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Protecting Privilege in Internal Investigations: Understanding the Ask

To kick off our series of blogs about internal investigations, let us note that rarely does a week pass in a white collar investigation - or in an SEC-regulatory outside counsel's life - that an auditor or government enforcement attorney does not request some interim (or final) read-out. These requests for information can encompass investigative process and factual findings, lists of search terms, interview outlines, or similar investigative materials. However, this information, if provided, presents a very real risk of privilege waiver. We encourage pushback against the "nobody else ever fights us on this" contention often heard from government enforcers and outside auditors wanting to "better understand" a client's internal investigation making these requests. Outside lawyers often conduct internal investigations and provide counsel to companies through their internal audit committees, special committees, boards of directors, and management. The areas of privileged and confidential legal advice can include reacting to findings of wrong-doing, SEC disclosure obligations, fiduciary duties, and strategic transactions. It is in this context that third parties will request search term lists, or "key document" collections generated during such investigations. Outside auditors, following a final read-out, might even ask for an all-things-considered assessment of wrong-doing (ala "so, did your client violate any criminal proscriptions?"). An internal investigator's refusal to provide this information is frequently met with disbelief. But the investigator's job is to both figure out what happened, and to make sure that the investigator's findings receive the maximum level of privilege protection. After all, even when an internal investigation finds no material wrongdoing, there is a real and articulable concern that the client might end up dealing with another legal follow-on action. This could be a wrongful termination suit after parting from employees in the context of discipline and remediation, legal action against competitor companies or other individuals, negotiating with whistleblowers, addressing shareholder suits, or responding to enforcement or regulatory actions. Making a misstep by sharing privileged materials can have devastating legal and reputational consequences to client and counsel alike. When an outside auditor or government enforcer asks for arguably protected materials, it is critical to think around the corners and anticipate problems, even if that results in an occasional look of incredulity from lawyers across the table.

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