

To Privilege or Not to Privilege: A Question of Risk Assessment and Legal Exposure

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Speakers



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Is There a “Right” Way to Structure an Assessment?

- Some assessments are conducted in the ordinary course.
 - For example, an audit conducted pursuant to the audit schedule.
- In other cases, there is purely a legal need for a privileged and work product-protected investigation to advise counsel in anticipation of litigation.
- However, assessments often have both business and legal purposes.
- How do you use a protected assessment for business purposes without destroying its legal protections?

Example: After an Incident

- There was a data breach.
- Regulators and plaintiffs’ counsel are sniffing around.
- The company wants to find the root cause of the breach and fix it.
- Breach response has overlapping legal and business components.
 - A company will need to preserve evidence, educate counsel, fulfill statutory notice obligations, and prepare for foreseeable litigation.
 - A company will also want to remediate and improve security and fulfill contractual obligations.

Example: Recommendations vs. Obligations

- The inclusion of recommendations in a report may be of particular concern.
 - Example: “We identified that the company is not in compliance with its patching policy. The company should implement tracking software in the next quarter.”
- If recommendations were not timely adopted, they could be misused by an adversary who may argue that:
 - the company did not react reasonably following an incident.
 - the company has a pattern of unreasonable security.
- But recommendations are often a valuable part of an assessment, so simply omitting them is not a good option.

Example: Unnecessary Language is a Gift to Adversaries

- Often time assessors may not be aware that a statement could have a legal consequence.
 - Assessors may not be aware of every legal risk faced by an organization.
- Other times, assessors include extra language to emphasize the seriousness of findings. For example:
 - “Critical vulnerability X remains unpatched after 180 days ***despite being identified during the last two audits.***”
- Often, this extra language is not necessary to the primary purpose of the assessment, but can create significant additional risk.

Solution(s)

- We need a way of protecting assessments that allows for some business use of the assessment report: 1) without destroying privilege or work product protections; and 2) that gives counsel an opportunity to safely edit prior to any distribution.
- This is known as a “dual use” assessment.
- There are two types of dual use assessments: “dual track” and “dual purpose.”
- There are many variations within each type, each with its own benefits, burdens, and risks.

Why Don't We Just Fully Protect Everything?

- There often isn't a good faith basis to do so.
- It would be unnecessarily expensive and burdensome.
- Over-using a privilege designation may weaken privilege claims when you really need to make them.
- There are times when you want risk assessment materials to be discoverable so that you can rely on them.
 - When you want to produce a document to establish the reasonableness of conduct.
 - To satisfy contractual obligations.
- Ethical and practical risks.

Ethics and Privilege Logs

"[T]he fact that the Young firm claimed attorney-client privilege, when there is not even a scintilla of evidence that an attorney was involved in the creation of these statements, alone demonstrates bad faith...Accordingly, the Court hereby enters a finding of liability against [Defendants] who are represented by the Young firm, as sanctions for the Young firm's conduct."

- *Heath v. F/V Zolotoi*, 221 F.R.D. 545, 550-53 (W.D. Wash. May 12, 2004)

Practical Consequences to Weak Privilege

"National Grid has introduced an attorney into their nearly contemporaneous investigation for the sole reason of claiming the privilege and avoiding discovery.

Such procedure constitutes a sham on the Court and the other parties in this case and will not be permitted."

- *Cataldo v. National Grid USA et al.*, No. 2006-5120 23 Mass. L. Rptr. 493 (Sup. Ct. Mass. Feb. 15, 2008), 2015 WL 496718 at *6 (emphasis supplied)

There Is Not a Single Perfect Solution...

- “Dual use” assessments may or may not withstand scrutiny if the privilege designation is challenged.
- The initial goal is to develop a credible basis to withhold these documents on a privilege log.
- The first step is to select an appropriate structure:
 - Dual Track is generally better if there is a high legal risk.
 - Dual Purpose is the most common and flexible structure available.
- The second step is to determine how to implement the selected assessment structure to balance the strength of the desired privilege claim against costs and burdens.

Agenda

- Introduce four possible assessment structures.
- Discuss how to implement a “dual use” assessment.
 - Dual Track
 - Dual Purpose
- Discuss changing structure mid-assessment.
- Discuss protecting resulting reports and information.

Four Assessment Structures

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Assessment Structures

- There are four assessment structures:
 1. Ordinary course



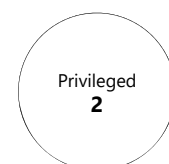
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Ordinary Course Assessments

- Pros:
 - Comparatively cheapest, fastest and least burdensome
 - Most flexible distribution and use of resulting information and materials
 - Maximum leveraging of internal expertise
 - Scoped by individuals who best understand the business concerns
- Cons:
 - Full discoverability of reports as well as any underlying notes and work product
 - Highest risk that language in the resulting materials could be harmful

Assessment Structures

- There are four assessment structures:
 1. Ordinary course
 2. (Fully) Privileged

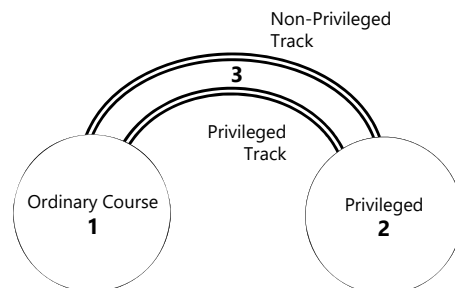


Privileged Assessments

- Pros:
 - Highest protection of reports and notes from discovery
 - Low risk of unnecessarily harmful language
 - Scoped by individuals who are aware of the legal landscape
- Cons:
 - Comparatively more expensive and burdensome than ordinary course
 - Least flexibility of use and distribution
 - Potential tension with the business and internal auditors

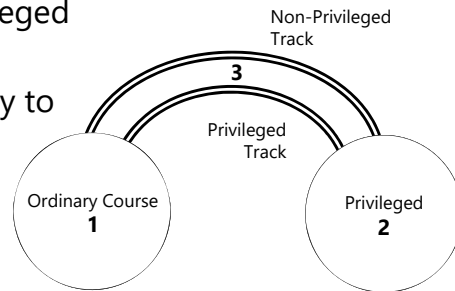
Assessment Structures

- There are four assessment structures:
 1. Ordinary course
 2. (Fully) Privileged
 3. Dual track



Dual Track Assessments

- Dual track risk assessments involve two investigations conducted in parallel: privileged and non-privileged.
- You expose some information to discovery to attempt to strengthen the privilege claim where it really matters.

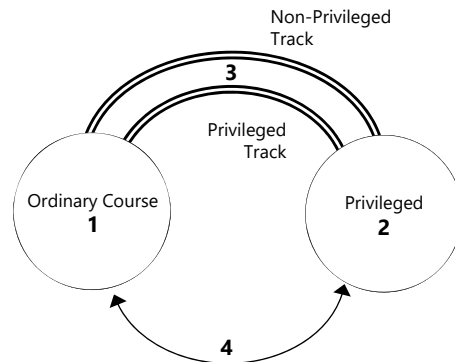


Dual Track Pros and Cons

- Pros:
 - Provides the most robust protection of the dual use structures
 - Total control over how information is distributed throughout the course of the parallel investigations
- Cons:
 - More expensive and burdensome than dual use as it requires two independent assessments
 - Exposing some information could give a litigant a hook to explain why it needs more
 - Greater risk of privilege waiver than a fully privileged assessment

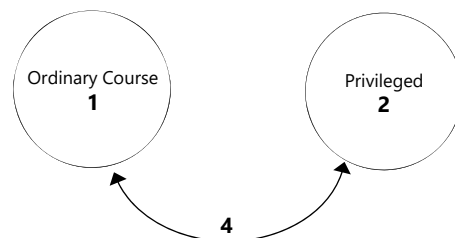
Assessment Structures

- There are four assessment structures:
 1. Ordinary course
 2. (Fully) Privileged
 3. Dual track
 4. Dual purpose



Dual Purpose Assessments

- Dual purpose risk assessments involve a single assessment that will be used for both legal and non-legal purposes.
- If properly structured and implemented, the business purpose is integral to and not discretely separable from the legal purpose.



Dual Purpose Pros and Cons

- Pros:
 - Less expensive than the dual-track approach
 - Most flexibility to calibrate the level of investment and resulting strength of the privilege claim to the particular risks
- Cons:
 - Privilege claim is more likely to be challenged because of the intertwined business purpose
 - There is generally (with one big exception) no non-privileged material that can be disclosed to, for example, a regulator

Dual Purpose Assessments: Variations

- The output of a dual purpose assessment might be multiple reports:
 - A privileged report with the complete analysis and conclusions
 - A separate privileged report with recommendations
 - A non-privileged report with non-protectable factual information
- The process by which these reports are created should be closely directed by counsel.

Implementing a Dual Track Assessment

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Structuring a Dual Track Assessment

- Separate teams should work independently of each other.
 - No overlapping team members.
 - Restrict sharing of findings.
- Counsel directs and oversees the privileged track team.
- Each team should have a separate scope.
 - The privileged track team is focused on informing counsel so that attorneys can provide legal advice and prepare to defend the company in pending and reasonably anticipated litigation.
 - The results of privileged track would not have been prepared in substantially the same form or with the same content but for the anticipated litigation.

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In re Target

- This case presents an example of a successful use of a dual track assessment approach following a data breach.
- Target's 2013 data breach resulted in 41 million customers having their credit card information stolen.
- Target set up two investigation teams:
 - A team known as the "Data Breach Task Force," who ran a privileged investigation and
 - A team known as the "Credit Card" team, who ran a non-privileged investigation.

In re Target

- The Data Breach Task Force was directed by outside counsel and established at the request of Target's in-house counsel and involved a third party consultant team to help educate lawyers on technical matters.
- The "Credit Card" team included Target and a separate team of personnel of the same third party consultant, who sought to learn how the breach happened so that Target and the credit card companies could respond appropriately.
- The "Credit Card" team was separate and did not communicate with the Data Breach Task Force.

In re Target: Holding

“Target has demonstrated...that the work of the Data Breach Task Force was focused not on remediation of the breach ... but on informing Target's in-house and outside counsel about the breach so that Target's attorneys could provide the company with legal advice and prepare to defend the company in litigation that was already pending and was reasonably expected to follow.”

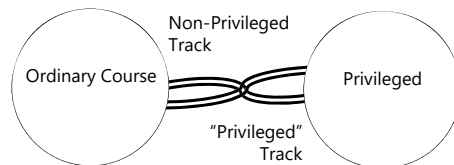
- *In re: Target Corp. Customer Data Security Breach Litig.*, MDL No. 14-2522 (D. Minn. Oct. 23, 2015), 2015 WL 6777384 at *1

Cataldo v. National Grid

- This case presents another example of a dual track assessment approach following a data breach.
- National Grid investigated an accident in which a high voltage power line fell on the plaintiff.
- National Grid's inside counsel set up two teams:
 - The first team was a non-privileged team, instructed to assess what happened and how to prevent a re-occurrence.
 - The second team was a privileged team to address specific questions posed by inside counsel.

Cataldo v. National Grid

- The court found that there was no privilege or work product protection for documents created in either track, because:
 - The two teams had overlapping members,
 - There was evidence that the teams did not operate independently,
 - The teams did not operate independently during their investigations, and
 - The reports contained similar information.



Implementing a Dual Purpose Assessment

Implementing a Dual Purpose Assessment

- An assessment will only be protectable if a court can conclude that the assessment would not have existed in its current form but for the legal purpose.
- The goal is to distinguish the dual purpose assessment from similar assessments that may have been conducted in the ordinary course.
- The more “indicia of privilege” applicable to the investigation, the more likely the assessment will be protected.
- Other than some involvement of counsel, no particular indicia is required.

Designing the Assessment is Key

“If the investigation was of a nature that the business would ordinarily have conducted it in all events then the privilege will not apply. But if the investigation was conducted which would not have been conducted in the ordinary course of business but ... so that legal advice could be given, it will be privileged protected.

Much depends on how the investigation is structured before it is even begun, what the employees are told is the purpose of the interviews, and how the facts are cast.”

- *U.S. v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. Nov. 21, 2012)
(quotations omitted) (emphasis supplied)

Scoping the Assessment

- The scope of the dual purpose assessment should demonstrate that the assessment would not be conducted in the same manner in the ordinary course.
 - Consider having counsel scope the assessment.
 - Tie the assessment to a specific event or increased regulatory inquiries in a specific area based on similar lawsuits against other companies.
 - Focus on all the adverse risks associated with the event and potential legal issues.
 - Provide analyses that differs from what is prepared in the ordinary course.
- Memorialize the legal purpose in a (privileged?) memorandum

The 9th Circuits “Because of Litigation” Test

“Dual purpose documents are deemed prepared because of litigation if in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation. In applying the ‘because of’ standard, courts must consider the totality of the circumstances and determine whether the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation.”

-US v. Richey, 632 F.3d 559, 567-68 (9th Cir. 2011)

California Earthquake Authority

- Wells Fargo made an investment causing CEA to lose over \$47M.
- CEA hired third party PwC to investigate the events and circumstances leading up to the investment and prepare a report for CEA's governing board.
- The PwC investigation was supervised by CEA's general counsel.
- Deciding that this was a dual purpose assessment, the court relied on:
 - Timing of retention of PwC, which was contemporaneous with negotiations between CEA and outside counsel and the institution of a litigation hold.
 - The CEA-PwC engagement letter and detailed SOW, which confirmed that anticipated litigation "animated every document PwC prepared."
 - CEA requested mediation with Wells Fargo around the time that PwC completed its investigation and draft report.

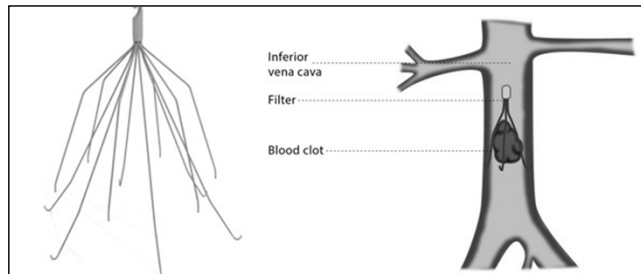
The Business Purposes Should be "Profoundly Interconnected" with Litigation Purposes

"The same investigation that would identify what duties were allegedly breached and from whom remedies could purportedly be sought **would likely illuminate any necessary changes to existing investment policies, procedures, and investments** to avoid reoccurrence of such a loss."

- *California Earthquake Authority v. Metropolitan West Securities LLC*, 285 F.R.D. 585, 591 (E.D. Cal. Aug. 1, 2012) (emphasis supplied)

In re: Bard IVC Filters

- In early 2004 Bard began receiving notices of adverse events, including a patient death, associated with its Recovery Filter device.
 - Bard’s IVC Recovery Filter is a device implanted into a patient’s inferior vena cava (hence “IVC”) to prevent blood clots from blocking blood flow.
 - Bard’s filters would sometimes break and/or move out of place.



Source: <http://www.drugsclaim.com/blog/recovery-ivc-filter-puts-patients-at-risk/>

In re: Bard IVC Filters

- By April 2004, Bard learned of a second death associated with the filter and retained a third party, Dr. Lehmann, to conduct a risk assessment.
 - Dr. Lehmann previously worked for Bard and previously prepared ordinary course assessments known as “health hazard evaluations” (or “HHEs”).
- Dr. Lehmann prepared a report and provided it to Bard’s general counsel.
- Plaintiffs moved to compel discovery of the report and argued it was just another ordinary course HHE.
- The court applied the Ninth Circuit’s because of litigation test and concluded that Dr. Lehmann’s report was protected as it was prepared because of the prospect of litigation.

In re: Bard IVC Filters: The Court's Determination

"HHEs were prepared pursuant to Bard's regulatory obligations, while the Report was not; the purpose of the HHEs was to 'guide potential market actions or corrections,' while the purpose of the Report was to provide guidance on Bard's risk and overall exposure from adverse events associated with the Recovery Filter;

HHEs considered a product's risks and benefits, while the Report considered only the Recovery Filter's risks;

HHEs each focused on a single adverse event involving migration, while the Report dealt with all adverse events associated with the Recovery Filter; and

the Report involved a detailed statistical analysis personally performed by Dr. Lehmann, while HHEs did not."

- *In re: Bard IVC Filters Products Liability Litig.*, MDL No. 2641 (D. Ariz. Feb. 11, 2016), 2016 WL 537587 at *5 (emphasis supplied)

Assembling the Team

- Dual purpose risk assessments use a single team.
- Counsel should over see the dual purpose risk assessment and enforce a clear reporting line.
- It should be made clear that non-lawyers who are part of the team are acting at counsel's direction in order to assist counsel in providing legal advice.

Assembling the Team: Counsel

- Will you involve inside counsel, outside counsel, or both?
 - Hiring outside counsel is not required but is an additional indicia of privilege.
- Whether or not you hire outside counsel, be clear on who is overseeing the risk assessment.
- It is not enough to just copy counsel.
 - The more active counsel is involved the stronger the protection.

Attorneys Should Not Have a “Consultation Lite” Role

“At bottom, the respondent’s claim to privilege **appears to be premised on a gimmick: exclude counsel from conducting the internal investigation but retain them in a watered-down capacity to “consult”** on the investigation in order to cloak the investigation with privilege. Unfortunately for the respondent, this sort of ‘consultation lite’ does not qualify the Audit Report for the protections of the attorney-client privilege. ... This sort of **arms-length coaching by counsel, as opposed to direct involvement of an attorney**, undercuts the purposes of the attorney-client privilege in the context of an internal investigation.”

- *U.S. v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 129-130
(D.D.C. Nov. 21, 2012) (emphasis supplied)

Assembling the Team: Third Parties

- If it is determined that third party experts or consultants are necessary, take care in how they are engaged and how their work is overseen.
 - Counsel may retain the third party expert.
 - The engagement letter with the consultant may state that the purpose of the engagement is to assist counsel in providing legal advice
 - Consider executing a separate statement of work, even where the third party already has a master agreement with the Company and may already have a business relationship with the Company (possibly even to help with the same subject matter of assessments).
 - In the most sensitive cases, avoid using the same consultants.

Fact Finding

- In conducting interviews and writing questionnaires consider:
 - Should interviews be conducted by counsel, or by non-lawyers expressly at the direction of counsel?
 - Inform the interviewees and respondents of the questionnaire that the purpose of the interview or questionnaire is to assist the company in obtaining legal advice.
 - Counsel should instruct employees to treat the interview/questionnaire and the investigation as “highly confidential” and to not discuss their interviews or responses with anyone without specific advance authorization of counsel.
 - Provide an *Upjohn* warning and receive (and memorialize) a clear affirmation.

Written Materials

- Include legal analysis rather than mere facts in written materials.
 - If written materials contain business advice, note the legal rationale for such advice (relatedly, note when materials include counsel's mental impressions or opinions).
 - Communicate sensitive, preliminary or non-final conclusions orally when possible.
- Mark documents privileged and confidential and/or or prepared at direction of counsel).
 - Proper legending is another indicia of privilege.
 - Overuse or improper use of these designations can, however, dilute a legitimate claim of protection (and in rare cases may lead to waiver).
 - Confidentiality designations should have a legitimate, good faith basis.

Limit Distribution and Access

- Keep a "participation list" of individuals required to be involved in the assessment, and keep distribution of assessment materials to those listed.
 - Limit distribution of assessment materials to individuals on a "need to know" basis.
- If assessment materials are distributed to non-lawyers, include language that the materials are highly confidential and should not be redistributed or discussed without prior approval from in-house or outside counsel.
- Physically limit access to the assessment materials:
 - If physical, designate a separate room in which to lock assessment files.
 - If electronic, limit access to specific users or password-protect the files or workspaces.

Changing Structures Mid-Assessment

Changing Structures Mid-Assessment

- What if during an ordinary course assessment you learn of a security incident?
- Can you change the structure of the assessment prospectively?
- Yes, if you are careful.
- But you cannot retroactively cloak already-prepared ordinary course documents in privilege.
- Attempts to do so may compromise prospective privilege claims.

In re Premera Blue Cross

- Third party expert, Mandiant, was hired by Premera to review Premera's data management system.
- In the course of its review, Mandiant found the existence of malware in Premera's system.
- After the discovery of malware by Mandiant, Premera hired outside counsel in anticipation of litigation

Premera Tried to Cloak the Entire Assessment in Privilege

- Premera and Mandiant then entered into an amended statement of work (SOW) that shifted supervision of Mandiant's work to outside counsel.
- The amended SOW did not otherwise change the scope of Mandiant's work from what was described in its original service agreement with Premera.
- Several weeks after the amendment, Mandiant provided its report.

Premera's Privilege Claim Failed

- The court concluded that the change in supervision of Mandiant's assessment, alone, was not enough to establish work product protection for Mandiant's report and underlying documents.
- Premera failed to show that the report and underlying documents "would not have been created in substantially similar form but for the prospect of litigation."
- The court focused on the following facts:
 - Premera had already hired Mandiant, who was performing an ongoing ordinary course investigation under Premera's supervision before outside counsel became involved.
 - Mandiant's SOW did not change at the instruction of outside counsel from the business purpose it was performing when it was engaged by Premera.

Changing Structures Calls for Re-scoping

"This situation is unlike the *Target* data breach case relied upon by Premera....With Premera, however, there was only one investigation, performed by Mandiant, which began at Premera's request. When supervisory responsibility later shifted to outside counsel, the scope of the work did not change. Thus, **the change of supervision, by itself, is not sufficient to render all of the later communications and underlying documents immune from discovery as work product."**

- In re Premera Blue Cross Customer Data Security Breach Litig., 296 F. Supp. 3d 1230, 1245 (D. Or. 2017)
(citations omitted) (emphasis supplied)

Maintaining Protections Following Completion of the Assessment

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Practical Problem

- After an incident a company runs a dual use assessment of scope "X."
- The assessment identified a number of problems, which were remediated by the business team.
- The company now wants to run a second assessment of the same scope to confirm the remediation.
- Must the second assessment be structured in the same manner?
 - If not, will the second assessment affect the protections that apply to the initial assessment?

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Preventing Waiver

- When scoping the non-protected assessment, distinguish the scope to the extent possible from the scope of the prior protected assessment.
- Modify the structure to remove indicia of privilege so that it is clear that this assessment is being run in a different manner.
- Avoid unnecessarily creating connections back to the earlier assessment.
 - Avoid referencing the earlier report or details specific to the incident subject of the earlier report.
 - Extract relevant information from the earlier report and generate a new document for the later assessment, rather than provide the new team with the earlier report.

Practical Tip

- Running a protected assessment pursuant to a written policy provides consistency and additional defensibility.
- The policy could include standardized language to be included in third party contracts.
- To the extent possible, centralize oversight and responsibility for running protected assessments for visibility and to ensure that decisions are made at an organization and not an individual level.

Final Thought

- Moving a business process into the legal realm can sometimes create conflict with the business and internal auditors.
- Educate individuals who work on ordinary course assessments about the use of dual use assessments and bring them into the process to the extent possible (at counsel's direction).
- This training will also help prevent the inclusion of unnecessary language in ordinary course reports and make the business more sensitive to when they need to proactively reach out to legal.

