between individuals with a “need to know”)
- In confidence
- For the purpose of seeking, obtaining, or providing legal advice

The attorney-client privilege protects **confidential communications** where there is an expectation that the communication will not be disclosed.

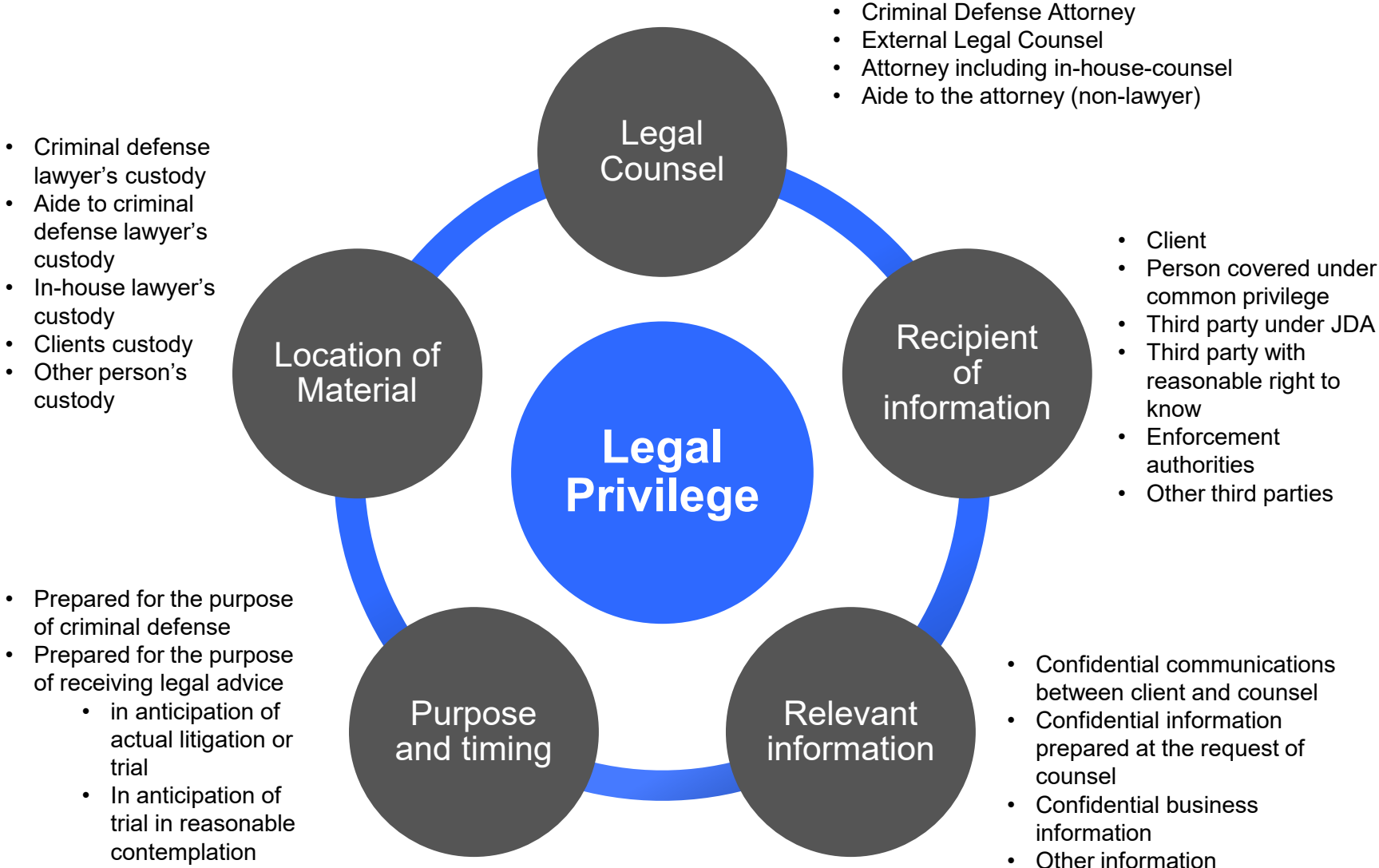
- The attorney-client privilege protects only communications between the attorney and client; it **does not protect the underlying facts**.

The attorney-client privilege attaches only when an **attorney acts in their capacity as an attorney**.

There is a current **Circuit-split** in the United States **related to the whether “dual-purpose” communications are privileged**.

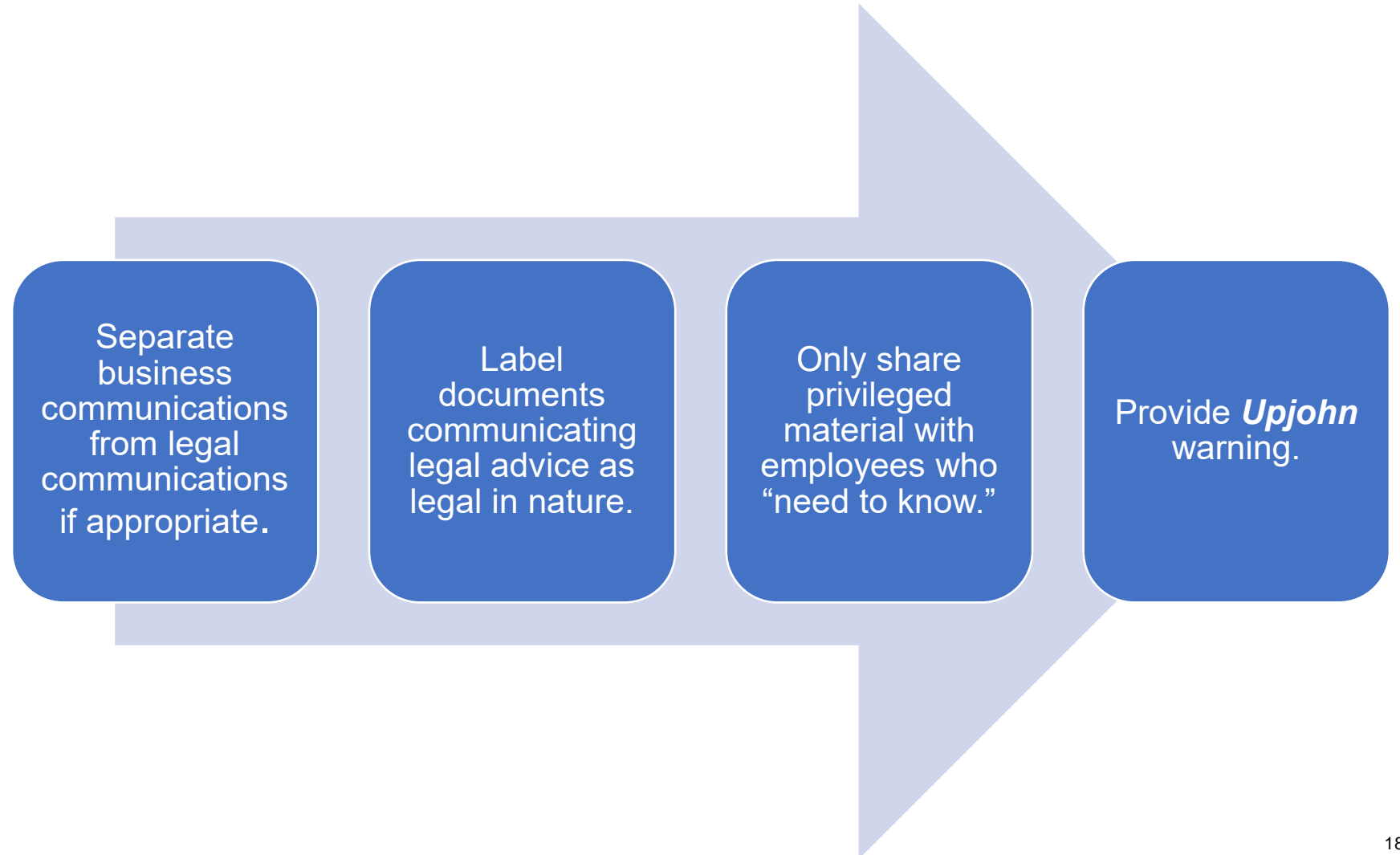
International Considerations

Relevant Factors Impacting the Privilege in Different Jurisdictions



Privilege: Best Practices

General principles for protecting privilege include:



Privilege: Best Practices

- Only share information gathered during the investigation with those with a **“need to know.”**
 - Keep the number of personnel receiving privileged materials as small as possible.
- Discuss only **factual findings** during voluntary disclosures to the government.
 - Provide downloads that **only disclose underlying factual information** and do not reveal communications or exchanges between company counsel and the witnesses.
 - Emphasize and memorialize caveats, such as couching statements in terms of “general conclusions,” and deliver downloads in a **hypothetical format** that provides fewer details of what the witness said.
 - Paraphrase and present the factual content **thematically**, rather than as a complete recounting of the witness’s statements.
 - Provide factual proffers based on **documents** created solely for the purpose of providing the information.

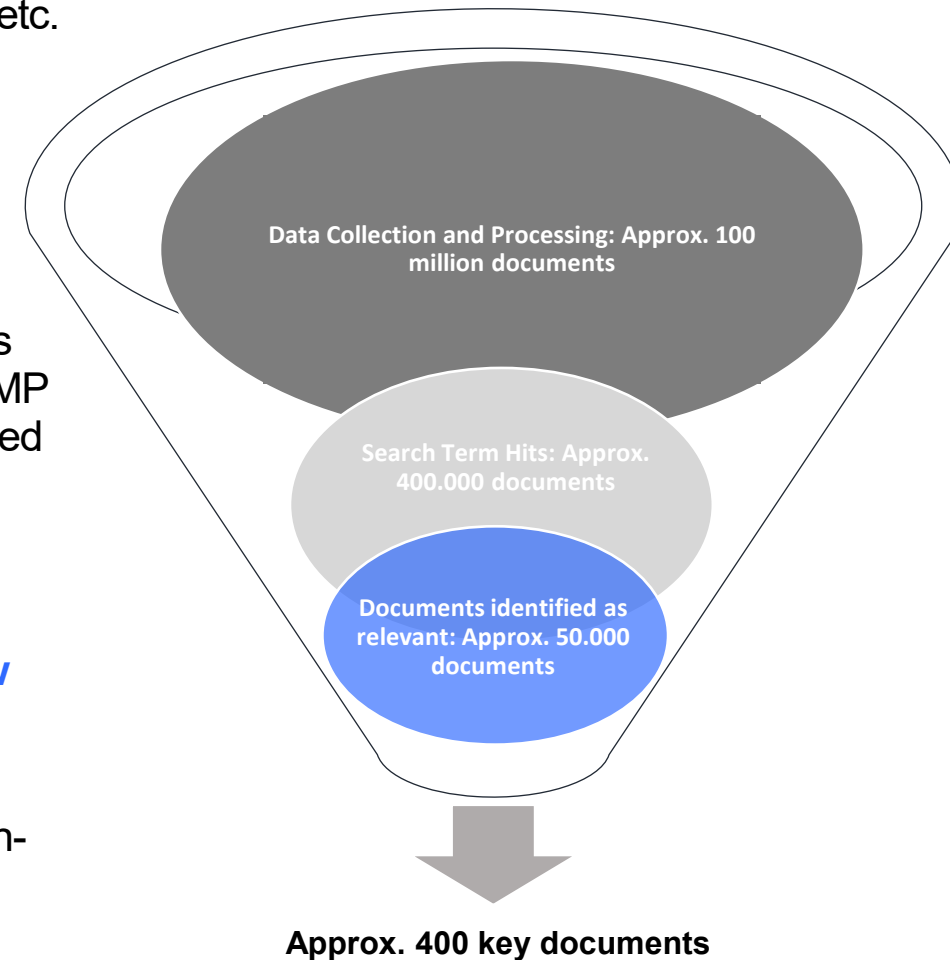
E-DATA REVIEW AND INTERVIEWS

4

Factual development

Document Collection and Review

- Utilize **scoping interviews** to assist in document collection.
 - Identify where relevant documents are kept or stored and relevant communication channels – Email, IM, text, mobile apps, etc.
- Address **foreign document restrictions**.
 - Data privacy laws, blocking statutes
- Identify and set up a **review platform and protocol**
 - Consider potential data security concerns and requirements (For example, FedRAMP requirements if review will involve classified or controlled unclassified information (“CUI”))
- Generate **search terms**
- Consider using **Technology-Assisted Review** (“TAR”) depending on data volume
 - Utilizes AI to assist in identifying most-relevant documents and weeding out non-responsive ones



Interviews: Best Practices

When possible, schedule **interviews after document review** completed.

- Helps to ensure no key documents missed during interviews;
- Avoids need to re-interview employees;
- Some higher-ranking employees (and many former employees) may only be available to sit for a single interview.

Establish alerts with HR to **warn of key employee departures**.

- Interview key employees before they leave the company;
- Consider entering into cooperation agreements as part of any severance package.

Interview **one employee (or former employee) at a time**.

- Helps to preserve privilege and provides cross-check against other testimony.
- But **take into account local requirements** such as right to have employee representative present.

Non-U.S. in-house counsel should only attend introduction to interview, then depart.

- Helps to preserve privilege.

Individual Counsel for Employees

Companies must consider whether, and to whom, to provide pool counsel or separate individual counsel.

- What interests do the employees share?
- How likely are conflicts between current/former employees requiring representation?
- What happens in the event a conflict arises during the representation?
- How segregable are the issues/charges?
- Can information learned by pool counsel be used for the benefit of all clients in the pool?
- Should executives receive individual counsel?
- Criminal investigation targets should receive individual counsel.
- Advancement/indemnification issues are determined by company bylaws.
- Country-specific rules regarding employee counsel should be taken into account.

SHARING FINDINGS WITH THE GOVERNMENT

5

Sharing Findings with the Government

Companies must carefully assess when, and what, to share with the government.

In connection with every corporate resolution, prosecutors assess whether the company provided cooperation in a timely fashion and will consider whether a company promptly notified prosecutors of particularly relevant information once discovered or if disclosure was delayed.

- To be eligible for cooperation credit, production of evidence most relevant for assessing individual culpability should be prioritized.
- Companies that fail to produce relevant facts in a timely manner place cooperation credit in jeopardy.

DOJ policy generally precludes DOJ from asking for privileged material.

There is no obligation to self-disclose in the United States.

There are advantages to making a voluntary disclosure, but doing so will trigger a government investigation that entails significant costs for the company.

Effects of Voluntary Disclosure in the United States

To qualify for a **presumption of a declination**: (i) self-disclosure, without aggravating circumstances; (ii) full cooperation; and (iii) timely and appropriate remediation. No declination if there is no self-disclosure or if there are aggravating circumstances (where aggravating circumstances are present, declination is possible if the company meets certain voluntary disclosure, compliance program, and cooperation and remediation requirements).

- One key potentially disqualifying aggravator is if the company is a “recidivist,” but “recidivist” is not defined, though a speech by Deputy AG Lisa Monaco suggested it was a lookback for 10 years for criminal resolutions and 5 years for civil resolutions covering similar conduct.

When a company meets the qualifying criteria, DOJ will issue a declination (with disgorgement) or, in the event of a prosecution, recommend up to a **75% reduction** off the USSG fine range and **generally not require a monitor**.

Even when a company does not voluntarily disclose, full cooperation and appropriate remediation will result in a **reduction of up to 50%** off the USSG fine range (e.g., Albemarle Corporation received a 45% discount in its September 2023 FCPA-related non-prosecution agreement; the company did not receive a declination because DOJ believed disclosure was not “reasonably prompt.”)

Point from which the credit is applied within the USSG range:

- Middle of range or higher for recidivists or those that do not cooperate; and
- Bottom of range for non-recidivist companies that cooperate.

International & Other Disclosure Considerations

Self-disclosure

- There may be mandatory disclosure requirements in jurisdictions outside the United States.
 - For example, in Germany there is a criminal law obligation to report, but only in the most serious cases (§ 138 StGB).
- Consider whether there are specific circumstances in which there is a mandatory disclosure requirement.
- Also consider potential leniency programs that may be available.

Other considerations when there is no obligation to report

- Inadvertent leaks from within the organization;
- Investigative journalists;
- Ad-hoc notifications; and
- Whistleblowers.

VIRTUAL INVESTIGATIONS IN A POST-COVID WORLD

6

Virtual Investigations in a Post-COVID World

Virtual investigation methods developed during the COVID-19 pandemic remain an important part of an investigations toolkit and offer significant advantages for clients with minimal downside:

Cost-effectiveness: The pandemic has demonstrated that attorneys can be effective fact gatherers without spending time and money travelling to meet witnesses in person. This continues to result in significant savings for clients.

Flexibility: Video interviews allow attorneys to conduct interviews across time zones and work environments, giving clients more control over the format and cadence of an investigation.

Efficient fact gathering: Video interviews allow attorneys to gather and process facts quickly and effectively, increasing the pace of investigations.

Immediacy: Increased flexibility allows attorneys to uncover facts while they are still fresh, minimizing the risk of lost recollections and confusion.

Expanded reach: Video interviews allow attorneys to interview a wider range of employees and personnel, regardless of geographic location. This ensures attorneys are able to see issues from all sides and obtain a well-rounded perspective.

Virtual Investigations in a Post-COVID World

Videoconference interviews began as a necessity and have evolved into a cornerstone of an effective investigation. Thoughtful preparation can help ensure effective information gathering.



Environment

- Impact on rapport



Timing

- Status of the investigation; workday; time zones



Security

- Household members/third parties nearby; external intrusion/recording

Do's and Dont's refined during the pandemic:

- ❑ **Consider** how many will participate and their responsibilities (questions vs. notes) to ensure integrity of record without overwhelming witness
- ❑ **Address** potential recording issues (on both sides of the line)
 - Evaluate applicable anti-wiretapping laws in advance
- ❑ **Avoid** giving legal advice (see *Upjohn* admonitions)
- ❑ **Pay attention to** appropriate tone and building rapport
 - Allow time for rapport building
 - Plan on how to manage and control hostile interviewee
- ❑ **Stress** that while interview cannot be kept confidential, company will treat contents with discretion (but do not contradict *Upjohn* points)
- ❑ **Manage** participation of individual counsel and control “rules” of the interview

Virtual Investigations in a Post-COVID World

Work-from-home circumstances have blurred some lines between corporate and personal communications; but preservation obligations remain the same.

Same Requirements (Pandemic or Not)

1. **Retain** data and documents as required under applicable law
 2. **Maintain** attention to data retention (spoliation carries severe sanctions)
-

Additional Sources and Potential for Loss

1. **Consider** employee use of personal devices at home or new communication platforms (e.g., Slack, Teams, WeChat, WhatsApp)
 2. **Pursue** orders / subpoenas to prevent destruction of personally stored information
 3. **Implement** proactive BYOD policies discussing potential need for preservation
 4. **Consider** sandboxes (separate spaces for work apps) and required use of enterprise messaging apps
 5. **Obtain** and **retain** information from former employees
-

Virtual Investigations in a Post-COVID World

What has changed: *Hybrid Models*

1. Continue to evolve videoconference best practices

- Remaining current on the latest communications technology and making adjustments to best practices accordingly will ensure that we are able to continue effective fact gathering via videoconferencing tools.

2. Introduce select in-person interviews when advantageous

- While videoconferencing offers many advantages, there are instances when an in-person interview will accomplish objectives more effectively than a videoconference. We are mindful of areas in which in-person meetings can further client's goals.

3. Retain robust assessments of security issues

- Hybrid investigations require staying apprised of information security challenges and selecting partners (for document collection or communications technology) with the goal of security in mind.

4. Understand evolving challenges of hybrid workplaces

- Employees across industries are facing varying work place environments, impacting the logistics of videoconference interviews and document collection. An individualized investigation plan is critical to ensuring a successful investigation.

5. Take care to police appropriate attorney-client privilege/attorney work product bounds

- Privilege considerations are constantly changing as workplaces and means of communication evolve. Staying on top of these developments and of accompanying ACP/AWP jurisprudence is critical to ensuring client's privacy is maintained.

Upcoming Programs – Fall White Collar Webcast Series

Date and Time	Program	Registration Link
Tuesday, October 1, 2024 12:00 PM – 1:00 PM ET 9:00 AM – 10:00 AM PT	DOJ's Consumer Protection Branch Presenters: Nicola Hanna, Gustav Eyler, Katlin McKelvie	Event Details
Wednesday, October 2, 2024 12:00 PM – 1:00 PM ET 9:00 AM – 10:00 AM PT	Navigating Parallel Investigations: Managing Simultaneous DOJ and SEC Investigations Presenters: Douglas Fuchs, Poonam Kumar, Mark Schonfeld	Event Details
Wednesday, October 9, 2024 12:30 PM – 1:30 PM ET 9:30 AM – 10:00 AM PT	SDNY and EDNY Prosecution Trends Presenters: F. Joseph Warin, Zainab Ahmad, Karin Portlock	Event Details



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