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Internal Investigations: Law on Work Product & Attorney-Client Privilege

Following up on [our recent blog](#) in a series about internal investigations, note that Federal Rule of Evidence 502(g) states: (1) "Attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and (2) "Work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial. The work-product privilege is more comprehensive than attorney-client privilege. Whereas the attorney-client privilege includes only communications between an attorney and the client, work product includes materials prepared or collected by persons other than the attorney or someone working for them with an eye towards the realistic possibility of impending litigation. Classic opinion work product thus includes documents like investigative work plans and memoranda of interview, not mere lists of words and phrases connected by Boolean search operators. As noted, these search term lists, not unlike interview outlines, can reveal a great deal about the attorney's legal theories and factual suspicions. Because these records typically would not exist but for the fact that the company anticipates potential legal action, attorneys should consider pressing the position that work-product protection should apply. Let us at this point also get ahead of an argument occasionally advanced by those skeptical of this perspective. Opinions rejecting arguments that search terms amount to opinion work product, like *FormFactor v. Micro-Probe*, were birthed in the context of civil cases. In those cases, the search terms at issue were prepared to identify documents and information responsive to opposing counsel's specific discovery requests. In that context, then, production of search terms in civil litigation may legitimately assist opposing counsel in judging whether the other side has fulfilled its mandatory discovery obligations. Internal investigations are fundamentally different from civil litigation. Rarely can an internal investigation be deemed legally mandatory, such that counsel or the company would be duty-bound to prove the sufficiency of its investigative efforts. And in the context of investigations, the facts do not emerge as a result of the opposing side's discovery requests. Rather, counsel makes continuous judgment calls on what information may be important. Further, lurking immediately beneath the surface of the investigative process we find an implicitly adversarial relationship between the investigating attorney and the individuals whose data is being reviewed. This is never more so than when those investigative targets are employees who are believed to be guilty of wrongdoing. In this context, investigative data review efforts are best described as an active, prelitigation attempt to discover the nature and scope of potential wrongdoing. Consider, by analogy, those few cases addressing requests for disclosure of metadata, which is information attached to a text-based file showing, for example, the drafting history of the document. Courts for good reason have ruled that metadata "almost by definition, shows the mental processes of the drafter of a document by revealing the drafter's drafting decisions and steps." *United States v. Wirth*, Crim. No. 11-256 ADM/JJK, 2012 BL 87068, at *4 (D. Minn. Apr. 3, 2012). Even if a court were to reject characterizing investigative search term lists as opinion work product, a useful fallback position is to note that some courts have found that, when search terms are used as a "mechanism for determining the scope of [discovery obligations]," the terms may be protected as fact work product. *United States v. Cadden*, Crim. No. 14-10363-RGS, 2015 BL 320421, at *3 (D. Mass. Sept. 30, 2015).

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