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In-House Counsel CLE Webinar Series: Spring Forward

Session 2

June 8, 2020

Grow | Protect | Operate | Finance

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What Tougher Enforcement of White Collar Crimes Could Mean for Your Company

June 8, 2020

Grow | Protect | Operate | Finance

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- Co-Chair, Dentons' national White Collar & Government Investigations Practice Group
- Former International Banker in both U.S. and London
- Extensive experience:
 - Financial Crimes Defense
 - Health Care Fraud
 - CARES Act PPP Loan audits and DOJ investigations
 - Environmental Crimes
 - Internal Investigations
 - Criminal & Civil Trials – over 100 jury trials



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- Co-Chair of Dentons' Global Compliance and Investigations
- Former Prosecutor, U.S. Department of Justice
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- Extensive experience
 - Foreign Corrupt Practices Act (FCPA) & International Bribery (*Fresenius Medical Care AG & Co.*)
 - Securities & Exchange Commission (SEC) matters
 - Corporate Compliance
 - Internal Investigations



Mark Califano

- Partner, Dentons US, New York and Washington, D.C.
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- Global Head of Litigation, Legal Policy and Gov. Investigations—GE Capital and American Express
- Global Head of Compliance, GE Capital
- Partner, CLO and Head of Americas, Nardello & Co., global investigations firm
- Bitstamp, Independent Board Member
- Experience
 - Crypto, Digital Assets & Blockchain—governance, regulatory, litigation, and compliance
 - DOJ, SEC, and Multijurisdictional Government Enforcement
 - Foreign Corrupt Practices Act (FCPA) & International Bribery
 - Complex and Appellate Litigation
 - Corporate Compliance
 - Internal Investigations



Chelsea Granville Reed

- Member, White Collar & Government Investigations Practice Group
- Member, Litigation & Dispute Resolution Practice Group
- Former Judicial Law Clerk for the Honorable Doris Pryor, U.S. District Court, Southern District of Indiana (nominated for Seventh Circuit)
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 - CARES Act SBA Audits and DOJ fraud investigations of PPP loans
 - Civil litigation
 - Employment and labor matters



Current DOJ Priorities

- New emphasis on corporate crime
- Increased penalties for companies that are repeat offenders
- New policies for companies that seek resolution with DOJ
 - To get credit for cooperation, companies must turn over “everything and everyone.”
 - Even unrelated prior misconduct will be taken into account
 - Prior deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) will be considered

Source: Deputy U.S. Attorney General Lisa Monaco speech to American Bar Association’s 2021 White Collar Crime National Institute Summit (October 28, 2021)



Department of Justice Prosecution of Corporations

- “Vigorous enforcement of the criminal laws against **corporate wrongdoers**, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes..”
 - The Justice Manual (formerly “United States Attorneys Manual” 9-28.100
- “In certain instances, it may be appropriate to resolve a corporate criminal case by means other than indictment. **Non-prosecution and deferred prosecution agreements**, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.”
 - **The Justice Manual 9-28.200**

Department of Justice Prosecution of Employees of Corporations

- “Prosecution of a corporation is not a substitute for the **prosecution of criminally culpable individuals** within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. **Provable individual criminal culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution.** In other words, regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals.”
 - The Justice Manual (formerly “United States Attorneys Manual” 9-28.210

New DOJ Leadership

Kenneth Polite

**Assistant Attorney General, Criminal
Division**

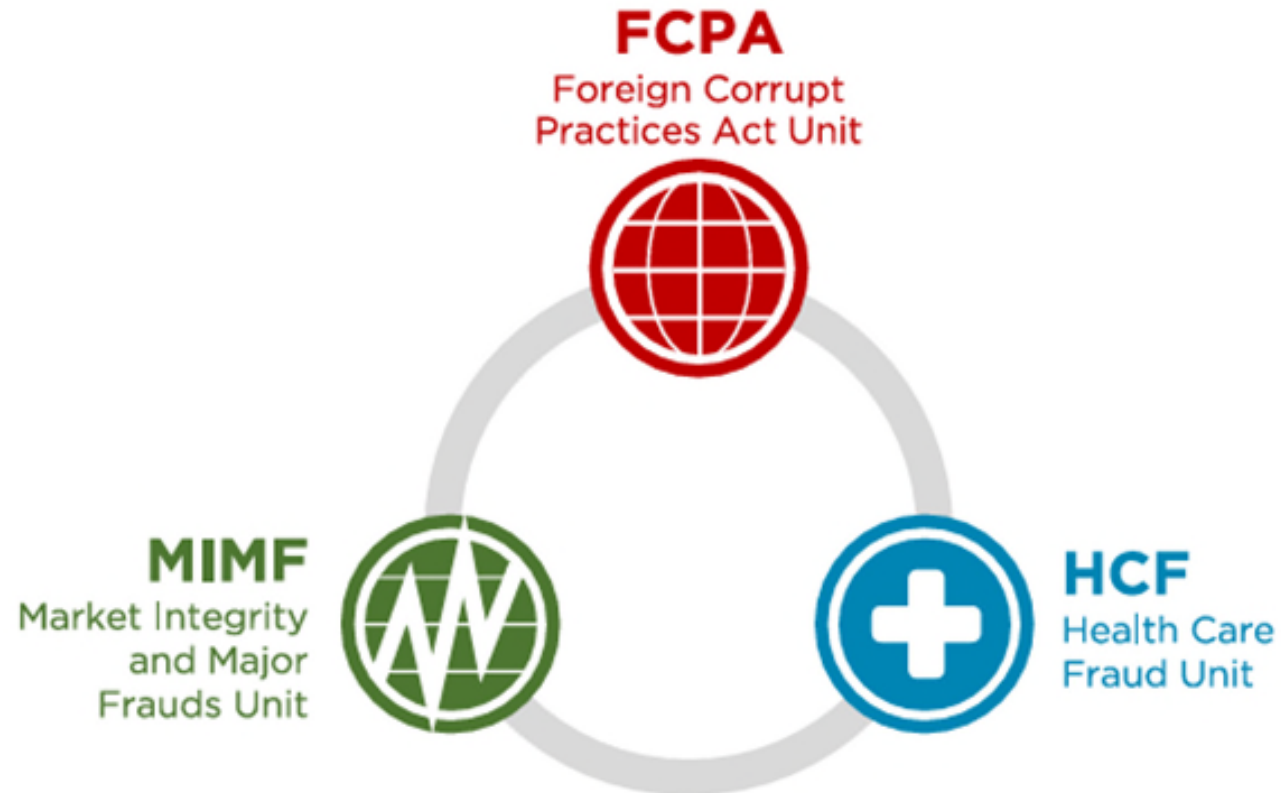
Former U.S. Attorney, E.D. LA

Former VP and Chief Compliance Officer,
Entergy (electric utility company)



The DOJ Fraud Section

The Fraud Section has three litigating units:



<http://www.justice.gov/criminal-fraud>

DOJ Enforcement Priorities

- Health Care Fraud
- Cryptocurrencies
- CARES Act Fraud
- FCPA & International Bribery
- Environmental Crimes
- Corporate Corruption & Corporate Crimes

Health Care Fraud

- False Claims & Statements
- Upcoding
- Unnecessary Surgeries & Procedures
- Billing for Services Not Provided
- Anti-Kickback Statute
- Worthless Services
- False Certifications
- Criminal Prosecution
- Civil False Claims Act

Environmental Crimes

**Renewed
DOJ
Focus**

**Clean
Air Act**

**Clean
Water
Act**

CARES Act Enforcement

- PPP Loans
- EIDL Loans
- Other CARES Act Funding
- Criminal Prosecution
- Civil False Claims Act Enforcement

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False Claims Act Enforcement

31 U.S.C. § 3729

- Presentment of a false or fraudulent claim
- To a federal government program (e.g., SBA)
- Or use of a false or fraudulent document to support a claim
 - False W-2s, inflated costs
- Or retention of an overpayment
- Presented “knowingly” with:
 - Actual knowledge
 - Reckless disregard of the truth or falsity
 - Deliberate ignorance of the truth or falsity
- Treble damages
- *Qui tam* (“whistleblower” lawsuits), 31 U.S.C. § 3730(b)

“Deliberate Ignorance”



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DOJ is leading the global ABC fight

- Its not just the **FCPA**, anymore
- Its not just **DOJ** and the **SEC**
- Its ABC laws from **around the world**
- Its market manipulation, fraud, money laundering and embezzlement
- **Glencore International AG plead guilty last month**
 - One of the worlds largest mining and commodities companies
 - Coordinated enforcement: UK SFO, US DOJ and CFTC, and Brazil's MPF
 - Bribery and Market Manipulation over more than a decade in 7 countries
 - \$1.1 billion in fines and penalties

Lessons from Glencore

“The scope of this criminal bribery scheme is staggering,” said U.S. Attorney Damian Williams for the Southern District of New York. “Glencore paid bribes to **secure oil contracts**. Glencore paid bribes to **avoid government audits**. Glencore bribed judges to **make lawsuits disappear**.”

At bottom, Glencore paid bribes to make money – hundreds of millions of dollars. And it did so with the approval, and even encouragement, of its top executives.

But those short-term gains, resulted in **massive long-term losses**.

Not just the billion dollar fine, the legal fees, the monitorship, the opportunity cost, easily exceed another billion dollars in costs, created by the conduct.

Be Prepared

- Don't focus on "a" law or "an" agency
- Understand your **risk**
 - Your operations
 - Your industry
 - Your jurisdictions
- Build your business by focusing on **profit**, not **revenue**
- **Bribery is theft.** One criminal act begets another.
- Look at your **incentive** structure
- Make compliance **simple** and ensure it **advances** the business
- Be a partner with the business team, understand their goals
- Cultural change takes time and commitment

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What are crypto, digital assets and blockchain?

- **Crypto (cryptocurrency)** is a digital medium of exchange that uses cryptography (computer encryption) to execute secure transactions. Cryptocurrencies work through a **blockchain**, which is a publicly-accessible transaction database visible to all participants (a distributed ledger).
- Cryptocurrencies can have **centralized** or **decentralized** control—compare to **central banking systems** that handle fiat currencies (e.g., the Federal Reserve with the US dollar). Bitcoin, created in 2009, was the first decentralized cryptocurrency.
- Since then, hundreds of other cryptocurrencies have been created with different characteristics. Some primary currencies:
 - **Ethereum** – smart contracts
 - **USDC, Tether, DAI, UST** – stablecoins
 - **Dogecoin** – entertainment
- Cryptocurrencies are used in Decentralized finance (**DeFi**), a form of peer-to-peer finance that uses smart contracts on blockchains. It does not rely on central financial intermediaries such as brokerages, exchanges, or banks to offer traditional financial instruments and is not regulated.

Investment is mainstream, use... not so much yet

- **Major financial institutions are starting to offer digital asset investments and uses:**
 - **Morgan Stanley:** first major U.S. bank to offer clients bitcoin investment funds.
 - **BNY Mellon and JP Morgan:** taking steps so clients can hold crypto assets.
 - **Goldman Sachs:** preparing launch of investment vehicles for bitcoin/digital assets
 - **PayPal, Mastercard and Visa** are including crypto payments on their networks.
- Despite recent significant losses, the value of the cryptocurrency market was **\$1.3 trillion** as of May 31, down from **\$2.9 trillion** last November. **Bitcoin** accounts for **>46%** of market capitalization; **Ether 18%**.
- **The biggest beneficiaries of crypto industry growth are venture capital and private equity firms.**

The State of Regulation

Cryptocurrencies originated and grew in vast, unregulated global markets, and many black markets. As the crypto enters mainstream finance, legal and regulatory activity has grown.

- Crypto exchanges are lightly regulated by state and national authorities. **Decentralized Exchanges (DEXs)**, peer-to-peer marketplaces where cryptocurrency is traded directly without an intermediary, are unregulated.
- DeFi is unregulated—but could be.

Hot issues include whether certain digital assets, futures and derivatives are subject to regulation by federal authorities. [**Hint: they will be.**]. Some of the developing legal disputes and enforcement actions--

- Investigations into Binance and Tether
- SEC v. Ripple Labs, Inc., et al.

Recent market disruptions have seen significant reduction in cryptocurrency value, beyond the losses in the stock market.

The effect of large movements of capital in a very lightly regulated market have had catastrophic effects—Terra's UST stablecoin collapsed in May, with losses of \$40B+

Government Regulation & Enforcement

- Domestically: SEC has staked its position in the Ripple case that cryptocurrency is a security subject to regulation, but there is no public plan on how to actually regulate that industry.
- Internationally: Regulation is mostly registration, examination, and accommodation to attract business.
- Enforcement remains focused on the use of unregulated cryptocurrency by criminal elements and sanctioned countries.
- Complex fraud and market manipulation—which causes the most damage—is only beginning to be examined by the authorities. Effective enforcement will require extraordinary international cooperation.

DOJ Initiatives: NCET and Kleptocapture

- **National Cryptocurrency Enforcement Team (NCET)**—created October 2021 to tackle complex investigations and prosecutions of criminal misuses of cryptocurrency.
 - [CEO of Mining Capital Coin Indicted in \\$62 Million Cryptocurrency Fraud Scheme](#)
 - [BitConnect Founder Indicted in Global \\$2.4 Billion Cryptocurrency Scheme](#)
 - [Two Arrested for Alleged Conspiracy to Launder \\$4.5 Billion in Stolen Cryptocurrency](#)
 - [Two European Citizens Charged for Conspiring with a U.S. Citizen to Assist North Korea in Evading U.S. Sanctions Using Cryptocurrency Services](#)
- **Task Force KleptoCapture**—created March 2022 to enforce sanctions, export restrictions, and economic countermeasures imposed with allies on Russia in response to its invasion of Ukraine, including through DEXs and unregulated exchanges.

Thank you.

Dick Kiefer

Max Carr-Howard

Mark Califano

Chelsea Granville Reed



***“We want to do an
ESG assessment”***

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Legal Privilege: The Indispensable ESG Tool

Stephen L. Hill, Jr.

June 8, 2020

Grow | **Protect** | Operate | Finance

**Since we're
talking
disclosures,
here's mine**

The information provided in this presentation does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available in this webinar are for general informational purposes only. Information in this webinar may not constitute the most up-to-date legal or other information for any particular US jurisdiction.

The concepts we'll discuss are primarily premised on state-by-state judicial decisions therefore you should consult your particular state's approach.

Today's proposition:

Assessing, developing and disclosing your ESG strategy involves both business opportunities and legal risk for the company. One way to mitigate your risks is under the protective umbrella of legal privilege, which can be employed broadly and easily.



The attorney client privilege in a nutshell...

The attorney-client privilege protects from disclosure confidential communications between attorney and client made to obtain or provide legal advice.

The elements establishing the attorney client communication privilege

The privilege protects...

A communication

made between
privileged persons
(i.e. attorney, their
client or their
agent),

confidentially,

for the purpose
of obtaining or
providing legal
assistance for
the client.

SEC Enforcement Manual on Privilege

Elements necessary to establish the attorney-client privilege include:

- it is a communication
- the communication was made in confidence
- ***the communication was to an attorney***
- the communication was by a client
- the communication was for the purpose of seeking or obtaining primarily legal advice.

Securities and Exchange Commission Division of Enforcement Manual, pg. 69

<https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

And as applied by a court where the SEC is a party

“(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”

SEC v. Beacon Hill Asset Mgmt. LLC, 231 F.R.D. 134, 138 (S.D.N.Y. 2004) (quoting United Shoe).

Privilege Myths

- The privilege does not permit a party to resist disclosure of the **facts** underlying those communications.
- **Passing** the information through an attorney's hands (real or virtual) does not create the privilege.
- Copying or 'cc-ing' legal counsel, on its own, is not enough to establish the attorney-client privilege.
- Having an attorney in the room does not automatically create the privilege.
- **Stamping** the document as "privileged" does not necessarily mean it will be protected.

The background of the slide features a microscopic view of cells, with a prominent red color scheme and some blue highlights. A large, semi-transparent purple arrow shape points from the left towards the right, framing the text.

The legal nature of ESG actions

Climate disclosures have raised legal issues since at least 2010

“...Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.”

See 17 CFR 229.101(c)(1)(xii)

SECURITIES AND EXCHANGE COMMISSION 17 CFR PARTS 211, 231 and 241 [Release Nos. 33-9106; 34-61469; FR-82] *Commission Guidance Regarding Disclosure Related to Climate Change*

In 2010, SEC guidance put legal analysis front and center in the registrant's climate analysis

3 of 4 climate change topics that a registrant may need to consider are legal in nature:

- Impact of legislation and regulation.
- International accords.
- Indirect consequences of regulation or business trends.
- Physical impacts of climate change.

(the 4th may be the collection of legally significant information)

Fast forward to 2022 and the SEC issues a new framework for climate change assessment and disclosure chock full of legal issues

The proposed rule changes would require a registrant to assess and disclose information about:

- the registrant's governance of climate-related risks and relevant risk management processes;
- how any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term;
- how any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook; and
- the impact of climate-related events (severe weather events and other natural conditions) and transition activities on the line items of a registrant's consolidated financial statements, as well as on the financial estimates and assumptions used in the financial statements

A close-up photograph of a tortoise shell, showing the intricate patterns and textures of the scutes. The shell is a mix of grey, brown, and tan colors, with numerous small, dark, circular holes scattered across the surface. A large, solid purple shape is overlaid on the right side of the image, containing white text. The text is bold and reads: "Enforcement risk continues to expand the case for privileged activities".

Enforcement risk continues to expand the case for privileged activities

A few recent Federal and State Enforcement actions

- *In the Matter of BNY Mellon Investment Advisor, Inc.*, Administrative Proceeding File No. 3-20867(2022) <https://www.sec.gov/litigation/admin/2022/ia-6032.pdf>
- *Securities and Exchange Commission v. Vale, S.A.*, Case 1:22-cv-02405 E.D.N.Y. (2022) <https://www.sec.gov/litigation/complaints/2022/comp-pr2022-72.pdf>
- *United States Securities and Exchange Commission v. Trevor R. Milton*, Civil Action No. 1:21-cv-6445, S.D.N.Y. <https://www.sec.gov/litigation/complaints/2021/comp-pr2021-141.pdf>
- *In the Matter of Fiat Chrysler Automobiles N.V.*, Administrative Proceeding File No. 3-20092 (2020) <https://www.sec.gov/litigation/admin/2020/34-90031.pdf>
- *Commonwealth of Massachusetts vs. Exxon Mobil Corp.*, Civil Action No. 19-3333, Suffolk Superior Court (2019) <https://www.mass.gov/doc/october-24-2019-massachusetts-complaint-exxon/download>
- *People of the State of New York v. Exxon Mobile Corporation*, Index No. 452044/2018, Sup. Ct. of New York, County of New York http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2018/20181024_docket-4520442018_complaint.pdf
- *U.S. v. Walmart*, Case no. 22-965, U.S. D.Ct. D.C. (2022) https://www.ftc.gov/system/files/ftc_gov/pdf/2023173WalmartComplaint.pdf

The ever-growing list of civil litigation matters (not an exhaustive list)

- **Greenwashing claims**
- **Investor class action lawsuit**
- **Shareholder derivative suits raising fiduciary claims**
- **Securities-based class action litigation**
- **False advertising litigation**
- **Consumer protection/Fraud claims/Deceptive business practices**
- **Misrepresentation and breach of warranty claims**

Assessment

Assessment to identify
operational platform.

(Costs/risk management)
is important

A close-up photograph of a blue bee on a yellow flower. The bee's body is covered in fine hairs and is a vibrant blue color. It is positioned on a yellow flower, with its legs and antennae visible. The background is a soft, out-of-focus yellow. A large, semi-transparent purple shape is overlaid on the left side of the image, containing white text.

ESG's most challenging privilege issue
Communications with third parties



**Civil litigation risks both
near and far make the case for
privileged activities**

Exceptions to the general rule that may apply to ESG activities

There are three exceptions that have been recognized as not waiver and arguably within the privilege:

- The agent for the lawyer or client transfers or administers the legal advice.
- The third party is participating to assist an attorney in understanding and interpreting complex principles (referred to as the *interpretive exception*), and
- The third party is so thoroughly integrated into the company that he or she should be treated as *functionally equivalent* to an employee and therefore part of the client.

The general rule on third parties...

Since day one in law school, we are taught that the presence of an outside, or third, party on an otherwise privileged communication will waive privilege.





Interpretive role

The second exception to third party role

The Kovel Loophole based on interpretive role

- Recognizing that there are situations "*where the lawyer needs outside help*," the court found that when the accountant assists in the "effective consultation between the client and the lawyer which the privilege is designed to permit," the privilege should protect the communications. *United States v. Kovel*, 296 F.2d 918, 922 (2nd Cir. 1961).
- "[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases." *Id.* ***If the attorney directs the client to communicate with the accountant, "who is then to interpret it so that the lawyer may better give legal advice***, communications by the client reasonably related to that purpose ought fall within the privilege."
- "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service, ... or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." *Id.* (internal citations omitted, emphasis in original).



Functional equivalent rule

The third exception to the third-party rule

Functional equivalent exception (Bieter doctrine)

Some courts have adopted the *Bieter* doctrine which can extend privilege protection to communications with third parties who are the "functional equivalent" of employees. *In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994).

- Whether the consultant had primary responsibility for a key corporate job;
 - Whether there was a continuous and close working relationship between the consultant and the company's principals on matters critical to the company's position in litigation; and
 - Whether the consultant is likely to possess information possessed by no one else at the company. Company's financial advisors failed to meet this test.
-
- ✓ Are their activities a key role for the organization?
 - ✓ Do they have dedicated space at the organization?
 - ✓ Are they subject to the organization's policies and procedures?

Instances where a court did not find equivalency

- The corporation did not routinely use contractors in lieu of employees;
- The consultant had not publicly represented the corporation;
- The consultant was not frequently physically present in the corporation's offices;
- The corporation did not lack internal resources, necessitating the consultant's services;
- The consultant was not vested with independent decision-making authority; and
- The consultant never sought legal advice on behalf of the corporation.



Auditor work product

Likely not protected by the privilege

Purely audit activities are rarely privileged

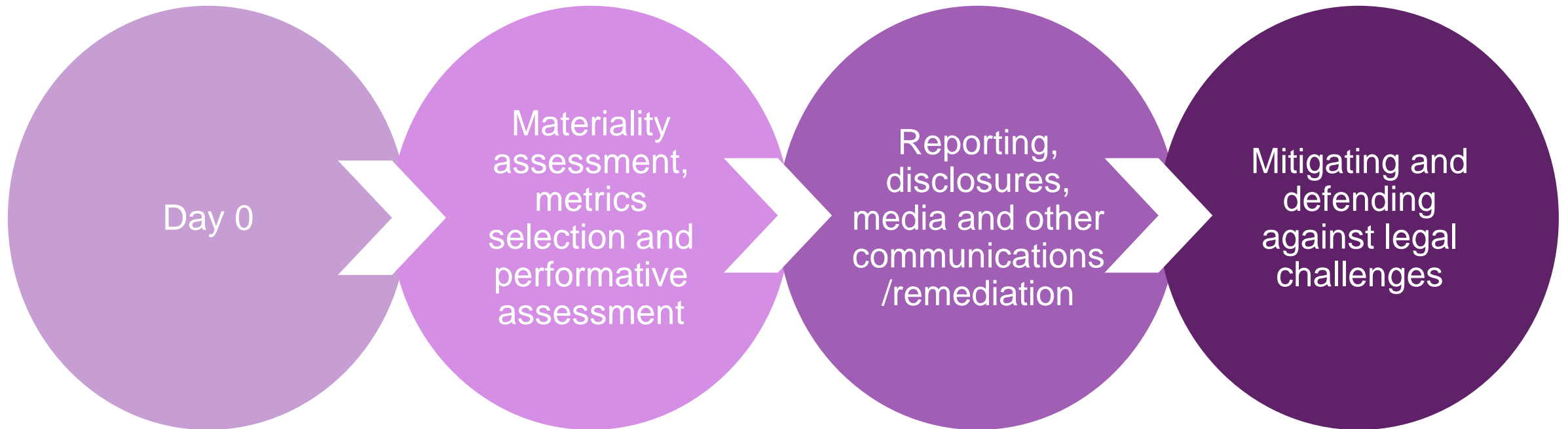
- “No confidential accountant-client privilege exists under federal law, and no state-created privilege had been recognized in federal cases.” *Couch v. United States*, 409 U.S. 322, 335 (1973).
- In light of *Couch*, the Court of Appeals' effort to foster candid communication between accountant and client by creating a self-styled work-product privilege was misplaced, and conflicts with what we see as the clear intent of Congress. *United States v. Arthur Young Co.*, 465 U.S. 805, 817 (1984).
- Disclosure of privileged information to independent auditors destroys any confidentiality with respect to that information, and “with the destruction of confidentiality goes as well the right to claim the attorney-client privilege.” *United States v. El Paso*, 682 F.2d 530, 540 (5th Cir. 1982).
- “Nor do we find persuasive the argument that a work-product immunity for accountants' tax accrual workpapers is a fitting analogue to the attorney work-product doctrine established in *Hickman v. Taylor*, 329 U.S. 495 (1947).” *United States v. Arthur Young Co.*, 465 U.S. 805, 817 (1984).



Setting up the ESG process

How can we maximize the privilege?

At what point do you put the legal privilege protections in place?



Steps in planning and protecting the privilege

1. Identify the legal issues in your ESG “windshield” and plan every step with legal counsel in a way that it is part of legal advice given to the client.
2. Have a written memorialization [retention agreement and/or subsequent memo] that the scope and focus of the work to be performed will be addressing discrete legal issues [related to legal issues triggered by climate change or governance legal analysis, disclosure and appropriate follow-up].
3. Have a delegation communication that lays out how the ESG process will address legal issues, who will be part of the effort to secure information and/or analyze the legal issue and outline how to keep communications confidential.
4. Third party service agreements should be scoped, designed and drafted with language asserting privilege in the use of dispensing legal advice, including fact collection and interpretive functions.

Steps (continued)

5. Early in the process, the lawyer and client should identify the information that is likely to be disclosed to external parties [aka “planned limited waiver”] to retain privileged.
6. Avoid dual-purpose communications (sort out legal vs. non-legal or business communications) and avoid overlap where possible.
7. To bolster the General Counsel’s role, all communications (including board minutes) should record his or her role as a legal advisor in the meeting, communication or document.
8. Documents that speak to ESG-related legal issues should be generated at the direction of legal counsel.

Steps (continued)

9. Closely control the process of who attends meetings that will discuss ESG-related legal issues and avoid waiver through attendance of third parties unrelated to addressing these issues.
10. If there are public relation functions that relate to legal issues, those personnel should be retained by outside counsel.
11. Purely non-legal external communications, including strategic and press communications, should be separated from legal issues work.

Thank you.