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Protecting Privilege During Internal Investigations

One of the many challenges companies face when conducting internal investigations is how to gather information in a timely and effective manner while encouraging employee candor and preserving as much privilege as possible. Recent court decisions both in the U.S. and the U.K. have shifted the privilege playing field, leaving many questioning how they can best protect their companies. Experts from both jurisdictions have shared with The Anti-Corruption Report their strategies for protecting privilege in the wake of these recent decisions.

First, the Ropes & Gray team [recommends](#) that companies clearly articulate and document their privilege claims at the beginning of each investigation. Second, when documenting what they learn during an investigation, counsel should take steps to separate mental impressions from factual evidence, the Baker Botts team [suggests](#). Third, counsel should consider whether the documents they are generating are being created for the purpose of litigation, [says](#) the team at Boies Schiller. If so, counsel should keep a contemporaneous record of that fact.

Counsel also must consider how to give effective *Upjohn* warnings without dampening an employee's willingness to share his or her story. Beginning a conversation about corporate goings-on with a solemnized speech reminding the employee that it is the company that holds the privilege might not always generate the sort of disclosure a lawyer is seeking. We recently [talked](#) to practitioners for their suggestions on how best to go about giving *Upjohn* warnings and what to do if an employee balks when receiving one.

For more on how to structure investigations in a way that best protects the company while also gathering all the relevant information, see the Further Reading section below or visit the [Privilege](#) section of our archives.

Warmly,

Nicole Di Schino
Editor-in-Chief