Practical Guidance for Maintaining Privilege During an Internal Investigation in China
在华内部调查特权维护实践指南

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I. Introduction 简介

This article describes the attorney-client privilege under U.S. law and where care must be taken in internal investigations in China to maintain the privilege and avoid inadvertently waiving its protections.

本文对美国法律下的“律师－客户特权”进行了阐述，并对在中国进行内部调查时为维持该特权及避免无意中放弃该特权保护所应注意的事项展开讨论。

A. Background on U.S. Privilege
美国法律特权背景

The attorney-client privilege is a legal doctrine, recognized in common-law jurisdictions like the United States, that protects confidential communications between an attorney and her client from disclosure. Privilege can be particularly important in internal investigations because it facilitates the company to gather facts about potential misconduct for the purposes of securing legal advice. Internal investigations also can involve complicated questions that impact the privilege, such as: Who is the client? Will information remain “confidential” if it is shared with regulators?

“律师－客户特权”是包括美国在内的许多普通法系国家司法管辖领域所公认的一项法律原则，其旨在保护律师与其客户之间的保密交流不被披露。该特权在内部调查中尤为重要，因为它有利于公司以获取法律建议为目的，对其可能存在的不当行为的事实情况进行收集。此外，在内部调查过程中可能也会涉及一些对特权效力具有影响的复杂问题，譬如，客户是谁？如果与监管部门共享信息，信息是否会继续“保密”？

Legal privilege was developed in common-law jurisdictions to encourage individuals and companies to speak freely with their lawyers to facilitate the provision of legal advice. As a policy matter, if individuals or companies -- or their lawyers -- were forced to disclose the contents of legal advice, they may be less willing to seek that advice. Jurisdictions with legal privilege often have some form of “discovery,” where parties to a legal dispute may demand the opposing side produce documents or answer questions related to that dispute. The privilege is a practical doctrine grounded in the idea that a person facing a legal problem should be able to freely consult an attorney for advice, without worrying that communications she has with her attorney may need to be turned over to the other side in discovery.

在普通法司法辖区中所形成和发展起来的法律特权保护原则，其目的在于鼓励个人、公司在无任何顾虑的情况下与其律师进行沟通交流，从而获取相应的法律建议。从政策角度上而言，如强迫要求个人、公司或其律师对相关法律建议的内容进行披露，那么他们就可能不太愿意去寻

求法律意见。在适用法律特权保护原则的司法辖区，一般会具有某种形式的“证据开示”制度，即某项法律争议的当事人可能要求对方就其争议而提交相关文件或对相关的问题进行解答。作为一项实用性法律原则，特权保护的基本理念在于，面临法律问题的人应能够自由地咨询律师的意见，而无需担心与其律师之间的任何沟通交流将可能在证据开示中需要向另一方进行披露。

The attorney-client privilege generally protects information from disclosure when the information is (1) a communication between attorney and client, (2) confidential, and (3) for the purposes of obtaining legal advice. Each of these elements seems simple, but can be surprisingly complicated in the context of an internal investigation. Further, in certain circumstances the right to assert the privilege over communications can be “waived”: for example, if the communication is not kept confidential, or is deliberately disclosed to persons outside of the attorney-client relationship. The consequences of waiving privilege can be quite significant. Under U.S. civil litigation rules, without the protection of privilege, a party could be forced to turn over to their opponent sensitive internal documents prepared in the course of an investigation, such as legal analysis, factual synthesis, and descriptions of investigative steps. This compelled disclosure could happen in any number of legal proceedings, including litigation brought by individuals related to the investigation, shareholder derivative lawsuits, and criminal proceedings brought by prosecutorial authorities. Waiving privilege can severely compromise a party’s ability to effectively litigate. Similarly, waiving privilege can have a significant impact on criminal proceedings. In the United States, criminal defendants have the right to refuse to testify to facts that could prove their guilt. Waiver of privilege could mean, however, that there would be little or no protection for the criminal defendant’s communications with his lawyer, which might be an unfavorable fact for the defendant.

“律师－客户特权”一般保护下列信息不被披露：(1) 为获取法律建议，(2)具有保密性质，(3) 律师与客户之间的交流沟通。这些要素貌似简单，但在内部调查的背景下可能会出乎意外地复杂。而且，在某些情形下，对通讯主张特权的权利可以“放弃”：例如，通讯不是保密情况下进行的，或者有意被披露给律师－客户关系之外的人士。放弃特权的后果可能很严重。根据美国民事诉讼规则，在没有特权保护的情况下，当事方可能会被迫向其对方披露在调查过程中所准备的法律分析意见、事实综合情况，以及调查步骤描述等内部敏感文件。该被迫披露的情形可能会发生在任何法律程序之中，包括个人就调查而提起的诉讼、股东衍生诉讼和检控部门提起的刑事诉讼。放弃特权可能严重损害一方进行有效诉讼的能力。同样，放弃特权会对刑事诉讼程序产生重大的影响。在美国，刑事被告人有权拒绝为可能证明其有罪的事实情况作证。但是，放弃特权保护则可能意味着，刑事被告人与其律师的交流沟通可能只受到极少的保护或完全不受任何保护，该种情况对被告可能不利。

A related doctrine is the attorney work-product protection, also called “work product immunity.” This protection designed to protect documents or other materials prepared by attorneys in anticipation of litigation. The attorney work-product protection applies when the material is (1) written materials or oral statements, (2) prepared by or for an attorney, (3) in the course of legal representation, (4) in anticipation of litigation. One of the main distinctions between attorney-client privilege and attorney work-product protection is that the privilege only applies to *communications* between a client and her lawyer, while the attorney work-product protection applies to work product created by an attorney even if never communicated to his client.

另外一个相关的原则是律师工作成果保护，也称为“工作成果豁免”。这项保护旨在保护律师为其预期的诉讼而准备的文件或其他材料。律师工作成果保护适用于：(1) 书面材料或口头陈述，(2) 由律师或为律师准备，(3)在法律代理期间，(4)为预期诉讼目的。“律师－客户特权”与律师工作成果保护的主要不同之处在于，特权仅适用于客户与其律师之间的*通讯*，而律师工作成果保护适用于律师创造的工作成果，即使从未将该成果传达给客户。

B. Privilege in China
法律特权保护在中国

China is not a common-law jurisdiction, and so takes a different approach to the relationship between lawyers and their clients. Because there is no formal discovery process during disputes, there is also no general rule that protects certain categories of documents from being obtained in discovery. Lawyers are required under the Lawyer's Law to keep their clients' trade secrets confidential, and to protect their clients' privacy.[1] Chinese lawyers are required, however, to disclose any crimes their clients are committing or are contemplating that severely impair national or public security.[2] In addition, lawyers may be sanctioned for concealing important facts, or threaten or solicit others to conceal important facts.[3] Therefore, when a court acts in its inquisitorial capacity and seeks information from the parties before it, a lawyer may be at risk of sanctions for concealing the subject matter of communications with its client.

中国并非普通法司法辖区，因此对于律师与其客户之间的关系有不同的规定。由于在争议期间没有任何正式的开示程序，因而也没有保护某些类别的文件不在开示过程中被披露的任何一般性规则。根据律师法，律师须对其客户的商业秘密保密，并保护其客户的隐私。[4]但中国律师须披露其客户准备或者正在实施的危害国家安全、公共安全的犯罪事实。[5]此外，律师还可能因隐瞒重要事实或威胁或诱使他人隐瞒重要事实而受到制裁。[6]因此，当法院行使审讯职能并要求出庭当事方提供信息时，律师可能会因隐瞒与其客户的通讯主题事项而受到制裁。

Even when a communication is not privileged for purposes of Chinese law, it still could be privileged under U.S. law, so care must be taken when sharing communications inside or outside of the company, whether the communication takes place in China or the United States.

即便一项通讯就中国法律而言不受特权保护，但在美国法律下其可能受到特权保护。因此无论通讯产生于中国或是美国，在公司内部或外部分享通讯时必须谨慎。

II. Begin an Investigation with Privilege in Mind
调查开始时应谨记的特权原则

Preserving the privilege begins at the very outset of an investigation. Careful thought must be given to decisions regarding whom outside counsel represents, who will oversee the investigation, and whether and how to involve non-lawyers.

在调查的初始阶段即可保留特权。应认真考虑有关外部法律顾问代表谁、谁会监督调查以及非律师人员是否及如何参与调查的决定。

[1] Lawyer's Law (2009), Arts. 33, 38.

[2] *Id.*

[3] Criminal Procedure Law (1996), Art. 48; Civil Procedure Law (1991), Art. 65.

[4] 《律师法》（2009），第 33 条和第 38 条。

[5] 同上。

[6] 《刑事诉讼法》（1996），第 48 条；《民事诉讼法》（1991），第 65 条。

A. Be Clear on Who the Client Is and Who Is Overseeing the Investigation 要清楚客户是谁以及谁在监督调查

To maintain privilege over an investigation, it is essential that outside counsel clearly establish whom they represent and to whom they are reporting. In many cases, the issue will be relatively straightforward because outside counsel will be representing a company, and the investigation will be overseen by in-house counsel. Board committee investigations add a layer of complexity. While communications between a board committee and its counsel are the classic type of attorney-client communications that would generally be privileged, the case for protection of communications between committee counsel and other stakeholders in an investigation, such as company counsel (in-house or outside) and management, is less clear.

为维持对调查的特权，需要外部法律顾问明确说明他们代表谁及他们向谁汇报。在许多情形下，该问题会相对比较明确，因为外部法律顾问会代表公司，调查将在内部法律顾问的监督下进行。董事会调查会增加了一定复杂性。尽管董事会和其法律顾问之间的沟通一般属于受特权保护的律师客户沟通，而对董事会法律顾问和调查中的其他利益相关方（如公司内部或外部法律顾问和管理层）之间的沟通保护并非那么明确。

Complications can also arise when an investigation (whether the client is the company itself or a board committee) involves allegations of wrongdoing by officers or directors, or when in-house counsel may have been involved in the conduct under investigation. An investigation may not be credible if it is overseen by the individuals whose conduct is at issue in the investigation. Leaving credibility issues aside, there are also very real waiver risks in such situations. For example, as discussed further below, if counsel reports the findings of an investigation to members of management or board members who have engaged in conduct that could make them adverse to the company, a waiver may result.[7] Additionally, particularly with respect to witness interviews, a lack of clarity over whether outside counsel represents both the company and individual directors and officers can have serious ethical and privilege implications.

在调查（无论客户是公司还是董事会）涉及对管理人员或董事的错误行为的指控，或者内部法律顾问可能涉及被调查的行为时，问题也会变得复杂。 如监督调查的人员涉嫌参与被调查的行为，则其监督调查的可信度将会受到质疑。抛开可信度问题，此等情形下还存在特定的放弃风险。例如，下文将进一步进行讨论，如法律顾问向管理层成员或董事会成员汇报调查结果，而该管理层成员或董事会成员做出了和公司存在利益冲突的行为，这可能会导致放弃情形 [8]。此外，特别就证人面谈而言，如不明确外部法律顾问是否既代表公司也代表个人董事和管理人员，则可能会产生严重的道德和特权影响。

To mitigate these risks, it may be desirable for outside counsel to be clear in their engagement letter about not only whom they represent, but also whom they *do not* represent. Additionally, outside counsel should be mindful that potential conflicts that are not apparent at the outset of an engagement may arise as facts are developed. For example, if, as an investigation

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[7] *See, e.g.*, *Ryan v. Gifford*, Civil Action No. 2213-CC, 2007 WL 4259557, at *2-3 (Del. Ch. Nov. 30, 2007). This issue can arise not only when counsel is reporting findings at the conclusion of an investigation, but also in circumstances where counsel is faced with requests from management to provide a briefing on the status of the investigation.

[8] 参考案例，如 *Ryan v. Gifford, Civil Action No. 2213-CC, 2007 WL 4259557*, at *2-3 (Del. Ch. Nov. 30, 2007)。不仅在法律顾问在调查结束汇报调查结果时会产生这个问题，在法律顾问面对管理层要求提供调查进展报告的请求的情形下也会产生这个问题。

progresses, it becomes apparent that the in-house counsel who is overseeing the investigation had substantive involvement in the events under investigation, outside counsel might consider recommending an alternative reporting line, or, if necessary, that oversight of the investigation be transferred to a board committee. These decisions are often complicated and highly sensitive, but outside counsel must satisfy itself from the outset that the engagement has been structured in a manner that most effectively safeguards the company's interests, including with respect to privilege.

为降低该等风险，可能需要外部法律顾问在其聘请函中不仅明确阐明他们代表谁，还要说明他们*不*代表谁。此外，外部法律顾问应注意，随着事实的发掘，可能会出现在聘请开始时不明显的潜在冲突。例如，随着调查的进展，如发现监督调查的内部法律顾问实质性参与被调查事件，外部法律顾问可能考虑推荐其他汇报方式，或者在必要时让董事会接管监督调查一事。该等决定通常是复杂且高度敏感的，但外部法律顾问必须从一开始就明确表明，聘请方式以最有效地维护公司利益为目的，包括在特权方面。

As a separate issue, foreign companies doing business in China are frequently involved in close business relationships with a China-based joint venture. When engaging counsel, the engagement letter should clearly state whether any separate legal entities are also privy to the attorney-client relationship—and make sure that all formalities regarding joint representation are observed, such as that there no current or foreseeable conflicts between the positions of the different entities. If the "client" for purposes of the engagement excludes joint venture partners, be aware that sharing confidential information with the joint venture or the joint venture partner may waive the privilege.

另外一个问题是，在中国经营业务的外国公司经常会与位于中国的合资企业产生密切的业务关系。在聘请法律顾问时，聘用函应当明确，是否有任何单独的法律实体也参与律师客户关系，并确保关于共同代理的所有规定均已得到遵守，例如，不同实体所持立场之间不存在任何目前或可预见的冲突。如果聘用关系的"客户"不包括合资伙伴，则须就与该合资企业或合资伙伴分享保密信息可能构成特权放弃而谨慎对待。

B. Be Careful About Using Non-Lawyers to Conduct or Assist in an Investigation
在使用非律师人员进行或协助调查时应谨慎小心

Privilege issues can also arise when non-lawyers conduct or assist in an investigation. While non-lawyers, such as forensic accountants, often play a critical role in the fact-development process, careful thought must be given to how they are employed and how their work is overseen.

在非律师人员进行或协助调查时也可能会引起特权问题。尽管非律师人员，如法务会计，通常在事实发现过程中起着重要作用，对如何聘用该等人员及如何监督他们的工作也应认真考虑。

Having a non-lawyer lead an investigation risks compromising the ability to claim privilege. Recall that, for an investigation to be privileged, it must be shown that the investigation was conducted for the ultimate purpose of providing legal advice to the client. Under U.S. law, non-lawyers *cannot* provide legal advice, and so this predicate for the privilege may be lacking in an investigation led by a non-lawyer (e.g., Internal Audit, Compliance). In some instances

where a non-lawyer leads an investigation, counsel will be involved in an advisory role on how to conduct the investigation.[9]

委托非律师人员主导调查存在有损害主张特权之能力的风险。须谨记，为使调查受特权保护，须证明调查的最终目的是为了向客户提供法律建议。根据美国法律，非律师人员不能提供法律建议，因此这使得非律师人员主导的调查（如内部审计、合规）可能缺乏特权保护。在非律师人员主导调查的一些情况下，法律顾问将以顾问身份提供关于如何进行调查的建议。[10]

If non-lawyers are employed to assist in an investigation, in order to maintain the privilege, it is critical that they act as agents for in-house or outside counsel, under the direction and control of such counsel, and for the purpose of assisting counsel in providing legal advice. The classic example of this is an accountant reviewing and analyzing a company's books and records to assist in an investigation.[11] There are several practical steps that counsel can take to help preserve the privilege in such circumstances.

如非律师人员被聘请协助调查，为了维护特权，关键点是他们担任内部或外部法律顾问的代理，在该法律顾问的指导和控制下工作，且目的是协助法律顾问提供法律建议。此方面一个典型案例就是会计师审查和分析公司的帐簿和记录以协助调查 [12]。在该等情形下，法律顾问还可以采取以下几项实践措施帮助保留特权。

First, if third-party consultants will be retained, it is preferable that the consultants be retained and directed by outside counsel rather than the ultimate client, and that the purpose and nature of the engagement be memorialized in a written agreement. For example:

第一，如聘请第三方顾问，第三方顾问最合适由外部法律顾问（而非最终客户）聘请和指导，且聘请的目的和性质应记录在书面协议中。例如：

> This Statement of Work ("SOW"), effective as of [DATE], is made by [CONSULTANT] and [LAW FIRM] acting as agent for [CLIENT]. [CONSULTANT] understands and acknowledges that the services provided under this SOW are being requested by [LAW FIRM] on behalf of [CLIENT], and will be performed at the direction of [LAW FIRM] in order to assist [LAW FIRM] in providing confidential and privileged legal advice to [CLIENT].

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[9] Note that some courts have rejected such an approach as a "gimmick" when they believe counsel is not actually conducting the internal investigation but is instead being used solely to try to "cloak" an investigation by non-lawyers with the legal privilege. *See, e.g., United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121 (D.D.C. 2012).

[10] 请注意，有些法院已将这一方法作为"噱头"而不予采纳，因为他们认为法律顾问并非实际进行内部调查，而是仅被利用来试图"伪装"为非律师进行的有法律特权的调查。*参考案例 United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121 (D.D.C. 2012)。

[11] *See, e.g., United States v. Kovel*, 296 F.2d 918, 922 (2nd Cir. 1961) (privilege applies to communications to an accountant retained by an attorney to assist in providing legal advice to the client).

[12] *参考案例 United States v. Kovel*, 296 F.2d 918, 922 (2nd Cir. 1961) (如会计师被律师聘请协助向客户提供法律建议，特权适用于和会计师的沟通) 。

> 本工作说明（“工作说明”）自[日期]起生效，由[顾问]和[律所]（作为[客户]的代理）签署。[顾问]理解并承认，本工作说明下提供的服务是[律所]代表[客户]要求的服务，将会根据[律所]指示履行，目的是协助[律所]向[客户]提供保密和受特权保护的法律建议。
>
> The parties understand that it is [LAW FIRM] and [CLIENT'S] intention that the work performed by [CONSULTANT] under this SOW will be covered by the attorney-client privilege, the attorney work-product protection, and all other applicable privileges and protections.
>
> 双方理解，根据[律所]和[客户]的意向，[顾问] 在本工作说明下履行的工作将受律师客户特权、律师工作成果保护以及所有其他相关特权和保护规定的保护。

A separate SOW or engagement letter along these lines should be prepared for all third-party vendors, even if they regularly work for the client, including under a master services agreement.

按此逻辑，应为所有第三方供应商准备一份单独的工作说明或聘请函，即使他们已经按照一份主服务协议项下定期为客户工作。

Second, counsel should closely oversee and direct the work of consultants. To be sure, cost and efficiency considerations may dictate that communications between third-party consultants and company employees occur without counsel present. U.S. courts accept that it is not necessary for an attorney to "observ[e] and approv[e] every minute aspect of [the consultant's] work."[13] That said, in order to maintain privilege, it should be stated clearly that such communications are being made "at the direction of counsel, to gather information to aid counsel in providing legal services."[14]

第二，法律顾问应密切监督和指导顾问的工作。可以肯定地说，成本和效率因素可能决定第三方顾问和公司员工之间的沟通会在没有法律顾问陪同的情形下进行。美国法院认可，律师没有必要“观察及批准[顾问]每一分钟的工作”。[15] 即便如此，为了维护特权，有必要明确说明该等沟通将在“法律顾问的指导下进行，以收集信息协助法律顾问提供法律服务为目的”。[16]

Third, consistent with these principles, if company employees are assisting in an investigation, that assistance should be formalized in written communications stating that they are working at counsel's direction in order to assist counsel in providing legal advice. For example:

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[13] *See Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 72 (S.D.N.Y. 2010) (quoting *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 81 (S.D.N.Y. 2006)).

[14] *Id.* at 80.

[15] *参考 Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 72 (S.D.N.Y. 2010) (引用 *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 81 (S.D.N.Y. 2006))。

[16] *参考同上*见 80。

第三，根据上述原则，如公司员工协助调查，应在书面通讯中对该项协助作出规定，即他们应按照法律顾问的指导工作，以协助法律顾问提供法律建议。例如：

> Dear []:
>
> 尊敬的[]：
>
> In response to a recent compliance hotline report, the Company has asked the Law Department to provide advice regarding the application of U.S. law to certain business conduct in the Company's operations in [COUNTRY X]. To provide this advice, the Law Department, with the assistance of outside counsel, will undertake a privileged and confidential investigation. I am writing to request your assistance in this matter in the preservation and collection of materials that may be relevant to this investigation, for the purpose of providing legal advice to the Company in this matter. In assisting in this investigation, you will be acting under the direction of the Law Department and its outside counsel in providing legal services to the Company.
>
> 针对近期的一项合规热线举报，公司已要求法务部就美国法律适用于公司在[国家 X]运营中的特定商业行为一事提供建议。为提供此建议，法务部将在外部法律顾问的协助下进行特权和保密调查。现要求您协助此事，帮助保存和收集可能与此调查有关的材料，目的是向公司提供有关此事的法律建议。在协助调查时，您将在法务部及其外部法律顾问指导下行事，以向公司提供法律服务。
>
> Any and all communications relating to this investigation are privileged and confidential, and neither those communications nor the fact of this investigation should be disclosed to anyone other than Company or outside counsel or others to whom Company counsel has authorized disclosure. Additionally, any materials or information collected in the course of this investigation should be treated as confidential, and should not be disclosed to anyone except at the express direction of Company or outside counsel.
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> 与此调查有关的所有沟通均受特权保护且应被保密对待，该等沟通及此调查的事实均不应披露给公司或外部法律顾问或公司法律顾问授权的披露对象之外的任何人。此外，除非有公司或外部法律顾问的明确指示，应对调查过程中收集的任何材料或信息保密不得披露给任何人。

C. Understand All Investigative Steps Taken Before Counsel Was Involved 在法律顾问参与前理解所采取的所有调查步骤

U.S. courts may limit claims of privilege for steps in an investigation that occur without the direction of counsel. Counsel, whether in-house or outside, should request all internal reports or communications that led to the investigation to have a complete picture of areas where privilege claims may be weaker. For one example of the risks, where a China-based bank received a threat of private civil litigation in the U.S. courts, its internal Legal and Compliance

Department took steps to investigate the claims. The U.S. district court later decided that the internal investigation was conducted for several months without the benefit of in-house or outside lawyers, and that no privilege could be claimed with respect to those communications.[17] The court did not deem the Legal and Compliance Department individuals located in the China bank's China offices to be "attorneys" for U.S. attorney-client privilege purposes,[18] and that even after U.S. outside counsel was hired, further investigative steps were made without "U.S. counsel actually direct[ing]" or "otherwise [being] consulted for legal advice regarding the investigation."[19]

美国法院可以在没有法律顾问指导的情况下限制对调查步骤的特权主张。法律顾问（无论是内部或是外部法律顾问）应当要求导致调查的所有内部报告或通讯完整地描述特权主张可能较弱的领域。举一示例说明该风险，如果一家总部在中国的银行受到在美国法院提起私人民事诉讼的威胁，其内部法务和合规部门采取行动就此开展调查。美国联邦地区法院之后认定，该项内部调查进行了几个月，而没有内部或外部律师参与，对于该等通讯不能主张任何特权。[20]法院不认为位于该中国银行中国办事处的法务和合规部门人员是美国律师客户特权定义下的"律师"，[21]且即便在聘请美国外部法律顾问之后，所采取的进一步调查行动也没有"美国法律顾问的实际指导"或"就调查征询其法律意见"。[22]

To avoid these risks, the safest route to preserving privilege for U.S. purposes is to involve U.S.-qualified counsel as early as possible in the investigation, and to rely on that counsel to work directly with the in-house legal and compliance team to develop an investigation plan and collect key facts. When counsel knows what work was done before taking an active role directing the investigation, counsel can tailor the investigation plan to mitigate the risks of waiving privilege.

为避免这些风险，保留美国特权的最安全途径是尽早地让具有资格的美国法律顾问参与调查，并委托该法律顾问真正与内部法务和合规团队合作，以制定调查计划和搜集重要事实。如果法律顾问在积极指导调查前了解已经完成的工作，则能有针对性地调整调查计划，以降低放弃特权的风险。

D. Make Clear that the Purpose of the Investigation Is to Provide Legal Advice
明确说明调查的目的为提供法律意见

If a company or a board committee intends to maintain privilege over an internal investigation, it should say so explicitly. This can be accomplished through various means—*i.e.*, in board minutes, through an email, orally if later memorialized in a file memo, or through a more formal, direct communication from management or the board authorizing counsel to undertake an investigation for the purpose of providing legal advice. If possible, in order to

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[17] *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 393 (S.D.N.Y. 2015). Wultz 诉中国银行股份有限公司，304 F.R.D. 384,393（S.D.N.Y. 2015 年）。

[18] *Id*. at n.3.

[19] *Id*. at 388.

[20] *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 393 (S.D.N.Y. 2015). Wultz 诉中国银行股份有限公司，304 F.R.D. 384,393（S.D.N.Y. 2015 年）。

[21] *参考同上*见脚注 3。

[22] 参考同上见 388。

help substantiate a claim for protection under the attorney work-product protection, the communication should identify actual or anticipated litigation or government investigations arising from the conduct under investigation. The following is an example of a formal communication achieving this objective:

如公司或董事会有意维持对内部调查的特权，其应明确说明。该说明可通过多种方式实现，如在董事会会议记录中说明、通过电子邮件说明、口头说明（但随后应在文件备忘录中记录）或者通过管理层或董事会授权的法律顾问以提供法律建议之目的，而进行调查更为正式和直接的沟通。如可行，为了帮助实现依据律师工作成果保护原则提出的保护主张，沟通时应说明因被调查行为产生的实际或预期的诉讼或政府调查。以下是一个为实现此目的的正式沟通的示例：

To: General Counsel
致：总法律顾问

From: Chief Executive Officer
自：首席执行官

Re: Investigation of Matters in [COUNTRY X]
关于：[国家 X]事宜的调查

In response to a recent compliance hotline report and press reports, I am requesting the Law Department to provide advice regarding the application of U.S. law to certain business conduct in the Company's operations in [COUNTRY X]. To provide this advice, I am requesting that the Law Department, with the assistance of outside counsel, undertake a privileged and confidential investigation.

针对近期的一项合规热线举报和媒体报告， 我现要求法务部就美国法律适用于公司在[国家 X]运营中的特定商业行为一事提供建议。为提供此建议，我现要求法务部在外部法律顾问的协助下进行有特权的保密调查。

The events at issue have already given rise to a number of shareholder demand letters threatening litigation, and a request to inspect the Company's books and records. We are also aware of several law firms that have issued press releases indicating that they are investigating potential claims against the Company under U.S. securities laws. Additionally, we expect that the events that are the subject of the hotline and press reports will attract the attention of U.S. and foreign law enforcement authorities, including the Securities and Exchange Commission and the Department of Justice. The Company is seeking legal advice in connection with these matters, in anticipation of litigation, and the investigation is necessary so that you can provide this advice.

所涉及问题已经引起了多位股东发出的威胁进行诉讼的律师函，以及一份检查公司帐簿和记录的请求。我们还意识到几家律师事务所已作出新闻发布，表示他们正在根据美国证券法调查针对公司的潜在指控。此外，我们预计热线和新闻发布中所反映的问题会引起包括美国证券交易委员会和司法部在内的美国和

> 外国执法机构的关注。公司目前正在寻求有关该等事宜的法律建议，考虑到可能会有诉讼，调查是必要的，因此您可以提供该等建议。
>
> Any and all communications relating to this investigation and the requested legal advice are privileged and confidential, and neither those communications nor the fact of this investigation should be disclosed to anyone other than Company or outside counsel or others to whom Company counsel has authorized disclosure. Additionally, any materials or information collected in the course of this investigation should be treated as confidential, and should not be disclosed to anyone except at the express direction of Company or outside counsel.
>
> 与此调查及要求的法律建议有关的所有沟通应受特权保护且应被保密对待，该等沟通及此调查的事实均不应披露给公司或外部法律顾问或公司法律顾问授权的披露对象之外的任何人。此外，除非有公司或外部法律顾问的明确指示，在此调查过程中收集的任何材料或信息应保密对待，不应披露给任何人。

This type of formal communication has the advantage of establishing and articulating the purpose of the investigation in a manner that best protects the privilege. Ideally, the purpose of the investigation should be clearly articulated early and often as the investigation proceeds—for example, when counsel seeks assistance from company personnel in preserving and collecting data, in how interviewees are advised of the purpose of the interview (see the discussion of *Upjohn*[23] warnings, Section III. A, below), in presenting findings to management or the board, and, if necessary, when interacting with enforcement authorities. In other words, it should be clear from the entire record of the investigation that outside counsel had been retained to conduct an investigation for the purpose of providing the company with legal advice. The existence of such a record will help a company to rebut an argument that no privilege attached to the investigation.[24]

此类型正式沟通的优势是用最大程度保护特权的方式以确定和明确调查目的。 理想情形下，调查目的应尽早明确说明，且应通常随着调查的进展在以下情形说明，例如，在法律顾问寻求公司人员保存和收集数据方面的协助时，在向面谈对象告知面谈目的（参见下文第 III 部分 A 款关于 *Upjohn*[25]警告的讨论）时，在向管理层或董事会提交结果时，以及必要情形下在与执法机构交流时。换言之，应可从整个调查记录中明确看出聘请外部法律顾问进行调查的目的是为了向公司提供法律建议。该记录的存在将帮助公司反驳调查不附带特权的论点。[26]

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[23] *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[24] *See, e.g., In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (applying privilege when "one of the significant purposes of the internal investigation was to obtain or provide legal advice"). 在 Kellogg Brown＆Root，Inc.，756 F.3d 754,760（D.C. Cir.2014）中（当"内部调查的重要目的之一是获取或提供法律建议"时适用特权）。

[25] 参考 *Upjohn Co. v. United States*, 449 U.S. 383 (1981)。

[26] *See, e.g., In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (applying privilege when "one of the significant purposes of the internal investigation was to obtain or provide legal

E. Be Sensitive to the Privilege Complexities Introduced by Cross-Border Legal Advice
对跨境法律建议引起的特权复杂性保持敏感

If the subject matter of an internal investigation has the potential to draw the attention of non-U.S. regulators or litigants, counsel cannot safely assume that United States law will govern subsequent adjudications of privilege issues. Similarly, where an investigation has key fact-gathering in China, involves China-based co-parties, or may involve a Chinese regulator, counsel must carefully consider the risks to privilege that can result. In a number of non-U.S. jurisdictions, in-house counsel do not enjoy the same privilege and work-product protections as in the United States. As noted above, Chinese law does not recognize attorney-client privilege, and Chinese lawyers may in certain instances have an affirmative duty to report information.

如内部调查的事件有可能吸引非美国监管机构或诉讼方的注意，法律顾问不能想当然地推定美国法律将适用于特权问题的后续裁决。同样，如果一项调查需要在中国搜集重要的事实，涉及总部在中国的共同当事方或可能涉及中国监管机构，法律顾问须认真考虑可能导致的特权风险。在若干非美国司法辖区，内部法律顾问不享有像在美国一样的特权和工作成果保护。如上所述，中国法律不承认“律师-客户特权”，中国律师在某些情形下可能有报告信息的明确义务。

For example, where a company in China provides Chinese regulators communications or information about an ongoing investigation, including where U.S. outside counsel or Chinese in-house attorneys are involved, U.S. courts in some situations will consider privilege to be waived. This is because the communication or information may no longer be deemed “confidential” as required to benefit from the protections of the attorney-client privilege.[27]

例如，如果一家在中国的公司向中国监管机构提供关于一项正在进行的调查的通讯或信息，包括在美国外部法律顾问或中国内部法律顾问参与的情况下，美国法院于某些情况下将视特权已被放弃。这是因为该等通讯或信息可能不再被视为具有“保密性”，而这正是受“律师-客户特权”保护所必备的条件。[28]

The European Union does not recognize that communications between in-house counsel and their employers are protected by the privilege. In 2010, the European Court of Justice held that, because in-house counsel are unable to exercise independence from the companies that employ them, their communications with the company are not privileged.[29] Thus, for

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advice”) 在 Kellogg Brown＆Root，Inc.，756 F.3d 754,760（D.C. Cir.2014）中（当“内部调查的重要目的之一是获取或提供法律建议”时适用特权）。

[27] Submitting otherwise-privileged documents to the US government will typically waive claims of privilege not only against the government; it will also waive claims of privilege over the documents with respect to other parties. *See Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1424-27 (3d Cir. 1991). This principle has been applied equally to governments outside of the United States. *See, e.g., In re Vitamin Antitrust Litigation*, Misc. No. 99-197, 2002 WL 35021999 (D.D.C. Jan. 23, 2002) (finding waiver of work product protections).

[28] 向美国政府提交本应受特权保护的文件通常不仅会放弃对政府的特权主张，还会放弃就文件对第三方的特权主张。*参考 Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1424-27 (3d Cir. 1991). 该原则同样适用于美国境外的政府。参考如 *In re Vitamin Antitrust Litigation*, Misc. No. 99-197, 2002 WL 35021999 (D.D.C. 2002 年 1 月 23 日)

[29] Case C-550/07P, *Akzo Nobel Chems. Ltd. & Ackros Chems. Ltd. v. Comm'n*, 2010 E.C.R. I-08301.

investigations that may ultimately be the focus of litigation in the European Union, companies should evaluate the privilege risks that arise from having in-house lawyers lead such investigations. As a more general matter, in light of the differing legal standards that operate in foreign jurisdictions, counsel should take time at the outset of an investigation to research the relevant jurisdiction's privilege law when deciding which personnel will conduct which aspects of the investigation.

欧盟不认可内部法律顾问和雇员之间的通讯受特权保护。2010 年，欧洲法院认为，由于内部法律顾问缺乏独立于聘用他们公司的独立性，他们与公司的沟通不享有特权[30]。因此，就可能最终成为在欧盟的诉讼焦点的调查而言，公司应评估内部法律顾问领导该等调查所产生的特权风险。作为一个更普遍的问题，鉴于不同外国司法辖区的不同法律标准，在决定哪些人将负责哪些方面的调查时，法律顾问应在调查一开始就研究相关司法辖区的特权法。

III. Maintain Privilege in the Middle of an Investigation 在调查中间阶段的特权维护

The fact-development stage of an investigation—conducting interviews, reviewing and producing documents, coordinating with other attorneys, and providing advice to the client—presents numerous risks to the privilege. We consider here some of the risks related to interviews, productions of documents, joint defense or common interest agreements, and the provision of advice on issues ancillary to an investigation.

调查的事实发现阶段---进行面谈，审查和出示文件，与其他律师协调，以及向客户提供建议---会给特权带来诸多风险。在此我们考虑与面谈、文件出示、联合抗辩或共同利益协议相关的一些风险，并提供调查附带事宜的建议。

A. Carefully Consider the "*Upjohn* Warning" 认真考虑"*Upjohn* 警告"

Conducting effective interviews is an essential element of a thorough investigation. Preserving the company's privilege, however, requires that attorneys notify interviewees of the purpose of the interview and ensure that the employee understands that the interview is to be treated confidentially and is for the purpose of a legal investigation. This notification, called an "*Upjohn* warning", should take place before beginning the interview.[31] If an attorney glosses over the warning or leaves out key aspects of it, he or she may jeopardize the privileged nature of the interview. Care must also be taken with the tone, as taking an overly prosecutorial tone may make witnesses believe that they have done something wrong, even if they have not, and can chill the witness's willingness to cooperate fully, or even at all.

进行有效的面谈是全面充分调查的一个关键要素。但是，保留公司的特权要求律师告知面谈对象面谈的目的并确保员工理解面谈应予以保密且是出于法律调查的目的。该项告知称为"*Upjohn* 警告"，应于面谈开始前进行。[32]如果律师掩饰警告或者遗漏其关键方面，可能会影响

[30] 案件 C-550/07P, *Akzo Nobel Chems. Ltd. & Ackros Chems. Ltd. v. Comm'n*, 2010 E.C.R. I-08301。

[31] The notification is called an "*Upjohn* warning" after a Supreme Court case holding that attorney-client privilege protects communications from corporate employees to attorneys representing that corporation for the purpose of furnishing legal advice. *Upjohn Co. v. U.S.* 449 U.S. 383 (1981).

[32] 该告知称为"*Upjohn* 警告"，来源于最高法院审理的一个案件，法院认为律师客户特权保护公司员工发给代表公司的律师以便律师提供法律意见的通讯。*Upjohn Co. v. U.S.* 449 U.S. 383 (1981)。

面谈的特权性质。语调也需小心，采用过于法律的语调可能会让证人认为他们做错了什么事（即便并非如此），并可能降低证人全力配合、甚至进行配合的意愿。

The *Upjohn* warning should cover the following points, although this exact language need not be used:

“*Upjohn* 警告”应涵盖以下方面，但不一定需要使用完全一样的语句：

- I am a lawyer representing the company and do not represent you personally.
  我是代表公司的律师，不代表您个人。
- The purpose of the interview is to learn about [the issue] in order to provide legal advice to the company.
  面谈的目的是了解[问题]，以为公司提供法律建议。
- This conversation is privileged, but the privilege belongs to the company, not you. It the company's decision whether to waive the privilege, including with respect to sharing information with the government or other third parties.
  谈话是受特权保护的，但特权属于公司，而非您个人。公司将决定是否放弃特权，包括是否向政府或其他第三方进行披露。
- The questions asked and the answers provided during the interview should be kept confidential in order to preserve the company's privilege.
  在面谈过程中所提问的问题及回答应予以保密，从而对公司特权进行保护。

Once those foundational points have been made clear, attorneys should inquire whether the witness has any questions. Before moving to the substantive focus of the interview, attorneys should receive a clear affirmation that the witness understands the warning and is willing to proceed with the interview.

一旦说清楚该等基础问题，律师应询问证人是否有问题。在进入面谈的实质重点之前，律师应得到证人的明确确认，说明证人理解警告并愿意继续面谈。

If delivered effectively, the *Upjohn* warning will adequately advise the witness of the implications of the interview without chilling the witness's willingness to cooperate. The following are some practical tips that can lead to cooperative, privileged interviews:

如能有效传达，“*Upjohn* 警告”将充分告知证人面谈的影响，且不会降低证人配合的意愿。以下是能使证人配合特权面谈的一些实践技巧：

- Confer with the client in advance of interviews to understand whether particular witnesses present any unique sensitivities. In such circumstances, it may be helpful for in-house counsel or the employee's manager to have a brief discussion with the employee outside the presence of outside counsel in order to provide some context for the interview.
  在面谈之前与客户沟通，了解某些证人是否会有独特敏感性。该等情形下，如内部法律顾问或员工的经理能在外部法律顾问不在场的情形下与员工进行简短交流从而获得一些面谈背景信息可能会有帮助。
- Do not deliver the *Upjohn* warning in a rote, mechanized way; be friendly and casual rather than reading from a script.
  不要以僵硬机械的方式传达“*Upjohn* 警告”；在传达时应友好、自然，而不是照本宣科。

- Emphasize the importance of the investigation to the company and the need for complete and accurate information. Express appreciation for the witness's assistance in helping the company to understand the relevant facts.
  强调调查对公司的重要性以及需要完整准确信息的重要性。对证人帮助公司了解相关事实表示感谢。
- If applicable and appropriate, explain that the company is interviewing a number of individuals and is not singling out that particular employee.
  如适用及适当，解释公司将与多位人员进行面谈，而非仅针对该特定员工。

Once counsel has delivered the *Upjohn* warning and obtained the witness's agreement to proceed, the content of the interview will be protected by the attorney-client privilege, so long as the attorney and the witness keep its content confidential. As part of the interview, counsel should document in the notes the fact that he or she delivered the Upjohn warning to witness. As an additional precaution, counsel should remind the witness at the conclusion of the interview not to discuss the substance of the interview with anyone else — the questions asked and the answers provided — except to the extent that the witness wishes to convey additional information or to ask follow-up questions. Such follow-up communications should be directed to an appropriate contact in the company's legal department or, depending on the circumstances, to outside counsel directly. If follow-up interviews with the same witness are conducted, remind the witness of the *Upjohn* warning and confirm that they have not discussed the interview with anyone else since they were last interviewed.

一旦律师传达了"*Upjohn* 警告"并获得证人的同意继续面谈，只要律师和证人对面谈内容进行保密，面谈内容将受到"律师-客户特权"保护。做为面谈的一部分，律师应在其笔记中，记录其向证人传达 *Upjohn* 的事实情况。作为附加提醒，法律顾问应在面谈结束时提醒证人不得与其他人讨论面谈的内容（包括所问的问题和所提供的回答），除非证人是有意传达更多信息或者询问后续问题。该等后续沟通应交由公司法务部的适当联系人负责，或者根据具体情形，直接由外部法律顾问负责。如果与同一证人进行后续面谈，应提醒证人"*Upjohn* 警告"，并确认他们自上次面谈以来未曾与任何其他人讨论过面谈内容。

The risks of failing to give an adequate *Upjohn* warning can be severe. The 2009 case *United States v. Ruehle*[33] provides a stark example. *Ruehle* involved a DOJ and SEC investigation into alleged stock-option backdating at Broadcom Corporation. In the course of Broadcom's internal investigation, its outside counsel interviewed William Ruehle, Broadcom's CFO. During the interview, Ruehle made numerous statements that he later sought to suppress as privileged in his criminal trial. Ruehle argued that because outside counsel had represented Ruehle and other individual officers in shareholder suits and had failed to advise him during the interview that his statements could be disclosed to third parties, his statements in the interview were privileged. The district court agreed. The court suppressed Ruehle's statements from the interview, concluded that outside counsel had breached their duty of loyalty to Ruehle, and referred the lawyers involved to the California State Bar for possible discipline.[34]

[33] 583 F.3d 600 (9th Cir. 2009).

[34] *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev'd sub nom. United States v. Ruehle*, 583 F.3d 600.

未能给予充分的"*Upjohn* 警告"可能会带来重大风险。2009 年的*美国政府对抗 Ruehle*[35]一案就是一个很典型的例子。Ruehle 卷入了司法部和证券交易委员会对 Broadcom Corporation 的期权回溯调查。在 Broadcom 的内部调查过程中，其外部法律顾问和 William Ruehle（Broadcom 的首席财务官）进行了面谈。在面谈期间，Ruehle 做出了许多陈述，其后来以特权为由而禁止在其刑事审判中使用该等陈述。Ruehle 抗辩说，由于外部法律顾问曾代表 Ruehle 和其他个人管理人员参与股东诉讼，在面谈中没有告诉他其陈述可以披露给第三方，因而其在面谈中的陈述受特权保护。地区法院同意了 Ruehle 的观点。法院从面谈中删去了 Ruehle 的陈述，总结说外部法律顾问违反了其对 Ruehle 的忠实职责，并将所涉律师移交加州律师协会接受相应惩罚。[36]

In reaching its decision, the district court concluded that there was no record that an adequate *Upjohn* warning had been provided, relying, among other things, on the fact that there was no reference to an *Upjohn* warning in the interviewing attorneys' notes.[37] The court went on to note that even if it credited one of the interviewing attorneys' testimony that he had given an *Upjohn* warning, the warning was inadequate because the attorneys failed to advise Ruehle that they were not acting as his counsel during the interview, or that "any statements he made to them could be shared with third parties, including the [U.S.] Government in a criminal investigation."[38] While the Ninth Circuit ultimately overturned the district court's privilege ruling on the ground that Ruehle knew his statements would be disclosed to the company's auditors—and thus were not confidential—this case illustrates the problems that can occur when there is a lack of clarity about whom outside counsel represents and when attorneys fail to provide adequate *Upjohn* warnings.[39]

在作出决定时，地区法院表示，没有记录显示给予了充分的"*Upjohn* 警告"，其中一个依据是在面谈律师的记录中没有提到"*Upjohn* 警告"。[40]法院继续表示，即使其认可其中一位面谈律师的证词，说明其给予了"*Upjohn* 警告"，该警告也是不充分的，因为律师在面谈中没有告知 Ruehle，他们不代表 Ruehle，或者"Ruehle 向他们作出的任何陈述可以在刑事调查中与第三方分享，包括[美国]政府"。[41]尽管第九巡回法院最终推翻了地区法院基于以下理由的特权判决：Ruehle 知道其陈述会披露给公司的审计师---因而不是保密的---此案件解释了在外部法律顾问代表谁这个问题不明确时以及律师没有给予充分的"*Upjohn* 警告"时可能产生的问题。[42]

B. Be Aware of Contractual Limitations on Confidentiality
小心关于保密的合同限制

A key aspect of maintaining privilege is ensuring that employees do not disclose discussions made with counsel, including the contents of any witness interviews they give. In the past

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[35] 583 F.3d 600 (9th Cir. 2009)。

[36] *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev'd sub nom. United States v. Ruehle*, 583 F.3d 600。

[37] *Nicholas*, 606 F. Supp. 2d at 1116.

[38] *Id.* at 1117.

[39] *See Ruehle*, 583 F.3d at 602.

[40] *Nicholas*, 606 F. Supp. 2d at 1116。

[41] *参考同上*见 1117。

[42] *参考 Ruehle*, 583 F.3d at 602。

some companies used confidentiality clauses to limit disclosures that employees could make, for example, to regulators, under risk of civil penalties. In 2015 , the Securities and Exchange Commission settled an administrative enforcement action against construction and engineering firm KBR, Inc., alleging violation of U.S. federal law by imposing confidentiality obligations on its employees that could be interpreted to restrict the ability of employees to report illegal conduct to regulators (so-called "whistleblower" actions).[43] One of the challenged provisions in KBR's confidentiality agreements required employees to speak to company lawyers before reporting violations to regulators. Following these developments, counsel must be careful both to convey to employees the importance of maintaining confidentiality during investigations, and avoid giving the impression that a company is potentially threatening employees' employment if they fail to maintain that confidentiality.

维护特权的一个重要方面是确保员工不披露与法律顾问进行的讨论，包括其进行的任何证人面谈的内容。过去，有些公司用保密条款来限制员工可以进行的披露，例如，在面临民事处罚风险时对监管机构进行的披露。2015 年，美国证券交易委员会对一家建筑工程公司 KBR 采取的行政执法行动进行了和解，指称其强制其员工具有保密义务，而该保密义务可解释为限制员工向监管机构报告非法行为的能力（所谓"举报"行动），而该做法却违反了美国联邦法律。在 KBR 保密协议中受到质疑的规定之一是，要求员工在向监管机构报告违法行为之前与公司律师谈话。鉴于这一情况，法律顾问须谨慎向员工传达在调查期间保密的重要性，并避免员工误解如果其未保密则公司可能会解雇他们。

C. Carefully Consider the Scope of Interviews Involving Former Employees and Third Parties
认真考虑涉及离职员工和第三方的面谈范围

Counsel must be particularly sensitive to privilege considerations when conducting interviews of former employees and third parties. Federal courts generally have held that communications with former employees about events that occurred within the scope of their prior employment are subject to the attorney-client privilege.[44] Counsel conducting an investigation should thus use great care to focus the interview on matters that occurred during the former employee's tenure, as some district courts have held that interviews on topics subsequent to employment with the company are not privileged.[45]

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[43] *In re KBR, Inc.*, No. 3-16466 (April 1, 2015). [fix citation]关于 KBR 公司，No. 3-16466 (2015 年 4 月 1 日).

[44] *See Upjohn Co. v. United States*, 449 U.S. 383, 403 (1981) (Burger, C.J., concurring) ("[A] communication is privileged at least when . . . an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment"); *In re Allen*, 106 F.3d 582, 605 (4th Cir. 1997) ("Most lower courts have followed the Chief Justice's reasoning and granted the privilege to communications between a client's counsel and the client's former employees."). *But see id.* at 606 n.14 (citing federal cases denying the privilege as to communications with former employees and describing them generally as either "following state law" or having concluded that "the former employee had ceased being employed by the client *before* the relevant conduct occurred").

[45] *See, e.g., United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999).

法律顾问在面谈离职员工和第三方时须敏感对待特权问题。联邦法院一般认为与离职员工之间有关其在职期间发生的事情的沟通受"律师-客户特权"保护。[46] 因而进行调查的法律顾问应尽力将面谈集中于离职员工在职期间发生的事情上，因为一些地区法院认为有关员工离职后事宜的面谈不受特权保护 [47]。

Counsel also should consider the circumstances of the witness's departure from the company when assessing whether the witness is likely to be cooperative or to maintain the confidentiality of the interview. In the absence of a contractual provision (*e.g.*, in a severance agreement) obligating an employee to cooperate in an investigation and maintain confidentiality, a company may have no effective remedy against a former employee who fails to maintain confidentiality. Even with such contractual protections, their utility may be limited; the SEC, for example, has made clear that such contractual undertakings cannot be used to prevent someone from reporting information to the Commission under the Dodd-Frank Wall Street Reform and Consumer Protection Act.[48] Thus, if a company has real concerns that the employee will not maintain confidentiality, it should think carefully about whether to proceed with the interview.

在考虑证人是否可能配合或保密面谈内容时，法律顾问还应考虑证人离开公司的情形。在没有合同条款对员工施加配合调查及保密对待调查义务的情形下（例如，在离职协议中），公司可能没有针对离职员工泄密的有效救济措施。即使有该等合同保护，他们的实用性可能也很有限。例如，证券交易委员会明确表示，该等合同承诺不能用于阻止人们根据《多德弗兰克华尔街改革及消费者保护法案》（"Dodd-Frank Wall Street Reform and Consumer Protection Act"）向证券交易委员会报告信息。[49]因此，如果公司确实担心员工不会保密，其应认真考虑是否继续相关面谈。

Counsel should be particularly cognizant of the privilege risks associated with interviews of third parties. In a recent ruling, a federal court held that interviews of a company's distributor's employees were protected by the attorney client privilege.[50] In *Cicel*, the dispute arose when Misonix, a medical device manufacturer, terminated an exclusive distributor contract with Cicel, its Chinese distributor, as a result of alleged findings from a foreign bribery investigation. As part of the investigation, an outside law firm representing Misonix interviewed several employees at Cicel. In an unfair termination contract dispute, Cicel sought "any transcripts, notes, recordings or videotapes of the questioning of Cicel's executives . . . by

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[46] *参考 Upjohn Co. v. United States*, 449 U.S. 383, 403 (1981) (Burger, C.J., concurring) ("沟通是受特权保护的，至少在 . . . 员工或离职员工按照管理层的指示与律师交流在职范围内的行为或提议行为时")；*In re Allen*, 106 F.3d 582, 605 (4th Cir. 1997) ("多数下级法院遵循了首席法官的推理，给予客户的法律顾问和客户的离职员工之间的沟通特权保护")。 但参考上述案例见 606 n.14 (引用否认与离职员工的沟通受特权保护的联邦案例，将该等沟通描述为"遵守州法律" 或者总结说 "在相关行为发生*之前*离职员工已经不再受聘于客户")。

[47] 参考案例 *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004)；*Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999)。

[48] *See* 17 C.F.R. § 240.21F-17(a) (2012).

[49] *参考* 17 C.F.R. § 240.21F-17(a) (2012)。

[50] *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc., No. 17CV1642ADSSIL*, 2019 WL 1574806, at *9 (E.D.N.Y. Apr. 11, 2019) Cicel（北京）科技有限公司. v. Misonix, Inc., No. 17CV1642ADSSIL, 2019 WL 1574806, at *9 (E.D.N.Y. 2019 年 4 月 11 日)

the law firm" and all documents related to the investigation into Cicel.[51] Because the law firm was hired for legal advice regarding potential violations of bribery laws, the court ruled that Misonix does not have to produce documents created by the outside law firm during the internal investigation, except those already disclosed to regulators. Before conducting any interviews of third parties, counsel should clearly articulate that the purpose of the interviews is to provide legal advice to the client company.

法律顾问应特别注意与第三方面谈相关的特权风险。在最近的一项裁决中，联邦法院认为与公司经销商员工进行的面谈受到"律师-客户特权"的保护。在 Cicel，由于涉嫌外国贿赂调查结果，医疗器械制造商 Misonix 与其中国经销商 Cicel 终止了独家经销商合同，从而引发了争议。作为调查的一部分，一家代表 Misonix 的外部律师事务所面谈了 Cicel 的数名员工。在不公平的终止合同纠纷中，Cicel 寻求"律师事务所询问 Cicel 高管的任何副本、备忘录、录音或录像带....."及与 Cicel 调查有关的所有文件。由于该律师事务所受雇于为其提供有关可能涉及违反贿赂方面法律的法律建议，法院裁定，除那些已向监管机构披露的文件外，Misonix 无须开示外部律师事务所在内部调查期间所创建的文件。在对第三方进行任何面谈之前，律师应明确说明面谈的目的是向客户公司提供法律建议。

D. Draft Interview Summaries or Memoranda with an Eye to Preserving Privilege
旨在保留特权的面谈概要或备忘录草稿

Memorializing the content of the interview is essential to a credible investigation. When crafted well, interview summaries should avoid the need to revisit topics with witnesses and can serve as a resource to the rest of the investigative team. To ensure that the content of such summaries remains privileged under U.S. law, interviews should not be recorded or transcribed verbatim. A recorded or transcribed interview summary will be considered more easily discoverable than a written summary that contains an attorney's mental impressions.[52] The summary should state expressly that it does not constitute a transcript and that the content is not presented sequentially. Moreover, the written summary should state that it contains the thoughts, mental impressions, and conclusions of the attorney. The written summary also should confirm that the *Upjohn* warning was delivered, describe the content of the warning, and indicate that the witness understood and agreed to proceed with the interview. Where the interviewing attorney takes hand-written contemporaneous notes, it can be a good idea to list each element of the *Upjohn* warning in the notes before starting the interview so that each element can be checked-off without causing too much distraction for the witness. Sample introductory language to a typical written interview summary follows:

对于一项可信的调查而言，记录面谈的内容是至关重要的。构思较好的面谈概要应当避免与证人重复讨论话题的需要，且可用作调查团队其余成员的资源。为确保上述概要的内容在美国法律下仍享有特权保护，面谈不应录音或逐字誊写。录音或逐字誊写的面谈概要将被视为比包含律师内心印象的书面概要更易于被开示。[53] 概要应当明确，其不构成誊本，且内容并非按顺序呈现。而且，书面概要应当说明，其包含律师的想法、内心印象和结论。书面概要还应当确认，已传达"*Upjohn* 警告"，描述该警告的内容，并指明证人理解并同意继续面谈。在面谈律师手

[51] *Id.* at *3.

[52] *See* FED. R. CRIM. P. 26.2(a), (f)(2).

[53] 参见 FED. R. CRIM. P. 26.2(a), (f)(2)。

写同期笔记时，建议在开始面谈之前列出"*Upjohn* 警告"的每一要点，以便能划掉每一要点而不致让证人太分心。典型书面面谈概要的范例引导语如下：

> On [DATE], [names of counsel] met with and interviewed [WITNESS], [TITLE] of Company X (the "Company"), at [LOCATION]. This memorandum consists of information obtained in the course of the interview as well as the thoughts, impressions and conclusions of counsel. The memorandum is not and is not intended to be a verbatim transcript of the interview and in many instances is organized topically, rather than in the sequence in which the conversation took place. This memorandum has not been reviewed by [WITNESS] for accuracy or otherwise adopted by him as his statement.
>
> 在[日期]，[法律顾问姓名]在[地点]与 X 公司（"公司"）[职务][证人]会见并面谈。本备忘录包含面谈过程中获得的信息以及法律顾问的想法、印象和结论。本备忘录不是且无意作为面谈的逐字记录，且在很多情况下是按话题组织，而非按谈话发生的顺序组织。本备忘录未经[证人]复核准确性，或被其采纳为其声明。
>
> At the outset, counsel explained that Company X is concerned about the possibility that certain laws may have been violated in connection with specific areas of Company X's business and that [LAW FIRM] had been hired to look into the situation and to give the Company legal advice. Counsel told [WITNESS] that [LAW FIRM] is representing the Company in this matter, not him personally, but that his help is needed to collect and understand the facts so that the Company can receive accurate advice. Counsel also explained that the conversation was privileged, but it was up to the Company to decide whether it would like to disclose what was discussed to a third party or to the government. Counsel told [WITNESS] not to talk to anyone else about this meeting or about what was discussed. He confirmed that he understood all of the above.
>
> 在面谈开始时，法律顾问解释，X 公司担心就 X 公司业务的特定领域可能存在违法行为，且[律师事务所]受聘调查此事并给予公司法律意见。法律顾问告知[证人]，[律师事务所]将在此事项中代表公司，而非其本人，但需要其协助收集和了解事实，以便公司能获得准确的意见。法律顾问还解释，此次谈话是受特权保护的，但公司是否愿意向第三方或政府披露讨论内容决定权在公司。法律顾问告诉[证人]不要向任何其他人谈及此次面谈或讨论的内容。[证人]确认其理解上述所有内容。

When interviews memos are prepared based on contemporaneous notes from the interview, counsel should take care to preserve those notes, instead of overriding or destroying them.

For example, a federal judge criticized a law firm that, in an effort to avoid preserving notes, overrode interview notes and draft summaries to create a single, final document.[54]

在根据面谈的同期记录准备面谈备忘录时，法律顾问应注意保留这些记录，而不是篡改或销毁它们。 例如，一位联邦法官批评一家律师事务所为了避免保留笔记，超越了面谈笔记和起草摘要内容而单独创建了一份最终文件。

There may be reasons under PRC employment law to have a more complete transcript of the interview, and to have witnesses review and sign the transcript. In doing so, it would be much more difficult that these notes are protected under U.S. law by privilege and work-product protection. During an internal investigation in China, these considerations often need to be balanced depending on the importance of U.S. versus PRC legal issues.

由于中国劳动法的一些要求，在某些情况下可能需对面谈进行更为完整的记录，并要求证人进行审阅并签字。然而，这样的做法会导致记录基于美国法律而获得的特权保护和工作成果保护遇到挑战。因此，在中国开展内部调查时，需时常基于其所涉及的美国与中国法律问题的相关重要性，对这些因素进行权衡考虑。

E. Joint Defense Agreements Should Have Language that Protects Privileged Communications
联合辩护协议应当有保护受特权保护通讯的措辞

Where an investigation requires collecting or sharing information with another company, including a joint venture or a joint venture partner, further steps should be taken to ensure that opening a channel to discuss privileged information with a partner that has its own counsel does not amount to a waiver. Sharing of information among counsel for clients with a common interest can yield substantial efficiencies and may be helpful in developing an accurate and comprehensive understanding of the facts. In order to safeguard the privilege, any time information is to be shared with another legal entity that is not privy to the same attorney-client relationship a joint defense or common interest agreement should be considered. These agreements address this concern by bringing confidential communications among outside counsel and their clients within the ambit of the attorney-client privilege and the attorney work-product protection. Carefully drafting joint defense agreements will ensure that attorneys can conduct an efficient investigation with other outside counsel, while preserving the privilege and other applicable protections. Some tips on drafting these agreements follow:

如果一项调查要求收集信息或与另一公司（包括合资企业或合资伙伴）分享信息，应采取进一步行动以确保开通与内部法律顾问的合作伙伴讨论受特权保护信息的渠道不会导致弃权。在拥有共同利益的客户的法律顾问之间共享信息可能极大地提高效率，且可能有助于准确而全面地了解事实。为了维护特权，每当与不参与同一律师客户关系的另一法律实体分享信息时，应考虑签署联合辩护或共同利益协议。这些协议将外部律师与其客户之间的保密通讯纳入“律师－客户特权”和律师工作成果保护的范畴内，从而解决了这一问题。谨慎地起草联合辩护协议将

[54] *United States v. Baroni*, No. 2:15-CR-00193-SDW, 2015 WL 9049528, at *4 (D.N.J. Dec. 16, 2015) (granting law firm's motion to quash while characterizing the law firm's tactics as "opacity and gamesmanship"). *United States v. Baroni*, No. 2:15-CR-00193-SDW, 2015 WL 9049528, at *4 (D.N.J 2015 年 12 月 16 日）（裁决律师事务所撤销动议，但同时将律师事务所采取的诉讼策略描述为“不透明和小动作”）。

确保律师能够与其他外部法律顾问开展高效的调查，同时保留特权和其他相关保护。起草这些协议的一些注意事项如下：

- Meticulously define the scope of the common interest and thus the scope of the agreement.
  谨慎小心地定义共同利益的范围乃至协议的范围。
- Indicate that the parties may, at their discretion, share information concerning the relevant matters without waiving any applicable privileges.
  指明各方可经其自主决定共享关于相关事项的信息，同时不放弃任何适用的特权。
- Note that nothing in the agreement—nor the simple sharing of information pursuant to the agreement—shall constitute a waiver of any applicable privilege or protection.
  指出协议中的任何内容（和依据协议而进行的简单共享）均不应构成对任何适用特权或保护的放弃。
- Include clawback language regarding inadvertent disclosures of privileged information.
  包括关于无意披露受特权保护信息的追索规定。
- Provide for unilateral withdrawal from the agreement by any party for any reason, while noting that the agreement will continue to protect all shared information prior to withdrawal.
  就任何一方因任何原因单方面撤销协议作出规定，并指出在撤销之前该协议将继续保护所有共享信息。

Care must be exercised when operating as part of the agreement. The discovery that the parties to the agreement no longer share a common interest may lead to waiver of any further privileged information that is shared. Each party to an agreement must remain vigilant and ensure that there is no potential conflict that arises, and in the event of such a conflict, the party should timely notify the other participants that it intends to withdraw from the arrangement.

在作为协议一部分解释时也须小心。协议当事方不再有共同利益的证据发现可能导致所分享的任何其他受特权保护信息不再受保护。协议的每一方须保持谨慎，并确保不会产生任何可能的冲突，且在产生此类冲突的情况下，该方应及时通知另一方其拟撤出这一安排。

F. Be Wary of Providing Non-Legal Advice
谨慎提供非法律意见

In any internal investigation, outside counsel may be asked to advise on topics that are ancillary to the core legal issues under investigation. A prominent example is advice on issues relating to termination of commercial relationships or employee discipline. In light of recent case law, counsel should be aware that the provision of "business advice"—even in the context of a privileged investigation—may not itself be privileged. For example, in the 2014 case *Koumoulis v. Independent Financial Marketing Group, Inc.*, the plaintiffs sought to compel production of communications between the defendants and their outside counsel regarding the internal investigation of plaintiff's discrimination claims.[55] The defendants withheld the documents, asserting the attorney-client privilege and work-product protection. Although these documents seem like core privileged communications, the district court did not find

[55] *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 29 F. Supp. 3d 142, 145 (E.D.N.Y. 2014). *Koumoulis 诉 Indep. Fin.Mktg. Grp.，Inc.，29 F. Supp。 3d 142,145（E.D.N.Y. 2014 年）。*

clearly erroneous a magistrate's finding that "their predominant purpose was to provide human resources" advice; the district court accordingly held that no attorney-client privilege attached.[56] The district court explained that "almost all of the information contained in the [documents] relates to business advice provided by outside counsel to Defendants' human resources personnel or the factual record of Defendants' internal investigation."[57]

在任何内部调查中，外部法律顾问都有可能被要求就附属于受调查核心法律事宜的主题提供意见。一个较明显的例子是就商业关系终止或员工纪律处分事宜提供的意见。鉴于近期的案例法，法律顾问应当明白"商业意见"的提供（即便在调查受特权保护的情况下），其本身不受特权保护。例如，在 2014 年 *Koumoulis* 诉 *Independent Financial Marketing Group, Inc.* 案中，原告试图强行提供被告与其外部法律顾问之间有关原告歧视指控内部调查的通讯。[58] 被告拒绝提供这些文件，主张"律师－客户特权"和工作成果保护。尽管这些文件貌似是受特权保护的核心通讯，但联邦地区法院并不认为治安法官的下列认定有明显错误："其主要目的为提供人力资源"意见；联邦地区法官因而认定，其不附带任何"律师－客户特权"。[59]联邦地区法院解释说，"[文件]中包含的几乎所有信息均与外部法律顾问对被告人力资源人员提供的商业意见或被告内部调查的事实记录有关。"[60]

For similar reasons, the court explained that attorney work-product protections did not apply: While "it may be true that the possibility of litigation prompted Defendants to seek outside counsel's advice, the communications themselves demonstrate that rather than discussing litigation strategy or advice, [outside counsel] advised Defendants on how to conduct the internal investigation," as well as on how to address plaintiff's "ongoing work performance issues and internal complaints," which is "advice that would have been given regardless of a specific threat of litigation."[61]

基于类似理由，法院解释说，律师工作成果保护不适用：尽管"下列情况也许属实：诉讼的可能性促使被告寻求外部法律顾问的意见，但通讯本身表明：[外部法律顾问]并未讨论诉讼策略或意见，而是就如何进行内部调查"以及就如何处理原告"持续的工作表现问题和内部投诉为被告提供意见，"但这属于"无论是否有具体的诉讼威胁都会提供的意见"。[62]

This decision makes clear that there is a real disclosure risk in providing advice of a "business-related character" when assisting clients in conducting an internal investigation.[63] Any such communications not only should be labeled with privilege legends, but also should include more than "a stray sentence or comment within an e-mail chain referenc[ing] litigation strategy or advice."[64] Communications related to the structure and scope of an internal

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[56] *Id.* at 146-49.

[57] *Id.* at 145.

[58] *Koumoulis v. Indep. Fin. Mktg. Grp.*, No. 10-CV-0887, 2014 WL 223173 (E.D.N.Y. 2014 年 1 月 21 日)

[59] *参考同上*见*3-5。

[60] *参考同上*见*2。

[61] *Id.* at 149.

[62] *参考同上*见*6。

[63] *Id.* at 147.

[64] *Id.*

investigation must be continually tied back to the provision of legal advice and the prospect of future litigation.

该裁定表明，在协助客户进行内部调查时提供"商业相关性质"的意见确实存在被披露的风险。[65] 任何该等通讯不仅应标上受特权保护的说明，而且仅仅"在电邮链中加入提及诉讼策略或意见的无关句子或评论"是不够的。[66]与内部调查的结构和范围有关的通讯必须始终强调提供法律意见和发生未来诉讼的可能性。

IV. Avoid Privilege Waivers at the End of an Investigation 避免调查结束时的弃权

The conclusion of an internal investigation—particularly one that will inform the U.S. or another government's decision on whether to bring an enforcement action—will often involve some form of reporting that may implicate a variety of privilege considerations. We consider here the risks related to such reporting, the issue of "selective waiver," and the issues to consider in communicating with a company's outside auditors about an internal investigation.

内部调查（尤其是那些会告知关于是否采取执法行动的美国或他国政府决定的调查）的结束往往会涉及可能包含各种特权考量的某种形式的报告。我们在此考虑的是与该报告有关的风险、"选择性弃权"问题和在与公司外部审计师就内部调查进行沟通时应考虑的问题。

A. When Reporting Findings, Carefully Consider the Audience and Method of Reporting 在报告结果时，仔细考虑受众和报告方式

The manner in which outside counsel reports the findings of the internal investigation has significant consequences for the privilege. Reporting in the context of a U.S. government investigation presents a unique form of risk, given the possibility of a broad subject-matter waiver of the privilege. To guard against this risk, counsel is typically well served both to limit the disclosure of investigative findings (whether delivered orally or in writing) to material that is not privileged, to audiences with a need to know, and to be clear that such communications are confidential. Focusing disclosure on material not ordinarily subject to the attorney-client privilege, such as the investigative process and non-privileged facts, is less likely to lead to a waiver. Limiting disclosure to those with a need to know helps preserve arguments that the material has been kept confidential. The format of disclosure can also be significant: if counsel is able to avoid preparing a written report and can instead prepare a presentation consisting of source documents, coupled with an oral presentation of relevant facts, the risk of a privilege waiver can be substantially mitigated.

In both written submissions and oral presentations, counsel should be aware of the risks associated with attributing facts or recollections to a single witness. Recently, a court found that defendants "impliedly waived" the attorney-client privilege to the extent any attorney-client communications "formed the basis" of a communication with the government.[67] The communication at issue, a letter to the Department of Justice, contained factual

[65] *参考同上*见*4。

[66] 参考同上。

[67] *In re Grand Jury Investigation*, No. MC 17-2336 (BAH), 2017 WL 4898143 (D.D.C. Oct. 2, 2017). 在大陪审团调查中，编号 MC 17-2336（BAH），2017 WL 4898143（D.D.C.2010 年 2 月 2 日）。

representations that were "explicitly attributed" to the defendants' "recollection." When possible, counsel should consider presenting facts or witness interviews downloads in an aggregate narrative, instead of attributing facts or statements to a specific individual. 外部法律顾问报告内部调查结果的方式对于特权会有重大的影响。鉴于存在广义上主题特权放弃的可能性，美国政府调查背景下的报告呈现了一种独特的风险。为防范这一风险，法律顾问通常会这么做：将调查结果的（口头或书面）披露限制于向有需要了解的受众人群进行披露的非特权材料，并明确这种交流是保密的。注重披露通常不受限于"律师-客户特权"的材料，如调查过程和非受特权保护的事实，就可以降低放弃特权的风险。仅向需要了解的人员披露有助于证明材料已得到保密的论点。披露格式也很重要：如果法律顾问能够避免准备书面报告，转而准备一份包含源文件的演示文档，加之对相关事实的口头报告，则放弃特权的风险可大幅减轻。

在书面报告和口头汇告中，法律顾问应了解基于事实或回忆而依赖于单一证人的所带来的相关风险。最近，法院认定被告"默示放弃"了"律师 - 客户特权"，以至于任何律师 - 客户交流均"构成了与政府沟通的基础"。 就问题事宜所进行的沟通，致司法部的信函，对事实的陈述均"明确归因于"被告的"回忆"。如有可能，法律顾问应考虑以整体叙述的方式陈述事实或证人访谈，而不是归因于对特定个人的事实或陈述。

As noted above in Section II. A, special attention must be given to the risk of waiver in circumstances where counsel is communicating findings to potentially adverse parties. For example, if outside counsel has been retained by a board committee and subsequently presents to the entire board, there is a risk of waiver to the extent the facts suggest the board members did not receive and consider the presentation in their roles as fiduciaries of the company, but rather in their personal capacities as defendants (potential or actual) in litigation.[68]

如第二部分 A 款所述，在法律顾问向潜在的不利当事方披露调查结果的情况下，须特别注意弃权的风险。例如，如果外部法律顾问受聘于某董事会委员会，并随后向该董事会作说明，且若事实表明董事会成员并未以其公司受托人身份而是以诉讼中被告人的个人身份接收和考虑该项说明，则存在弃权风险。[69]

B. Even Oral Proffers Risk a Waiver
即便是口头提供也有弃权的风险

Oral proffers are frequently employed to provide U.S. government enforcement authorities with factual information gathered in an internal investigation. Although this tactic can alleviate the risk of handing over a written document memorializing the results of a privileged investigation, there is still danger in making oral proffers.[70] There is a significant risk of work

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[68] *See, e.g., Ryan v. Gifford*. Civil Action No. 2213-CC, 2007 WL 4259557, at *3 (Del. Ch. Nov. 30, 2007) (finding a subject-matter waiver where a special committee's findings were disclosed to the full board, including board members who were defendants in the underlying derivative suit and whose personal counsel attended the presentation).

[69] *参考案例，Ryan v. Gifford*. 民事诉讼号 2213-CC, 2007 WL 4259557, 见 *3 (Del. Ch. 2007 年 11 月 30 日)（认定主题事项弃权，向全体董事（包括在相关衍生诉讼中身为被告人且其个人法律顾问参与报告的董事）呈交了特别委员会的一份调查结果，）。

[70] For example, in *SEC v. Vitesse Semiconductor Corp.*, outside counsel for a non-party company's audit committee had delivered to the SEC oral summaries of multiple witness interviews. No. 10 Civ. 9239, 2011 WL 2899082, at *1-3 (S.D.N.Y. July 14, 2011). When the defendants learned of notes from these witness interviews and moved to compel their production, the district court found that the non-party company had waived work-product protection because the oral summaries were so detailed that

product waiver when oral proffers of witness interviews are the "functional equivalents" of the underlying witness interview notes and memoranda. In *SEC v. Herrera*, a law firm was held to have waived work product protection for witness interview notes and memoranda when it provided the SEC with what the court described as "an oral recitation of what each (relevant) witness stated during the interviews."[71] In granting a motion to compel production, the court noted that even though the SEC was not given actual witness notes and memoranda, there was no meaningful difference between the physical and oral production of a witness interview note or memorandum.

口头提供经常用于向美国政府执法部门提供在内部调查中收集的事实信息。 尽管此策略能减轻移交记录受特权保护调查结果的书面文件的风险，但在进行口头提供时仍有风险。[72]当证人面谈的口头提供是潜在证人面谈记录和备忘录的"功能等同物"时，律师工作成果豁免面临显著的风险。 在美国证券交易委员会诉 Herrera 案中，当一家律师事务所向证券交易委员会提供了法院描述为"每位（相关）证人在面谈中所说内容的口头陈述"时， 该律师事务所被认为放弃了证人面谈记录和备忘录的工作成果保护。 法院在裁决强制出示动议时指出，尽管证券交易委员会未被提供实际的证人记录和备忘录，但证人面谈记录或备忘录的实际和口头提供之间并不存在任何有意义的差异。

Companies, therefore, should exercise caution as they approach factual proffers based on witness interviews. In that regard, counsel should have a written understanding in place with the relevant governmental agency that the factual proffer is not intended to effect a waiver. Moreover, counsel should consider other means to avoid an inadvertent waiver, such as not providing verbatim recitations of witness interviews and attempting instead to proffer facts surrounding particular issues under investigation, drawing on the witness interviews and other sources to inform the proffer.

因此，当企业基于证人面谈提供事实证据时应当谨慎。在这方面，法律顾问应当与相关政府机构达成关于事实提供并非旨在实施弃权的书面谅解。而且，法律顾问应当考虑避免无意弃权的其他方式，例如不提供证人面谈的逐字记录，而试图围绕被调查的特定问题提供事实，利用证人面谈和其他来源提供信息。

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it was as if the non-party company had "effectively produced [the] notes to the SEC." *See also Gruss v. Zwirn*, 09 Civ. 6441, 2013 WL 3481350 (S.D.N.Y. July 10, 2013) (finding a work-product waiver where counsel "deliberately, voluntarily, and selectively disclosed to the SEC" summaries of twenty-one witness interviews in a PowerPoint presentation).

[71] No. 17-20301-CIV, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017). No.75-20301-CIV，2017 WL 6041750（S.D.Flas.Fid。2017 年 5 月）。

[72] 例如，在*证券交易委员会 v. Vitesse Semiconductor Corp.*一案中，非当事方公司审计委员会的外部法律顾问向*证券交易委员*交付了多份证人面谈口头记录。No. 10 Civ. 9239, 2011 WL 2899082, at *1-3 (S.D.N.Y. 2011 年 7 月 14 日)。当被告人得知来自这些证人面谈的笔记并采取行动强制提供这些笔记，联邦地区法院认为，非当事方公司已放弃工作成果保护，因为口头记录十分详细，以致如同非当事方公司已经"有效地向*证券交易委员*提供笔记"一样。*参考 Gruss v. Zwirn*, 09 Civ. 6441, 2013 WL 3481350 (S.D.N.Y. 2013 年 7 月 10 日)（认定工作成果弃权，因为法律顾问"有意、自愿且选择性地向*证券交易委员*披露了"PowerPoint 格式的二十一份证人面谈记录）。

C. Do Not Rely on "Selective Waiver" 不要依赖"选择性弃权"

Reporting only on the facts learned in an investigation may not provide a sufficiently comprehensive account to the U.S. government to preclude an indictment or to achieve an otherwise favorable resolution. In these circumstances, a company may conclude that the benefits of full disclosure outweigh the costs of waiving the privilege, and hope to make an agreement with the U.S. government whereby privileged information can be disclosed to the government without waiving privilege with respect to third parties. This principle, called "selective waiver," is disfavored in most federal jurisdictions in the U.S., and should be approached with caution.[73]

仅报告在调查中获知的事实或许不能给美国政府提供足够全面的信息，以达到避免起诉或实现其他有利的结果。在这些情形下，企业可能断定完全披露的利大于放弃特权的弊，并希望与政府达成一项协议。这样，受特权保护信息可在不为第三方放弃特权的情况下向美国政府披露。这一原则称为"选择性弃权"。由于该原则在多数联邦司法辖区不被采纳，因此应当谨慎对待。[74]

If the company does intend to disclose privileged material to the U.S. government, it should first attempt to obtain an agreement from the U.S. government that it will keep the information confidential (often called a "McKesson letter"). Future plaintiffs, however, will not be parties to this agreement, and some courts have found that productions of privileged materials pursuant to confidentiality agreements with the U.S. government nonetheless constitute a waiver.[75] Notwithstanding the risk, these agreements can still be worthwhile because they limit the chance that the U.S. government will argue that a voluntary production constitutes a waiver. Recently, a federal appellate court held that the disclosure of privileged communications to the government pursuant to a confidentiality agreement did not waive privilege, even when the agreement contained language that permitted the government to disclose the communications to third parties under certain circumstances.[76] Simply put, a

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[73] *Compare Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (adopting doctrine of selective waiver to encourage "corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers"), *with In re Pac. Pictures Corp.*, 679 F.3d 1121, 1127-28 (9th Cir. 2012) (rejecting selective waiver and noting that the doctrine had been "rejected by every other circuit to consider the issue since" the Eighth Circuit considered it in *Diversified Industries*).

[74] *Compare Diversified Indus., Inc. 诉 Meredith*, 572 F.2d 596, 611 (第八巡回，1978)（全席听审）（采纳选择性弃权原则，鼓励"企业为保护股东、潜在股东和客户而聘用独立外部法律顾问为其进行调查和咨询"），以及 *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1127-28 (第九巡回，2012)（拒绝选择性弃权，并提出，自第八巡回法院在多元化经营方面考虑该原则以来，该原则已"被审理此问题的其他各巡回法院拒绝采纳"）。

[75] *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302-04 (6th Cir. 2002); *Westinghouse*, 951 F.2d at 1424-27, 1431. *But see Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at *11 (Del. Ch. Nov. 13, 2002) ("I adopt a selective waiver rule for disclosures made to law enforcement agencies pursuant to a confidentiality agreement.").

[76] *In re Grand Jury 16-3817 (16-4)*, 740 F. App'x 243, 245 (4th Cir. 2018) (noting that the agreement contained language permitting the government to disclose information "to the extent that [the government] determines in its sole discretion that disclosure would be in furtherance of the [government's] discharge of its duties and responsibilities or is otherwise required by law"). 大陪审团

confidentiality agreement is beneficial, but even with an ironclad agreement in place, companies should not expect that materials produced to the U.S. government will be immune from subsequent disclosure in civil litigation. 如果企业真正有意对美国政府披露受特权保护的资料，其首先应试图向美国政府请求一项关于美国政府将对该等信息保密的协议（通常被称之为"McKesson 函"）。但是如果未来的原告不是该协议的当事方，一些法院已认定依据与美国政府签订的保密协议提供受特权保护的资料仍然构成弃权。[77]尽管有此风险，这些协议仍值得签订，因为其限制了美国政府主张自愿提供构成弃权的可能性。最近，联邦上诉法院认为根据保密协议向政府披露特权沟通之信息并非为放弃特权，即使该协议包含允许政府在某些情况下向第三方披露沟通信息的条款。简言之，保密协议是有益的，但即便签订了严格的协议，企业也不应当指望提供给美国政府的资料在民事诉讼中将免受后续披露。

D. Exercise Care in Communications with Outside Auditors 在与外部审计师沟通时须当谨慎

As a general matter, disclosure of privileged information to external auditors constitutes a subject-matter waiver of the attorney-client privilege.[78] Auditors, however, typically recognize that demanding privileged information would put the company in an untenable position, and they are often receptive to a company's waiver concerns. To the extent that auditors have continued to request more detailed information in the wake of high-profile accounting fraud cases, companies need to be prepared to communicate with their auditors about internal investigations in a way that will not constitute a waiver of the privilege. Some tips follow:

一般而言，对外部审计师披露受特权保护的信息构成"律师－客户特权"的主题事项弃权。[79]但是，审计师通常承认，要求受特权保护的信息将使企业陷入两难处境，且他们通常都容易接受公司的弃权担心。如果在一些引人瞩目的会计欺诈案发生后，审计师继续要求更详细的信息，企业需要准备以不会构成放弃特权的方式与其审计师就内部调查进行沟通。一些注意事项如下：

- Consider briefing the auditors from the outset of the investigation. Have a candid conversation with them about the need for outside counsel to maintain privilege, while still providing them the information they require to perform their procedures. Enlist the help of the general counsel, the head of the internal audit department, or other appropriate in-house personnel to facilitate the dialogue between outside counsel and the independent auditors.
  从调查的一开始就考虑向审计师做简要说明。就外部法律顾问需保留特权一事与审计师进行开诚布公的对话，同时仍向审计师提供其履行程序所需的信息。向总法律顾问、内部审计部负责人或其他相关内部人员求助，以促成外部法律顾问与独立审计师之间的对话。
- Focus on process. Without revealing privileged legal advice, provide the auditor detailed information about the investigative process—the investigation's structure,

16-3817（16-4），740 F. App'x 243,245（4th Cir.2018）（注意到该协议包含的语言允许政府披露信息"在[政府]的范围内 自行决定披露是为了促进[政府]履行其职责和责任，或法律另有规定"）。

[77] *参考案例， In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302-04 (第六巡回， 2002); *Westinghouse*，951 F.2d, 见 1424-27, 1431。*但参考 Saito 诉 McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at *11 (特拉华州衡平法院，2002 年 11 月 13 日) （"对于根据保密协议对执法机构作出的披露，我采纳选择性弃权规则"）。

[78] *See, e.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).

[79] *参考案例，Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (第 9 巡回，1992)。

the personnel involved, the document preservation steps that were taken, the number of interviews conducted, the number of documents reviewed, the outside accountants and vendors employed, and any other relevant information. The stronger the investigative process and the more complete the description of the process, the more likely it is that the auditors will feel comfortable with the reliability of the investigation.
专注于过程。在不披露受特权保护的法律意见的情况下，向审计师提供关于调查过程的详细信息——调查的结构、涉及的人员、采取的文件保留措施、进行面谈的次数、审查的文件份数、聘请的外部会计师和供应商以及任何其他相关信息。调查过程越稳健，对过程的描述越完整，审计师越有可能对调查的可靠性感到满意。

- If necessary, provide factual proffers to the auditors orally, rather than in a written, discoverable document.
如有必要，以口头方式而非以书面、可开示文件的形式向审计师提供事实。

Finally, while the disclosure of privileged information to auditors will likely waive the attorney-client privilege, work-product protection may remain intact because the auditor is not adverse to the client.[80] Although this view is not universally held,[81] if the client cannot avoid disclosure of privileged information to its auditors, counsel should zealously argue in subsequent civil litigation that work-product protection remains intact.

最后，虽然向审计师披露受特权保护的信息可能会放弃"律师－客户特权"，但工作成果保护仍然有效，因为审计师不是客户的对立方。[82] 尽管持有该观点的人士并不普遍，[83] 但如果客户无可避免需向其审计师披露受特权保护的信息，法律顾问应当在后续的民事诉讼中大力主张工作成果保护仍然有效。

V. Conclusion 结论

The consequences of a waiver of attorney-client privilege or attorney work-product protections can be significant. Even if these protections are not applicable under Chinese law, waiving them can expose the company to additional problems or liability in the United States. It is

[80] *See, e.g.*, *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004) (finding no waiver of work product because the role of an auditor "simply is not the equivalent of an adversarial relationship contemplated by the [attorney] work product doctrine.")

[81] *Compare SEC v. Schroeder*, No. C07-03798, 2009 WL 1125579, at *8-9 (N.D. Cal. Apr. 27, 2009) (finding work-product protection applied to documents that had been disclosed to a company's auditors), *with Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 116 (S.D.N.Y. 2002) (holding that disclosure of the meeting minutes of a Special Litigation Committee to the company's auditors waives work-product protection because the disclosure "did not serve any litigation interest . . . or any other policy underlying the [attorney] work product doctrine" and because the auditors' interests "were not necessarily united with those of" the company).

[82] *参考案例 Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004)（认定工作成果弃权不成立，因为审计师的作用"不能简单地等同于[律师]工作成果原则预期的对抗关系。"）

[83] *参较 SEC v. Schroeder*, No. C07-03798, 2009 WL 1125579, at *8-9 (加州北区， 2009 年 4 月 27 日) (认定工作成果保护适用于已向公司审计师披露的文件), 以及 *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 116 (纽约州南区， 2002)（认定对公司审计师披露特别诉讼委员会会议纪要构成对工作成果保护的放弃，因为该项披露"不符合任何诉讼利益.....或作为[律师]工作成果原则基础的任何其他政策"，且审计师的利益"不一定与公司的利益一致"）。

therefore critical that attorneys conducting privileged internal investigations remain continually focused not only on conducting a credible, comprehensive investigation, but also on doing so in a manner that ensures the integrity of the attorney-client privilege, attorney work-product protection, and other applicable privileges and protections. This article has explained that pitfalls with respect to waiver exist at every stage of an internal investigation. Nonetheless, with careful planning and vigilance, attorneys can guide their clients safely through an internal investigation while minimizing these downstream risks.

放弃“律师－客户特权”或律师工作成果保护的后果可能很严重。即便这些保护在中国法律下不适用，放弃这些权利可能使公司在美国有遭遇额外问题或承担责任的风险。因此进行受特权保护的内部调查的律师不仅需要持续专注地开展可信、全面的调查，同时还需要确保“律师－客户特权”、律师工作成果保护和其他相关特权和保护的有效性。本文阐释了放弃特权保护相关的隐患存在于内部调查的每个阶段，但是如果能够仔细规划和保持警惕，律师就能安全地指导其客户完成内部调查，同时将这些下游风险降至最低。

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