

Chapter VIII:
**Public Relations &
Message Management**

Summary

First Public Relations Steps During a Crisis:

- Gather appointed stakeholders to coordinate messaging and ensure consistency across audiences.
- Identify groups who need to receive messaging, including employees, the public, regulators, customers, and creditors.
- Coordinate all disclosures with assistance and advice from counsel.
- Consider hiring a public relations firm quickly *in conjunction with* legal representation.

Key Points:

- Consider legal—and practical—factors of any public response.
- Decide whether to disclose—do you have a duty, and if not, is it the right move strategically in order to frame the message?
- Craft the disclosure—work to maximize its effectiveness while avoiding language that may lead to follow-on regulatory or litigation exposure.
- Work closely with counsel and public relations firms, and avoid waiving privilege by following important protocols.

Introduction

Frequently, the issues companies face during large-scale, oftentimes very public, crises require more than exclusively legal skills; they also require communications skills. The court of public opinion can have just as big of an impact—if not bigger—on a company’s operations than any decision by a court of law. For example, when allegations of Wells Fargo’s practice of opening fraudulent accounts came to light, it quickly lost 10% of its market capitalization for a \$25 billion dollar loss¹—but has faced roughly \$800 million in fines and settlement amounts thus far, even after resolving major regulatory and civil cases.² The reputational impacts of these crises may be felt for years to come, especially if poorly handled. Indeed, failing to address a crisis promptly—and instead dealing with issues in an uncoordinated, piecemeal fashion—can lead to ongoing disclosures that not only complicate the legal response, but also keep the bad news in public view. By contrast, a well-designed litigation strategy frequently combines strictly legal arguments with public relations strategies.

This chapter discusses the process for how to handle the public relations aspects of any crisis, including how to weigh the practical and legal risks and benefits of any public response, whether voluntary or mandated, such as required disclosures under U.S. securities laws. For situations where a response is warranted, this chapter also contains factors to consider when crafting and delivering the message to limit risk. Further, these factors touch upon other details to keep in mind when executing these strategies, such as how to maintain legal privilege³ and flexibility for any follow-on lawsuits or investigations. While each crisis is different, these elements and considerations should provide useful tools to manage the public response in a variety of situations.

¹ Lucinda Shen, *Wells Fargo’s Shares are Now a Buy*, Forbes, Sept. 19, 2016, <http://fortune.com/2016/09/19/wells-fargo-baird-buy-scandal/>.

² *Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, Consumer Fin. Protection Bureau (Sept. 8, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/>; Wells Fargo, *Wells Fargo Announces Agreement in Principle to Settle Class Action Lawsuit Regarding Retail Sales Practices*, Mar. 28, 2017, https://www.wellsfargo.com/about/press/2017/class-action_0328/; Stacy Cowley, *Wells Fargo Agrees to Settle With Shareholders for \$480 Million*, N.Y. Times, May 4, 2018, <https://www.nytimes.com/2018/05/04/business/wells-fargo-shareholder-suit-phony-accounts.html>.

³ Considerations regarding legal privilege are discussed in further detail in Chapter IV: Preserving Legal Privilege.

Assembling the Team

The first step, even before a crisis arises, is to assemble a crisis-response or communications team that will be available in the event of a crisis. Assembling a team in advance expedites any company response—with respect to issuing a public statement or deciding not to issue one—and defines responsibilities among stakeholders early to avoid confusion in execution. Below, we walk through considerations when choosing who to include on the communications team, including internal and external stakeholders.

Internal Stakeholders

The first members of the team should come from different cross-sections of the company. This group will ensure that the company's messaging is consistent across the company and that every potential audience is considered (such as the regulators, the public, and other employees). There are some obvious candidates for this group: senior management of the company, the general counsel's office, compliance, and senior members from any marketing, public relations and investor relations groups. Next, specific considerations for each crisis may dictate membership of other response team members. If certain subsidiaries or subdivisions play a prominent role in the crisis, the response team should consider including senior members from those groups, to help ensure a consistent message. For many investigations, especially those that may implicate management or Board members, it makes sense to create a special committee of the Board of Directors as an independent entity that can oversee the investigation and manage the crisis.

External Assistance

Once a crisis hits, the next decision will be whether to retain outside legal counsel and public-relations consultants to help handle the public response. For example, simple matters, such as possible violations caused by rogue, low-level employees and caught early by internal compliance may not ever require a large public response. Ultimately, like the decision to retain outside counsel generally in an investigation, the decision will turn on factors such as the complexity of the issues and nature of the exposure, including additional potential consequences. Of course, if a situation

calls for outside assistance, the quicker they are involved, the sooner they can help with messaging.

Deciding Whether and When to Make Public Statements After a Crisis

Having assembled and convened the crisis response team, one of the first steps during a crisis will be to determine what to say and when to say it. Like many aspects of responding to a crisis, the answer will depend on how it arises. For example, disclosing a public investigation in response to a Wells letter will likely be a careful, more deliberate disclosure than one arising after a high-profile public incident or indictment. Either way, in both instances companies need to evaluate both potential duties to disclose and risks of any public response. These considerations should encompass both legal and practical concerns, as, for example, business considerations to rebuild trust in a community or within a consumer base may trump legal considerations for follow-on law suits or investigations. Note that these considerations may also operate on different time-tables: a company may want to respond to unhappy consumers making a public outcry today, knowing that law suits may take years to resolve.

Practical Considerations to Playing Defense: Responding to Negative Press

When the investigation stems from an event garnering a lot of publicity, it may be worthwhile to make a statement to help shape the narrative and to express the appropriate concern and attentiveness to the matter. Thus, one strategy could be to begin resolving the issue as quickly as possible and make forceful assurances that the issue is being addressed, rather than letting bad news trickle out over a long period. However, the ability to execute this strategy will depend on what information is available to the company and the status of the investigation. Thus, in situations where companies are still in the early stages of determining what happened, a more generic statement acknowledging the situation but avoiding commenting on the facts may be more appropriate.

CASE STUDY: VOLKSWAGEN DIESEL EMISSIONS

On September 18, 2015, the Environmental Protection Agency (“EPA”) issued its first statements about Volkswagen’s emission scandal resulting from “defeat devices” used to circumvent certain emission requirements. Volkswagen’s early response tried to underplay the severity of the crisis, initially placing the blame on “mistakes of a few people” even though it quickly came to light that the misconduct went on for longer and involved more people than initially disclosed. By January, Volkswagen seemed willing to shoulder more of the blame. However, after National Public Radio did an initial interview with its CEO, who claimed the company never lied to regulators, he was forced to call back the next day to partially retract his statements.⁴

By failing to be upfront at the start of the initial investigations or making statements without complete information, the trickle of news from subsequent statements guaranteed that it stayed in the front pages. Further, in multiple instances these problems were compounded as the company had to walk back earlier statements about the scale of wrongdoing, making them seem simultaneously more culpable and less responsible. Thus, one option may have been for the company to have more fully disclosed the wrongdoing initially. Another option would have been to weather the storm of criticism caused by delaying any initial response, in favor of waiting for the results of its investigation.

Practical Considerations to Playing Offense: Managing the Message

Other crises will not arise in such a public way forcing a company’s reaction, but will present the option for the company to make the initial disclosure in some manner, whether in a forceful public statement or in a limited disclosure as part of a larger set of statements. Either way, getting out in front of the issue offers the opportunity to control the story, and also to mitigate the impact of later bad news. Also, effective messaging may “creat[e] a climate in which prosecutors and regulators might feel freer to act in ways less antagonistic.”⁵

⁴ Pradnya Joshi & Danny Hakim, *VW’s Public Relations Responses and Flubs*, N.Y. Times (Feb. 26, 2016), <https://www.nytimes.com/interactive/2016/02/26/business/volkswagen-public-relations-flubs.html>.

⁵ *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003).

Of course, there may also be reasons to wait to disclose. For example, a public company facing the prospect of a regulatory investigation may wait to disclose the investigation, in order to avoid creating a future duty to disclose or update. It may also be premature to disclose if the investigation is at its early stages. The histories of regulatory investigations are rife with examples of investigations that otherwise might have died but that were given political and public fuel by premature disclosure. Additionally, when there is an opportunity to get ahead of the crisis and messaging, a premature statement may only worsen the situation if the underlying facts are unclear and the outcome uncertain. Especially early on in an investigation, it may be unclear how far up the management chain the conduct goes, thus certain confidence-inspiring messaging may be impossible or incorrect.⁶ Finally, as discussed further below, if done incorrectly, any public statements may be misleading and could result in liability.⁷

Legal Duties to Disclose Investigations

Public companies operating in certain countries may face an additional factor to consider when choosing whether to disclose. This obligation may not be all-encompassing, however. For example, in the United States, public companies have no general duty to disclose information investors deem important.⁸ There is also a presumption of confidentiality initially for formal investigations—hence the secrecy of criminal grand-jury investigations⁹—and Freedom of Information Act exemptions of law enforcement records, such as for the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC” or “Commission”).¹⁰ Moreover, as long as public releases do not mislead, companies can take a reasonable amount of time to understand a problem and effectively address it.¹¹ Thus, companies can be

⁶ For example, in the Wells Fargo case, the company’s initial statements tried to cabin the wrongdoing to a few individuals, but later revelations that executives who were aware of the conduct left with substantial severance packages undermined its message regarding how serious the company was in addressing the issue. See James Rufus Koren, *Wells Fargo to pay \$185 million settlement for ‘outrageous’ sales culture*, L.A. Times (Sept. 8, 2016), <http://www.latimes.com/business/la-fi-wells-fargo-settlement-20160907-snap-story.html>; Jen Wiczner, *How Wells Fargo’s Carrie Tolstedt Went from Fortune Most Powerful Woman to Villain*, Fortune (Apr. 10, 2017), <http://fortune.com/2017/04/10/wells-fargo-carrie-tolstedt-clawback-net-worth-fortune-mpw/>.

⁷ See *infra* Part IV(b).

⁸ 17 C.F.R. § 240.10b-5(b) (2018); see also *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988).

⁹ Fed. R. Crim. P. 6(e)(2)(B).

¹⁰ 5 U.S.C. § 552(b)(7) (2018).

¹¹ *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 53-54 (2d Cir. 1995) (one-month delay before announcing third failed FDA inspection resulting in plant closure did not make a securities claim); *City of Rockton Ret. Sys. v. Avon Prods., Inc.*, No. 11 Civ. 4665(PGG), 2014 WL 4832321, at *24 (S.D.N.Y. Sept. 29, 2014) (three-month delay before announcing investigation following whistleblower letter was a “reasonable amount of time to evaluate potentially negative information”).

strategic and need not disclose immediately every instance in which they undertake an investigation, whether by their own initiative or at the behest of a regulator. However, in certain situations, public companies have a duty to disclose material information about regulatory investigations.

For companies subject to its jurisdiction, the SEC has promulgated various reporting requirements for public companies to follow in their filings. Here is a brief summary of the most-pertinent Regulation S-K items that relate specifically to disclosing material information about regulatory investigations.

Regulation S-K Item 103

Item 103 states that a company must “[d]escribe briefly any material pending legal proceedings . . . known to be contemplated by governmental authorities.”¹² However, this standard only requires the disclosure of *imminent* litigation. There is no duty to disclose litigation that is not “substantially certain to occur.”¹³ Thus, for example, receiving a subpoena or a Wells Notice about an SEC investigation does not necessarily trigger a disclosure requirement—that is, the fact of an investigation need not be disclosed.¹⁴

Regulation S-K Item 401(f)

Item 401(f) requires that in identifying and describing the background of its directors, registrants must describe certain events that are “material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the registrant.”¹⁵ Included in the definition of such events is whether the person is “a named subject of a pending criminal proceeding.”

¹² 17 C.F.R. § 229.103 (2018).

¹³ *In re Lions Gate Entm't Corp. Sec. Litig.*, 165 F. Supp. 3d 1, 12, 18 (S.D.N.Y. 2016) (“[T]he securities laws do not impose an obligation on a company to predict the outcome of investigations.”)

¹⁴ *Id.*; *Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 273-74 (S.D.N.Y. 2012); *see also Westland Police and Fire Ret. Sys. v. MetLife, Inc.*, 928 F. Supp. 2d 705, 718 (S.D.N.Y. 2013) (holding that although pending state investigation was not a required disclosure under Item 103, it was a required disclosure under Item 303 because of potential business changes and fines resulting from state regulatory action).

¹⁵ 17 C.F.R. § 229.401(f) (2018).

Regulation S-K Item 503(c) and Regulation S-K Item 303 (MD&A)¹⁶

Item 503(c) applies to prospectuses in securities offerings and is incorporated into periodic filings by Item 1A of the instructions to Forms 10-K and 10-Q. It requires a discussion of the most significant risk factors a company faces. Item 303 is a similarly broad regulation which also imposes a duty to “[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.”¹⁷ Thus in one instance, a court permitted claims to go forward for a failure to disclose ongoing criminal and civil investigations impacting a company’s operations and financials.¹⁸

Duties to Correct and Update

Beyond formal regulations, case law in the United States has created additional requirements for public companies to correct or update prior communications in certain situations. A duty to correct previous communications may arise when the issuer of the statement discovers that the statement was inaccurate or misleading when made.¹⁹ Similarly, even if a company’s statements are accurate when made, a duty to update explicit or implicit forward-looking statements may arise if circumstances change and such statements become inaccurate or misleading. Certain circuits have recognized a duty to update but have construed it narrowly,²⁰ whereas the Seventh Circuit has held that there is no duty to update forward-looking statements.²¹ This is an area in which the case law is in flux. Thus, companies should exercise extra caution when making statements early on in a crisis or investigation to avoid being forced into making a statement later when additional relevant facts are unearthed.

¹⁶ 17 C.F.R. § 229.503(2018); 17 C.F.R. § 229.303 (2018).

¹⁷ *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 94 (2d Cir. 2016) (citing 17 C.F.R. § 229.303(a)(3)(ii), *cert. granted sub nom. Leidos, Inc. v. Indiana Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017), *cert. dismissed*, No. 16-581 (R46-032), 2018 WL 3026583 at *1 (U.S. June 18, 2018).

¹⁸ *Id.*

¹⁹ *Vacold LLC v. Cerami*, 545 F.3d 114, 121 (2d Cir. 2008); *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17 (1st Cir. 1990) (*en banc*).

²⁰ These are the First, Second and Third Circuits. See *Backman*, 910 F.2d at 16-17; *In re Int’l Bus. Machs. Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998); *Weiner v. Quaker Oats Co.*, 129 F.3d 310, 316-18 (3d Cir. 1997).

²¹ *Gallagher v. Abbott Labs.*, 269 F.3d 806, 810-11 (7th Cir. 2001) (reasoning a duty to update would undermine purpose of periodic reporting regime).

**CASE STUDY:
BP OIL SPILL SECURITIES SUIT**

Only days after the Deepwater Horizon oil spill, BP issued the first of multiple statements that the flow rate of the leak was about 5,000 barrels of oil per day. Eventually BP settled for \$525 million with the SEC. The settlement noted that BP failed to update this initial flow rate disclosure despite internal data and third party data indicating that the actual indicated flow rate was ten to thirty times higher. If the company had not specified the flow rate in initial statements, it may not have been liable for failing to update the rate later.²²

**PRACTICE TIP:
CHECKLIST OF U.S. SECURITIES LAW DUTIES
TO DISCLOSE INVESTIGATIONS**

- Item 103 – Investigations known to be pending or imminent.
- Items 503(c) and 303 – Risk factors and material impact on net sales.
- Item 401(f) – Events material to the integrity of directors.
- Duty to correct previous statements in light of new information that made it misleading at the time.
- Duty to update certain forward-looking statements.

For companies not subject to the jurisdiction of U.S. regulators—as well as for those which are—there may be other regulatory regimes that impose similar, or even quite different requirements. It is therefore essential at the start of a crisis to identify the different applicable rules and to plan a response cognizant of the potential duties by which the company is bound.

²² Press Release, Sec. Exch. Comm'n., *BP to Pay \$525 Million Penalty to Settle SEC Charges of Securities Fraud During Deepwater Horizon Oil Spill* (Nov. 15, 2012), <https://www.sec.gov/news/press-release/2012-2012-231.htm>.

**PRACTICE TIP:
CHECKLIST WHEN CRAFTING A STATEMENT**

- Consider the audience. A message to corporate employees should differ from that delivered to a Congressional committee. Of course, while nuance may shape the delivery and content of each message for the corresponding audience, the messages must remain consistent.
- Whether to admit to wrongdoing is frequently a close question and requires careful examination and discussion. A well-crafted “admission” can earn regulatory credit and may staunch the bleeding in a public relations crisis. On the other hand, such admissions may be extremely harmful in litigation. A company may want to consider not admitting to or conceding anything that it would not concede in litigation. The short-term credibility gain may not be worth the long-term expense of having that statement constantly paraded about.
- Focus on policies—past and present. Explain how new policies will prevent similar occurrences in the future and how the company was always committed to avoiding such outcomes.
- Avoid unnecessarily pointing fingers. In some instances it may be necessary to explain what happened, but oftentimes trying to shift blame too overtly will backfire.²³ On the other hand, in an appropriate case, it might suitably frame the message.
- The reactionary “no comment” response may not always be the most effective. When consistent with other messaging on the topic, it may be better to avoid overly-legal language or the simple “no comment”-type of statements.
- Do not predict the outcome of an investigation.

Delivering the Message

After deciding to issue a statement, there are certain legal and practical considerations to keep in mind when drafting a statement’s content. On the legal side, the primary goal will be to craft statements that are accurate and that limit exposure, and that protect privilege during investigations and suits. On the practical side, the message will need to be easily understood and crafted not to invite further scrutiny

²³ When Mylan came under scrutiny for its pricing of the EpiPen, its initial strategy of trying to deflect blame onto the healthcare system writ large served to fan the flames before antitrust charges. Charles Duhigg, *Outcry Over EpiPen Prices Hasn’t Made them Lower*, N.Y. Times (June 4, 2017), <https://www.nytimes.com/2017/06/04/business/angry-about-epipen-prices-executive-dont-care-much.html>.

on the matter. Sometimes, these two goals may be in tension and the company will need to evaluate benefits and risks of achieving one goal at the expense of the other.

Practical Messaging Guidelines

Every crisis and brand is unique and thus companies should work closely with relevant public relations staff or consultants before drafting any public statement. There is no one-size fits all system for public messaging. However, below are some relevant considerations when putting together any statement.

Legal Requirements for Statements by Public Companies

Beyond drafting a statement to achieve the desired effect on the public, the statement should be tailored in consideration of legal requirements and ramifications. As an important example, if a public company subject to U.S. securities laws makes “misleading” statements—including, in certain instances, opinions with regards to its compliance with the laws—this can be the basis of independent legal action. Thus, even forward-looking statements expressing opinions regarding a crisis or investigation need to be carefully constructed to avoid being perceived as misleading. Therefore, statements should first be carefully evaluated by counsel before they are made public.

The authority for these requirements comes from SEC Rule 10b-5(b), which makes it unlawful for a company subject to the U.S. securities laws to make untrue statements, or statements which omit material facts.²⁴ Even opinion statements can be misleading (i) if the speaker does not actually believe them or (ii) if the speaker omits material facts about the inquiry into or knowledge concerning the opinion statement, even if the initial statement was not necessary.²⁵

²⁴ 17 C.F.R. § 240.10b-5(b) (2018); see also *SEC v. Gabelli*, 653 F.3d 49, 57 (2d Cir. 2011) *rev'd on other grounds*, 568 U.S. 442 (2013) (“The law is well settled . . . that so-called ‘half-truths’ – literally true statements that create a materially misleading impression – will support claims for securities fraud.”).

²⁵ *Omnicare Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1326-27 (2015). After *Omnicare*, the Second Circuit has held that the standard does not require disclosure of facts counter to the opinion—merely that the defendant conducted a “meaningful” inquiry and in fact held that view. *Tongue v. Sanofi*, 816 F.3d 199, 214 (2d Cir. 2016).

**CASE STUDY:
BIOSCRIP**

Be explicit in disclosures about investigations to avoid being misleading. After BioScrip received a subpoena, it released a statement in its 10-K SEC filing that there could be “no assurance that we will not receive subpoenas or be requested to produce documents in pending investigations or litigation from time to time.” The court said that “those statements suggest [] [BioScrip] routinely responded to investigatory requests from the Government, but was not presently in the process of responding to such a request.” However, at that time, it was under an investigation and had received such a subpoena. Thus, even if the statement was technically true, the court found it was likely to mislead prospective buyers.²⁶

U.S. Private Securities Litigation Reform Act “safe harbor” for certain statements

The Private Securities Litigation Reform Act in the United States has a “safe harbor” that prevents certain forward-looking statements from being subject to U.S. securities suits.²⁷ These forward looking statements are insulated if: (i) the statements are accompanied by meaningful cautionary statements; or (ii) plaintiff fails to prove that the company had actual knowledge that the statement was false or misleading.²⁸ If the forward-looking statement is an oral statement, it should also reference a written cautionary disclosure. All cautionary disclosures should be specific as to the cautions and not use boilerplate language.

Thus, although a disclosure about an ongoing investigation (internal or otherwise) should not include a prediction about its outcome, language regarding the potential risks or next steps may fall under this umbrella. In one non-investigatory example, Chipotle’s forward-looking statements regarding impact on earnings and risk of outbreaks during the initial period after an E. Coli breakout were protected by the safe harbor.²⁹ However, take care when drafting the statements—forward-looking provisions that are accompanied by overly vague or “catch-all” cautionary statements

²⁶ *In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 727 (S.D.N.Y. 2015).

²⁷ 15 U.S.C. § 77z-2 (2018); 15 U.S.C. § 78u-5 (2018).

²⁸ 15 U.S.C. § 77z-2 (2018).

²⁹ *See Ong v. Chipotle Mexican Grill, Inc.*, No. 16 Civ. 141 (KPF), 2017 WL 933108, at *18 (S.D.N.Y. Mar. 8, 2017).

referring to risks generally are not “meaningful,” and are therefore not protected by the safe harbor.³⁰

**PRACTICE TIP:
DO NOT CONTRADICT SETTLEMENT AGREEMENTS**

It may be tempting, when settling on a no-admit or no-admit-or-deny basis, to issue a statement denying wrongdoing by implying that the company always maintained certain standards and practices. Be forewarned: regulators may force a withdrawal of such strongly-worded post-resolution statements, which then undermines the company’s credibility. Thus, even a statement after a settlement on a no-admit-or-deny basis as benign as “we have maintained our standards, in market share as well as our reputation, in my view” have come under scrutiny.³¹

Privilege Considerations when Working with a Public Relations Firm

Hiring a dedicated crisis-management team and public relations firm can go a long way in mitigating the effects of damaging publicity. As discussed generally in Chapters I and IV, under the *Kovel* doctrine, communications with agents of attorneys are equally protected in many circumstances as communications with attorneys themselves.³² This applies when attorneys (whether inside or outside counsel) hire a public relations firm specifically for the purposes of assisting in managing issues related to litigation.³³ Thus, whether it be by attorney-client privilege or the work-product doctrine, in order to protect privilege to the fullest extent possible, consider having outside counsel directly retain any public relations firm rather than the company doing so itself. Communications with a public relations firm hired to do general public relations work will not be as protected.

³⁰ *Asher v. Baxter Int’l Inc.*, 377 F.3d 727, 732 (7th Cir. 2004).

³¹ Robert Khuzami, *Testimony on “Examining the Settlement Practices of U.S. Financial Regulators”*, Sec. Exch. Comm’n (May 17, 2012), https://www.sec.gov/news/testimony/2012-tso51712rkhtm#P77_13677. See also Floyd Norris, *Morgan Stanley Draws S.E.C.’s Ire*, N.Y. Times (May 2, 2003), <https://www.nytimes.com/2003/05/02/business/morgan-stanley-draws-sec-s-ire.html>.

³² *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

³³ *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 332; *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No. 02 Civ. 7955 (DLC), 2003 WL 21998674, at *4-5 (S.D.N.Y. Aug. 25, 2003) (documents drafted by counsel and sent to public relations consultant are not privileged but subject to work product protection).

**CASE STUDY:
PREMERA BLUE CROSS DATA BREACH**

In October 2014, insurance provider Premera hired Mandiant, a forensic consulting firm to review its data management system. Mandiant discovered malware, and Premera promptly hired outside counsel in anticipation of litigation. Premera and Mandiant “entered into an amended statement of work that shifted supervision of Mandiant’s work to outside counsel,” but did not change the scope of work. After Mandiant issued a report, Premera announced the data breach to consumers. Then, during discovery of the subsequent class action litigation, plaintiffs sought, among other items, this report and other documents created by Mandiant about the breach. In opposing the motion to compel, Premera argued unsuccessfully these were protected under doctrines of work product and attorney-client privilege. Despite being supervised by outside counsel, the court held that because Mandiant was hired for business reasons and the scope of its work did not change, its work would not be protected under either doctrine, in comparison to other cases, like Experian and Target, where outside counsel separately retained an expert to conduct an investigation.³⁴

³⁴ *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1244-46 (D. Or. 2017).