A Guide to the Attorney-Client Privilege and Work Product Doctrine for Tax Practitioners

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A GUIDE TO THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE FOR TAX PRACTITIONERS

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I. INTRODUCTION

During the last few years, the IRS has made a concerted attempt to obtain as broad a swath of client documents as possible.

The environment surrounding tax reporting and filing has changed. As a result, and in order to properly defend a tax controversy, it is imperative for taxpayers to understand the various information production privileges available to them. This risk is one which cannot be ignored; increasingly, it is clear that what you say and the thought processes and deliberations that went into that statement can and will be used against you in a court of law.

There are a number of privileges that may protect the deliberative process from inadvertent or involuntary disclosure to the IRS. The most significant privileges are the attorney-client privilege (both as to communications with lawyers and federally enrolled agents) and the work-product doctrine.

Recent practice has identified a number of situations where clients have been forced to disclose to the IRS and other tax authorities their candid, honest and internal discussions of tax risks related to business transactions. This forced disclosure not only provided tax auditors with a road map, but it also gave the government ammunition to use in challenging the company’s tax position.

In most cases, what caused this forced disclosure of internal tax discussions was inadvertent – and fully avoidable. It resulted from the failure of company personnel to preserve privilege and confidentiality during their early-stage discussions with third-parties. And, in several cases, it resulted in a waiver of attorney-client privilege and attorney work product confidentiality for the entire issue – meaning that the law department’s files became subject to discovery.

A few years ago, the risk of unintended disclosure was possible as a theoretical matter, but it seldom occurred. In today’s new financial and tax reporting environment, however, the risk has increased significantly. Taxing authorities’ have developed new "tools" to identify and challenge tax positions, such as new IRS disclosure requirements for reportable transactions. In addition, the enhanced PCAOB and SEC auditing and reporting rules have made it difficult for companies to take uncertain tax positions that will not be examined in depth by a seasoned team of government auditors who combine resources on a national scale. This anticipated review heightens the need for companies to thoroughly analyze, discuss and consider the tax risks in business transactions without fear that their tax concerns, and the discussions which surround them, will be introduced into evidence and used against them. In order to do this, companies must develop an institutional sensitivity to the actions necessary to preserve privilege and confidentiality.
In the end, this is about managing risk – the risk that the company's own words will be used against it in litigation (or audit dispute), and ultimately, the risk that the IRS or other taxing authorities will prevail. These risks can be minimized with some fairly simple policies and procedures.

This outline will first lay out briefly, recent developments in IRS and agency enforcement protocols, it will then lay out in some detail the specifics of the attorney-client privilege, the work product doctrine, the accountant-client privilege and, ultimately, will discuss how those privileges/doctrines may be preserved and/or waived.

II. THE CURRENT TAX ENVIRONMENT

A. IRS Initiatives

In the past few years, the IRS has dramatically expanded its efforts to curb abusive tax transactions, including corporate tax shelters.

The most notable IRS efforts include:

- New, expansive definitions of “tax shelters” and “reportable transactions.”
- New tax return disclosure requirements on taxpayers.
- New “reportable transaction” and list maintenance requirements on material advisors.
- New nationally coordinated tax shelter examination teams.
- New penalty provisions.

Other expansions of IRS review of taxpayers include increased attempts to access data and corporate records which, traditionally, the IRS has not sought, including:

- E-mails and other correspondence describing the tax benefits – and the tax risks – of specific transactions;
- Internal financial analysis of alternative tax strategies; and
- Management presentations regarding negotiation strategies.

The IRS is also expanding efforts to access auditor workpapers, including the increasingly detailed FAS 5 tax accruals and valuation analysis.
B. Sarbanes-Oxley and FASB Audit Guidelines

Risk of unintended tax disclosure and the scope of review of tax reporting positions are aggravated by Sarbanes-Oxley and new SEC and FASB audit guidelines. The only “certainty” in the new FIN 48 requirements requiring the documentation of uncertain tax positions is that the records required to be kept will provide a “road map” for tax auditors in determining and assessing deficiencies.

In response to litigation risks and new SEC and FASB mandated audit guidelines, outside auditors are expansively documenting uncertain tax positions taken by companies.

For example, the Public Company Accounting Oversight Board (PCAOB) requires auditors to aggressively reviewing every aspect of a company’s tax analysis if necessary to support tax accrual workpapers, “notwithstanding potential concerns regarding attorney-client ... privilege.”

PCAOB has criticized two accounting firms for having inadequate support for contingent liabilities, including tax reserves and valuation allowances.

The new FAS 5 pronouncement on Accounting for Uncertain Tax Positions will further increase the risk that tax decisions will be reviewed in more detail by auditors in response to FASB requirements.

C. The Changing Environment – A Time Line

Attached to this outline is a graphical time line of the various events that have slowly converged to put greater stress on confidentiality and heighten the risk of exposure of sensitive documents.

D. The Impact of the Changing Environment

The confluence of these recent developments highlights the need for companies to implement procedures that:

- Permit companies to evaluate alternative tax positions and properly optimize available tax benefits without the risk that the company’s internal deliberations will be misconstrued or mischaracterized on audit by the IRS or other taxing authority, and

- Ensure public auditors have access to company information to the extent necessary to properly conduct the audit – but with appropriate safeguards to maintain to the maximum extent possible attorney-client privilege.
To be effective, the new procedures must properly identify – and differentiate – privileged communications from non-privileged communications.

Failure to do so will put it at a significant disadvantage in any tax audit or litigation with the IRS or other tax authorities – and will unnecessarily subject the company to legal risk and [its tax personnel to] embarrassment.

Unfortunately, the new “404 SOX” procedures being implemented by companies – usually with the oversight of outside accounting firms – often ignore this important issue.

III. ATTORNEY-CLIENT PRIVILEGE

A. Introduction

1. Importance of the Attorney-Client Privilege

The attorney-client privilege represents perhaps the most important legal doctrine that lawyers must learn.

The attorney-client privilege potentially applies every time that lawyers communicate with their agents, their clients, or their clients' agents.

Because the privilege can be subtle and complicated, clients cannot be expected to understand it.

- This means that lawyers necessarily play the primary role in properly creating the privilege, teaching their clients about the privilege and avoiding its waiver.

Because the privilege often covers communications that are frank and self-critical (which, as explained below, is the very purpose of the privilege), improperly creating the privilege or losing it later can have disastrous results.

- Cases are lost every day because lawyers or improperly trained clients do not correctly create the privilege, or lose the privilege.

Lawyers making mistakes can lose their clients, be sued in malpractice cases and (because of the ethical duty discussed below) sanctioned by the bar.

2. Difference Between the Attorney-Client Privilege and the Ethical Duty of Confidentiality

The ethical duty of confidentiality sometimes parallels the attorney-client privilege, but has a different source, a different purpose and a different scope.
The ethical duty of confidentiality comes from each state's ethics rules (rather than the common law).

The ethical duty applies at all times, and does not arise only when a third party seeks access to attorney-client communications.

- In contrast, the attorney-client privilege is an evidentiary rule that protects certain limited communications from a disclosure if a third party seeks to discover them.

Under most formulations of the ethical duty, lawyers must preserve the confidentiality of "information relating to the representation of a client." ABA Model Rule 1.6(a).

- The old ABA Model Code of Professional Responsibility followed a different approach. The ABA Model Code required lawyers to preserve the confidentiality of "confidences" and "secrets." The old ABA Model Code defined "confidence" as "information protected by the attorney-client privilege under applicable law," and defined "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." ABA Model Code DR 4-101(A).

- Some states continue to follow this old ABA Model Code approach. See, e.g., Virginia Rule 1.6(a).

ABA Model Rule 1.6 cmt. [3] explains the relationship between the attorney-client privilege (and work product doctrine) and the broader ethical duty of confidentiality.

- ABA Model Rule 1.6 cmt. [3] ("The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.").

Thus, the ethical duty will cover information that the privilege does not protect.
• Examples include the client's identity, the amount of fees paid, information about a client obtained from public records or from some third party.

3. Source of Privilege Law

a. History of the Attorney-Client Privilege

The attorney-client privilege is the law's oldest recognized protection from disclosure.

• The privilege's roots go back at least to Elizabethan times. United States v. (Under Seal), 748 F.2d 871, 873-74 (4th Cir. 1984).

b. State Law

Each state has developed its attorney-client privilege principles organically -- through the common law.

• Although some states have incorporated all or part of their privilege law in statutes, most states continue to recognize the privilege in the common law tradition. Restatement (Third) of Law Governing Lawyers § 68 cmt. d (2000).


c. Federal Common Law

Federal courts have also developed a "federal common law" set of attorney-client privilege principles. Swidler & Berlin v. United States, 524 U.S. 399 (1998).

d. Extent and Effect of Variations in the Privilege Law

Ironically, there is less variation among the states' attorney-client privilege principles than among federal courts' interpretation of the identical federal rule on the work product doctrine (discussed below).

On the other hand, some differences might create a problem for corporations.

- For instance, Illinois continues to follow the "control group" test for the privilege.

- As explained below, this approach applies the privilege only to communications between a company's lawyers and those with decision-making authority (and those on whom the decision-makers rely for providing advice about the decisions).

- A company litigating in Illinois might find that the Illinois court will apply the Illinois privilege law -- meaning that the court will find unprotected communications taking place in other states that both the lawyers and the clients thought at the time would be protected by a law other than Illinois's.

4. Choice of Laws

As mentioned above, most jurisdictions follow essentially the same basic principles governing the attorney-client privilege.

- This is welcome news, because determining exactly which law applies can be a nightmare.

Because the attorney-client privilege is tested, vindicated, or lost in litigation, it is helpful to examine what law courts addressing the privilege will select for determining privilege issues.

- This is not to say that transactional lawyers can always rely on their litigation colleagues to understand and apply privilege issues.

- On the contrary -- transaction lawyers are much more responsible than litigators for properly creating the privilege.

- They are also more likely than litigators to lose the privilege by either themselves sharing privileged communications with someone outside the intimate attorney-client relationship, or failing to warn their clients against doing so.
a. State Court Litigation

In state court litigation, courts use standard choice of law principles to determine what state's privilege will apply.

- This might be an easy task in very certain limited litigation.

- For instance, a state court dealing with a company having employees only in that state communicating between themselves (or with their lawyer) only in that state will usually (but not always) apply that state's attorney-client privilege law.

However, in today's world, such scenarios seem rare. In a more typical situation, a company with headquarters in one state and manufacturing sites or sales offices in many states will want to protect communications between its employees and lawyers in yet other states, perhaps involving transactions taking place elsewhere, sometimes even with a foreign element (discussed in more detail below).

b. Federal Court Litigation

In federal court, the situation is even more complicated.


- Most (but not all) federal court will also apply federal common law to any state law issues they are handling under their ancillary jurisdiction.

- Patent cases present a more complicated choice of law issue, because the Federal Circuit applies: (1) its own law to patent issues; and (2) regional circuit law to non-patent procedural issues. MPT, Inc. v. Marathon Durable Labeling Sys. LLC, No. 1:04 CV 2357, 2006 U.S. Dist. LEXIS 4998, at *8 (N.D. Ohio Feb. 9, 2006) (concluding that "the existence of the privilege will be determined by Federal Circuit law while waiver and the community of interest doctrine [usually called the "common interest" or "joint defense" doctrine] will be decided by Sixth Circuit law").

In diversity cases, federal courts will follow the choice of law rules of the state in which they are sitting. Satcom Int'l Group, PLC v. Orbcomm Int'l Partners, L.P., No. 98 CIV. 9095 (DLC), 1999 U.S. Dist. LEXIS 1553, at *2 (S.D.N.Y. Feb. 16, 1999).
State or federal courts searching for the appropriate privilege law under these choice-of-laws rules have applied the following privilege law:


- The law of the state where "the defendant's attorney-client relationships were formed." *Note Funding Corp. v. Bobian Inv. Co.*, No. 93 CIV. 7427 (DAB), 1995 U.S. Dist. LEXIS 16605, at *2 (S.D.N.Y. Nov. 9, 1995).


- The law of the state where (i) the attorney-client relationship arose; (ii) the defendant was incorporated; (iii) the defendant had its principal place of business; and (iv) the defendant's law firm was located. *McNulty v. Bally's Park Place, Inc.*, 120 F.R.D. 27, 31 (E.D. Pa. 1988).

- The law of the state where a party's litigation conduct implicated the waiver doctrine, rather than the state where the documents at issue were created. *Baker v. General Motors Corp.*, 209 F.3d 1051, 1057 (8th Cir. 2000).

- The law of the state where the defendant was headquartered and its in-house counsel worked, rather than where its outside counsel was located. *Interphase Corp. v. Rockwell Int'l Corp.*, No. 3-96-CV-0290-L, 1998 U.S. Dist. LEXIS 15111, at *4-5 (N.D. Tex. Sept. 22, 1998).

- The state law that the parties have designated as controlling. *Bell Microproducts Inc. v. Relational Funding Corp.*, No. 02 C 329, 2002 U.S. Dist. LEXIS 18121, at *11 (N.D. Ill. Sept 24, 2002).

Given this varied approach to the controlling law, clients and their lawyers can have little confidence that they will be able to predict what privilege law will apply.
c. Possible Application of Foreign Law

To make matters even more complicated, American courts (both state and federal) sometimes look to foreign law when applying the attorney-client privilege.

- As with courts' search for the correct American privilege law, the results are unpredictable.

American courts have looked to the following foreign law:


- Foreign privilege law from the country where the pertinent document was written. SmithKline Beecham Corp. v. Pentech Pharm., Inc., No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281, at *17 (N.D. Ill. Nov. 5, 2001).

- Foreign law, but only if the communications relate to an activity in the foreign country, and do not "touch base" with the United States -- which would require the application of United States privilege law. Tulip Computers Int'l B.V. v. Dell Computer Corp., 210 F.R.D. 100, 104 (D. Del. 2002).

- Foreign law, under general standards of international comity (if the foreign country has the most direct or compelling interest in the communication). Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 221 F. Supp. 2d 874, 884 (N.D. Ill. 2002).

- Foreign law, to the extent that documents would generally not be subject to discovery in a foreign country -- even if the immunity from discovery is based on the narrow scope of discovery in the foreign country, rather than on its recognition of some privilege covering the documents. Astra Aktiebolag v. Andrx Pharm., Inc., 208 F.R.D. 92, 102 (S.D.N.Y. 2002).

5. Other Countries' Laws

In an increasingly worldwide economy, companies doing business in other countries should remember that not every country follows the Anglo-Saxon legal tradition.

As explained above, American courts sometimes look to foreign law in determining if communications deserve privilege protection.
• Clients and their lawyers should also remember that privilege issues can arise both in American courts and in foreign courts or other tribunals.

In some situations, other countries follow attorney-client privilege principles that prove more restrictive than those in the United States

• This is most pronounced in the case of in-house lawyers.

• Many European countries (especially those following the Napoleonic Code or civil tradition) generally do not protect communications to or from in-house lawyers.

• These countries apparently reason that in-house lawyers are not independent enough to deserve privilege protection.

This unfriendly approach often means that communications that would be privileged in the United States will be subject to discovery in Europe.

• The good news is that European discovery generally is fairly limited, so perhaps the risk is not as great as one might think at first blush.

• Still, in-house lawyers in the United States dealing with European affiliates or employees should remember that the files of those clients might be subject to discovery and ineligible for privilege protection.

On the other hand, communications that would not be privileged in the United States might deserve privilege protection if they occur in Europe.

• Lawyers working for accounting firms can give legal advice in Europe, which would deserve privilege protection.

• In the United States, lawyers working for accounting firms cannot independently give legal advice, so the only way their communications can deserve privilege protection is if they are assisting another lawyer in providing legal advice to a client (this would be very difficult to establish in most circumstances).

In some ways application of foreign law can expand a company's privilege protection in other ways.

• This is because American courts will often apply American privilege law to communications with foreign company agents that do not have a law degree -- but who perform jobs in their countries that are analogous to what lawyers perform in the United States (see below).
- For instance, American courts often will protect communications with foreign patent agents.

- This extension of the privilege is discussed below, in the "Lawyer Participants" section.

In-house lawyers working for companies with overseas operations should check the privilege law of the countries in which their clients operate.

- ACCA has compiled a useful appendix of how countries treat communications to and from in-house lawyers.

- Lex Mundi has also made data like this available on the Internet.

6. Competing Principles Underlying the Attorney-Client Privilege

Many counter-intuitive aspects of the attorney-client privilege come from the basic societal purpose of the privilege, and the tension inherent in its application.

The attorney-client privilege provides absolute protection when clients and lawyers follow the rules. In re Dow Corning Corp., 261 F.3d 280, 284 (2d Cir. 2001).

- Society provides this protection to encourage clients to provide all necessary facts to their lawyers, so that lawyers will guide their clients' conduct in the right direction, and resolve disputes. In re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 641 (8th Cir. 2001); United States v. (Under Seal), 748 F.2d 871, 873-74 (4th Cir. 1984).

- The United States Supreme Court has rejected the notion of any "balancing test" in applying the attorney-client privilege. Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998).

- Another federal court recently affirmed the importance of the attorney-client privilege by prohibiting a patent holder from arguing any adverse inference based on an alleged infringer's assertion of the privilege and refusal to produce a non-infringement opinion. Knorr-Bremse Systeme Für Nutzfahrzeuge GmbH v. Dana Corp., 383 7.3d 1337 (Fed. Cir. 2004).

However, society pays a price for this protection -- because the privilege undeniably hampers the search for truth. In re Feldberg, 862 F.2d 622, 627 (7th Cir. 1988); United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984).

The attorney-client privilege case law thus reflects a tension between this grand societal benefit (encouraging clients to disclose facts so that their lawyers will
foster a lawful society) and the cost (keeping out of view forever what could be the most relevant communication).

As a result, the privilege is very difficult to create, is surprisingly fragile, and can be easy lost.

7. Key Concepts Underlying the Attorney-Client Privilege

Those considering the privilege should keep in mind the three key elements of the privilege -- doing so will often guide the analysis.

- The attorney-client privilege rests on the *intimacy* of the attorney-client relationship.
- The attorney-client privilege rests on the *confidentiality* within that intimate relationship.
- The attorney-client privilege rests on communications within that intimate relationship.

8. Basic Elements of the Attorney-Client Privilege

Under the most common formulation, determining if a communication deserves protection under the attorney-client privilege requires an analysis of six separate elements -- all of which must be satisfied for the privilege to apply.

The attorney-client privilege protects:

1. Communications from a client.
2. To a lawyer.
3. Related to the rendering of legal advice.
4. Made with the expectation of confidentiality.
5. Not in furtherance of a future crime or fraud.
6. As long as the privilege has not been waived.

It seems more logical to address the privilege in a slightly different fashion.

- The communication must involve two types of participants: clients and lawyers.
- The communication's *content* must directly involve legal advice.
- The communication must be made in the context of confidentiality.
- The use of the communication must not forfeit (waive) the protection.
B. Participants: Clients

1. Communications

   a. Acts as Communications

      The "communications" element can include a client's actions (such as moving
documents), United States v. Freeman, 619 F.2d 1112, 1119 (5th Cir. 1980),

   b. Uncommunicated Client Statements

      Although the privilege generally rests on communications between clients and
their lawyers, the privilege can sometimes protect statements that the client
has not communicated to the lawyer -- if the client created the statement with
the original intent to communicate it to a lawyer.

      • For instance, the privilege can protect a client's "diary" or journal that the
client creates at a lawyer's direction (to assist the lawyer in providing legal
advice to the client) -- even if the client does not send the diary to the
143 F.R.D. 601, 607-09 (M.D.N.C. 1992) (addressing daily notes prepared
by both the plaintiff and the defendant in a large construction case; holding
that the privilege protected the plaintiff's log because the plaintiff created
the log at the direction of a lawyer to assist the lawyer in giving legal
advice; holding that the privilege did not protect the defendant's log,
because the defendant created the log in the ordinary course of its
business rather than to help a lawyer provide legal advice).

2. Individual Clients

   The attorney-client privilege evolved over several hundred years with individuals
as the "client" for analytical purposes.

   Some basic attorney-client principles developed during this earlier time continue
to apply (both to individuals and to corporations).

   • The privilege belongs to the client and not to the lawyer (meaning that the
client can assert or waive the privilege regardless of the lawyer's desires).
United States v. Under Seal (In re Grand Jury Proceedings), 33 F.3d 342, 348
(4th Cir. 1994).

   • The privilege normally covers communications between a lawyer and a
• Lawyers representing more than one client on the same matter must (absent some agreement to the contrary) share information learned from one client with the other jointly represented client. Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000).


• If it has been properly created and not waived, the privilege provides absolute protection. Swidler & Berlin v. United States, 524 U.S. 399 (1998) (rejecting the notion of any "balancing test").

3. Joint Representation of Multiple Clients

Lawyers sometimes represent more than one client on the same matter -- which is called a "joint representation."

• This is different from the "joint defense" or "common interest" doctrine, which involves separately represented clients cooperating in connection with litigation or anticipated litigation (discussed below).

As a matter of ethics and privilege, generally there can be no secrets among jointly represented clients -- so that the lawyer must share with each client whatever the lawyer learns from one of the jointly represented clients. Restatement Third) of Law Governing Lawyers § 75 cmt. d at 580-81 (1998); Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 439 (Bankr. S.D.N.Y. 1997) ("In a joint client situation, there is no secrecy between the two parties at the time of communication.").

• With full disclosure, the clients can consent to an arrangement under which their common lawyer does not share such information, but there are ethical limitations on such an arrangement. Restatement Third) of Law Governing Lawyers § 75 cmt. d at 581 (1998).

Because there generally can be no secrets among jointly represented clients, any of the clients can obtain access to the lawyer's files, and access to communications that the lawyer had with the other clients even if the client seeking the access was not present at the time. Franklin v. Callum, 804 A.2d 444, 447 (N.H. 2002); Felix v. Balkin, 49 F. Supp. 2d 260, 270 (S.D.N.Y. 1999).

• For instance, if a lawyer jointly represents a husband and wife in estate planning, the wife can discover what her husband and the lawyer discussed about their estate planning even if she was not present.
These basic concepts make sense in a situation involving individuals, but applying them in the corporate context can yield some surprising and even frightening results (these are discussed below).

4. Corporate Clients

a. General Rule

In the case of corporate clients, the basic principles are somewhat more difficult to apply.

Every state recognizes that corporations can enjoy attorney-client relationship with a lawyer. In re Grand Jury Proceedings, 219 F.3d 175, 185 (2d Cir. 2000).

- The privileged nature of communications with current and former corporate employees, and independent contractors hired by the corporation, are discussed below.

In some situations it may difficult to tell whether a lawyer represents a corporation or a separate group of constituents of the corporation.

- Ex parte Smith, No. 1050607, 2006 Ala. LEXIS 107 ( Ala. May 12, 2006) (assessing a bankrupt company's trustee's motion for access to pre-bankruptcy communications between a group of outside directors and the group's law firm Skadden Arps; noting that the trustee argued that Skadden represented the corporation, which he now controlled; acknowledging that the company paid Skadden's bills, but also pointing to an explicit engagement letter indicating that the law firm represented just the outside directors and not the company; ultimately denying the trustee's request for access to the documents).

b. Communications among Affiliated Corporations

Most courts protect communications among related companies, even if they are not wholly-owned affiliates of each other. Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989); Cary Oil Co. v. MG Ref. & Mktg., Inc., No. 99 Civ. 1725 (VM) (DFE), 2000 U.S. Dist. LEXIS 17587, at *17 (S.D.N.Y. Dec. 6, 2000).

c. Corporate Successors' Ownership of the Privilege

As a corporate asset, the privilege generally passes to corporate successors (who can assert or waive the privilege) -- including bankruptcy trustees.

- However, a purchaser of a bankrupt company’s stock (or even assets, as explained below) might be found to control the privilege.

d. Defunct Corporations

Courts disagree about whether a defunct corporation can assert the attorney-client privilege. Lewis v. United States, No. 02-2958 B/An, 2004 U.S. Dist. LEXIS 26680, at *12, *10, *14 (W.D. Tenn. Dec. 6, 2004) (holding that Baker Donelson could not assert the attorney-client privilege in responding to an IRS subpoena, because the law firm’s former client “has no assets, liabilities, directors, shareholders, or employees”; noting that “courts are split over whether a corporation is entitled to protection from the attorney-client privilege after the corporation’s ‘death,’” the court concluded that “[t]he attorney-client cannot be applied to a defunct corporation.”).

e. Corporate Transactions Involving Stock Sales

The purchaser of a corporation’s stock generally steps into the shoes of the previous owner, and may assert or waive the privilege. Bass Public Ltd. Co. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474, at *6-7 (S.D.N.Y. Apr. 25, 1994) (finding that the former owner of a corporate subsidiary could not block the current owner from seeking documents from the subsidiary’s law firm that were generated before the transaction; noting that the former owner of the subsidiary could have avoided this result by addressing the issue in the transactional documents); Rayman v. Am. Charter Fed. Sav. & Loan Ass’n, 148 F.R.D. 647, 652 (D. Neb. 1993) ("a surviving corporation following a merger possesses all of the privileges of the pre-merger companies"); McCaugherty v. Siffermann, 132 F.R.D. 234, 245 (N.D. Cal. 1990) ("[T]he purchaser of a corporate entity buys not only its material assets but also its privileges. . . . Since the attorney-client privilege over a corporation belongs to the inanimate entity and not to individual directors or officers, control over privilege should pass with control of the corporation, regardless of whether or not the new corporate officials were privy to the communications in issue."); In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 248 (4th Cir. 1990) (finding that the new management of a subsidiary created by divestiture could waive the privilege); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 51 (S.D.N.Y. 1989) ("Polycast acquired this authority to waive the joint privilege when it purchased the stock of Plastics. The power to waive the corporation’s attorney-client privilege rests with corporate management, who must exercise this power consistent with their fiduciary duty to act in the best interest of the corporation. Just as Plastics' new management has an obligation to waive or
preserve the corporation's privileges in a manner consistent with their fiduciary duty to protect corporate interests, Polycast, as parent and sole shareholder, has the power to determine those interests. Because there are ample grounds for a finding that the privilege is held jointly by Polycast and Uniroyal, and because Polycast acquired control over Plastics' privilege rights when it purchased the company, Polycast and Plastics' new management may now waive the privilege at their discretion." (internal citations omitted); finding that the purchaser of a subsidiary of Uniroyal was entitled to obtain copies of notes of the subsidiary's vice president that he prepared before the transaction).

- The purchaser and seller of the corporation's stock might be able to vary this rule in the purchase agreement. Medcom Holding Co. v. Baxter Travenol Labs, Inc., 120 F.R.D. 66, 70 (N.D. Ill. 1988).

f. Corporate Transactions Involving Asset Sales


- One recent case applied the "practical consequences" rule to deny a bankruptcy trustee's effort to control the privilege. Coffin v. Bowater Inc., No. 03-277-P-C, 2005 U.S. Dist. LEXIS 9395, at *7, *9 (D. Me. May 13, 2005) (rejecting a bankruptcy trustee's attempt to waive a bankrupt company's privilege; rejecting a "bright-line rule" that only a stock sale conveyed the privilege; finding that privilege now belonged to the purchaser of the company's assets (including all the company's "tangible and intangible rights"); explaining that because the "practical consequences" of the asset purchase "was to transfer virtually all control and continuation of the [company's] business" to the new owner, the new owner -- not the company's bankruptcy trustee - had the right to waive or assert the privilege).
g. Effect of a Joint Representation of Corporate Affiliates in Later Adversity between the Former Clients

In many (if not most) transactions in which one member of a corporate "family" becomes an independent company through either a stock or asset sale, the same law firm represents both entities while they are still members of the same corporate "family."

Because jointly represented clients generally must be given access to the files generated by the lawyer representing the clients, this means that the newly independent company generally may obtain access to the files generated by the law firm that jointly represented the companies while they were still members of the same corporate "family."

- If the newly independent company declares bankruptcy, a bankruptcy trustee can thus generally call upon the law firm to produce all of its files during the former joint representation -- including communications between the law firm and the parent that the law firm also represented during the "transaction."

- Some large well-known law firms have found themselves dealing with this very troubling situation. In re Mirant Corp., 326 B.R. 646, 649 (Bankr. N.D. Tex. 2005) (requiring the Troutman Sanders law firm to produce files it generated while jointly representing the firm's long-time client The Southern Company and the subsidiary which became known as Mirant when it became an independent company and later declared bankruptcy; rejecting Troutman Sanders' argument that Mirant's bankruptcy trustee was not entitled to communications between Troutman Sanders and The Southern Company created during the joint representation; noting that "[i]t is well established that, in a case of a joint representation of two clients by an attorney, one client may not invoke the privilege against the other client in litigation between them arising from the matter in which they were jointly represented").

- An even more recent case provides another frightening example of this principle. Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), Civ. No. 04-1266-SLR, at *7, *8 (D. Del. June 2, 2006), (holding that bankrupt companies and their Official Committee of Unsecured Creditors could obtain access to: (1) files generated by the law firm that jointly represented the companies' Canadian parent Teleglobe and Teleglobe's parent BCE (Canada's largest communications company); and (2) privileged documents sent to or from other law firms (including Shearman & Sterling) which had only represented the ultimate parent BCE, but which had shared the documents with BCE's in-house lawyer -- who "jointly represented BCE and Teleglobe [BCE's subsidiary
and the bankrupt companies' parent]"); acknowledging that allowing such
discovery would force a company like BCE to "either forego the valuable
advice of its in-house counsel, or forego the protection of the
attorney-client privilege with its retained counsel"; nevertheless explaining
that the law is so clear that a lawyer representing two clients in a matter
cannot withhold relevant information from either client; "it should come as
no surprise to BCE that information channeled through its in-house
counsel would have to be disclosed to Teleglobe"; also explaining that
BCE "had the opportunity to isolate its privileged communications with
retained counsel from in-house counsel, or to clearly terminate the
attorney-client relationship between its in-house counsel and [its
subsidiary] Teleglobe").

A number of other cases have dealt with such adversity between a parent and
a former subsidiary (or its new owner), with differing results. Fogel v. Zell (In
re Madison Mgmt. Group, Inc.), 212 B.R. 894 (Bankr. N.D. Ill. 1997) (the
same lawyers represented a parent and a subsidiary; when the subsidiary
went bankrupt, the trustee for the subsidiary sought to give to a third party (a
creditor) documents created during the time of the joint representation; the
court distinguished the situation from that in Santa Fe (in which the former
subsidiary wanted to obtain documents for itself), and held that the parent
could block the trustee for the former subsidiary from providing privileged
documents to the third party creditor (although the parent and the former
subsidiary were now adverse to one another)); Glidden Co. v. Jandernoa, 173
F.R.D. 459 (W.D. Mich. 1997) (Glidden (now called Grow) sold its subsidiary
(Perrigo) to the subsidiary's management; Grow then sued its old subsidiary
and the subsidiary's management; the court ordered the former subsidiary to
produce all of the requested documents to the former parent; the court also
rejected the argument that the former subsidiary's management could assert
their own privilege); Bass Pub. Ltd. Co. v. Promus Cos., No. 92 Civ. 0969
Watkins represented both the parent (Promus) and a subsidiary (Holiday Inn),
which was sold to Bass; the former subsidiary (which was merged into Bass)
sought documents from Latham & Watkins dating from the time of the joint
representation; although the court found that the documents were not created
as part of a joint litigation defense effort, it ordered Latham & Watkins to
produce the documents, finding that the jointly represented subsidiary was
entitled to them); In re Santa Fe Trail Transp. Co., 121 B.R. 794 (Bankr. N.D.
Ill. 1990) (in-house lawyers represented both a parent and a subsidiary; the
former subsidiary went bankrupt, and its trustee sought documents from the
former parent; although the court found that the situation did not involve a
joint litigation defense arrangement (but instead was a joint representation),
the court held that the former subsidiary could obtain documents from the
parent that were created before the closing of the spin (and certain document
created after that date)); In re Grand Jury Subpoenas 89-3 & 89-4 & 89-129, 734 F. Supp. 1207 (E.D. Va. 1990) (a parent waives any attorney-client privilege applicable to documents by leaving those documents with the spun subsidiary); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 51 (S.D.N.Y. 1989) (Uniroyal sold its subsidiary (Plastics) to a company called Polycast; Polycast sued Uniroyal for fraud; the court found that communications among the lawyers who jointly represented Uniroyal and its then-subsidiary Plastics did not involve a joint litigation defense, meaning that the new management of Plastics (now owned by Polycast) could obtain the documents); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 120 F.R.D. 66 (N.D. Ill. 1988) (the parent (Baxter) sold all of the stock of its subsidiary Medcom to Medcom Holding; Medcom Holding later sued Baxter for securities fraud; the court found that the same lawyers represented Baxter and Medcom during the relevant time; the court held that Medcom's new management had the power to waive the privilege as to some of the documents; however, the court held that documents created during an earlier litigation when Baxter and its subsidiary were jointly represented could not be obtained by the subsidiary's new parent unless Baxter itself consented, even though adversity had developed between Baxter and the new owners of its former subsidiary).

h. Courts' Suggestions about Changing these General Rules when Selling Subsidiaries

A number of decisions have explained how companies may change the application of these general rules if they are planning to sell a subsidiary.

First, one court has held that a parent wishing to avoid the possibility of a spun subsidiary waiving the privilege that otherwise protects communications with lawyers working for both parent and the spun company may avoid that result by hiring separate lawyers to represent the subsidiary before the spin. Medcom Holding Co. v. Baxter Travenol Labs., Inc., 120 F.R.D. 66 (N.D. Ill. 1988) (a parent wishing to avoid the possibility of a spun subsidiary waiving the privilege that otherwise protects communications with lawyers working for both parent and the spun company may avoid that result by hiring separate lawyers to represent the subsidiary before the spin).

Second, one court has suggested that a parent wishing to maintain all of the privilege rights could sell a subsidiary's assets rather than its stock. Bass Pub. Ltd. Co. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474 (S.D.N.Y. Apr. 25, 1994) ("Had Promus [parent] wished, it could have sold only Holiday Inn's [subsidiary's] physical assets, which would have avoided the consequences [of allowing new management of the subsidiary to waive the privilege]").
Third, one court has suggested that a parent spinning off a subsidiary should contractually retain access rights to documents the spun company acquires in the spin. Bass Pub. Ltd. Co. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474, at *6-7 (S.D.N.Y. Apr. 25, 1994); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 120 F.R.D. 66 (N.D. Ill. 1988) (a parent spinning off a subsidiary should contractually retain access rights to documents the spun company acquires in the spin).

Fourth, one court has suggested that a parent may retain the right to veto a newly spun subsidiary's waiver of the attorney-client privilege. In re Grand Jury Subpoenas 89-3 & 89-4 & 89-129, 734 F. Supp. 1207 (E.D. Va. 1990) (a parent waives any attorney-client privilege applicable to documents by leaving those documents with the spun subsidiary).

Fifth, one court has held that a parent waives any attorney-client privilege applicable to documents by leaving those documents with the spun subsidiary. In re Grand Jury Subpoenas 89-3 & 89-4 & 89-129, 734 F. Supp. 1207 (E.D. Va. 1990) (a parent waives any attorney-client privilege applicable to documents by leaving those documents with the spun subsidiary).

- Thus, a parent spinning off a subsidiary may want to consider reviewing all of its files, and removing any documents that the parent wishes to remain privileged.

5. Current and Former Corporate Employees

a. General Rule

As indicated above, lawyers representing corporations actually represent the incorporeal entity that is the corporation. Avianca, Inc. v. Corriea, 705 F. Supp. 666, 680 n.4 (D.D.C. 1989) ("A corporate attorney’s 'client' is the corporate entity, and not individual officers or directors."); aff'd, 70 F.3d 637 (D.C. Cir. 1995); ABA Model Rule 1.13(a).

- As a matter of ethics, lawyers must very carefully guard against accidentally creating an attorney-client relationship with some of the human beings with whom they deal while representing the corporation (this is discussed above).

- Mistakes in this process can create duties of loyalty and confidentiality to someone other than the institution, possibly creating conflicts that prevent the lawyer from representing the only client that the lawyer wanted to represent (the corporation).
The importance of carefully defining the client also has privilege ramifications, but these are generally much less consequential than the ethics issues.

- Communications between a lawyer and an accidentally created individual client will almost surely still deserve protection under the attorney-client privilege. However, the key is who owns that privilege.

- The careful lawyer should take the steps mentioned above (in the ethics discussion) to assure that the corporate client always owns the privilege -- except in certain limited circumstances in which the lawyer intends to create an attorney-client relationship with someone else connected to the corporation.

b. "Control Group" Test

Most states formerly held that only a corporation's upper management (and those upon whom they rely) could speak for the corporation, so that only communications with those officials deserved attorney-client privilege protection. *Va. Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 400 (E.D. Va. 1975).


- The control group test is not quite as narrow as many lawyers believe -- it covers communications to and from those in the upper corporate hierarchy and underlings who provide advice (not just facts) upon which the upper decision-makers rely.

- Still, the "control group" test clearly provides less protection to corporate clients than the newer "Upjohn" approach, both in the original communication (which can involve a much smaller number of corporate employees than under Upjohn) and in the waiver analysis (because the "control group" approach places many more corporate employees outside the "need to know" group, so that sharing the communications within the corporation is more likely to waive the privilege).

c. "Upjohn" Test

The United States Supreme Court rejected the control group test in *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
In essence, the Supreme Court abandoned the former "hierarchical" approach (in which the privilege's applicability depended on the company employee's level in the corporate hierarchy) in favor of a much looser "functionality" test. Under this new test, the privilege's applicability depends on what role the corporate employees play, not their spot in the bureaucracy.

Under the Upjohn approach, employees of any level within a corporation are entitled to have privileged conversations with the company's lawyer, provided that the company lawyer undertake certain specified steps (described below).

Thus, the Upjohn approach focuses on the nature of the employees' function and information, rather than on the strict hierarchical approach of the "control group" test. Federal courts and most state courts now follow the Upjohn approach.

To assure that the attorney-client privilege protection covers the communication, company lawyers should explain (and perhaps provide a written explanation of) the Upjohn factors: the company's lawyers have been asked to provide legal advice to their client (the company); the employee has factual knowledge that the company lawyers require; that information is not readily available elsewhere; the employees should keep all of their communications with the company lawyers confidential (even within the company).

d. Former Employees

Once courts adopted the "functionality" test, it was an easy step for them to extend the privilege to communications to and from company employees who are not currently in the hierarchy, but whose function when they worked at the corporation met the Upjohn standard.


Former employees should receive a modified Upjohn explanation, which emphasizes that the interview will cover facts related to the employee's time at the company.

The ethical implications of ex parte communications with an adverse corporation's employees are discussed above.
6. Independent Contractors and Other Client Agents

As mentioned above, the attorney-client privilege exists only within the intimacy of the attorney-client relationship.

Under the Upjohn standard, corporate employees fall within this intimate relationship if they have information that a lawyer representing the corporation needs to serve the institutional client. However, those acting on behalf of or for corporation that have a more attenuated relationship with a corporation deserve much more careful scrutiny.

Client agents involve a spectrum of relationships with the client -- starting with independent contractors who are essentially acting as full-time employees, and ending with consultants who occasionally work for the client.

a. Independent Contractors

Courts disagree about the attorney-client privilege protection's applicability to communications with a corporation's independent contractors.

- In a fairly recent trend that holds promise for corporations which outsource corporate functions, courts increasingly treat as corporate employees those independent contractors who are the "functional equivalent" of employees. Viacom, Inc. v. Sumitoma Corp. (In re Copper Mkt. Antitrust Litig.), 200 F.R.D. 213, 216, 220 n.4 (S.D.N.Y. 2001) (public relations advisors); In re Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994).


- As this new trend develops, courts have begun to analyze the facts required to support the "functional equivalent" doctrine. Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113, 114 (S.D.N.Y. 2005), (explaining that in determining whether a consultant meets the functional equivalent standard, courts "look to 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," rejecting defendant's contention that its financial advisor deserved this status, noting that the financial consultant (1) apparently never used an office made available to him in defendant's premises, and (2) was able to "start
and build a successful consulting business" despite spending 80 – 85 percent of his time working on a restructuring deal for defendant).

b. Agents

Agents assisting corporations in some way act further along the continuum that starts with full-time employees and includes independent contractors who are the "functional equivalent" of employees.

- The status of agents can have a critical effect on the attorney-client privilege, in a number of settings: communications between the company's employees or lawyers and the agents may or may not be privileged ab initio, depending on the agents' status; having agents present during communications between the company's employees and the company's lawyers may or may not prevent the privilege from even protecting those communications, depending on the agents' status; later sharing privileged communications with agents may or may not waive the privilege, depending on the agents' status.

**Agents Necessary for the Transmission of the Communications.** Every court applies the attorney-client privilege to client agents who assist in the transmission of the attorney-client communications.

- This type of client agent includes translators, interpreters, etc.

**Other Agents (Not Necessary for the Transmission of the Communications).** Courts take differing positions on the attorney-client privilege implications of involving client agents who are not necessary for the transmission of the attorney-client communications. Some authorities take a fairly liberal approach, but the vast majority apply the privilege more narrowly.

The **Restatement** and a few courts take a fairly liberal approach.

- **Restatement (Third) of Law Governing Lawyers** § 70 cmt. f (2000). ("An agent for communication need not take a direct part in client-lawyer communications, but may be present because of the Client's psychological or other need. A business person may be accompanied by a business associate or expert consultant who can assist the client in interpreting the legal situation.").

- Courts taking this liberal view have protected communications to and from the following agents: financial and tax advisors (Segerstrom v. United States, No. C 00-0833 SI, 2001 U.S. Dist. LEXIS 2949 (N.D. Cal. Feb. 6, 2001)); litigation consultants (Caremark, Inc. v. Affiliated Computer Servs., Inc., 192 F.R.D. 263 (N.D. Ill. 2000)); crisis management public relations...

The vast majority of courts have taken a much narrower view, refusing to provide privilege protection to client agents who are not assisting in the transmission of information, but instead providing their own independent advice to the clients.

- In discussing waiver (a concept addressed later in this outline), one court coined a useful phrase. United State v. Morrell-Corrada, 343 F. Supp. 2d 80, 88 (D.P.R. 2004) ("Where a client chooses to share communications between himself and his lawyer outside the 'magic circle' of secretaries and interpreters, the courts have usually found a waiver of the privilege.").


A recent case applied this narrow approach to a large company's disclosure of documents to its insurance broker. Cellco P'ship v. Certain Underwriters at Lloyd's London, Civ. A. No. 05-3158 (SRC), 2006 U.S. Dist. LEXIS 28877, at *7, *11 (D.N.J. May 11, 2006) (explaining that "just because a communication between an attorney and a specialist prove[s] helpful to the attorney's representation of his/her client does not mean that the communications are necessarily privileged"); holding that the privilege did not protect communications between Verizon Wireless and employees of its insurance
broker Aon; "Aon did not act as an agent of the attorney or [Verizon Wireless] for purposes of providing or interpreting legal advice. While the information that Aon provided may have proved helpful, it was not needed to interpret complex issues in order to provide competent legal advice or to facilitate the attorney-client relationship.").

- Courts taking this narrow approach also generally hold: (1) that the presence of such agents during an otherwise privileged attorney-client communication prevents the privilege from ever arising; and (2) that sharing a privileged communication with such an agent waives the privilege -- this Outline covers these concepts below.

**Importance of the Majority (Narrow) View of Client Agents.** The general inability of a client's agent to engage in privileged communications with corporate clients or their lawyers (and the waiver implications of sharing privileged communications with those agents) represents perhaps the most counter-intuitive aspect of the attorney-client privilege.

- Corporate officers and employees might logically assume that members of their problem-solving "teams" such as environmental consultants, outside accountants, financial advisors, etc. -- who have fiduciary duties of loyalty and confidentiality to the clients just like lawyers do -- should be able to participate in joint communications, learn what the lawyer member of the "team" has to say, etc.

- Lawyers must educate their clients about the erroneous nature of this assumption.

For instance, lawyers should remind their clients that Martha Stewart lost the privilege protection that covered an e-mail to her lawyer by sharing the e-mail with her own daughter. *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

- If a client's only daughter is not within the intimate attorney-client relationship, surely other professional advisors fall outside as well.

7. **Multiple Representations of Corporations and Corporate Employees**

   a. **Ethical Considerations**

      Lawyers who represent corporations generally should not attempt to represent any other corporate constituent.

      - Such activity risks compromising the lawyer's duty of loyalty and confidentiality to the lawyer's primary client -- the institution.
• Doing so accidentally can have disastrous results.

For obvious reasons, lawyers dealing with company employees who might misunderstand the lawyer's role must "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." ABA Model Rule 1.13(f).

• In one recent celebrated case, a court criticized (but ultimately found effective) a "corporate Miranda warning" given by a company's in-house lawyers and outside lawyers to an executive that they were interviewing -- the lawyers advised the executive that they represented the company, but that they "could" also represent the executive "as long as no conflict appeared." Under Seal v. United States (In re United States Grand Jury Subpoena), 415 F.3d 333, 336 (4th Cir. 2005) (holding that the company alone controlled the privilege despite the looseness of the warning given to the executive; pointing to a separate part of the warning explaining that the privilege belonged to the company and not to the executive).

• Most courts are reluctant to find that company lawyers also represent company executives -- unless the relationship has been clearly established. Applied Tech. Int'l, Ltd. v. Goldstein, Civ. A. No. 03-848, 2005 U.S. Dist. LEXIS 1818 (E.D. Pa. Feb. 7, 2005).

b. Attorney-Client Privilege Ramifications

Such multiple representations have privilege implications too.

As mentioned above, absent a contractual understanding to the contrary, there can be no secrets among jointly represented clients on the same matter. Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 439 (Bankr. S.D.N.Y. 1997).

• Lawyers who jointly represent a client do not have to worry about the efficacy of a "joint defense" or "common interest" agreement (discussed below), because the privilege generally covers communication between lawyers and jointly represented clients, or between jointly represented clients who are anticipating communicating with the lawyer or discussing legal advice the lawyer has already given them. Kroha v. Lamonica, No. X02CV980160366S, 2001 Conn. Super. LEXIS 81, at *12 (Conn. Super. Ct. Jan. 3, 2001) (unreported decision).

• Of course, to the extent that a corporation's constituents act as agents of the institutional corporation, most of these protections arise even if there is
no separate attorney-client relationship between the corporation's lawyer and the individual corporate constituent.

The privilege's ownership can become critically important if the company wants to waive the privilege covering its lawyers' communications with an executive (for instance, to cooperate with a government investigation), while the executive wants to assert the privilege.

- If the company's lawyer has jointly represented the company and the executive, the executive generally has a "veto power" over the company's right to waive the privilege. Under Seal v. United States (In re United States Grand Jury Subpoena), 415 F.3d 333 (4th Cir. 2005) (ultimately finding that the company executive could not assert the veto power because the company's lawyers did not jointly represent the company and the executive).

- To the extent that the company and the executive become litigation adversaries, neither can assert the privilege to avoid disclosure of communications that occurred during a joint representation.

- It is also worth remembering that a "common interest agreement" (explained below) can also give a "veto power" even to a separately represented company executive. Under Seal v. United States (In re United States Grand Jury Subpoena), 415 F.3d 333 (4th Cir. 2005) (finding that a company and an executive had not entered into a common interest agreement, so that the company alone controlled the privilege.)

c. Disclosure and Consent

Lawyers tempted to engage in multiple representations should carefully consider the implications, and definitely articulate the exact nature of the relationship in a document.

Two decisions decided on the very same day highlight the risks of making a mistake.

- Home Care Indus., Inc. v. Murray, 154 F. Supp. 2d 861, 869 (D.N.J. 2001) (disqualifying the Skadden, Arps law firm from representing a corporation after it became adverse to its CEO with whom Skadden had dealt; finding that the CEO could reasonably have thought that Skadden represented him too; noting that "[a]n explanation of the Skadden Firm's position as counsel for HCI exclusive of its officers, would have gone a long way to avoid the position that said firm finds itself defending in the instant matter").
8. Privilege Implications of Company Employees Using Company E-Mail Systems

In some situations, company employees assert privilege protection for e-mail communications (using the company's e-mail system) with the employees' private lawyers.

Most cases find the privilege inapplicable. Kaufman v. SunGard Inv. Sys., Civ. A. No. 05-cv-1236 (JLL), 2006 U.S. Dist. LEXIS 28149 (D.N.J. May 9, 2006) (opinion not for publication) (holding that the privilege did not cover communications between an employee and her personal lawyer that she left on the company computer when she returned it to the company after she stopped working there; also finding that even if the privilege applied, the former employee waived the protection when she did not delete the privileged communications before returning the computer).

Surprisingly, some courts find that company employees may assert privilege protection, although the e-mail system and computer obviously belong to the company.

Curto v. Medical World Commc'ns, Inc., No. 03CV6327 (DRH)(MLO), 2006 U.S. Dist. LEXIS 29387 (E.D.N.Y. May 16, 2006) (holding that the privilege continued to cover an employee's privileged communication with her personal lawyer; acknowledging that the employee had used a company-owned computer, but noting that she used it only at her home office, and that it was not connected to the company's network; pointing to the company's policy that prohibited personal use of the company's computers, but noting that the company had not vigorously enforced the policy and therefore could not rely on it); In re Asia Global Crossing, Ltd., 322 B.R. 247, 261 (Bankr. S.D.N.Y. 2005) (finding that a company had not clearly enough warned executives that they could not use the company e-mail system for personal communications; noting that "at log on, some business computers, including those used by this Court's personnel, warn users about personal use and the employers' right to monitor," holding that company executives could withhold from the company's bankruptcy trustee e-mail communications with their personal lawyers).
9. Former Employees’ Right of Access to Privileged Communications in Which They Engaged While Employees

Courts disagree about former employees’ right to obtain discovery (when they are now adverse to their former employer) of privileged communications to which they had access while company employees. Inter-Fluve, Inc. v. Montana 18th Judicial Dist. Court, 112 P.3d 258, 262 (Mont. 2005) (agreeing with a former director’s argument that “since he was entitled to access these communications at the time they occurred, it would be a perversion of the attorney-client privilege to now deny him access to that information simply because he is no longer a director”); Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454, 463 (Colo. Ct. App. 2003) (noting the debate among courts on this issue, and holding that a former director who is now adverse to the corporation could be denied access to privileged documents; explaining that “the privilege may be asserted against an adverse litigant” -- even if the litigant previously had access to the privileged documents).

10. "Fiduciary Exception"

a. Application to Shareholders

Given the fiduciary duty that corporate management owes corporate shareholders, most courts recognize the latter’s limited right to discover communications between corporate management and corporate lawyers -- under certain circumstances. Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971).

b. Application to Other Situations

Many courts have expanded what is now called this "fiduciary exception" to include other situations in which the beneficiaries of a fiduciary relationship seek access to communications between the fiduciary and the fiduciary’s lawyer. Cox v. Adm’r United States Steel & Carnegie, 17 F.3d 1386, 1415-16 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995).


This "fiduciary exception" generally is limited to communications that relate to the fiduciary relationship, and not to (for instance) the possible liability of the fiduciary. *United States v. Mett*, 178 F.3d 1058, 1064, 1065 (9th Cir. 1999).

- For instance, because "the amendment or termination of plan benefits is not a fiduciary action," a former employee claiming that the employer improperly terminated an ERISA plan generally cannot rely on the "fiduciary exception" to discover communications between the employer and the employer's law firm. *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779 (7th Cir. 2005).
C. Participants: Lawyers

1. Communications Not Involving a Lawyer, and Uncommunicated Lawyer Notes

Although the attorney-client privilege normally protects communications between clients and lawyers, client-to-client communication may also deserve protection under certain circumstances.

- First, the privilege can protect communications among corporate employees gathering facts requested by the lawyer. SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 477 (E.D. Pa. 2005) ("In the case of a corporate client, privileged communications may be shared by non-attorney employees in order to relay information requested by attorneys.")

- Second, the privilege can protect corporate employees relaying a lawyer's advice to other employees. Baptiste v. Cushman & Wakefield, Inc., No. 03 Civ. 2102 (RCC) (THK), 2004 U.S. Dist. LEXIS 2579, at *7 (S.D.N.Y. Feb. 20, 2004) (holding that the attorney-client privilege protected e-mails from one corporate executive to another, which conveyed outside counsel's advice; concluding that "[i]t is of no moment that the e-mail was not authored by an attorney or addressed to an attorney"); U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C., Civ. A. No. 112-N, 2005 Del. Ch. LEXIS 95, at *12 (Del. Ch. June 9, 2005) (explaining that "communications originating from non-attorneys can be protected by the attorney-client privilege, if those communications relay legal advice from counsel to a party with a common interest").

Although the attorney-client privilege can protect documents prepared by a client that a client never sends to a lawyer (as long as the client created the documents with the intent of sending them to a lawyer), the privilege is less likely to protect uncommunicated lawyer documents.

- Sheeks v. El Paso County Sch. Dist. No. 11, Civ. A. No. 04-cv-1946-ZLW-CBS, 2006 U.S. Dist. LEXIS 27579, at *3 (D. Colo. Apr. 12, 2006) ("Defendant has cited no authority, and the Court has found none, indicating that internal law firm communications which are not conveyed to the client are covered by the attorney-client privilege"); SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 481-82 (E.D. Pa. 2005) (the attorney-client privilege does not protect "attorney thought processes"); American Nat'l Bank & Trust Co. v. AXA Client Solutions, LLC, No. 00 C 6786, 2002 U.S. Dist. LEXIS 4805 (N.D. Ill. Mar. 20, 2002) (holding that the attorney-client privilege did not cover handwritten notes prepared by an in-house lawyer, because the lawyer had not communicated them to anyone else).
• Of course, the privilege will protect a lawyer’s uncommunicated memorializations of communications between the lawyer and the client.

2. Lawyer-to-Client Communications

Egocentric lawyers normally assume that the privilege will protect their communications to clients.

However, the law only protects those communications to the extent that they reveal what the client told the lawyer. Breon v. Coca-Cola Bottling Co. of New England, 232 F.R.D. 49, 54 (D. Conn. 2005) ("communication running from the lawyer to the client is not protected unless it reveals what the client has said").

This doctrine sometimes applies to a lawyer’s report back to the client of the lawyer’s communications with third parties, government regulators, etc. Tri-State Hosp. Supply Corp. v. United States, Civ. A. No. 00-1463 (HHK/JMF), 2005 U.S. Dist. LEXIS 33155, at *12-13 (D.C. Dec. 16, 2005); Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 443 (D. Md. 2005) ("[T]he attorney-client privilege does not protect information obtained by the attorney from sources other than the client, or notes or memoranda summarizing such information. . . . Thus, to the extent that certain documents listed in Defendants’ privilege log are not based upon information supplied in confidence by Defendants, but rather consist of notes and summaries of attorneys’ conversations with third parties, then those documents may in fact be discoverable."); Schmidt, Long & Assocs., Inc. v. Aetna U.S. Healthcare, Inc., Civ. A. No. 00-CV-3683, 2001 U.S. Dist. LEXIS 7145, at *10-11 (E.D. Pa. May 31, 2001) ("In order for a communication between an attorney to [sic] a client to be privileged, the communication must be based upon confidential communications received from the client. . . . The communication will not be privileged if the attorney is merely conveying information learned from sources other than the client.")

3. In-House Lawyers

In the United States, the attorney-client privilege protection can cover communications to and from inside counsel.


The attorney-client privilege protection can cover communications to and from inside counsel even if they are not licensed in the state in which they

- In-house lawyers practicing in states that do not require them to be licensed in that state (discussed in the ethics section above) might face what would seem to be a dangerous risk -- letting their license lapse through inadvertence or sloppiness.

- Fortunately, because the client's expectations generally govern, even those lawyers (who are technically no longer licensed anywhere) generally may continue to have privileged communications with their clients. Restatement (Third) of Law Governing Lawyers § 72 cmt. e (2000).

As mentioned above, most European countries do not recognize an attorney-client privilege applicable to communications to or from in-house lawyers. As explained below (in connection with the "legal advice" requirement), in-house lawyers face a higher burden than outside lawyers in establishing the privilege's applicability.

4. Foreigners with the Equivalent of a Law Degree

Many American courts hold that foreigners engaged in activities in their home country that parallel American lawyers' practice of law may engage in privileged conversations. VLT Corp. v. Unitrode Corp., 194 F.R.D. 8, 18 (D. Mass. 2000) (using principles of comity to protect communications with Japanese patent agents called "benrishi").


5. Law Department Staff

These assistants help facilitate communications to and from clients, and also assist the lawyers in the substantive work of providing legal advice.

However, a recent decision denied privilege protection for communications to and from a corporation's long-time in-house paralegal because the court found that the paralegal was giving her own advice, rather than assisting a lawyer.

HPD Labs., Inc. v. Clorox Co., 202 F.R.D. 410, 417 (D.N.J. 2001) (holding that the attorney-client privilege did not protect from disclosure communications between a long-time Clorox in-house paralegal and Clorox employees, because the employees were seeking the paralegal's own advice rather than working with the paralegal to obtain a lawyer's advice; rejecting Clorox's argument that the privilege applied because the paralegal worked under the general supervision of a Clorox lawyer and consulted with a lawyer if any "unusual or novel" issues arose; noting that the paralegal met with Clorox employees without a lawyer present, and did not copy a lawyer on e-mails to and from employees; ordering the production of documents reflecting communications between the paralegal and Clorox employees).

This case highlights the importance of lawyers' involvement in the pertinent communications, but so far has not started a trend.

6. Outside Lawyers

Because courts more carefully scrutinize privilege claims asserted by in-house counsel (given their multiple roles), companies may want to involve outside lawyers -- especially if they wish to protect material related to corporate investigations, or if litigation looms.

Involving outside lawyers in these circumstances: increases the odds of successfully asserting the attorney-client privilege; helps buttress the work product protection (by showing that the investigation is not in the "ordinary course" of the company's business, but instead was undertaken in anticipation of litigation); adds credibility to the investigation if a government agency suspects management wrongdoing, and therefore mistrusts in-house counsel.

7. Lawyer's Agents and Consultants

As explained above, the law’s emphasis on the intimacy of the attorney-client relationship generally means that a client's agent is outside the attorney-client relationship -- unless the agent plays some role in facilitating communications to or from the lawyer.

Because an agent's role (and the nature of a lawyer's supervisory role over that agent's activities) can change over time, some courts find that an agent's

In striking contrast to the role of a client's agent in communications between a lawyer and client, the attorney-client privilege generally protects communications to or from (or in the presence of) a lawyer's agents whose role is to help the lawyer provide legal advice to the client.


Taking this skeptical approach, courts have rejected the applicability of the attorney-client privilege to communications to and from some people claiming to have been acting on the lawyer's behalf:

One interesting debate involves lawyers' arguments that they need a public relations consultant to help them give legal advice. One court rejected that argument (Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000)), while a more recent case found that a criminal defense lawyer actually needed a public relations consultant to help give legal advice. In re Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003) (acknowledging the "artificiality" of distinguishing between public relations firms hired by the targeted corporate executive client and public relations firms hired by the lawyers, but nevertheless holding that the privilege would not have protected communications if the client had hired the public relations firm directly, even "if her object in doing so had been purely to affect her legal situation").

Lawyers cannot assure this protection simply by retaining the agent or consultant, or preparing a self-serving letter explaining that the lawyer needs the consultant's assistance to help give legal advice.

Courts look at the bona fides of the arrangement. If the consultant is not actually assisting the lawyer in providing legal advice, communications with the consultant will not deserve protection.

In a good example of how courts address this issue, the Southern District of New York found that one law firm legitimately needed an investment banking firm's help in understanding its client's financial situation (Calvin Klein Trademark Trust v. Wachner, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000)), while rejecting another law firm's claim that it needed a public relations consultant to assist it in giving legal advice to a client. Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000).

Clients and lawyers cannot "launder" an agent's or consultant's advice through the lawyer in order to protect the communications with the attorney-client privilege.

A recent case involving the well-known Hunton & Williams law firm highlights the risk of thinking that having the lawyer hire the consultant will assure privilege protection. Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship), Bankr. No. 01-12295DWS, Adversary No. 04-1012, 2005 Bankr. LEXIS 2373, at *19, *35, *14, *16, *18, *19-20 (Bankr. E.D. Pa. Nov. 17, 2005) (assessing privilege claims by a company being sued under a successor liability theory after purchasing substantially all of the assets of another company; assessing privileged and work product claims for an asset valuation prepared by an outside consultant; explaining that the proposal letter indicates that the valuation report will be used for "management planning' purposes", noting that the company's business executive sent the proposal to the company's in-house lawyer, who forwarded it to outside
counsel; quoting outside counsel’s response: “‘Curtis [outside lawyer] and/or I should have discussions with the appraiser beforehand, and if you prefer, H&W [outside counsel Hunton & Williams] can retain the appraiser directly for Smithfield’s benefit in the hope that we can keep the appraisal privileged. Even if Smithfield retains the appraiser, we can be the recipient of the appraisal, then forward it to you, which also should help the case for maintaining its as privileged.’”; using harsh language in describing the privileged claim: “Smithfield engaged in a blatant subterfuge, i.e., using H&W [outside law firm] as a mere conduit, in order to make its relationship with Valuation Research [outside consultant] appear privileged.”; “this was a ‘ghost-hiring’ on Smithfield’s behalf to create the appearance of attorney-client privilege over the appraisal, as was H&W’s subsequent receipt and ‘laying of hands’ upon the report”; “contemporaneous e-mails evidence that H&W’s involvement in Valuation Research’s work was artifice, used solely to create the appearance of the now-asserted attorney-client privilege”; “Given the artifice surrounding the Valuation Research appraisal, I find it more likely that the reference to ‘potential litigation,’ like H&W’s involvement, was added solely to give rise to a colorable claim that the report is a protected document.”; concluding that “the purpose of the redacted communication is not to obtain H&W’s legal advice or services. To the contrary, these redacted e-mail exchanges show that H&W was brought into the Valuation Research engagement solely to ‘lay hands’ upon the work of Valuation Research in an attempt to create an attorney-client privilege around what would be an otherwise an [sic] unprivileged appraisal report. The privilege clearly does not attach in this situation.” (emphases added)).

Although outside lawyers undoubtedly face more pressure to do so than in-house lawyers, all lawyers must explain to their clients that it really is “too good to be true” to assure privilege protection by having the lawyer arrange for retention of an agent or other consultant that will really be providing independent advice to the client.

Lawyers (outside or in-house) who legitimately need assistance in providing legal advice to their client should carefully document this need, and probably should retain those agents/consultants using a retainer letter that memorializes the privileged nature of the communications and the basis for the privilege.
D. Content of the Communication

1. Legal Advice

The attorney-client privilege only protects communications that relate to the request for or rendering of legal advice.

- Many lawyers overlook this key element of the attorney-client privilege.

a. The Four Types of Privileged Communications

Four types of communications can meet this standard: Two types of communications from a client to a lawyer, and two types of communications from a lawyer to a client.

(1) A client's request for legal advice from a lawyer (explicit or implicit -- a client's conveyance of a draft document to a lawyer might be an implicit request for legal advice about the draft).

(2) A client's communication to a lawyer of facts the lawyer needs to give legal advice (this might be an implicit request for legal advice itself, or accompany a request for legal advice).

(3) A lawyer's request for facts that the lawyer needs to give legal advice.

(4) A lawyer's legal advice.

In addition, the privilege can cover communications related to these types of communication.

- For example, the privilege can cover a communication from one non-lawyer company employee to another non-lawyer company employee (with no copy to or from a lawyer) if the communication discusses the collection of facts that the lawyer needs to provide legal advice, or if it paraphrases the advice that the lawyer has given to the company. Long v. Anderson Univ., 204 F.R.D. 129, 134 (S.D. Ind. 2001).

b. Misconceptions about the Privilege's Applicability

This "legal advice" element of the attorney-client privilege is another critical area in which clients' intuition will lead them in the wrong direction.

- Most corporate executives would undoubtedly vote "yes" if asked whether they could assure the privilege protection merely by putting a "privileged" legend on a document, or by sending a copy of the document to a lawyer.
These incorrect (but widely held) misperceptions can lead clients to include unfortunate statements in documents that will not deserve privilege protection in later litigation.

The privilege does not apply:

- Just because someone has written "privileged" on the document. On the other hand, some courts point to the absence of such a legend in finding the privilege inapplicable. MSF Holding, Ltd. v. Fiduciary Trust Co. Intl, No. 03 Civ. 1818 (PKL) (JCF), 2005 U.S. Dist. LEXIS 34171, at *4 (S.D.N.Y. Dec. 7, 2005) ("Neither of the e-mails in question bears any legend identifying it as an attorney-client communication or as a document prepared in anticipation of litigation. Had FTIC intended to preserve the confidentiality of these documents, it should have taken such an elementary precaution.")


- Just because a client sends a non-privileged document to a lawyer. SmithKline Beecham Corp. v. Pentech Pharms., Inc., No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281, at *4 (N.D. Ill. Nov. 5, 2001); United States v. Robinson, 121 F.3d 971, 975 (5th Cir. 1997).


c. Client’s Identity


• Some courts recognize a very narrow exception to this rule in the case of criminal cases in which the client’s identity will incriminate the client. Subpoenaed Witness v. United States (In re Subpoenaed Grand Jury Witness), 171 F.3d 511, 513, 514 (7th Cir. 1999).

d. Attorney’s Fees and Bills


• The privilege might apply to specific information on a lawyer’s bill that would reveal the substance of the lawyer's communications with the client. Montgomery County v. MicroVote Corp., 175 F.3d 296, 304 (3d Cir. 1999); Nesse v. Shaw Pittman, 202 F.R.D. 344, 356 (D.D.C. 2001).

e. Facts and Circumstances of the Communication

The attorney-client privilege normally does not protect the facts and circumstances of the privileged communication (such as where or when the communication occurred, how long meetings lasted, etc.). Cardtoons, L.C. v. Major League Baseball Ass’n, 199 F.R.D. 677 (N.D. Okla. 2001).
In some situations, such background information can provide adversaries some possible insight into the substance of privileged communications. *Miles Distribs. Inc. v. Specialty Constr. Brands, Inc.*, No. 3:04-CV-561 CAN, 2005 U.S. Dist. LEXIS 11061, at *6 (N.D. Ind. June 3, 2005) (ordering a defendant to answer the question: "After legal reviewed the letter, were changes made?", explaining that "[t]his inquiry does not encroach upon the attorney-client privilege because it is not addressing the substance of the communication, but addresses the fact of whether any changes were made.")

f. General Description of the Lawyer's Services

The attorney-client privilege normally does not cover a general description of the lawyer's services. *United States v. Legal Servs.*, 249 F.3d 1077, 1081 (D.C. Cir. 2001).

It can be very difficult to draw the line between permissible discovery requests asking for general information about a lawyer's services, and improper discovery requests that seek the substance of a client-lawyer communication.

- For instance, an adversary probably will be permitted to ask a client "did you talk with your lawyer about the contract," but probably will not be able ask "did you talk with your lawyer about the third sentence in section 6 of the contract?"

g. Historical Facts


- For instance, the stop light was either red or green -- that fact does not become privileged just because a client and a lawyer talk about the light.

However, this simple axiom has generated substantial confusion and some erroneous case law.

PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 838 A.2d 135, 167 (Conn. 2004) (refusing to protect a lawyer’s communications to a client that "merely reported back to [the client] what he had said to a third party and how the third party had responded"; because the communication was not "inextricably linked to the giving of legal advice," the memorandum did not deserve privilege protection; explaining that the memorandum was simply "a reconstitution of an event that occurred with third parties involved," and therefore failed the confidentiality component of the privilege (internal citations omitted)).

- Courts analyzing this issue properly protect the communication about the facts. In re ExxonMobil Corp., 97 S.W.3d 353 (Tex. Ct. App. 2003); VEPCO v. Westmoreland-LG&E Partners, 259 Va. 319, 326 (2000) (rejecting the argument that a letter providing factual information to a lawyer and seeking legal advice is discoverable because the adversary "is only seeking factual material, the contents of the letter, not the advice counsel gave to [clients] concerning the letter"; explaining that "the substance of the letter in this case constitutes the very matter for which legal advice was sought. There is no 'factual material' apart from the substance of the letter itself.").

- Of course, the party seeking the historical facts can engage in the normal discovery by seeking documents, deposing witnesses, etc., -- but they cannot invade the privilege protecting communications between clients and lawyers about those facts.

h. Information Obtained from Third Parties

Courts also debate whether the privilege protects communications in which lawyers relay to their clients information that the lawyers have obtained from third parties.


- Courts are more likely to protect the communications if they include some lawyer input or analysis. In re Grand Jury Proceedings, No. M-11-189, 2001 U.S. Dist. LEXIS 15646, at *98, 99, 100 n.51 (S.D.N.Y. Oct. 3, 2001).

i. Most Narrow View of the Attorney-Client Privilege

Some courts take an extremely narrow view of the "legal advice" requirement.
See, e.g., Seibu Corp. v. KPMG LLP, No. 3-00-CV-1139-X, 2002 U.S. Dist. LEXIS 906, at *9 (N.D. Tex. Jan. 18, 2002) (in assessing KPMG's lawyer-run investigation into its audit of a client, finding that KPMG had failed to establish that "any particular communication in connection with that investigation facilitated the rendition of legal advice to the client"; noting that the majority of documents relating to the investigation involved the determination of whether a KPMG partner should be required to withdraw, and noting that "[e]ven if lawyers were involved in making this decision, it is primarily an exercise of business judgment"; "The fact that counsel initiated the investigation that led to [the partner's] withdrawal does not cloak every communication made in that context with attorney-client privilege. KPMG still must prove that the communication was made for the purpose of facilitating the rendition of legal services to the client.").


Some courts parse communications so carefully that they deny privilege protection to a communication made by the client at a meeting after the lawyer rendered legal advice, holding that by definition the communication could not have been made to assist the lawyer in rendering the advice. Marsh v. Safir, No. 99 Civ. 8605 (JGK)(MHD), 2000 U.S. Dist. LEXIS 5136, at *39 (S.D.N.Y. Apr. 20, 2000).

2. Lawyers Playing Other Roles

Both inside and outside counsel can play roles other than as legal advisors, and the privilege does not protect communications to or from the lawyers acting in those other roles.


At one time, courts disagreed about the availability of privilege protection for communications to and from patent lawyers -- some courts held that patent lawyers simply acted as a "conduit" for submitting factual information to the government (Bio-Rad Labs., Inc. v. Pharmacia, Inc., 130 F.R.D. 116, 126 (N.D. Cal. 1990), while other courts found that such communications deserve privilege protection. Hydraflow, Inc. v. Enidine, Inc., 145 F.R.D. 626, 633 (W.D.N.Y. 1993).


3. Mixed Communications

a. Communications with Mixed Legal/Business Purposes

Courts often wrestle with communications that deal with both legal and business concerns.


Courts sometimes point to wide circulation of privileged communication in finding that the communication primarily related to business (rather than legal) matters, and thus did not deserve privilege protection at all. de Espana v. Am. Bureau of Shipping, No. 03 Civ. 3573 (LTS) (RLE), 2005 U.S. Dist. LEXIS 33334, at *6 (S.D.N.Y. Dec. 14, 2005) (assessing a privilege claim; noting that the email recipients included a number of business executives; "The inclusion of ABS employees outside the legal department as recipients further support [sic] the conclusion that the e-mails contain business advice."); Lyondell-Citgo Refining, LP v. Petroleos de Venezuela, S.A., No. 02 Civ. 0795 (CBM), 2004 U.S. Dist. LEXIS 26076, at *3 (S.D.N.Y. Dec. 24, 2004) (explaining that "the inclusion of people outside the legal department in the recipient list further supported the conclusion that the email contained business advice.")
A Guide to the Attorney-Client Privilege and Work Product Doctrine For Tax Practitioners

McGuireWoods LLP
C. Bell
T. Spahn
(9/25/07)

- One court analyzed this issue by comparing the small number of executives receiving the privileged communications to the total number of the company's employees -- which weighed against a finding that that the disclosure indicated a non-privileged purpose. SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 478 (E.D. Pa. 2005) ("Plaintiff has identified with specificity nearly every person who received each document . . . Each document purportedly served the purpose of either securing or providing legal advice or legal services -- they were not routine business communications . . . None of these documents was widely distributed. The recipient lists were limited to between five and twenty-five individuals within a 50,000-person organization.").

b. Communications with Mixed Components

If a communication contains both privileged and non-privileged components, the privilege protects only the former.


- As a practical matter, litigants seem to use such redaction only in documents containing discrete portions that obviously lend themselves to such a process (such as agendas or minutes of meetings with clearly separate sections that can be considered individually).

4. Special Rules for In-House Lawyers

Because in-house lawyers often provide business or other nonlegal advice, most courts apply a heightened scrutiny to communications to or from in-house counsel. United States v. Dakota, 197 F.3d 821, 825 (6th Cir. 1999). B.F.G. of Ill., Inc. v. Ameritech Corp., No. 99 C 4604, 2001 U.S. Dist. LEXIS 18930, at *15, 16, 16-17, 21 (N.D. Ill. Nov. 8, 2001) (explaining that the court "will not tolerate the use of in-house counsel to give a veneer of privilege to otherwise non-privileged business communications"); recognizing that there is "a particular burden" on a corporation to demonstrate why communications with an in-house lawyer "deserve protection and are not merely business documents"; ordering certain documents to be produced and awarding attorneys' fees based on an incomplete and inaccurate privilege log prepared by the Chicago law firm of Winston & Strawn for its client Ameritech); Amway Corp. v. Procter & Gamble Co., No. 1:98cv 726, 2001 U.S. Dist. LEXIS 4561, at *17-18 (W.D. Mich. Apr. 3, 2001) ("The mere fact that a certain function is performed by an individual with a law degree will not render the communications made to the individual privileged. . . . Where, as here, in-house counsel appears as one of many recipients of an otherwise business-related memo, the federal courts place a heavy burden on
the proponent to make a clear showing that counsel is acting in a professional legal capacity and that the document reflects legal, as opposed to business, advice.

- In undertaking this analysis, courts sometimes look at whether the corporate employee possessing a law degree works as part of the corporation's law department. *Boca Investerings P'ship v. United States*, 31 F. Supp. 2d 9, 12 (D.D.C. 1998) ("There is a presumption that a lawyer in the legal department or working for the general counsel is most often giving legal advice, while the opposite presumption applies to a lawyer... who works for the Financial Group or some other seemingly management or business side of the house. ... A lawyer's place on the organizational chart is not always dispositive, and the relative presumption therefore may be rebutted by the party asserting the privilege").

- Those with law degrees working outside the law department will have even a more difficult time proving that their communications deserve privilege protection. *Boca Investerings P'ship v. United States*, 31 F. Supp. 2d 9, 12 (D.D.C. 1998).

5. Crime/Fraud


- Of course, the privilege can cover communications between clients and lawyers about past crimes, frauds or other wrongdoing (under the right circumstance).

- The crime-fraud "exception" (which really is not an exception at all) applies only to communications about future wrongdoing.

Most courts require the party seeking to overcome the attorney-client privilege by relying on the crime-fraud exception to make some level of an independent showing of probable cause that a crime or other covered wrongdoing has been committed or was planned, and that the privileged information related to the crime or wrongdoing. *In re Grand Jury Subpoena*, 223 F.3d 213, 217, 219 (3d Cir. 2000); *United States v. Under Seal (In re Grand Jury Proceedings)*, 33 F.3d 342, 348 (4th Cir. 1994); *Riggs Nat'l Bank v. Andrews (In re Andrews)*, 186 B.R. 219, 222 (Bankr. E.D. Va. 1995); *X Corp. v. Doe*, 805 F. Supp. 1298, 1307 (E.D. Va. 1992); *Cogdill v. Commonwealth*, 219 Va. 272, 276 (1978).

- The crime-fraud exception does not apply "simply because privileged communications would provide an adversary with evidence of a crime or
The court also recognized a separate (lower) level of proof required to justify an in-camera review of the privileged communications to determine if the crime-fraud exception applies. In re Grand Jury Proceedings, 417 F.3d 18, 23 (1st Cir. 2005) (noting that many decisions focus on the level of proof necessary to justify a court's in camera review of the communications at issue, rather than on the standard required to actually strip away the privilege; the former analysis generally requires a "prima facie" finding that the otherwise privileged communications involved a future crime, while the latter requires that "there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud.")

Judicial discussion of the crime-fraud exception often involves one of two issues. First, courts debate what wrongdoing can trigger the crime-fraud exception.

- All courts apply the doctrine to crimes. Union Camp Corp. v. Lewis, 385 F.2d 143, 144 (4th Cir. 1967).

Second, courts disagree about the relationship required between the wrongdoing and the otherwise privileged communication.

- Some courts merely require some connection between the wrongdoing and the communication (United States v. Paz, 124 F. App’x 743, 746 (3d Cir. 2005) (explaining that the crime fraud exception applied if the otherwise privileged communication was "related" to the criminal activity); In re Grand Jury Proceeding Impounded, 241 F.3d 308 (3d Cir. 2001); while most courts insist that the otherwise privileged communication have played a role in
furthering the crime or fraud. Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 133 (D.D.C. 2005) (requiring that the client "made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act" (internal citation omitted). In re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 642 (8th Cir. 2001); Renner v. Chase Manhattan Bank, No. 98 Civ. 926 (CSH), 2001 U.S. Dist. LEXIS 17920, at *35, 36 (S.D.N.Y. Nov. 1, 2001).

- Significantly, most courts do not require that the lawyer realize that his or her communication is assisting the wrongdoing. In re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 642 (8th Cir. 2001).

Some courts' expansive application of the crime-fraud exception had threatened to swallow the attorney-client privilege, but a recent case took a welcome narrow view -- requiring that a securities law plaintiff present some proof of fraudulent conduct, and criticizing the lower court for failing to conduct an in-camera review of the pertinent documents. In re BankAmerica Corp. Sec. Litig., 270 F.3d 639 (8th Cir. 2001).
E. Context of the Communication

1. Expectation of Confidentiality

a. Basis of the Requirement

As discussed above, the attorney-client privilege depends on the intimacy of the attorney-client relationship, and exists only to the extent that the client expects the communication to remain confidential within that attorney-client relationship. *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001).

b. Treating Privileged Communications Like the "Crown Jewels"

Clients and lawyers must remember that the privilege will survive only if they treat privileged communications very carefully.

- One court used a colorful but accurate phrase when discussing how careful clients and their lawyers must be. *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) ("[I]f a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels --if not crown jewels.").

Courts continue to emphasize this concept, even if they do not use that phrase.

- *Chase v. City of Portsmouth*, Civ. No. 2:05cv446, 2006 U.S. Dist. LEXIS 29294, at *20 (E.D. Va. Apr. 20, 2006) (holding that a City Attorney's letter to the City Council and others deserved privilege protection; but finding that the City had lost the privilege protection by not treating the letter carefully enough -- pointing to the transmission of the letter in unsealed plain envelopes and through use of a fax machine in a City Council member's home (even pointing to the lack of a written policy on the treatment of privileged documents, and to the lack of any training programs on the privilege); also finding that the letter deserved work product protection, which can survive "limited disclosure to third parties" and therefore continued to protect the letter).

c. Relationship to the Waiver Doctrine

The "expectation of confidentiality" requirement is related to the waiver doctrine (discussed below).

- Communications made with no expectation of confidentiality deserve no privilege protection from the beginning, while privileged communications or documents may later lose their privilege protection if they are shared
with others (the privilege having been "waived"). *Griffith v. Davis*, 161 F.R.D. 687, 694 (C.D. Cal. 1995).

- The main difference between these two concepts arises if the communication is shared with someone outside the attorney-client privilege. This sharing of privileged communications outside the attorney-client relationship can cause a **subject matter waiver** - requiring the disclosure of additional documents on the same subject matter (this is explained below). This sharing of non-privileged documents does not carry this additional risk. *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001).

**d. Communications in the Presence of Third Parties**


Courts have held that the presence of third parties (outside the intimacy of the attorney-client relationship) can prevent the privilege from ever arising.


- Courts sometimes apply this principle in surprising situations. *Black v. State*, 920 So. 2d 668 (Fla. Dist. Ct. App. 2006) (rejecting a convicted robber's appeal, which was based on the court's admission of the robber's
statements during a telephone call he placed from jail to his lawyer; noting that the robber's sister placed the call and then stayed on the line — thus destroying any chance of privilege); Grenier v. City of Norwalk, No. X06CV0001694835, 2004 Conn. Super. LEXIS 3719, at *2 (Conn. Super. Ct. Dec. 16, 2004) (holding that a plaintiff's lawyer waived the privilege by speaking to his terminally ill client in front of a videographer setting up to videotape a statement by the client; noting that "[t]he attorney could have easily and effectively communicated with his client outside of [the videographer's] presence").

Some courts have held that otherwise privileged communications occurring in the presence of third parties lose the protection only if someone actually overheard the privileged communication. Ashkinazi v. Sapir, No. 02 CV 0002 (RCC), 2004 U.S. Dist. LEXIS 14523, at *4 (S.D.N.Y. July 27, 2004).

2. Expectation of Disclosure

The mirror-image of the "expectation of confidentiality" is of course an expectation that a communication will be disclosed outside the intimate attorney-client relationship.

It should go without saying that communications the client expects to reveal to others do not deserve protection under the attorney-client privilege. Restatement (Third) of Law Governing Lawyers § 71 cmt. d (2000).

- This includes such common documents as securities filings, offering for proxy materials, etc. In re Grand Jury Proceedings, 220 F.3d 568, 571-72 (7th Cir. 2000).

Some courts erroneously apply the "expectation of disclosure" principle beyond just the documents intended to be revealed — stripping away privilege protection for all related materials.

This concept does not make much sense, but some state courts and federal courts have relied on this principle to trip away privilege protection.

Courts taking what seems to be a more common-sense view apply the privilege to any information that is not ultimately disclosed. Schenet v. Anderson, 678 F. Supp. 1280 (E.D. Mich. 1988).

3. Drafts

Courts' analysis of the "expectation of confidentiality" element of the attorney-client privilege (and some courts' misapplication of that issue) can be critical when courts consider the privilege protection applicable to internal drafts of
documents whose final version will be disclosed outside the attorney-client relationship.


Although it should make no difference from a conceptual standpoint, lawyers might want to consider communicating their thoughts about drafts in separate documents directed to their clients.

- For example, a lawyer reviewing a draft proxy statement or a client’s affidavit intended to be used in litigation should consider conveying legal advice about those documents in a memorandum to the client that articulates the privileged nature of the communication and has a proper legend on it.

- A court conducting an in camera review of documents included on a privilege log in later litigation might be more inclined to protect such a document, while the same court might misapply the "expectation of confidentiality" principle and order the production of a draft of the document itself, which contains a lawyer's handwritten note scribbled on the margin -- even if the handwritten marginal note contains the same substantive legal advice as the stand-alone memorandum.

4. Common Interest Doctrine

The "joint defense" or "common interest" doctrine is in some ways an anomaly in the law of privilege.
a. History of the Doctrine

Starting with an old Virginia case (Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 841-43 (1871)), court carved out an exception to both the "expectation of confidentiality" and the "waiver" concepts.

- The exception permitted certain outsiders who were not within the intimacy of the attorney-client relationship to engage in communications that were privileged from the beginning, or later share privileged communications -- without causing a waiver.

- Those originally included within this narrow exception were criminal co-defendant who wanted to cooperate with their fellow co-defendants in preparing a cooperative defense to the government's criminal charges.

b. Expansion to the "Common Interest" Doctrine

Starting with what was called the "joint defense" doctrine, court eventually expanded this exception -- most courts ultimately calling it the "common interest" doctrine to represent this expanded concept. In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990) (noting that what was called the "joint defense privilege" is "more properly identified as the 'common interest rule'" (citing United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989))).

c. Difference between the Common Interest Doctrine and Multiple Representations

Although some courts get it wrong, the "common interest" doctrine is fundamentally different from the "multiple representation" situation discussed above -- which involves the same lawyer representing more than one client on the same matter.

- In contrast, the "common interest" doctrine applies to communication among different clients with different lawyers. Restatement (Third) of Law Governing Lawyers § 76 cmt. e (2000).

- Surprisingly, some courts use the term "common interest doctrine" when referring to multiple clients retaining the same lawyer -- although that situation involves a joint representation, not a "common interest" arrangement. Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 292, 294 (4th Cir. 2004).
d. True Nature of the Common Interest Doctrine

Properly considered, the "common interest" doctrine is not a separate privilege or protection -- it instead merely eliminates what would be the ill effects of the "expectation of confidentiality" element (which would otherwise defeat the privilege ab initio if those outside the intimate attorney-client relationship participate in the original communication) or the "waiver" element (which would otherwise destroy the privilege if protected communications are shared outside the intimate attorney-client relationship). **McNally Tunneling Corp. v. City of Evanston**, No. 00 C 6979, 2001 U.S. Dist. LEXIS 170902, at *6 (N.D. Ill. Oct. 16, 2001).

e. Courts Taking a Broad View of the Common Interest Doctrine

Courts taking a broad view of the common interest doctrine protect communications between co-defendants and co-plaintiffs, whether or not litigation has actually begun, and whether or not the clients sharing the common interests also have some adverse interests. **Restatement (Third) of Law Governing Lawyers** § 76 cmt. e (2000); **United States v. Moscony**, 927 F.2d 742, 753 (3d Cir.), cert. denied, 501 U.S. 1211 (1991); **United States v. Zolin**, 809 F.2d 1411, 1417 (9th Cir. 1987); **Prevue Pet Prods., Inc. v. Avian Adventures, Inc.**, 200 F.R.D. 413, 417 (N.D. Ill. 2001); **Wsol v. Fiduciary Mgmt. Assocs., Inc.**, No. 99 C 1719, 1999 U.S. Dist. LEXIS 19002, at *14-15 (N.D. Ill. Dec. 6, 1999).

f. Courts Taking a Narrow View of the Common Interest Doctrine

Many courts take a narrow view of the common interest doctrine, and the trend appears to be in favor of narrowing the doctrine's reach. **United States v. Aramony**, 88 F.3d 1369, 1392 (4th Cir. 1996), cert. denied, 520 U.S. 1239 (1997).

First, courts are increasingly likely to find that the "common interest" is commercial rather than legal, thus rendering the doctrine inapplicable.

- In one celebrated case, a well-known New York law firm representing a bank in a large merger shared privileged communications with J. P. Morgan and Goldman Sachs, who acted as the bank's investment advisors. **Stenovitch v. Wachtell, Lipton, Rosen & Katz**, 756 N.Y.S.2d 367 (N.Y. Sup. Ct. 2003). When investors sued the bank, the law firm attempted to rely on the "common interest" doctrine to protect the communication shared with the investment advisors -- who otherwise would have been the kind of client agents who (as explained above) are outside the attorney-client relationship.
A New York court rejected the common interest argument, and found that the law firm had waived the bank's privilege by sharing protected communications with investment advisors.

Even worse, the court found that the sharing caused a subject matter waiver -- thus requiring the bank to disclose even more protected communications to the private plaintiffs (the concept of the "subject matter waiver" is discussed below).

Second, courts are increasingly requiring that participants in a common interest agreement be involved in or anticipate litigation before applying the doctrine.


Some courts require that litigation be a "palpable reality." *In re Santa Fe Intl Corp.*, 272 F.3d 705, 714 (5th Cir. 2001) (internal quotations and citation omitted).

One case required the same sort of "anticipation of litigation" necessary for the work product doctrine protection (discussed below) before it recognized the efficacy of a "common interest" agreement. *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 390 (M.D.N.C. 2003); *American Legacy Found. v. Lorillard Tobacco Co.*, Civ. A. No. 19406, 2004 Del. Ch. LEXIS 157 at *16 (Del. Ch. Nov. 3, 2004) (finding that a Wilmer Cutler client had not waived the attorney-client privilege covering that law firm's advice by sharing the advice with the client's advertising agency, because the client and the agency could "foresee potential litigation" and therefore could rely on the "common interest doctrine").

g. Privileged Nature of the Common Interest Agreement Itself


h. Later Adversity Among Common Interest Agreement Participants

Later adversity between common interest participants can have differing effects, depending on the degree of adversity.
First, litigation adversity among participants in a common interest agreement normally deprives any of the participants from withholding privileged communications from their adversary. United States v. Agnello, 135 F. Supp. 2d 380 (E.D.N.Y.), aff'd, 16 F. App'x 57 (2d Cir. 2001); Hillerich & Bradsby Co. v. MacKay, 26 F. Supp. 2d 124, 127 (D.D.C. 1998).

Second, less serious adversity between common interest participants generally will not destroy each participant's right to "veto" another participant's attempt to reveal protected communications.

- For instance, a company entering into a common interest agreement with an executive might lose the sole power to control the privilege if the company and executive later become adversaries, but not begin litigating against each other. Under Seal v. United States (In re Grand Jury Subpoena), 415 F.3d 333 (4th Cir. 2005) (finding that the executive hoping to veto the company's disclosure of privileged communications to the government had not established the existence of a common interest agreement between the company and executive).

- A law firm representing one member of a common interest agreement consortium may be prohibited by the conflicts of interest rules from later taking positions adverse to another member, absent a prospective or contemporaneous consent after full disclosure. GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1581 (N.D. Ill. 1996).

- One well-known law firm recently lost a battle involving this issue. In re Gabapentin Patent Litig., 407 F. Supp. 2d 607, 615 (D.N.J. 2005) (disqualifying Kaye Scholer from representing the plaintiff Pfizer in a large case, because Kaye Scholer had hired two lawyers who had previously worked at another firm for one of the defendants in the case; noting that two lawyers had obtained their former client's consent for Kaye Scholer to represent the plaintiff, and that Kaye Scholer had completely screened them from the firm's representation of Pfizer, but concluding that the two lawyers Kaye Scholer hired had a "fiduciary and implied attorney-client relationship" with the other defendants who had been part of a common interest arrangement, so that they could seek Kaye Scholer's disqualification from representing the plaintiff).

### Dangers of Common Interest Agreements

Governmental investigators or prosecutors often view with suspicion any cooperation between companies and their employees, so company lawyers handling criminal matters should be very careful when entering into joint defense agreements with company employees.
• Even in civil litigation, if the applicable privilege law does not protect the common interest agreement itself, there is some danger that an adversary might rely upon the agreement to bolster some conspiracy claim.

In appropriate circumstances, company lawyers should arrange for a written common interest agreement with company employees, affiliates, or third parties with whom the company might share a common legal interest.
F. Use: Avoiding Waiver of the Privilege

1. General Rules

Lawyers play an especially important role in avoiding waiver of the attorney-client privilege, because clients cannot be expected to understand some of the waiver doctrine's subtleties.

Even some of the seemingly basic waiver rules can create complications.

For instance, a waiver usually occurs only if the disclosure is voluntary -- not if it is compelled. Restatement (Third) of Law Governing Lawyers § 79 cmt. g (2000); Amway Corp. v. Procter & Gamble Co., No. 1:98cv 726, 2001 U.S. Dist. LEXIS 4561 (W.D. Mich. Apr. 3, 2001).

- However, a litigant seeking to avoid a finding of waiver might argue that a hastily ordered document production amounted to a compelled disclosure (Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 650-51 (9th Cir. 1978)), or contend that the production of a privileged document was "compelled" because they would have lost a fight over privilege. Urban Box Office Network, Inc. v. Interfase Managers, L.P., No. 01 Civ. 8854 (LTS) (THK), 2004 U.S. Dist. LEXIS 21229 (S.D.N.Y. Oct. 19, 2004) (rejecting this argument).

Although all courts agree that the privilege's proponent has the burden proof, courts have debated who has the burden of proving waiver.

- Some courts hold that privilege's proponent must prove lack of waiver (Wells v. Liddy, 37 F. App'x 53, 65 (4th Cir. 2002)), while other courts place the burden on the party challenging the privilege. Times-Picayune Pub. Corp. v. Zurich Am. Ins. Co., Civ. A. No. 02-3263 Section "M" (2), 2004 U.S. Dist. LEXIS 1027, at *26 (E.D. La. Jan. 26, 2004) (holding that "[o]nce a claim of privilege has been established, the burden of proof shifts to the party seeking discovery to prove any applicable exception to the privilege, such as waiver").

Many clients (and even lawyers) are surprised by the attorney-client privilege's fragility.

- The attorney-client privilege is so fragile that Martha Stewart waived the attorney-client privilege covering an e-mail to her lawyer by later sharing the e-mail with her own daughter. United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

- Voluntarily disclosing privileged communications to someone outside the intimacy of the attorney-client relationship generally causes a waiver even if
the privilege's owner and the third party enter into a strict confidentiality agreement -- which may create a contractual obligation to keep the communications secret, but which does not prevent destruction of the privilege protection. Urban Box Office Network, Inc., v. Interfase Managers, L.P., No. 01 Civ. 8854 (LTS) (THK), 2004 U.S. Dist. LEXIS 21229 (S.D.N.Y. Oct. 19, 2004). This means that others who are not bound by the contractual agreement generally may seek access to the shared communications that were previously privileged.

2. Who Can Waive the Privilege

One key question is of course who can waive a corporation's attorney-client privilege -- since many agents of the corporation deal with communication whose privilege is owned by the intangible institution.

a. Current Company Employees

Some courts hold that only a company's management may waive the attorney-client privilege. United States v. Agnello, 135 F. Supp. 2d 380, 384-85 (E.D.N.Y. 2001).


- Even these courts hold that a disloyal employee may not waive the corporation's privilege by surreptitiously revealing privileged information. In re Grand Jury Proceedings, 219 F.3d 175 (2d Cir. 2000).

b. Former Company Employees


- As discussed above, courts have debated whether corporations can deny requests by now-adverse former executives or directors for access to privileged communications to which they had access while working for the corporation.

- Of course, finding that former directors or executives are entitled to see privileged documents to which they had access while at the company does not give them the right to waive the company's privilege.
c. Lawyers

Most courts hold that a company's lawyer may waive the privilege. *Restatement (Third) of Law Governing Lawyers* § 78 cmt. c (2000).

d. Jointly Represented Clients


- This is one of the reasons why lawyers should rarely (if ever) enter into a joint representation of a company and an employee on the same matter. *Under Seal v. United States (In re Grand Jury Subpoena)*, 415 F.3d 333 (4th Cir. 2005) (finding that company lawyers did not jointly represent an executive, so that the company maintained sole ownership of the privilege and did not need the executive's permission to provide the government access to privileged communications with the executive).

If the formerly jointly represented clients become litigation adversaries, either of the clients generally can use the privileged communications against their now-adversary. *Restatement (Third) of Law Governing Lawyers* § 75 cmt. d (2000).

e. Common Interest Agreement Participants

Analyzing who can waive the privilege becomes more complicated in situations where clients share a lawyer or have entered into a common interest arrangement.

First, no single client who is jointly represented, and no single member of a common interest arrangement may waive the privilege covering joint communications -- all of the clients or all of the common interest participants generally must join in any waiver. *Restatement (Third) of Law Governing Lawyers* § 76 cmt. g (2000); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 556 (8th Cir. 1990).

Second, if jointly represented clients become adversaries in a future proceeding, either one may generally waive the privilege that would otherwise cover their joint communications with their common lawyer. *Restatement (Third) of Law Governing Lawyers* § 75 & cmt. d (2000); *FDIC v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000).
• The former jointly represented client might even be given access to communications between the other client and the common lawyer to which the client was not privy at the time.


• Unlike a joint defense arrangement, a common interest agreement participant in such a situation will not be given access to private communications that the other participants had with their own lawyers.

• However, each participant's lawyer's receipt of confidential information as part of the common interest arrangement generally will disqualify the lawyer from adversity to other participants, absent a prospective or contemporaneous consent. GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1581 (N.D. Ill. 1996).

3. Express Waiver Outside the Company

Sharing privileged communications outside the company normally does not amount to a waiver if they are shared with other companies in the same corporate family or under some common interest agreement. Tenneco Auto. Inc. v. El Paso Corp., Civ. A. No. 18810-NC, 2001 Del. Ch. LEXIS 138, at *5-6 (Del. Ch. Nov. 5, 2001); Strougo v. BEA Assocs., 199 F.R.D. 515 (S.D.N.Y. 2001).

On the other hand, common sense would dictate that voluntarily sharing privileged communications outside the corporation risks waiver of the privilege. Such disclosure can occur intentionally or inadvertently.

a. Intentional Disclosure

The intentional sharing privileged communications outside the company normally waives the attorney-client privilege.

• One court used a trite but useful phrase in assessing waiver. United States v. Morrell-Corrada, 343 F. Supp. 2d 80, 88 (D.P.R. 2004) ("Where a client chooses to share communications between himself and his lawyer outside the 'magic circle' of secretaries and interpreters, the courts have usually found a waiver of the privilege.").
Courts have found that clients (or their lawyers) sharing privileged communications with the following third parties causes a waiver:

- investment banker (United States v. Ackert, 169 F.3d 136 (2d Cir. 1999);
- ERISA plan administrator (found to be a fiduciary acting on behalf of the beneficiaries, and not a company representative) (Lewis v. UNUM Corp. Severance Plan, 203 F.R.D. 615 (D. Kan. 2001));
- accountant Strougo v. BEA Assocs., 199 F.R.D. 515, 522 (S.D.N.Y. 2001);
- United States ex rel. Mayman v. Martin Marietta Corp., 886 F. Supp. 1243, 1249 n.10 (D. Md. 1995);

Some courts are surprisingly harsh in situations that many companies might face. Universal City Dev. Partners, Ltd. v. Ride & Show Eng’g, Inc., 230 F.R.D. 688, 698 (M.D. Fla. 2005) (assessing a litigant's efforts to obtain the return of inadvertently produced privileged documents; noting that the litigant had sent the documents to an outside copy service after putting tabs on the privileged documents, and had directed the copy service to copy everything but the tabbed documents and send them directly to the adversary; noting that the litigant had not reviewed the copy service's work or ordered a copy of what the service had sent the adversary; emphasizing what the court called the "most serious failure to protect the privilege" -- the litigant's "knowing and voluntary release of privileged documents to a third party -- the copying service -- with whom it had no confidentiality agreement. Having taken the time to review the documents and tab them for privilege, RSE's counsel should have simply pulled the documents out before turning them over to the copying service. RSE also failed to protect its privilege by promptly reviewing the work performed by the outside copying service."; refusing to order the adversary to return the inadvertently produced documents).

Clients of large and prestigious law firms have been on the losing end of such waiver analyses. American Legacy Found. v. Lorillard Tobacco Co., C.A. No. 19406, 2004 Del. Ch. LEXIS 157 (Del. Ch. Nov. 3, 2004) (holding that Wilmer Cutler's client had waived the privilege by sharing the law firm's advice with its public relations firm; rejecting the law firm's argument that the
public relations firm's employees were the "functional equivalent" of the client's employees, or that they were agents of the client; concluding that the firm's client and the public relations firm did not share the necessary "common interest," because the relationship between them was not "supervised by counsel"); Stenovitch v. Wachtell, Lipton, Rosen & Katz, 756 N.Y.S.2d 367 (N.Y. Sup. Ct. 2003) (rejecting Wachtell, Lipton's argument that its bank client and various investment advisors shared a "common interest"; holding that disclosure of privileged communications to the investment advisors waived the client's privilege, and finding a subject matter waiver).

Clients or their lawyers generally waive the privilege by sharing privileged communications even during such legally encouraged activities such as settlement talks. Bausch & Lomb Inc. v. Alcon Labs., Inc., 914 F. Supp. 951 (W.D.N.Y. 1996).


- This is another way that the privilege differs dramatically from the work product doctrine -- as explained below, a confidentiality agreement can make all the difference when sharing work product.

Worse yet, waiving the privilege as to one third party outside the intimate attorney-client relationship almost always waives it as to everyone else -- meaning that the protection disappears forever.

Two recent lines of cases are consistent with this general approach, but might surprise some clients.


- Only a few cases hold out any hope for avoiding a waiver when sharing privileged communications with the government. In re Natural Gas Commodities Litig., 232 F.R.D. 208, 211 (S.D.N.Y. 2005) (assessing the waiver effect of a company disclosing to the government documents...
generated in the course of an internal investigation; "Pursuant to the Second Circuit's holding in Steinhardt, courts in this district have held that voluntary disclosure to government agencies pursuant to an explicit non-waiver agreement does not waive the attorney or representative work product or attorney-client privilege. . . . Plaintiffs argue that the Order should be set aside because a majority of Circuits have held that disclosure of privileged materials constitutes waiver even where disclosure was pursuant to a non-waiver agreement. . . . However, Magistrate Judge Peck correctly held that the Court is bound by Second Circuit authority and is not free to adopt the opinion of other circuits."; finding no waiver).


- Clients might also be surprised by the waiver implications of sharing work product material with the government and auditors (this is discussed below).

Courts disagree about the waiver implications of intentionally sharing privileged communications as part of a corporate transaction.


b. Inadvertent Disclosure

The inadvertent sharing of privileged communications outside the company can also waive the privilege. Jasmine Networks, Inc. v. Marvell
Semiconductor, Inc., 12 Cal. Rptr. 3d 123, 125, 132 (Cal. Ct. App. 2004) (finding that two lawyers and a client for one company waived the attorney-client privilege by failing to hang up a speaker phone when leaving a message on another company's executive's voicemail -- and accidentally leaving a message on that voicemail about the possibility that company executives "might go to jail" for wrongdoing that the company planned); Bower v. Weisman, 669 F. Supp. 602, 606 (S.D.N.Y. 1987) (finding that leaving a privilege document on a table in a hotel room in which another person would be staying amounts to a waiver).

Such inadvertent sharing can occur because of a mistake in transmission of privileged communications (outside the litigation setting).

- Such inadvertent transmission might create an ethical duty by the recipient to return the communication without reading it.
- The ABA first recognized this duty in ABA LEO 368 (11/10/92).
- The ABA has now backed away from its strict approach, and ABA Model Rule 4.4(b) now indicates that a lawyer receiving a document who "knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender" -- there is no per se requirement if the recipient returns the inadvertently sent document.
- As a result of these changes in the ABA Model Rules, the ABA recently took the very unusual step of withdrawing the earlier ABA LEO that created the "return unread" doctrine. ABA LEO 437 (10/1/05) (citing February 2002 ABA Model Rules changes, the ABA withdraws ABA LEO 368, and holds that ABA Model Rule 4.4(b) governing the conduct of lawyers who receive inadvertently transmitted privileged communications from a third party "only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."; instead, the lawyer must abide by a court's determination of what to do with the privileged material).

Some bars have recently wrestled with the duties of lawyers sending and receiving "metadata" (data hidden in documents that are transmitted electronically, but which allow the recipient to determine who made changes to the document, when the changes were made, what changes were proposed and rejected, etc.)

- The New York State Bar has held that lawyers receiving electronic documents with metadata may not "look behind" the document to "mine" the metadata. New York LEO 749 (12/14/01).
Interestingly, the New York State Bar followed up this legal ethics opinion with New York LEO 782 (12/8/04), indicating that lawyers have an ethical duty to "use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."

No state bar seems to have followed New York.

The Florida Bar Board of Governors recently expressed its sentiment that the recipients of documents containing metadata should not "mine" the metadata.

The Florida Bar News provided an interesting description of the Board of Governors' vote: "President-Elect Hank Coxe gave the board a graphic example of what that means. He said a senior partner in his firm was working on a brief which was requested by another firm for a case it was working on. When the partner finished the brief, he offered to fax it, but the other firm asked that it be e-mailed. That firm then mined it for metadata. What they got, Coxe said, was a history showing every change that had been made to the document, as well as who had worked on it. At one point, the client had been e-mailed for input and the client had replied by e-mail. Both had been attached to the document as it was being prepared and later deleted; and both communications were recovered by the other law firm." (emphasis added).

To be sure, the Florida Bar Board member who made the motion to adopt such a sentiment did not articulate a very useful intellectual underpinning for his position.

"I have no doubt that anyone who receives a document and mines it . . . is unethical, unprofessional, and un-everything else,' said board member Jake Schickel, who made the motion that the board express its disapproval at the practice." The Florida Bar News.

The same article provided another interesting insight, noting that: "several board members said that they hadn’t heard of it [metadata] until it came up at their December [2005] meeting."

Thus, the issue clearly is driven by generational differences.

Clients or lawyers may also inadvertently disclose privileged communications to third parties as part of a litigation-related document production.

In such situations, some courts find that such inadvertent sharing always waives the privilege (In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir.)
A Guide to the Attorney-Client Privilege and Work Product Doctrine
For Tax Practitioners

C. Bell
T. Spahn
(9/25/07)


- This middle approach looks at the procedures established for the document review, whether the procedures were followed, the number of documents reviewed and the privileged documents inadvertently revealed, the speed with which the producing party requested the document's return, and the breadth of the disclosure before the request.

Most courts seem to honor what are called "non-waiver" agreements entered into between litigants -- which require the return of any accidentally produced privileged documents.

- However, one recent case found that a non-waiver agreement requiring the signatories to return "inadvertently produced" privileged documents during a commercial litigation case did not require the return of documents that were sent to the other side through "gross negligence." VLT, Inc. v. Lucent Techs., Inc., Civ. A. No. 00-11049-PBS, 2003 U.S. Dist. LEXIS 723 (D. Mass. January 21, 2003).

- Even worse, the court found that the "grossly negligent" production of some privileged documents created a subject matter waiver. Id.

Such non-waiver agreements make sense in situations where all of the possibly interested parties are involved in the litigation and can sign the agreements (as in many commercial litigation matters).

- They do not make much sense in "pattern litigation" such as products liability and employment discrimination cases.

- This is because the agreement obviously only binds the signatories, and does not prevent another plaintiff from arguing waiver (even if the unintentionally produced document is returned to the company).

4. Express Waiver Inside the Company

At first blush, it might seem that the Upjohn approach (described above) means that all company employees (at any level) are within the intimate attorney-client relationship and therefore may share privileged communications without causing a waiver.
• However, the Upjohn rule only applies to communications between the company's lawyer and those employees with knowledge that the lawyer must obtain to provide legal advice to the company.

• Thus, Upjohn has a built-in "need to know" test.

Company employees might waive the attorney-client privilege by sharing communications inside the company -- beyond those with a "need to know."

• Perhaps the best judicial analysis of the "need to know" standard explained it as follows: "[t]he 'need to know' must be analyzed from two perspectives: (1) the role in the corporation of the employee or agent who receives the communication; and (2) the nature of the communication, that is, whether it necessarily incorporates legal advice. To the extent that the recipient of the information is a policymaker generally or is responsible for the specific subject matter at issue in a way that depends upon legal advice, then the communication is more likely privileged. For example, if an automobile manufacturer is attempting to remedy a design defect that has created legal liability, then the vice president for design is surely among those to whom confidential legal communications can be made. So, too, is the engineer who will actually redesign the defective part: he or she will necessarily have a dialogue with counsel so that the lawyers can understand the practical constraints and the engineer can comprehend the legal ones. By contrast, the autoworker on the assembly line has no need to be advised of the legal basis for a charge [sic] in production even though it affects the worker's routine and thus is within his or her general area of responsibility. The worker, of course, must be told what new production procedure to implement, but has no need to know the legal background." Verschoth v. Time Warner Inc., No. 00 Civ. 1339 (AGS) (JCF), 2001 U.S. Dist. LEXIS 3174, at *6-7 (S.D.N.Y. Mar. 22, 2001).

• Some of the cases dealing with such waiver implications of intra-corporate sharing might seem harsh. For instance, one court held that a corporation's distribution of a privileged memorandum to only six corporate employees created "serious doubts" as to its privileged nature. Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 696 n.6 (E.D. Va. 1987).

As with the "expectation of confidentiality" and "waiver" rules governing the disclosure of documents to other consultants and agents, this waiver principle would probably surprise most company executives -- who want to keep various other executives or employees "in the loop" and therefore might share privileged communications with them.
• This danger is most acute when employees communicate via e-mail (because e-mail is so easy to circulate, and because employees often use outdated recipient lists).

As explained above, courts sometimes point to an overly wide circulation of a privileged communication within a company as demonstrating that the communication was business-related and therefore did not deserve privilege protection ab initio.

• Some courts have noted in the abstract that such an overly wide circulation might cause a waiver, but few if any courts actually make such a finding -- instead pointing to the overly wide circulation as demonstrating the lack of any privilege protection at all.

Lawyers should train their clients to treat privileged communications as the company's "crown jewels" -- not even sharing them with others within the company, unless they clearly have a "need to know."

• Of course, even widely circulated memoranda deserve privilege protection if they meet this standard. Kirk v. Ford Motor Co., 116 P.3d 27, 34 (Idaho 2005) (protecting a company's widely circulated orders suspending document retention guidelines because of litigation.)

5. Federal Rule of Evidence 612

Under Federal Rule of Evidence 612, a federal court may order witnesses to produce even privileged documents they reviewed before testifying -- if the documents refreshed their recollection, and the disclosure is in the "interests of justice." In re Managed Care Litig., 415 F. Supp. 2d 1378, 1380 (S.D. Fla. 2006).

• Thus, lawyers might waive the privilege even by showing their own clients copies of privileged documents.

6. Implied Waiver

The attorney-client privilege is so fragile that its holders can waive its protections not only by intentionally or inadvertently disclosing privileged communications (express waiver) but also by relying on the fact of privileged communications -- even without actually disclosing them.

This type of waiver is called an implied waiver.

• Surprisingly, some courts mistakenly use the term "implied waiver" in discussing the actual disclosure of privileged information. Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 294 (4th Cir. 2004).
As one would expect (because lawyers write the rules), clients attacking their lawyers impliedly waive the privilege -- thus permitting the lawyers to defend themselves.

a. Dangerous Nature of Implied Waivers

Implied waivers are inherently more frightening and dangerous than express waivers.

- Clients and their lawyers could be expected to understand that disclosing privileged communications to third parties might cause a problem, but intuition might not alert either the client or the lawyer to the waiver implications of referring to a privileged communication.

b. Explicit Reliance on Legal Advice

The classic example of a client causing an implied waiver is a criminal defendant relying on the defense of "ineffective assistance of counsel" or a civil litigant relying on the defense of "advice of counsel."  


- Litigants sometimes stumble into an "advice of counsel" defense.  
  Engineered Prod. Co. v. Donaldson Co., 313 F. Supp. 2d 951 (N.D. Iowa 2004) (finding an implied waiver because a litigant's lawyer allowed the client to testify that its lawyer was the source of the client's belief that an adversary had "sat on its rights").

In-house and outside corporate lawyers are likely to face implied waiver issues in two situations.

First, corporations are often tempted to use the fact (and perhaps the ultimate result) of an internal investigation in an effort to sway public opinion, deter governmental sanctions, or defend civil lawsuits.

- Depending on the nature of the reliance and the degree to which the client in seeking some advantage in doing so, such reliance can cause an implied waiver of the attorney-client privilege that might otherwise cover communications related to the investigation.  
  In re Subpoena Duces Tecum Served on Wilkie Farr & Gallagher, No. M8-85, 1997 U.S. Dist. LEXIS 2927 (S.D.N.Y. Mar. 14, 1997) (holding that a company had waived the privilege that otherwise protected the report prepared by its outside law firm and provided to its auditor by citing the fact of the audit in seeking to avoid federal regulatory punishment); Harding v. Dana Trans., Inc., 914 F. Supp. 1084, 1096-97 (D.N.J. 1996) (finding that a party waived the
attorney-client privilege otherwise protecting the results of a corporate investigation by relying on the investigation (although not its content) in defending against government allegations of civil rights violations; In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 472 (S.D.N.Y. 1996) ("This pattern of usage of the report by Kidder amply justifies the conclusion that it has put in issue the statements made by all interviewees, including Kidder employees, to Lynch and his colleagues in the course of their preparation of the report. Waiver necessarily follows. . . . The fairness doctrine is still more explicitly triggered by Kidder's use of the Lynch report in the pending lawsuits and arbitrations. As noted, Kidder has repeatedly proffered the Lynch report not merely as a signal of its own good faith, but as a reliable, if not authoritative, source of data on which the court should rely in reaching whatever conclusion would favor the company. Implicitly, then, Kidder is proffering the underlying facts on which the Lynch report is assertedly based, including particularly the statements made to the investigators by the witnesses whom they interviewed.").

- Courts recognize that companies can conduct different (and sometimes parallel) investigations, one of which will not be privileged because the company intends to rely on its fruits, and one of which will be protected by the privilege (and the work product doctrine) because the company disclaims any intent to rely on its fruits. EEOC v. Rose Casual Dining, L.P., No. 02-7485, 2004 U.S. Dist. LEXIS 1983 (E.D. Pa. Jan. 23, 2004).

Second, some employment discrimination laws recognize an explicit affirmative defense allowing a corporation to avoid liability by demonstrating the fact that it investigated alleged wrongdoing and took reasonable remedial measures (as in the case of sexual harassment allegations).

- Courts uniformly hold that corporations asserting this defense impliedly waive the attorney-client privilege otherwise covering those investigations. Austin v. City & County of Denver, Civ. A. No. 05-cv-01313-PSF-CBS, 2006 U.S. Dist. LEXIS 32048, at * 21-22, *18 (D. Colo. May 19, 2006) (noting that the Denver Water Department hired an independent consultant to investigate the plaintiff's claim of age and gender discrimination; explaining that the plaintiff sought discovery of the investigator's report and materials, but the Department resisted; finding that the investigator acted essentially as an in-house human resources employee, so that his material deserved privilege protection; noting that the Department had filed an affirmative defense claiming that it had "exercised reasonable care to prevent and promptly correct any unlawful behavior by its employees of which it was made aware" (internal quotations omitted); although acknowledging that the plaintiff had discussed "only in passing the issue of waiver," finding that this affirmative
defense created a subject matter waiver that covered the investigator's report and materials; \textit{McGrath v. Nassau County Health Care Corp.}, 204 F.R.D. 240, 247 (E.D.N.Y. 2001) (finding that a company had waived the attorney-client privilege and work product doctrine protections by asserting an affirmative defense in a sexual harassment case that it was "not liable because it exercised reasonable care to prevent and promptly correct any sexual harassing behavior"); \textit{Rivera v. Kmart Corp.}, 190 F.R.D. 298, 304 (D.P.R. 2000) (holding that in a wrongful termination case defendant Kmart had waived any privilege protection for documents relating to a Kmart employee's interview of a store manager because Kmart referred to the interview in justifying plaintiffs' termination); \textit{Brownell v. Roadway Pkg. Sys., Inc.}, 185 F.R.D. 19, 25 (N.D.N.Y. 1999) ("The Court finds, however, that RPS waived its right to invoke the privilege by asserting the adequacy of its investigation as a defense to Plaintiff's claims of sexual harassment"); \textit{Sealy v. Gruntal & Co.}, No. 94 Civ. 7948 (KTD)(MHD), 1998 U.S. Dist. LEXIS 15654, at *15, 16 (S.D.N.Y. Oct. 6, 1998) (finding that an affirmative defense that defendant conducted an investigation into plaintiff's sexual harassment case "constitutes a waiver of privilege for otherwise protected communications"); \textit{Pray v. New York City Ballet Co.}, No. 96 Civ. 5723 (RLC)(HBP), 1997 U.S. Dist. LEXIS 6995, at *2-3, 7 (S.D.N.Y. May 19, 1997) (allowing plaintiff in a sexual harassment case to depose four partners at the law firm of Proskauer, Rose, Goetz & Mendelsohn; "]where, as here, an employer relies on an internal investigation and subsequent corrective action for its defense, it has placed that conduct 'in issue'. Thus, an employer may not prevent discovery of such an investigation based on attorney-client or work product privileges solely because the employer has hired attorneys to conduct its investigation. . . The employer has waived the protection of these privileges concerning the investigation and subsequent remedial action by virtue of its defense."); \textit{Wellpoint Health Networks, Inc. v. Superior Court}, 68 Cal. Rptr. 2d 844, 856 (Cal. Ct. App. 1997) ("If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived.").

c. "At Issue" Doctrine

A number of courts have taken this implied waiver principle to the extreme, adopting an approach called the "at issue" doctrine.
• The traditional implied waiver concept involves clients explicitly pointing to privileged communications to gain some advantage — it is understandable how notions of fairness do not permit such clients to withhold the communications from the adversary's discovery.

• In contrast, the "at issue" doctrine involves a client asserting some other position (usually affirmatively, but sometime defensively) in litigation — the full exploration and consideration of which might require assessment of privileged communications. Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975); Conklin v. Turner, 883 F.2d 431, 434 (5th Cir. 1989).

• For instance, a litigant might seek to avoid a statute of limitations defense by contending that it was not aware of some benefit or right — which arguably puts its mental state and knowledge "at issue," and might justify a forced disclosure of communications that client had with a lawyer during the time period the client claims ignorance. Lama v. Preskill, 818 N.E.2d 443, 450, 449 (Ill. App. Ct. 2004) (over a strong dissent, holding that a malpractice plaintiff had impliedly waived the attorney-client privilege otherwise covering communications during a meeting her husband had with a lawyer several days after her surgery, by alleging in her complaint that she did not learn of her injury until a date after that meeting; not explaining whether it would have reached the same result if the plaintiff had not "voluntarily injected into the case the factual and legal issues of when she learned of her injury," but instead had waited to respond to the defendant's statute of limitations affirmative defense).

Courts extending the implied waiver concept this far normally require that the information at stake be important, and that it be unavailable absent forced disclosure of privileged communications.

359, 361 (S.D.N.Y. 1991)); lack of notice that relieves the party of the statute of limitations defense or acts as an estoppel that prevents the adversary from relying on the statute of limitations defense (Peterson v. Fairfax Hosp. Sys., Inc., 37 Va. Cir. 535, 542 (Va. Cir. Ct. 1994) (holding that "where the plaintiffs rely on estoppel to combat a plea of statute of limitations, fairness requires that the attorney-client privilege be deemed waived" because "what counsel knows and when he knew it are issues dragged into the case by invoking the defense of estoppel"); explaining that because "[t]he defendants maintain that the plaintiffs were on inquiry notice of the possibility of fraudulent actions in the previous case more than two years before this action was filed. [C]ounsel's knowledge, or lack thereof, is relevant, probative and discoverable"); a claim of "appropriate remedial action" by an institution in response to the plaintiff's complaint (McGrath v. Nassau County Health Care Corp., 204 F.R.D. 240, 247 (E.D.N.Y. 2001)); argument that a law firm did not represent a client at a certain time (E.I. du Pont de Nemours & Co. v. Conoco, Inc., Civ. A. No. 17686, 2001 Del. Ch. LEXIS 99 (Del. Ch. Feb. 6, 2001)); an argument that it was compelled to participate in a foreign arbitration (which the court found "places their attorneys' opinions, advice and decision-making directly an issue").


Company lawyers should carefully advise any company representative (especially management) about the risk they run in relying upon, or even talking about, the fact of an investigation -- especially with the government or another third party outside the company.

7. Subject Matter Waiver

Most courts recognize what is called the "subject matter waiver doctrine," under which a waiver of some privileged information will require the company to reveal all privileged communications on the same subject matter.

The subject matter waiver concept comes from notions of fairness.
For instance, if a litigant introduces into evidence certain privileged communications with a lawyer in order to advance the litigant's case, it would not be fair for the litigant to withhold the rest of communications with the lawyer on that subject.

Similarly, a litigant pleading "advice of counsel" as a defense should not be able to resist discovery about the advice, what facts the client gave the lawyer before receiving the advice, etc.

a. Intentional Express Waiver


Because disclosing a privileged document often causes a subject matter waiver, in some situations there is a bizarre switch in positions -- with the party having disclosed a document claiming that it was not privileged (hoping to avoid a subject matter waiver), and the adversary arguing that the document was privileged (hoping to trigger a subject matter waiver).

See, e.g., Strong Capital Mgmt., Inc. v. Land Auth. of P.R., Civ. No. 04-2088(SEC), 2006 U.S. Dist. LEXIS 36103 (D.P.R. May 30, 2006) (assessing defendants' argument that plaintiff's voluntary disclosure of a memorandum caused a subject matter waiver; agreeing with plaintiff that the memorandum did not deserve privilege protection, and therefore holding that its disclosure did not cause a subject matter waiver); Static Control Components, Inc. v. Lexmark Int'l, Inc., No. 04-84-GFVT, 2006 U.S. Dist. LEXIS 40612, at *20 (E.D. Ky. June 15, 2006) (assessing defendant's argument that the plaintiff caused a subject matter waiver by disclosing to its customer a memorandum from a law professor about the enforceability of a patent; rejecting plaintiff's argument that the letter was not privileged; explaining that "a rose by any other name smells the same," and finding a subject matter waiver of both the attorney-client privilege and the work product doctrine that required disclosure of all documents on that subject).

b. Implied Waiver

c. Extra-Judicial Disclosure (von Bulow Doctrine)

Some courts have looked for ways to avoid the harsh results of the subject matter waiver doctrine.

- In an approach articulated for the first time by the Second Circuit, some court distinguish between disclosure of privileged communication in a litigation context (which will cause a subject matter waiver) and what courts call "extrajudicial" settings (which will not cause a subject matter waiver). McGrath v. Nassau County Health Care Corp., 204 F.R.D. 240, 245 (E.D.N.Y. 2001).

- This is called the von Bulow doctrine because it originated with Alan Dershowitz's publication of a book about his representation of the criminal defendant von Bulow. In re von Bulow, 828 F.2d 94 (2d Cir. 1987).


- The von Bulow doctrine can avoid harsh results. In re Polymedica Corp. Sec. Litig., 235 F.R.D. 28, 33 (D. Mass. 2006) (assessing plaintiffs' reliance on standard waiver principles in seeking the production of documents created by PricewaterhouseCoopers LLP (PWC) in connection with a report PWC prepared for the defendants, and which defendants had given to plaintiffs and the SEC; rejecting plaintiffs' waiver arguments, noting that "there is no evidence that the Defendants sought to make use of the report in a judicial proceeding," put the report at issue, or sought to use PWC's testimony; explaining that the plaintiffs could interview witnesses, review documents, and otherwise conduct their own investigation and prepare their own report).

d. Inadvertent Express Waiver

Some courts seem to take the subject matter waiver doctrine too far.

- While the subject matter waiver doctrine makes sense if a litigant expressly or impliedly relies on privileged communications to gain some advantage in litigation, it seems too harsh to take the same approach if a litigant instead inadvertently produces privileged documents during discovery.

- Yet some courts following this simplistic rule that disclosure of some privileged communications requires the disclosure of other related privileged communications have blindly found subject matter waivers even
in the case of an inadvertent production of privileged documents. Texaco P. R., Inc. v. Dept of Consumer Affairs, 60 F.3d 867, 883-84 (1st Cir. 1995).

e. Scope of the Waiver


- Perhaps the most thoughtful analysis appeared several years ago. United States v. Skeddle, 989 F. Supp. 917, 919 (N.D. Ohio 1997) ("Among the factors which appear to be pertinent in determining whether disclosed and undisclosed communications relate to the same subject matter are: 1) the general nature of the lawyer's assignment; 2) the extent to which the lawyer's activities in fulfilling that assignment are undifferentiated and unitary or are distinct and severable; 3) the extent to which the disclosed and undisclosed communications share, or do not share, a common nexus with a distinct activity; 4) the circumstances in and purposes for which disclosure originally was made; 5) the circumstances in and purposes for which further disclosure is sought; 6) the risks to the interests protected by the privilege if further disclosure were to occur; and 7) the prejudice which might result if disclosure were not to occur. By applying these factors, and such other factors as may appear appropriate, a court may be able to comply with the mandate that it construe 'same subject matter' narrowly while accommodating fundamental fairness." (internal quotations omitted)).

Most cases addressing the scope of a subject matter waiver involve a patent infringement litigant relying on a patent lawyer's non-infringement opinion in seeking to avoid multiple damages.

- Every court holds that such an affirmative "advice of counsel" defense causes a subject matter waiver, but they disagree about its scope.

This situation generates very difficult subject matter waiver issues.

- Because patent infringement constitutes a continuing wrong, an infringer must stop selling the infringing product upon learning of the infringement -- even if the client learns from its trial lawyer on the morning of trial.
On the other hand, it is easy to see the mischief caused by forcing a patent litigant relying on a non-infringement opinion to disclose all communication they had with any patent lawyer at any time.

Courts have taken differing positions on four basic questions.

- First, should the subject matter waiver extend to communications to and from: just the lawyer providing the opinion; all lawyers other than litigation counsel in the infringement litigation; or all lawyers (including litigation counsel)? The Federal Circuit recently held that a subject matter waiver covered privileged communications to and from outside lawyers and in-house lawyers. In re EchoStar Commc'ns Corp., 448 F.3d 1294 (Fed. Cir. 2006).

- Second, should the subject matter waiver extend as a temporal matter to: the date the product was put on the market; the date the infringement litigation began; or up through and including even the trial?

- Third, because infringement depends on the product seller's knowledge, should the subject matter waiver extend to opinions and other information the lawyer has never shared with the product seller client? The Federal Circuit recently settled this debate. In re EchoStar Commc'ns Corp., 448 F.3d 1294 (Fed. Cir. 2006) (explaining that a party's reliance on advice of counsel triggered a subject matter waiver that covered: (1) privileged communications with outside and inside counsel; and (2) work product conveyed to the client and uncommunicated documents that reflect such communications -- which presumably include such documents as memoranda memorializing communications).

- Fourth, if the subject matter waiver extends to other lawyers and communications after the original opinion, should the waiver cover: all communications; or just communications that are inconsistent with the original non-infringement opinion upon which the litigant relies?

Various opinions have adopted nearly every combination and permutation on these issues.

- For instance, one court recently held that because "infringement is a continuing activity," "all opinions received by the client relating to infringement must be revealed, even if they come from defendants' trial attorneys, and even if they pre-date or post-date the advice letter of opinion counsel." Akeva L.L.C. v. Mizuno Corp., 243 F. Supp. 2d 418, 423 (M.D.N.C. 2003).
Federal courts are now sorting out the effect of a recent Federal Circuit decision protecting clients from any adverse inference based on their reliance on the attorney-client privilege to shield a lawyer's patent opinion — the Federal Circuit raised the issue sua sponte and reversed its earlier approach to this issue. Knorr-Bremse Systeme für Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337 (Fed. Cir. 2004).

8. Efforts to Change the Harsh Waiver Rules

a. Impetus for the Proposals

Several developments have prompted numerous proposals to change the common law waiver rules.

- First, the government's increasing demand that companies share privileged communications as a sign of cooperation has prompted efforts to encourage such good corporate behavior by reducing or eliminating the risk that such cooperation will allow private plaintiffs to obtain the same communications (which most courts outside the Second Circuit view as an inevitable result of common law waiver principles).

- Second, the massive increase in the volume of electronic documents that must be accumulated, reviewed for privilege and produced has prompted calls for a rule protecting litigants from the potentially harsh impact of an inadvertent production of privileged communications.

b. Legislative Proposals

A number of proposed remedies to the first problem have surfaced in Congress over the past five years, but none of them have made it very far.
c. Federal Rules Change

An upcoming change at the end of 2006 in Fed. R. Civ. P. 26(b)(5)(B) will require a party receiving privileged or work product documents claimed to have been inadvertently produced by the other side to either return or destroy the documents, or to hold those documents until a court analyzes the situation.


- Because some courts take an unforgiving view of any inadvertent production of privileged documents, litigants in those courts will still lose their protection.

d. Federal Rules of Evidence Proposal

Proposed Federal Rule of Evidence 502 (under consideration in 2006 by the Advisory Committee on the Federal Rules of Evidence) would address both issues.

Proposed Rule 502(a) would define the general waiver rule.

A person waives an attorney-client privilege or work product protection if that person -- or a predecessor while its holder -- voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

- This essentially codifies the common law waiver rule, although it would presumably protect against a court's adoption of the most extreme "automatic subject matter waiver" approach.

Proposed Rule 502 contains various exceptions that would dramatically change the normal waiver approach.

- First, a voluntary disclosure would not operate as a waiver if "the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings -- and if the holder of the privilege or work product protection took reasonable precautions to prevent
disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the effort, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B)." This codifies the "middle ground" fact-intensive inadvertent waiver doctrine.

- Second, a voluntary disclosure would not cause a waiver if "the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation." This exception would address the first issue mentioned above. Although the standard confidentiality agreement currently agreed to by government authorities is not "limited to persons involved in the investigation," the proposed Rule presumably would apply to the typical situation in which a company cooperates with the government by disclosing privileged communications.

Proposed Rule 502 also contains procedural provisions.

- Proposed Rule 502(c) indicates that "[n]otwithstanding subdivision (a), a court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court."

- Another provision makes it clear that any agreement among the parties does not bind anyone else "unless the agreement is incorporated into a court order." Proposed Rule 502(d).

- This rule allows every court to mold an appropriate process (apparently even changing the basic waiver principle articulated in Rule 502(a)) with the certainty that its order will bind all third parties.

It is unclear how a new federal Rule of Evidence would apply in state courts, but one might expect state courts to adopt the same approach, or honor a federal court's order through comity, application of the Supremacy Clause, etc.

- Unfortunately, even one recalcitrant state court could eliminate the protection by declining to honor a federal court's order.

e. Sentencing Guidelines

On April 5, 2006, the United States Sentencing Commission voted to eliminate language in the Federal Sentencing Guidelines that essentially required companies to waive their privilege and work product protections to obtain more favorable sentencing treatment.
This change will take effect on November 1, 2006, unless Congress intervenes. 71 Fed. Reg. 28,063 (May 15, 2006).

The deleted language had been added to the Guidelines in April 2004 at the height of the Department of Justice's post-Enron efforts to root out corporate wrongdoing.

f. Department of Justice Policy

Various corporate and bar organizations (including the ABA) have (with varying degrees of vigor) condemned, criticized or sought to change the Department of Justice's policy that encourages -- some say "bullies" -- companies into waiving their privilege.

- None of these efforts have proven successful so far.
- However, it would be difficult to detect if the Department of Justice was less vigorous in its approach, because only anecdotal evidence allows an assessment of the Department's application of its policy.
IV. ACCOUNTANT-CLIENT PRIVILEGE

A. At Common Law

It is well established that no accountant-client privilege exists at common law. Coach v. U.S., 409 U.S. 322, 335 (1973) ("no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases").

B. The Federal Tax Advisor Privilege

1. General Requirements and Scope

Section 7525 of the Internal Revenue Code, enacted in 1998, created a statutory privilege for accountants. Specifically, Section 7525(a) provides: "[w]ith respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney."

The privilege applies to federally authorized tax practitioners, which are defined at I.R.C. § 7525 as any individual who is authorized to practice before the IRS. Effectively, it applies to certified public accountants, accountants, enrolled agents, and enrolled actuaries.

The privilege only extends to "tax advice" which is advice given by an individual within the scope of that individual's authority to practice before the IRS.

2. Limitations To Initial Applicability

The tax advisor privilege only applies in two situations:

Administrative Controversies. In administrative proceedings, the tax advisor privilege applies only to non-criminal proceedings before the IRS. It does not apply to criminal tax administrative proceedings or administrative proceedings before agencies other than the IRS.

Tax Litigation. In court, the tax advisor privilege applies only to non-criminal tax proceedings brought in federal court by or against the United States. It does not apply in state court tax cases, non-tax federal court cases, federal criminal tax cases, or federal tax cases that do not involve the United States.
3. Exceptions To Accountant Privilege Under Federal Statute

There are at least eight exceptions to Section 7525 that make it difficult to apply the statute in the manner in which it was originally intended—the work product doctrine, corporate tax shelters, identity privilege, tax return workpapers, crime-fraud exception, auditor communications, SEC and criminal matters, and state actions.

a. Work Product Doctrine

Practitioners and scholars uniformly have accepted the notion that no such privilege exists under Section 7525. Thus, "[i]t seems clear that most of the work produced by [accountants] in the context of a tax practice is not and will not be subject to the work product doctrine ...." (The Common Law Protections, Tax Planning & Practice Guides 102 (1999); U.S. v. Frederick, 182 F.3d 496, 502 (7th Cir. 1999) ("[t]he new statute protects communications between a taxpayer and a federally authorized tax practitioner ... (It does not protect work product.).")

b. Corporate Tax Shelters

The statute carves out an explicit exception for corporate tax shelters. The privilege under Section 7525 does not apply to any written communication "in connection with the promotion of the direct or indirect participation ... in any tax shelter." §7525(b)(2).

One of the problems with defining a tax shelter is that all meetings with tax advisers have as a significant purpose to avoid tax.

The tax shelter regulations have changed significantly since the enactment of Section 7525 and IRS is continuously updating its list of "listed transactions." (Rev. Proc. 2004-67, 2004-50 I.R.B. 967.)

The IRS' audit examination guide, however, does provide some guidance on such characteristics, which "include a lack of meaningful economic risk of loss or potential for gain; inconsistent financial and accounting treatment; presence of tax indifferent parties; complexity; unnecessary steps or novel investments; promotion or marketing; confidentiality; high transaction costs; and risk reduction arrangements."

A corporation that enters into a transaction for profit may not be able to rely on Section 7525 with regard to written advice intended to decrease tax liability resulting from the transaction.
c. Identity Privilege

Especially in the context of tax shelter litigation, there is no identity privilege remaining under Section 7525. Although it remains to be seen whether such a privilege exists with respect to non-tax shelter litigation. U.S. v. BDO Seidman, 337 F.3d 802 (7th Cir. 2003).

The BDO case made clear that a client’s identity is likely not privileged. The Seventh Circuit established the following factors to be considered when determining whether the identity privilege applies:

- the purpose and history of the practitioner’s representation of the client with respect to the tax shelter transactions at issue;
- whether revealing the clients’ identity in response to IRS summonses necessarily would reveal the clients’ motive for seeking tax advice or the substance of that advice;
- whether IRS could determine that the clients had participated in the transactions without obtaining their names from the practitioners; and
- whether any of the documents at issue were generated for the purpose of preparing tax returns.

On remand, the district court held that Section 7525 did not protect identity disclosure.

The court stated that although the clients were correct that Section 7525 protects identity to the extent it would result in disclosure of client motivation for seeking tax advice, Section 7525 does not apply to the extent clients were seeking tax return preparation rather than legal or tax advice.

Since the BDO decision, courts either have applied the BDO factors and found no identity privilege exists or concluded that BDO stood for the proposition that no identity privilege exists at all. See e.g., U.S. v. Arthur Andersen, 92 A.F.T.R. 2d 2003-5800 (N.D. Ill. 2003); and Doe 1 & 2 v. KPMG, 325 F. Supp. 2d 746 (N.D. Tex. 2004)(tax law "destroy[s] any reasonable expectation of confidentiality as to participation in a tax shelter.")

While the BDO court implied the potential for an identity privilege via its four-factor test, subsequent cases have held otherwise and the potential to claim this privilege appears slim.
d. Tax Return Workpapers

Information furnished by a taxpayer to a tax return preparer for the purpose of enabling the preparation of a return is not privileged.

In *U.S. v. Frederick*, 182 F.3d 496 (7th Cir. 1999), tax return workpapers were not privileged; since this is "accounting" work rather than legal work and even lawyers are not privileged when doing accounting work.

In *Doe #1 v. Wachovia Corp.*, 268 F. Supp. 2d 627 (W.D.N.C. 2003), the Court held that I.R.C. 7525 privilege does not protect communications regarding tax return preparation. The court stated, "'the privilege does not protect communications between a tax practitioner and a client simply for the preparation of a tax return.'"

e. Crime-Fraud Exception

The courts and the government will apply the crime-fraud exception to Section 7525 privilege claims when a client has sought legal advice to further a crime or fraud. "The government is asserting the crime fraud exception to privilege on a broad basis ...."

As a result, "[t]ax advisors must be careful about how they are creating and handling documents for clients .... Large accounting firms have long prided themselves on the presentation issues on tax returns, in terms of analyzing whether certain presentations increase the likelihood of audit .... In this environment, evidence of strategizing presentation issues is dangerous and could fall within one of the court's fraud factors ...."

To apply the exception, the courts must analyze eight potential indicators of fraud. In determining whether there was a prima facie showing of fraud in the context of alleged tax shelters, the District Court for the Northern District of Illinois in *BDO* (*BDO*, 95 A.F.T.R. 2d 2005-1725, 2005-1737), considered the following:

- the marketing of pre-packaged transactions by BDO;
- the communication by BDO's clients to BDO with the purpose of engaging in a pre-arranged transaction developed by BDO or a third party with the sole purpose of reducing taxable income;
- BDO and/or the clients attempting to conceal the true nature of the transaction;
• knowledge by BDO, or a situation where BDO should have known, that the clients lacked a legitimate business purpose for entering into the transaction;

• vaguely worded consulting agreements;

• failure by BDO to provide services under the consulting agreement, yet receipt of payment;

• mention of the alleged tax shelter known as "COBRA" (Currency Options Bring Reward Alternatives); and

• use of boiler-plate documents.

f. Auditor Communications

A recent article pointed out that a controversy is "brewing between the accounting and legal professions over the nature of documents and details that auditors should review to certify the financials of a company ....". Stratton, Lawyers Discuss Postshelter Assault on Privilege, 2005 TNT 71-5 (2005).

In fact, this is not a recent controversy because auditors and advisers have struggled with this topic for many years.

In Arthur Young, 465 U.S. 805, the Supreme Court held that auditors are "public watchdogs, which is a public declaration that any communications with them are not designed for confidentiality ...."

The court reasoned that "[a]n independent certified public accountant performs a different role [than an attorney]. By certifying ... public reports ..., the independent auditor assumes a public responsibility transcending any employment relationship with the client."

"To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations," the court continued.

This exception to Section 7525 is getting more attention given recent corporate scandals involving allegedly inappropriate financial statements filed on behalf of corporate giants.

Pressure from the Public Company Accounting Oversight Board and guidelines established by the American Institute of Certified Public Accountants are making it more difficult for taxpayers to maintain the privilege with tax advisers who are not attorneys – i.e. accountants or other consultants.
In addition, IRS is requesting more frequently taxpayers’ accrual workpapers, which can include documents prepared by a taxpayer’s independent auditor, as evidence in its fight against tax shelters.

Disclosing information to outside auditors must be closely monitored by a taxpayer’s advisers to reduce the risk of waiving potential privilege claims.

g. Tax Accrual Workpapers

1. Definition of Tax Accrual Workpapers.

IRS CCN CC-2004-010 (January 22, 2004).

Tax accrual workpapers are those audit workpapers relating to the tax reserve for current, deferred, potential, or contingent tax liabilities, however classified or reported on audited financial statements, and to footnotes disclosing those tax liabilities appearing on an audited financial statement.

Tax accrual workpapers reflect an estimate of a company’s tax liabilities and may also be referred to as the tax pool analysis, tax liability contingency analysis, tax cushion analysis, or tax contingency reserve analysis.

This definition does not include documents created prior to or outside of the consideration of whether reserves should be created, even those documents may have been subsequently used in the preparation of the tax accrual workpapers or are attached to workpapers. These pre-existing workpapers, however, will likely fall within the scope of the general IDR’s issued at the start of an audit and the taxpayer will likely therefore already have provided them to the IRS.

This definition also does not include workpapers and tax return documents that reconcile net income per books or financial statements to taxable income, because these documents are part of the tax return preparation process, and the information set forth in them is required to be reported on income tax returns. These documents will also likely fall within the scope of the general IDR’s issued at the start of an audit.

2. Authority to Request.


Subsequent to the Supreme Court decision in Arthur Young, the IRS announced that it would continue its policy of not routinely requesting tax accrual workpapers during examination. See Announcement 84-46, 1984-18 I.R.B. 18.
As part of the IRS's campaign against abusive tax shelters, in Announcement 2002-63, 2002-2 C.B. 72, the IRS announced it would begin requesting tax accrual workpapers when it audits tax returns with benefits claimed from listed transactions, or if the tax return reveals financial irregularity.

IRM 4.10.20.3 (July 12, 2004).

5. Non-Listed Transactions.
For tax returns without any listed transactions, the IRS will generally request tax accrual workpapers only when there are "unusual circumstances." Unusual circumstances generally exist when factual data supporting the taxpayer's tax return cannot be obtained from the taxpayer's records or from third parties, and then only as a collateral source. Unusual circumstances exist when:

- When the IRS identifies a specific issue for there is a need for additional facts;
- The IRS has requested the facts relating to the specific issue from the taxpayer and available third-parties; and
- The IRS has sought supplementary analysis (not necessarily contained in the workpapers) of facts relating to the identified issue and the IRS has performed a reconciliation of the taxpayer's Schedule M-1 or M-3 with respect to the identified issue.

The IRS policy varies. The IRS has provided additional information on its website in the form of frequently asked questions.

The IRS may request tax accrual workpapers if the taxpayer was required to disclose the listed transaction and did not do so. In general, the request will be limited to the workpapers for the years under audit, but it may also extend to other years that are relevant to the audit years (such as the year the underlying transaction took place).

8. Returns Filed on or after July 1, 2002.
(a) Disclosed Transactions.
If the transaction was properly disclosed on the tax return, the IRS will only request the tax accrual workpapers that pertain to the listed transaction for the
year under audit (although it may extend the request to workpapers relating to the transaction in other years if the other years are relevant to the audit years).

(b) Undisclosed Transactions.

If a listed transaction was not properly disclosed, the IRS will routinely request all tax accrual workpapers for the year under examination. The IRS may also request workpapers that related to other years if the workpapers are directly relevant to the IRS's audit of any known listed transactions for the years under audit.

(c) Multiple Listed Transactions.

The IRS may exercise its discretion to request tax accrual workpapers if it determines that the taxpayer claimed tax benefits from multiple listed transactions that were all properly disclosed.

(d) Financial Irregularities.

The IRS may exercise its discretion to request tax accrual workpapers in connection with the examination of a return claiming tax benefits from a single listed transaction that was disclosed, if there are reported financial irregularities with respect to the taxpayer.

h. SEC and Criminal Matters

By statutory exception, Section 7525 does not apply in SEC proceedings and criminal matters.

Although the statute appears clear in its intent, there is some ambiguity in determining when the privilege applies and when it does not because a civil examination can progress into a criminal investigation at any time.

In Chief Counsel Advice Memorandum 200008006, IRS considered whether Section 7525 applied in criminal tax matters where the subject communications occurred during, or with respect to, earlier civil matters.

Chief Counsel has advised that "the tax advice privilege is not applicable in criminal tax matters or proceedings even if a subject communication originated in the context of a civil matter or proceeding."

i. State Actions

The Section 7525 privilege may be asserted in a non-criminal tax proceeding in federal court brought by or against the United States. This means the privilege does not apply in proceedings in state court.
V. WORK PRODUCT DOCTRINE

A. Introduction

1. Courts' Confusion

Some courts mistakenly equate the attorney-client privilege and work product doctrine, occasionally using such terms as "attorney work product privilege." United States v. One Tract of Real Prop. Together with All Bldgs., Improvements, Appurtenances, & Fixtures, 95 F.3d 422, 427 (6th Cir. 1996).

- This is simply incorrect -- the attorney-client privilege and work product doctrine are fundamentally different concepts. Caremark, Inc. v. Affiliated Computer Servs., Inc., 195 F.R.D. 610, 613 (N.D. Ill. 2000).

- In fact, the four-word title "attorney work product privilege" contain two incorrect words -- the work product doctrine covers more than attorneys, and is not a privilege.

2. Source of Work Product Protection

Interestingly, one state court essentially created its own work product doctrine in the 1940s, derived from attorney-client privilege principles. Robertson v. Commonwealth, 25 S.E.2d 352 (Va. 1943).

- However, this common law development was soon trumped by a rule-based approach.


As indicated below, courts applying the work product doctrine exhibit surprising variation when interpreting a single sentence in the rules -- even more than courts analyzing the attorney-client privilege, although the privilege comes from organically developed common law in each state.

3. Choice of Laws

State courts generally apply their own work product rule, finding the protection to be a procedural matter.

4. Enormous Variation in Federal Courts' Approach

Ironically, there is a much greater variation among federal courts' approach to the work product doctrine than among states' approach to the attorney-client privilege -- even though all federal courts are simply applying the identical single sentence from the federal rules, while states are interpreting common law principles organically developed over hundreds of years.

Federal courts have taken dramatically differing positions on such issues as:

- Duration of the work product protection in later litigation.
- The degree of protection given to a lawyer's selection of documents or facts that arguably reflect the lawyer's opinion.
- The type of "anticipation" of litigation required -- ranging from requiring "imminent" litigation to protecting materials created "with an eye toward" possible future litigation.
- The degree of protection given to opinion work product (absolute or simply higher than that provided fact work product).

One recent case highlighted many of these debates, and cited federal court decisions on both sides of the issues. In re Grand Jury Subpoena, 220 F.R.D. 130 (D. Mass. 2004).

5. Differences between the Work Product Doctrine and the Attorney-Client Privilege

Unlike the attorney-client privilege, the work product doctrine:

(1) Is relatively new.


(3) Is a creature of statute and rule.

(4) Applies to non-lawyers.

(5) Arises only at certain times.

(6) Only protects communications made "because of" litigation.

(7) May be asserted by the client or the lawyer.
(8) May not last forever.

(9) May be overcome if the adversary really needs the information.

(10) Is not easily waived.


Unlike the attorney-client privilege, the work product doctrine:

- Does not rest on the intimacy of the attorney-client relationship -- a lawyer does not even have to be involved in its creation.

- Does not rest on the confidentiality within that intimate relationship -- it protects such materials as pictures of accident scenes, measurements of skid marks, interviews with strangers, etc.

- Does not rest on communications within that intimate relationship -- the work product doctrine can protect materials that have never been communicated to anyone.

The work product doctrine is both narrower and broader than the attorney-client privilege.

- It is narrower because: the work product doctrine only applies at certain times (during or in anticipation of litigation); and is not actually a privilege, but rather a qualified immunity that can be overcome under certain circumstances.

- It is broader because: anyone can create work product (without a lawyer's involvement); and work product can be shared more easily with third parties without causing a waiver of its protection.

Lawyers and their clients considering both the attorney-client privilege and the work product doctrine should remember that both, either or none may apply in certain circumstances.

- For instance, communications between lawyers and their clients occurring when no one anticipates litigation can never be work product, but may deserve privilege protection.

- Materials reflecting lawyers' communications with those other than clients (or the lawyers' own agents) can rarely if ever be privileged, but may well be work product -- such as notes of a witness interview.
Litigation-related communications between clients and lawyers may well deserve both protections.

6. Reasons to Assert Both Protections

Lawyers seeking maximum protection for their clients' communications should always examine both possible protections.

- In one concrete example, Martha Stewart was found to have waived the attorney-client privilege covering one of her emails by sharing the email with her daughter, but was found not to have waived the work product protection -- Stewart could not have resisted discovery if she had relied only on the privilege and not also asserted the work product protection. *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

However, litigants should not blindly seek both protections.

- For instance, companies should assess whether it would reflect poorly on their motivation if they claim to have anticipated litigation at certain times (for instance, at the beginning of contract negotiations).

- As explained below, asserting the work product protection might also trigger the obligation to preserve documents as of that date.
B. Participants

1. Who Can Create Work Product


2. Benefits of a Lawyer's Involvement

Although the work product doctrine can protect materials created without a lawyer's involvement, it is usually wise to have a lawyer involved.

- There are several reasons: some courts do not understand the doctrine and look for a lawyer's involvement; having a lawyer involved might also support an attorney-client privilege claim; a lawyer's role might rebut an adversary's argument that the documents were created in the "ordinary course of business" and therefore undeserving of work product protection; a lawyer's involvement may help establish anticipation of litigation; a lawyer's opinion deserves greater protection than mere fact work product.

3. Agents, Consultants and Experts

As explained above, the attorney-client privilege often rises or falls on a proper characterization of an agent or consultant as assisting the client or assisting the lawyer.

- This issue is irrelevant in the work product context.
a. General Rules

As explained above, even non-lawyers can create protected work product.

- Therefore, either the client's or the lawyer's agents should be entitled to work product protection for materials that the agent prepares.

b. Non-Testifying Experts


- **Ludwig v. Pilkington N. Am., Inc.**, No. 03 C 1086, 2003 U.S. Dist. LEXIS 17789, at *10 (N.D. Ill. Sept. 30, 2003) ("non-testifying expert information is entirely exempt from discovery not on the basis of privilege but, rather, on the basis of unfairness", holding that documents withheld under this rule do not have to be included on any privilege log).

- Some courts frankly admit that litigants can manipulate this rule to avoid discovery of harmful evidence. **Crouse Cartage Co. v. Nat'l Warehouse Inv. Co.**, No. IP 02-071 C T/K, 2003 U.S. Dist. LEXIS 478, at *6-7 (S.D. Ind. Jan. 13, 2003) (holding that a party could rely on the rule governing discovery of non-testifying experts to withhold materials prepared by a real estate appraiser, noting that the "key inquiry" is "whether the consultation took place in anticipation of litigation", acknowledging that ":[t]he underlying rule of nondisclosure invites shopping for favorable expert witnesses and facilitates the concealment of negative test results").

Fed. R. Civ. P. 26(b)(4)(B) specifically restricts discovery of such non-testifying experts to situations of "exceptional circumstances."

- Such "exceptional circumstances" can include: work by a non-testifying expert that has destroyed an important bit of evidence, or a situation in which the evidence has deteriorated or is no longer available for inspection by the adversary's expert. **Disidore v. Mail Contractors of Am., Inc.**, 196 F.R.D. 410, 417 (D. Kan. 2000).

- Given the general immunity of such non-testifying experts to normal privilege log requirements, it is difficult to imagine how an adversary would know anything about such an expert's involvement (unless a witness saw the non-testifying expert performing some test, and was asked about the incident during discovery).
c. Testifying Experts

Most courts hold that the work product doctrine does not cover materials created by a testifying expert.


Most decisions regarding discovery of testifying experts does not involve materials created by the expert, but rather opinion work product disclosed to the testifying expert.

- These issues are discussed below, in connection with the waiver doctrine.

d. Experts with Changing Roles

Experts who change from non-testifying to testifying experts (or vice versa) can present a complicated analysis.

Courts have debated whether testifying experts must produce documents they created or received in an earlier role as a non-testifying expert.

- Some courts hold that experts cannot "compartmentalize" their work, and that experts designated as trial witnesses cannot protect documents created or received in connection with their parallel work as non-testifying experts. *In re Painted Aluminum Prods. Antitrust Litig.*, No. 95-CV-6557, 1996 U.S. Dist. LEXIS 9911 (E.D. Pa. July 9, 1996).

- Other courts allow the same person to be a non-testifying expert in one case and a testifying expert in another, thereby limiting discovery to the latter. *Moore U.S.A. Inc. v. Standard Register Co.*, 206 F.R.D. 72 (W.D.N.Y. 2001).

Courts also disagree about discovery of testifying experts who move in the other direction (having been removed from the witness list by the litigant who retained them).

- *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023 (E.D. Cal. 2002) (noting the debate among courts on this issue, and ultimately concluding that such non-testifying experts enjoy immunity under the "exceptional circumstances" standard).
4. Who Can Assert the Work Product Doctrine

Most courts hold that both clients and lawyers can assert the work product protection. In re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994); United States v. Under Seal (In re Grand Jury Proceedings), 33 F.3d 342, 348 (4th Cir. 1994).


- One court has found that a common interest agreement itself deserves work product protection. McNally Tunneling Corp. v. City of Evanston, No. 00 C 6979, 2001 U.S. Dist. LEXIS 17090, at *12 (N.D. Ill. Oct. 16, 2001).


Courts disagree about the duration of the work product protection.

- Some courts apply the work product doctrine protection to material in a later litigation, as long as it is related to the litigation in which the work product was prepared. Simmons Foods, Inc. v. Willis, 196 F.R.D. 610 (D. Kan. 2000).

C. Context: Temporal Component

Unlike the attorney-client privilege, context is much more important in the work product arena than content.

- The privilege rests on the substance of the communication between a lawyer and client; the work product doctrine rests on when and why the client or a client representative created a document -- the substance might be as mundane as a laboratory test result and accident scene picture, or list of newspaper articles.

1. Temporal Requirement

The work product doctrine has both a temporal and a motivational component (which is discussed below).

a. Difference Between the Privilege and the Work Product Doctrine

Although the attorney-client privilege can protect communications between a lawyer and client at any time, the work product doctrine only protects materials created at certain times -- in connection with, or in "anticipation" of, litigation. Restatement (Third) of Law Governing Lawyers § 87 cmt. d (2000).

b. "Litigation" Requirement

Courts assessing a work product claim obviously must determine if they are dealing with "litigation" as contemplated in Fed. R. Civ. P. 26(b)(3).

In some situations, courts have no trouble with this task. However, some situations call for a more subtle analysis.

- See, e.g., Pacific Gas & Elec. Co. v. United States, 69 Fed. Cl. 784, 806, 808 (Fed. Cl. 2006) (holding that administrative proceedings before the Nuclear Regulatory Agency and two California administrative agencies did not automatically count as "litigation" -- because the "ultimate objective" of the administrative process was not adversarial, but rather to set rates or deal with licenses; noting that the proceedings might become adversarial if someone intervenes, so the court analyzed each pertinent document to determine if (as the court put it in one context) the document "would have been prepared irrespective of the potential adversarial aspects" of a rate proceeding; explaining that the work product doctrine would not protect any document that was prepared to obtain a permit or license "rather than in order to respond to, rebut, strategize for, or otherwise 'litigate' against a known adversary" -- even if the document "is later used in adversarial aspects of these proceedings").
• Most courts hold that government investigations do not amount themselves to "litigation," but that an investigation can result in a reasonable anticipation of litigation. Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 513 (D.N.H. 1996).

c. Subjective and Objective Components

Most courts indicate that the "anticipation" requirement has both a subjective and objective component.

• Somewhat ironically, it might be reasonable for a party to anticipate litigation even though it never comes, and it might be unreasonable to anticipate litigation even though it ultimately occurs. Restatement (Third) of Law Governing Lawyers § 87 cmt. i (2000); Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109 (7th Cir. 1983).

d. Need for Specific Claim

Courts debate whether a party asserting the work product protection must identify a specific claim in anticipation of which the party prepared the work product.


• Other courts are more liberal, and do not require a party to identify a specific claim. Judicial Watch, Inc. v. Reno, 154 F. Supp. 2d 17, 18 (D.D.C. 2001).

This distinction can be enormously important for companies which face "pattern" litigation such as products liability or employment discrimination cases.

• If the court protects only those documents prepared in connection with or in anticipation of a specific identifiable claim, the company might lose a work product fight over such documents as guidelines for handling a pre-litigation investigation, protocols for responding to threats of litigation, etc.

e. Degree of Anticipation Required

Courts apply widely varying views of what exactly must be "anticipated" to trigger the work product protection -- varying from the possibility of litigation
being "real and imminent" (McCoo v. Denny's Inc., 192 F.R.D. 675, 683 (D. Kan. 2000)) to there being "some possibility of litigation." In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979).

- In just a span of a few weeks, one court recently explained that a party seeking work product protection must show only that "litigation was a real possibility" (In re OM Group Sec. Litig., 226 F.R.D. 579, 584-85 (N.D. Ohio 2005), while another court one state away held that the work product protection could not apply "[i]f litigation is not imminent." Esposito v. Galli, No. 4:04-CV-475, 2005 U.S. Dist. LEXIS 1559, at *13 (M.D. Pa. Feb. 4, 2005) (internal quotations and citation omitted).

Assessing the "anticipation of litigation" requirement can be very complicated.


- Another court refused work product protection for documents created during a time that companies had entered into a “tolling agreement." Minebea Co. v. Papst, 229 F.R.D. 1, 4 (D.D.C. 2005) (noting that Papst had sued a company called Western Digital, but later dismissed the lawsuit without prejudice and entered into a tolling agreement with Western Digital; holding that documents created after that time were “no longer created for litigation purposes; rather, they [were] produced to facilitate a business relationship;” explaining that “[t]his is true even if the parties eventually end up in litigation because the negotiations fail,” although acknowledging that “there is clearly a point at which the parties once again begin 'anticipating litigation' as the relationship decays”).

f. "Trigger Events"

Courts have pointed to certain "triggering events" as justifying a reasonable anticipation of litigation:

In one very recent case, the Sixth Circuit dealt with this issue. United States v. Roxworthy, ___ F.3d ___, No. 05-5776, 2006 U.S. App. LEXIS 20481, at *7, *12, *13, *17-18, *22-23, *25, *26 (6th Cir. Aug. 10, 2006) (indicating that Yum! Brands could reasonably have anticipated litigation with the IRS after treating a transaction in a certain manner on its tax returns: because "the tax treatment of captive insurance companies, including the treatment of premium payments to captive insurance companies, was very unsettled and had been the subject of considerable litigation between the Internal Revenue Service . . . and other large corporate tax payers like Yum" (citation omitted); "because the loss was recognized for tax purposes but not book purposes," because "the IRS had a history of attacking transactions and litigating cases where a loss was only recognized for tax purposes" (citation omitted); "because of the
certainty of an IRS audit, the conspicuousness of the $112 million discrepancy between tax and book loss, and the unsettled law surrounding captive insurance transactions;" reversing a district court's holding, and protecting a memorandum prepared for Yum! by its consultant KPMG).

g. Insurance Context

Most courts hold that in the "first party" insurance context, insurance companies cannot reasonably anticipate litigation with their insureds in every case -- at least until something triggers such a reasonable anticipation. Stampley v. State Farm Fire & Cas. Co., 23 F. App'x 467, 470-71 (6th Cir. 2001).

- Courts are more generous in the third party insurance context. Urban Outfitters, Inc. v. DPIC Cos., 203 F.R.D. 376, 379-80 (N.D. Ill. 2001).


2. Danger: The Duty to Preserve Documents Might Start on the "Trigger" Date

Companies considering whether to claim the work product protection after some "trigger" event results in the reasonable anticipation of litigation against the company (discussed below) should remember that the same "trigger" might require them to start saving potential relevant documents.

The obligation of any litigant (or possible litigant) to preserve potentially responsive evidence obviously does not present a new issue -- but the enormous volume of electronic communications clearly makes the analysis more difficult, and exacerbates the possible burden.

It should go without saying that litigants must preserve potentially responsive documents (including electronic documents).

- The duty obviously arises before a discovery request arrives -- and can also arise before litigation begins.

• In *Zubulake*, the court held that: "[t]he obligation to preserve evidence arises . . . when a party should have known that the evidence may be relevant to future litigation." *Id.* at 216.

• In discussing the scope of a company's duty to preserve, the court rejected a blanket duty. "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation." *Id.* at 217 (footnotes omitted).

• Instead, the court explained that a company which anticipates being sued "must not destroy unique, relevant evidence that might be useful to an adversary." *Id.* The court held that the preservation duty extends to all "key players" in the anticipated litigation. *Id.* at 217-18.

• The *Zubulake* court found that UBS should have preserved electronic documents that were ultimately destroyed. It ordered UBS Warburg to pay the cost of the plaintiff's motion, directed the company to reimburse plaintiff for the costs of any depositions or re-depositions necessitated by the document destruction, and approved a jury instruction containing an adverse inference about the destroyed back-up tapes. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

Court's analyses of the "trigger" date for preserving documents essentially matches the "trigger" date for the work product doctrine.

• E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 587-88 (D. Minn. 2005) (assessing a spoliation claim against Deutsche Bank; explaining that a litigant asserting a spoliation claim must show bad faith if its adversary destroyed documents before the appropriate "trigger date," but need not show bad faith if documents are destroyed after that date; defining the "trigger date" as the date "when a party knows or should have known that the evidence is relevant to future or current litigation").
allegations of sexual harassment and retaliation as early as January 2001. Beginning in January 2001, Broccoli informed two of his supervisors at Echostar, Chip Paulson and Larry Goldman (as each testified on deposition and at trial), both orally and via email, of Andersen’s sexually harassing behavior. Paulson and Goldman testified that Broccoli made numerous complaints to them regarding Andersen’s inappropriate behavior throughout 2001 and that they subsequently relayed, verbally and via email, the complaints to their superiors at Echostar.; finding that the company should have started saving document as of that time).

Large companies have found themselves severely punished for destroying electronic documents under this standard.

- A court ordered Philip Morris to pay $2.75 million as a sanction for not preserving relevant e-mails, and also prohibited Philip Morris from relying on the testimony of any of its executives who had not saved their e-mails. United States v. Philip Morris USA Inc., 327 F. Supp. 2d 21 (D.D.C. 2004).


In one recent case, the Southern District of New York pointed to a well-known law firm's privilege log (which claimed work product protection for an historic document) as evidence that the company anticipated litigation as of that date -- thus triggering a duty to preserve documents. Ironically, the court had earlier held that the historic document did not deserve work product protection, because the company had prepared it in the "ordinary course" of business.

- Anderson v. Sotheby's Inc. Severance Plan, No. 04 Civ. 8180 (SAS), 2005 U.S. Dist. LEXIS 23517, at *16, *15-16 (S.D.N.Y. Oct. 11, 2005) (assessing an ERISA claim by a former Sotheby's employee; declining to grant plaintiff an adverse inference instruction based on what he alleged to have been Sotheby's wrongful spoliation of evidence; noting that the Sotheby's Severance Plan Committee Secretary routinely destroyed her handwritten meeting notes after she prepared a typewritten Committee Report, so plaintiff had not proven that the ERISA Administrator had "intentionally destroyed notes of the Committee meetings to prevent plaintiff from obtaining them"; however, also noting that the Committee's Chair and the Plan Administrator's outside lawyer interviewed several employees (of Sotheby's successor Cendant) regarding the plaintiff's claims, and that Sotheby's lawyers O'Melveny & Myers had withheld the interview notes during discovery by
asserting both attorney-client privilege and work product protection; although the Magistrate Judge had earlier found that the notes were prepared in the ordinary course of business and therefore did not deserve either protection, "because the Administrator claimed that it reasonably anticipated litigation as of July 6, 2004 [the date of the interview], the Administrator's duty to preserve the documents arose as of that date" (emphases added)).
D. Context: Motivational Component

In additional to the temporal requirement of the work product doctrine (discussed above), a party asserting the protection must also satisfy a motivational component.

1. Motivational Requirement

To deserve work product protection, a document must not only have been created at a time when the preparer anticipated litigation, the document must have been prepared because of the litigation. In re Grand Jury Proceedings, No. M-11-189, 2001 U.S. Dist. LEXIS 15646, at *50 (S.D.N.Y. Oct. 3, 2001).


a. Documents Created Pursuant to an External or Internal Requirement


b. Documents Created in the "Ordinary Course of Business"


Significantly, many courts apply this "ordinary course of business" standard regardless of a lawyer's involvement.


c. Other Documents Not Motivated by Litigation

Focusing on the "ordinary course of business" test can lead the analysis off track.

Even if materials were not created in the "ordinary course" of a company's business, they will not deserve work product protection unless they were motivated by the litigation. Seibu Corp. v. KPMG LLP, No. 3-00-CV-1639-X, 2002 U.S. Dist. LEXIS 906 (N.D. Tex. Jan. 18, 2002).

- For instance, a court found that the work product doctrine did not protect an investigation conducted by GMAC (the loan servicer on World Trade Center debt) immediately following the September 11 attacks on the World Trade Center. SR Int'l Bus. Ins. Co. Ltd. v. World Trade Ctr. Props. LLC, 01 Civ. 9291(JSM), 2002 U.S. Dist. LEXIS 11949 (S.D.N.Y. July 3, 2002).

A number of recent cases highlight this basic principle.

- See, e.g., In re Royal Ahold N.V. Sec. & ERISA Litig., 230 F.R.D. 433, 435 & n.3 (D. Md. 2005) (assessing Royal Ahold's work product claim for 827 witness interview memoranda prepared by outside counsel during an investigation; finding that the work product doctrine did not apply because the investigation was designed to "satisfy the requirement" of the company's outside accountants, and that "the investigation would have been undertaken even without the prospect of preparing a defense to a civil suit"; quoting a statement by the company's board chairman to shareholders that "[t]he purpose of our internal investigations is to enable our accountants to resume their audit work at quickly as possible"; also quoting from the accountant's letter to the company's audit committee,
which indicated that the company had conducted the investigation "to address the concerns" raised by the accountant).

- Even more recently, a court held that the work product doctrine did not protect a company's investigation begun within hours of an industrial accident in which the plaintiff lost his hand -- because the company had advised the plaintiff that it was "our standard practice to investigate accidents," so that the company apparently would have investigated the accident even if it had not anticipated the obvious litigation that almost immediately followed. Harpster v. Advanced Elastomer Sys., L.P., 2005 Ohio 6919, at ¶ 10 (Ohio Ct. App. 2005), appeal denied, 2006 Ohio 2466 (Ohio 2006).

- This theme appears in many similar cases. Carroll v. Praxair, Inc., No. 2:05-cv-307, 2006 U.S. Dist. LEXIS 43991, at *3, *10, *11, *12 (W.D. La. June 28, 2006) (assessing an investigation that resulted from an industrial accident in which a truck driver at defendant Praxair's facility was found unconscious; noting that within 24 hours, Praxair's law department created an investigation team -- instructing the team to report back to the law department and mark all their documents "Confidential Attorney Client/Work Product Privilege"; also pointing out that Praxair offered an affidavit of one of its environmental services managers stating under oath that the investigation was "lawyer-driven and primarily designed to address claims of liability and expected litigation against Praxair" (internal quotations omitted); rejecting Praxair's affidavit and argument, and instead pointing to testimony that "investigations are routinely done following any accident that occurs"; also noting that Praxair "made certain changes in its operations" as a result of the investigation, highlighting the business nature of the investigation; pointing out that "there is nothing before the court to indicate whether all investigations of accidents were conducted under the direction of the Praxair's Law Department.").

d. Types of Documents Protected by the Work Product Doctrine

Courts have debated what types of materials deserve work product protection.


- This limited the protection to documents such as draft pleadings, notes used during a deposition, etc.
Starting in the Second Circuit, courts began to expand the work product protection to documents created "because of" the litigation or anticipated litigation, even if they were not to be used in the litigation. United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998).

- A good example would be an analysis of how a company might pay for a large judgment that might be rendered against it in litigation -- the analysis would not be used in the litigation, but was clearly created "because of" the litigation.

The "because of" standard has spread beyond the Second Circuit and now clearly represents the trend in work product law. United States v. Roxworthy, ___ F.3d ___, No. 05-5776, 2006 U.S. App. LEXIS 20481, at *7, *12, *13, *17-18, *22-23, *25, *26 (6th Cir. Aug. 10, 2006) (assessing a work product claim by Yum! Brands, Inc., for a memorandum prepared by KPMG, which was acting as a tax consultant and not as Yum's outside auditor; adopting the "because of" standard and citing Adlman; also explaining that "the key issue in determining whether a document should be withheld is the function that the document serves;" rejecting a test that would require "that the primary or sole purpose of the KPMG memoranda be in preparation of litigation;" holding that the district court committed "clear error" in holding that Yum did not anticipate litigation; reversing and remanding with instructions to protect the KPMG memoranda as work product).

2. Deceptive Conduct

Some courts find that work product materials prepared through some client or lawyer wrongdoing (such as wiretapping) are not entitled to work product protection. Anderson v. Hale, 202 F.R.D. 548, 558 (N.D. Ill. 2001).

- In assessing a lawyer's conduct, some courts and bars have permitted lawyers and those working under their direction to engage in deceptive conduct that is justifiably deemed to have socially worthwhile purposes -- such as housing discrimination tests. Arizona LEO 99-11 (9/1999).

- Some courts have taken an even more expansive approach, and permitted lawyers to direct their subordinates to engage in knowingly deceptive conduct that seems to have a purely commercial purpose -- as long as the deception is not too gross. Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999); Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456 (D.N.J. 1998).
3. Application to Internal Corporate Investigations

a. Courts' Analysis of Work Product Claims for the Fruits of Internal Corporate Investigations

Most clients (and many lawyers) believe that the work product doctrine normally covers lawyer-supervised investigations of some accounting problem, employee wrongdoing, etc.

- Even if such investigations satisfy the temporal element of the work product doctrine, they often fail the motivational element.

Courts analyzing work product claims for internal corporate investigations tend to focus on three aspects.

(1) The initiating documents which describe the corporate investigation. These documents sometimes reflect a businessperson's description of the problem, even before the company involves or hires lawyers. Even when lawyers are involved, the initiating documents sometimes shy away from mentioning possible litigation -- perhaps for public relations reasons.

(2) The course of the investigation. In some situations the internal corporate investigation report focuses on business or process issues rather than litigation issues.

(3) The use of the investigation results. If companies use the investigation results to make employment decisions, re-tool corporate processes, etc., a court is more likely to find that the company undertook the investigation as a business rather than a litigation-related step.

b. Examples

Many large and prestigious law firms have failed in their efforts to protect the fruits of their corporate investigations.

For example, courts found that materials generated during the following lawyer-supervised corporate investigations did not deserve work product protection, because the company and its law firm had failed to show that the investigation was primarily motivated by litigation reasons.


• An investigation undertaken by Gibson, Dunn into alleged wrongdoing at KPMG. *Seibu Corp. v. KPMG LLP*, No. 3-00-CV-1639-X, 2002 U.S. Dist. LEXIS 906 (N.D. Tex. Jan. 18, 2002).


Although we will never know if these law firms knew from the beginning (and advised their clients) that their investigations would not deserve work product protection, we do know that they argued for such protection after the fact -- and lost.
E. Content: Fact and Opinion

As explained above, the content of work product is far less important than its context.

1. Scope of the Protection

Although the work product doctrine on its face applies only to "documents and tangible things" (Fed. R. Civ. P. 26(b)(3)), most courts apply the protection to non-tangible information such as deposition testimony. In re Lorazepam v. Clorazepate Antitrust Litig., MDL Dkt. No. 1290, Misc. No. 99-276 (TFH/JMF), 2001 U.S. Dist. LEXIS 11794, at *14 (D.D.C. July 16, 2001).

Unlike the attorney-client privilege, work product comes in two forms -- fact and opinion.

- Because opinion work product receives dramatically higher protection than fact work product, litigants often fight about the proper characterization.

2. Fact Work Product

Fact work product includes "tangible materials and intangible equivalents prepared, collected, or assembled by a lawyer. Tangible materials include documents, photographs, sketches, questionnaires and surveys, financial and economic analyses, hand-written notes, and material in electronic and other technologically advanced forms, such as stenographic, mechanical, or electronic recordings or transmissions, computer data bases, tapes, and printouts." Restatement (Third) of Law Governing Lawyers § 87 cmt. f (2000).


3. Opinion Work Product

a. General Rule

Opinion work product includes the impressions or opinions of a lawyer or other client representative.

- Opinion work product communicated to a client might also deserve attorney-client privilege protection, and it usually is worth asserting both protections -- the attorney-client privilege can provide absolute assurance of confidentiality, but the work product doctrine protection is less susceptible to waiver and therefore may survive the sharing of information with third parties (discussed below).

b. Recurring Issues Involving Opinion Work Product

Unfortunately for litigants and their lawyers seeking some certainty, courts take widely differing positions on opinion work product protection for commonly created documents.


- A few months later, a court found that the work product doctrine protected such reserve figures. *Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc.*, No. 02 C 5893, 2006 U.S. Dist. LEXIS 49319 (N.D. Ill. July 6, 2006), (holding that Household's in-lawyers' suggested reserve figure deserved protection under the work product doctrine).

Courts have debated the applicability of the opinion work product to several recurring situations worth mentioning.

**First,** some courts hold that every lawyer-prepared summary of a witness interview (or similar document) deserves opinion work product protection, because it necessarily reveals the lawyer's thought process (about what to ask the witness, what to write down, etc.). *Surles v. Air France*, No. 88 Civ. 5004 (RMB)(FM), 2001 U.S. Dist. LEXIS 10048, at *18 (S.D.N.Y. July 17, 2001); *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620 (N.D. Iowa 2000).

**Other courts are not as generous.** *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 230 F.R.D. 433, 437 (D. Md. 2005) (holding that a lawyer's witness interview memoranda consisted of a "fairly straight forward recitation of the information provided by the witness," and therefore did not deserve opinion work product protection); *Alexander v. FBI*, 198 F.R.D. 306 (D.D.C. 2000); *Nationwide Ins. Co. v. Aldershoff*, C.A. No. 00C-11-048-
Of course, as explained above, every court recognizes that some portions of such a document could deserve opinion work product protection (if they explicitly articulate the lawyer’s opinion).

Second, some courts hold that the opinion work product protects the identity of the witnesses the litigant has interviewed (out of the universe of witnesses who might possess pertinent knowledge). Electronic Data Sys. Corp. v. Steingraber, No. 4:02 CV 255, 2003 U.S. Dist. LEXIS 11816, at *6 (E.D. Tex. June 27, 2003) ("revealing the identity of witnesses interviewed would permit opposing counsel to infer which witnesses counsel considers important, thus revealing mental impressions and trial strategy"); McIntyre v. Main St. & Main Inc., No. C-99-5328 MJJ (EDL), 2000 U.S. Dist. LEXIS 19617, at *7 (N.D. Cal. Sept. 29, 2000).


Third, most courts hold that the opinion work product doctrine does not cover factual information obtained by a lawyer from third parties. McCoo v. Denny’s Inc., 192 F.R.D. 675, 695 (D. Kan. 2000).


The opinion work product doctrine should protect a lawyer’s compilation of documents or facts from a third party, if the compilation would reveal the lawyer’s opinion (for instance, the opinion work product should protect the identity of a small number of documents that a lawyer has selected from a larger collection made available by a third party -- as long as the adversary can review the third party’s documents itself).


As explained below (in the discussion of "Waiver") litigants cannot refuse to comply with pretrial requirements that they identify trial exhibits, trial witnesses, etc.

c. Lawyers' Compilation of Information or Documents as Opinion Work Product (the Sporck Doctrine)

Most courts recognize that a lawyer's (or other client agent's) compilation of specific information out of a larger universe of information deserves opinion work product protection -- because the selection process reflects opinions or impressions.

This approach is called the Sporck doctrine, based on the first case that articulated this type of opinion work product protection. Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985).

Courts have addressed this type of opinion work product protection in a number of settings.

First, starting with Sporck itself, some courts protect the identity of specific documents that a lawyer has asked a deponent to review before testimony.


If a database contains generic information that does not reflect a studied opinion of the data, it generally will not deserve such protection. In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844,


The trend seems to be against broad application of the opinion work product doctrine in these and similar situations, unless the compilation clearly reflects a lawyer's opinions or impressions. Hambarian v. Comm'r, 118 T.C. 565 (T.C. 2002) (finding that the Sporck doctrine did not apply to a prosecuting attorney's selection of 10,000 pages and a petitioner's defense attorney's selection of 100,000 pages from a larger universe of documents maintained by the prosecuting attorney; explaining that "[g]iven the large volume of documents (pages) involved, there is little or no likelihood that the defense attorney's mental impressions would be discernible."); In re Sealed Case, 124 F.3d 230, 236 (D.C. Cir. 1997) (although recognizing that opinion work product was entitled to more protection, holding that "[w]here the context suggests that the lawyer has not sharply focused or weeded the materials, the ordinary Rule 26(b)(3) standard should apply"; remanding to the district court for an additional review of the materials), rev'd sub nom. Swidler & Berlin v. United States, 524 U.S. 399 (1998).
F. Use: Preserving the Work Product Protection

1. Overcoming the Work Product Protection

a. Fact Work Product

Unlike the attorney-client privilege (which is absolute if properly created and not waived), the work product doctrine provides only limited protection from disclosure. Restatement (Third) of Law Governing Lawyers § 87 cmt. d (2000); Marsh v. Safir, No. 99 Civ. 8605 (JGK) (MHD), 2000 U.S. Dist. LEXIS 5136, at *26 (S.D.N.Y. Apr. 20, 2000).

Fed. R. Civ. P. 26(b)(3) allows a party to overcome the work product protection if the party has "substantial need" for the materials and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3).

- The "substantial need" test focuses on the importance of the information to the adversary's case. Madanes v. Madanes, 199 F.R.D. 135, 150 (S.D.N.Y. 2001).

- The "undue hardship" test focuses on whether the information is easily available elsewhere. Fletcher v. Union Pac. R.R., 194 F.R.D. 666, 674-75 (S.D. Cal. 2000).

As might be expected, litigants attempting to meet the "substantial need" standard for overcoming their adversary's work product protection have tried a number of theories.


- This argument generally does not work if the witnesses are available for interview or discovery by the adversary (because in such a circumstance the adversary usually cannot establish the necessary "undue hardship" element. Siddall v. Allstate Ins. Co., 15 F. App'x 522 (9th Cir. 2001); In re Grand Jury Proceedings, No. M-11-189, 2001 U.S. Dist. LEXIS 15646, at *74-75 (S.D.N.Y. Oct. 3, 2001).

- One court has held that a party whose tardiness forfeited the chance to seek discovery from a now-unavailable witness could not point to the

- Courts ordering the production of a litigant's witness interview notes under such a standard should normally allow redaction of any opinions included in the memorandum -- because they are entitled to a heightened protection.

(2) In another common situation involving a litigant's attempt to prove "substantial need" sufficient to overcome an adversary's work product claim, courts sometimes order the production of contemporaneous pictures, witness statements, etc., created immediately after the pertinent incident -- holding that such documents cannot be recreated long after the incident, when memories have faded. *Coogan v. Cornet Transp. Co.*, 199 F.R.D. 166 (D. Md. 2001); *Holton v. S&W Marine, Inc.*, No. 00-1427 SECTION "L" (5), 2000 U.S. Dist. LEXIS 16604, at *10 (E.D. La. Nov. 9, 2000).

(3) Courts sometimes accept other arguments advanced by litigants hoping to obtain their adversary's work product. Examples include:

- Need to obtain material to impeach an adversary's witness. 
  Restatement (Third) of Law Governing Lawyers § 88 cmt. c (2000); 


(4) On the other hand, some courts have rejected litigants' attempts to overcome their adversary's work product protection (sometimes taking views directly opposed to the approach of other courts, identified above). Examples include:


- Need to obtain corroborative evidence. *Baker v. GMC (In re GMC),* 209 F.3d 1051, 1054 (8th Cir. 2000).

- Witnesses' testimony that they do not recall the exact words they used during earlier interviews with their corporation's lawyer. *In re Woolworth Corp. Sec. Class Action Litig., No. 94 Civ. 2217 (RO),* 1996 Dist. LEXIS 7773 (S.D.N.Y. June 6, 1996).

- A first-party insurer's need to know "what the insurer knew at the time of the claim denial" in order to "assert both its defense and counterclaim." *St. Paul Reinsurance Co. v. Commercial Fin. Corp.,* 197 F.R.D. 620, 632 (N.D. Iowa 2000).

- Need to obtain material to impeach an adversary's testifying doctors who were expected to provide expert testimony. *Harris v. Provident Life & Accident Ins. Co.,* 198 F.R.D. 26 (N.D.N.Y. 2000).


(5) Courts also disagree about a litigant's right to obtain an adversary's computer database that took a substantial effort to create.

- Some courts have found that a party seeking such a database can meet the "substantial need" standard without trying to recreate the

- Other courts have held that a party may not obtain access to the adversary's database if the party could create its own database by reviewing documents or interviewing witnesses. Maloney v. Sisters of Charity Hosp., 165 F.R.D. 26, 30-31 (W.D.N.Y. 1995); Lawyers Title Ins. Corp. v. United States Fid. & Guar. Co., 122 F.R.D. 567, 570 (N.D. Cal. 1988).

- Courts have also rejected a litigant's arguments based on an alleged: need for an adversary's computer database so that a lawyer "could better frame his discovery requests" (Lawyers Title Ins. Corp. v. United States Fid. & Guar. Co., 122 F.R.D. 457, 570 (N.D. Cal. 1988)); need to obtain an adversary's computer database to ensure that the adversary is producing all relevant documents. Lawyers Title Ins. Corp. v. United States Fid. & Guar. Co., 122 F.R.D. 457, 570 (N.D. Cal. 1988).


(6) Most courts find that a surveillance videotape deserves work product protection if it was prepared in anticipation of litigation and motivated by the litigation (explained above).

- Courts generally require that a party preparing such a videotape must produce it, because the party that has been videotaped cannot replicate the videotape (Evan v. Estell, 203 F.R.D. 172, 173 (M.D. Pa. 2001)), or because the party intends to use the videotape at trial. Id. at 175.

- In an unusual twist, courts recognize the obvious benefit of a secret surveillance videotape in impeaching the party being videotaped (such as a personal injury plaintiff falsely claiming serious injuries) by permitting the party making the videotape to withhold it until after that party has deposed the subject of the videotape. Bradley v. Wal-Mart...
b. Opinion Work Product

Fed. R. Civ. P. 26(b)(3) requires that a court "shall protect" against the disclosure of opinion work product.


- Other courts apply every variation in between these two extremes.

c. Shifting Burdens of Proof

Litigants' fight over work product often involves an elaborately choreographed shifting of burdens back and forth.

- In In re OM Group Securities Litigation, 226 F.R.D. 579, 584 (N.D. Ohio 2005), the court explained (as do most courts) that (1) the party seeking an adversary's work product must establish relevance; (2) the burden then shifts to the party withholding the work product to show that it meets the work product standards; (3) the burden then shifts back to the requesting party to show that it has "substantial need" of the materials and is unable to obtain the "substantial equivalent" without "undue hardship"; and (4) if the requesting party carries this burden, the court must nevertheless protect the protecting party lawyers' and other representatives' opinions.

If a document contains both fact and opinion work product, courts sometimes require that parts of it be produced while other parts remain protected. Restatement (Third) of Law Governing Lawyers § 89 cmt. c (2000).
G. Use: Avoiding Waiver of the Work Product Protection

1. Express Waiver

a. General Rule


Interestingly, at least one court has held that the party challenging an adversary’s work product assertion has the burden of proof -- in contrast to the majority view that the party asserting the attorney-client privilege has the burden of proof. Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc., No. 03-1496 c/w 03-1664 SECTION: "A" (4), 2004 U.S. Dist. LEXIS 10048 (E.D. La. June 2, 2004).

b. Waiver Caused by Disclosing Work Product to Adversaries, or Others Who Might Share It with Adversaries

Although the attorney-client privilege is so fragile that any disclosure outside the attorney-client relationship generally waives the protection, most courts find that disclosing work product to third parties does not automatically waive that protection. Viacom, Inc. v. Sumitomo Corp. (In re Copper Mkt. Antitrust Litig.), 200 F.R.D. 213, 221 n.6 (S.D.N.Y. 2001).

Of course, disclosing work product to an adversary generally waives the work product protection.

Because inadvertently produced documents disclosed during litigation generally fall into the adversary’s hands, most courts apply the same tests (strict, liberal or fact-intensive) in determining waiver of the work product protection that they use in assessing waiver of the attorney-client privilege. Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990).

Disclosing work product to a third party other than an adversary generally causes a waiver only if the disclosure makes it likely that the work product will "fall into enemy hands" -- ending up with the adversary. Bowman v. Brush Wellman, Inc., No. 00 C 50254, 2001 U.S. Dist. LEXIS 14088, at *7 (N.D. Ill. Sept. 13, 2001); In re Doe, 662 F.2d 1073, 1081, 1082 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).
In essence, sharing work product with a friend or ally does not automatically waive the work product protection. Sheets v. Ins. Co. of N. Am., No. 4:04CV00058, 2005 U.S. Dist. LEXIS 27060 (W.D. Va. Nov. 8, 2005) (holding that a personal injury plaintiff did not waive the work product protection by sharing work product with others involved in a boating accident; noting that those to whom the plaintiff disclosed the work product shared the plaintiff's interest in obtaining insurance coverage for the boating accident).

- The similarity of interests in this situation does not have to be as tight as that required for creating a "joint defense" or "common interest" arrangement (which is the only way to avoid waiving the attorney-client privilege when disclosing privileged communications to a third party).

In fact, sharing work product with a third party may or may not waive the work product protection, depending on whether the disclosure makes it more likely that the adversary will obtain access to the protected work product.

- In such situations, courts often conduct a fact-intensive analysis of this possibility. Verschoth v. Time Warner Inc., No. 00 Civ. 1339 (AGS) (JCF), 2001 U.S. Dist. LEXIS 3174, at *10 (S.D.N.Y. Mar. 22, 2001) (holding that Time Warner waived the work product protection covering information about an employment discrimination case by sharing information with a former assistant managing editor of Sports Illustrated who continued to perform freelance editing for the magazine, because the editor was a long-standing friend of the plaintiff, and "it was not reasonable to discuss with [the editor] information that may have been gathered in anticipation of that litigation and expect him not to convey it to [the plaintiff]").

Given this difference between the attorney-client privilege and work product doctrine, it makes sense to share work product only under a confidentiality agreement.

- A confidentiality agreement would not prevent waiver of the attorney-client privilege, but might demonstrate that the party disclosing work product did not increase the chance the adversary would obtain access to the work product. Blanchard v. EdgeMark Fin. Corp., 192 F.R.D. 233, 237-38 (N.D. Ill. 2000).

c. Disclosure that Waives the Attorney-Client Privilege but not the Work Product Doctrine

This difference in waiver principles between the attorney-client privilege and the work product doctrine sometimes means that sharing materials protected by both the attorney-client privilege and the work product doctrine might waive the former but not the latter. Calvin Klein Trademark Trust v. Wachner.
198 F.R.D. 53 (S.D.N.Y. 2000) (sharing information with a public relations firm); Chase v. City of Portsmouth, Civ. No. 2:05cv446, 2006 U.S. Dist. LEXIS 29294, at *20 (E.D. Va. Apr. 20, 2006) (holding that a City Attorney's letter to the City Council and others deserved privilege protection; but finding that the City had lost the privilege protection by not treating the letter carefully enough; also finding that the letter deserved work product protection, which can survive "[l]imited disclosure to third parties" and therefore continued to protect the letter)

- In one recent celebrated case, Martha Stewart was found to have waived the attorney-client privilege protection covering one of her e-mails by sharing it with her daughter, but was found not to have waived the work product protection covering the e-mail. United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

d. Selective Disclosure to Gain an Advantage


- Sharing work product during settlement negotiations can waive the protection, although not all courts agree. In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846-47 (8th Cir. 1988); Sparton Corp. v. United States, 44 Fed. Cl. 557, 565-66 (Fed. Cl. 1999).

Some courts are quick to find a waiver, even if a company's public disclosure does not reveal actual work product -- but rather discloses the results of corporate investigations.

- In re Royal Ahold N.V. Sec. & ERISA Litig., 230 F.R.D. 433, 436, 437 (D. Md. 2005) (finding that Royal Ahold had waived any work product protection for hundreds of witness interview memoranda prepared by outside counsel, because the company had included in its Form 20-F filing "the information obtained from the witness interviews, and the conclusions expressed in the internal investigative reports"; noting that the "public disclosure argument is consistent with the position that the driving force behind the internal investigations was not this litigation but rather the need to satisfy Royal Ahold's accountants, and thereby the SEC, financial institutions, and the investing public"; not mentioning if the filing quoted from any of the interviews or mentioned the lawyers' role, although noting elsewhere that investigative reports made available to the plaintiffs quoted from the witness interview memoranda; finding that this amounted to "testimonial use" of the "material that might otherwise be protected as

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work product"; explaining that "[b]y its public disclosures in the Form 20-F and the production of several of the internal reports to the plaintiffs, Royal Ahold has therefore waived the attorney-client privilege and non-opinion work product protection as to the subject matters discussed in the 20-F and the reports"; finding that the witness interview memoranda themselves do not deserve opinion work product protection, "except as to those portions Royal Ahold can specifically demonstrate would reveal counsel's mental impressions and legal theories concerning this litigation").

e. Disclosure of Work Product to the Government

Courts have wrestled with the waiver implications of companies sharing work product with the government.

- As a theoretical matter, some courts held out the possibility that sharing work product with the government does not create a waiver. For instance, if the private party has an interest allied with the government's interest, sharing work product with the government may not waive the work product protection. In re Visa Check/Mastermoney Antitrust Litig., 190 F.R.D. 309, 314 (E.D.N.Y. 2000).

- However, a string of recent cases has held that companies always waive the work product protection by sharing work product with the government. In re Royal Ahold N.V. Sec. & ERISA Litig., 230 F.R.D. 433, 437 (D. Md. 2005) (requiring Royal Ahold to provide plaintiff 269 interview memoranda that Royal Ahold had earlier given to the SEC and to the U.S. Attorney's Office, noting that the confidentiality agreement between Royal Ahold and these governmental entities "allows substantial discretion" to the government to use or disclose the memoranda); In re CMS Energy Sec. Litig., No. 02-CV-72004 & 02-CV-72834, 2005 U.S. Dist. LEXIS 8838 (E.D. Mich. May 13, 2005) (finding that a company's sharing of an internal investigation report with various government agencies under a confidentiality agreement waives the attorney-client privilege and work product protections); In re Tyco Int'l, Inc. Multidistrict Litig., MDL Dkt. No. 02-1335-B, 2004 U.S. Dist. LEXIS 4541 (D.N.H. Mar. 19, 2004) (unpublished opinion); Spanierman Gallery v. Merritt, No. 00 Civ. 5712 (LTS)(THK), 2003 U.S. Dist. LEXIS 22141 (S.D.N.Y. Dec. 5, 2003); McKesson Corp. v. Green, 610 S.E.2d 54, (Ga. 2005); McKesson HBOC, Inc. v. Superior Court, 9 Cal. Rptr. 3d 812 (Cal. Ct. App. 2004).

- The most recent Circuit Court decision found that a company sharing work product with the government waived that protection (although it affirmed the lower court's ruling that allowed redaction of opinion work product before ordering disclosure to a private plaintiff). In re Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1187-88, 1199, 1196 (10th Cir. 2006) (assessing
the waiver implications of Boies Schiller sharing with the SEC and the DOJ approximately 220,000 pages of material created or collected during Boies Schiller's internal investigation of Qwest; upholding the district court's ruling that Boies Schiller had waived the work product protection by sharing the documents with the government, though permitting Boies Schiller to redact opinion work product; finding that the First, Second, Third, Fourth and Sixth Circuits had rejected the concept of a "selective waiver," which would allow companies to share work product with the government but not force them to disclose the protected materials to private plaintiffs; noting that some circuits (including the Second, Third and D.C. Circuits) hold out some hope for selective waiver in the work product context; but rejecting any selective waiver in either the privilege or work product contexts; finding that Qwest's confidentiality agreement with the government did little to restrict the agencies' use of the materials they received from Qwest; rejecting Qwest's and ACC's argument that companies now litigate in a "culture of waiver" that discourages corporations' cooperation with the government; noting that Qwest itself "hedged its bets by choosing to release 220,000 pages of documents [to the government] but to retain another 390,000 pages of privileged documents"; concluding that "Qwest perceived an obvious benefit from its disclosures but did so while weighing the risk of waiver.")

- A few recent cases have taken the opposite approach, but it is too early to tell if these cases are an aberration or represent a new trend. In re McKesson HBOC, Inc. Sec. Litig., Nos. C-99-20743 RMW & C-00-20030 RMW, 2005 U.S. Dist. LEXIS 7098 (N.D. Cal. Mar. 31, 2005); In re National Gas Commodity Litig., No. 03 Civ 6186 (VM) (AJP), 2005 U.S. Dist. LEXIS 11950 (S.D.N.Y. June 21, 2005).

- One court has held that sharing work product with the government waives the protection applicable to fact work product, but not opinion work product. In re Martin Marietta Corp., 856 F.2d 619, 625 (4th Cir. 1988), cert. denied, 490 U.S. 1011 (1989).

- Given this uncertainty, companies should never assume that they can share work product with the government without waiving that protection.

f. Disclosure of Work Product to Outside Auditors

Courts have also dealt with the waiver implications of sharing protected work product with outside auditors.

- Several earlier cases had indicated that company might be able to share work product with their auditors without waiving the work product protection -- because the outside auditors were not the company's


- A later case took the opposite position -- finding that a company sharing work product with its outside auditor did not waive the work product protection. Merrill Lynch & Co. v. Allegheny Energy, Inc., 229 F.R.D. 441, 444, 447, 448, 449 (S.D.N.Y. 2004) (acknowledging that the earlier Medinol decision took the opposite approach, but finding that Merrill Lynch did not have a "tangible adversarial relationship" with its auditor Deloitte & Touche, so that Merrill Lynch had not waived the work product protection covering an internal investigation report by sharing that report with Deloitte & Touche; noting that Deloitte & Touche concluded that the report "did not impact [Deloitte's] audit work or Merrill Lynch's financial statements"; pointing to Deloitte's "ethical and professional obligation" to maintain the confidentiality of materials received from Merrill Lynch; concluding that finding a waiver of the work product protection in such circumstances "could very well discourage corporations from conducting a critical self-analysis and sharing the fruits of such an inquiry with the appropriate actors").

- In an analogous situation, another Southern District of New York decision declined to follow Medinol, and instead held that a company did not waive the opinion work product protection by sharing the opinion work product with an actuary (who used the report in preparing filings with the New York Insurance Department). Am. S.S. Owners Mut. Prot. & Indem. Ass'n, No. 04 Civ. 4309 (LAK) (JCF), 2006 U.S. Dist. LEXIS 4265 (S.D.N.Y. Feb. 2, 2006).

- The most recent Southern District of New York decision took the same approach, meaning that the last three decisions from that important court found that a company sharing work product with an outside auditor did not waive that protection. International Design Concepts, Inc. v. Saks Inc., No. 05 Civ. 4754 (PKC), 2006 U.S. Dist. LEXIS 36695, at *8-9 (S.D.N.Y. June 5, 2006) (holding that Saks did not waive the work product protection covering an internal investigation report prepared by Wilmer Hale by disclosing the report to Saks' outside auditor PWC; "[A]llowing the outside auditor, retained by the client, to know the content of the attorney's confidential threat assessment does not, in this Court's view, destroy the
Here, I conclude that the report is protected because it contains the attorney's mental impressions and professional judgments concerning the magnitude, scope and/or likely merits of the claims, was prepared in contemplation of actual and potential litigations or claims, was created in reliance upon the attorney work product protection and was communicated to the client's auditor under a strict pledge of confidentiality for a valid purpose that serves the interest of the client.

Another 2006 decision on this issue agreed with the recent trend against finding a waiver in these circumstances. Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., No. 02 C 5893, 2006 U.S. Dist. LEXIS 49319, at *21, *25-26 (N.D. Ill. July 6, 2006), (holding that the work product doctrine protected Household's in-house lawyer's opinion letters to Household's outside auditor Anderson, and that disclosing the opinion letters did not waive the work product protection; "In the court's view, the fact that an independent auditor must remain independent from the company it audits does not establish that the auditor also has an adversarial relationship with the client as contemplated by the work product doctrine. Disclosing documents to an auditor does not substantially increase the opportunity for potential adversaries to obtain the information."; also finding that Household did not waive the work product protection covering its litigation database (which reflected its lawyer's mental impressions) by allowing Anderson to review a "sample of cases from the legal database to insure completeness" (citation omitted); explaining that "disclosing documents to an auditor does not substantially increase the opportunity for potential adversaries to obtain the information").

The newest decision on this issue comes from a case closely watched as one of the government's first efforts to get tax accrual workpapers through court proceedings from a financial services subsidiary of conglomerate Textron, Inc. United States v Textron, Inc., No. 06-198T (D.R.I. August 29, 2007). The U.S. District Court for the District of Rhode Island denied the government's petition to get the 2001 tax accrual workpapers from Textron, Inc.'s financial services subsidiary. Addressing the more specific facts of the case, Textron, Inc. (Textron), a publicly traded corporation with approximately 190 subsidiaries, had a subsidiary that provided commercial lending and financial services (Textron Financial Corp. or TFC) relied on Textron attorneys, private law firms, and outside accounting firms for advice regarding tax matters. IRS learned that TFC had engaged in nine "sale-in, lease-out" (SILO) transactions involving telecommunications equipment and rail equipment. Because the transactions were considered to be of a type engaged in for the purpose of tax avoidance, IRS issued more than 500 IDRs to Textron. In June 2005, the IRS manager examining Textron's return issued an administrative
summons for all of the tax accrual work papers for Textron's tax year ending Dec. 29, 2001. Textron refused to produce its tax accrual work papers asserting that they were privileged and that the summons was issued for an improper purpose. During the course of an audit conducted by Textron's independent auditor, Textron permitted the auditor to examine the final tax accrual work papers at issue in the case with the understanding that the information was to be treated as confidential. The court said determination of any tax owed must be based on factual information, none of which is contained in the work papers and all of which is readily available to the IRS through the issuance of information document requests (IDRs) and by other means. The court said that, in its view, the papers sought by the IRS would have little bearing on calculating Textron's tax liability. "The opinions of Textron's counsel, either favorable or unfavorable, would have little to do with that determination, and forced disclosure of those opinions would put Textron at an unfair disadvantage in any dispute that might arise with the IRS," the court found. The court ruled the requested documents are protected by the work product privilege, supporting Textron's claims. "The IRS has failed to carry the burden of demonstrating a 'substantial need' for ordinary work product, let alone the heightened burden applicable to Textron's tax accrual work papers, which constitute opinion work product," the court said in a 34-page opinion.

This new debate has caused great concern to in-house lawyers, who find themselves pressured by outside auditors to disclose litigation-related analyses, litigation outcome predictions, etc. -- yet justifiably worry about waiving the work product protection that would otherwise entitle the companies to withhold such documents from the private plaintiffs against whom they are litigating.

- IRS releases internal memoranda on FIN 48. "FIN 48 Disclosures . . . should be considered by examiners and others when conducting risk assessments." (Deborah Nolan, LMSB Commissioner). The battle wages on despite such court decisions like the Textron decision.

is an interpretation of the FASB Statement No. 109 regarding the calculation and disclosure for uncertain tax positions.

Since its release on July 13, 2006, FIN 48 has generated considerable interest and concern. Many taxpayers fear that the disclosures required by FIN 48 and the workpapers prepared in connection therewith will serve as a “roadmap” for IRS examinations. The IRS Office of Chief Counsel has determined that FIN 48 Workpapers are Tax Accrual Workpapers (TAW), and are therefore subject to the IRS’ current policy of restraint as contained in IRM 4.10.20. IRS officials have stated, however, that the current TAW Policy is being evaluated to ensure that it is still appropriate in today’s environment.

The memorandum captioned “FIN 48 Implications LMSB Field Examiner’s Guide,” lists ten common questions and answers related to the requirements of FIN 48. The first question, and the one most likely on taxpayers’ and IRS examiner’s minds is, “Are FIN 48 Disclosures a Roadmap for the IRS?” The memorandum does not answer this question with a simple “yes” or “no,” but it is clear from the answer that, at a minimum, IRS examiners should use the FIN 48 disclosures to point them in the right direction. The answer notes that FIN 48 disclosures may lack specificity, and therefore, it may be difficult, for example, to know whether the disclosure has a U.S. tax or foreign tax implication. Nevertheless, the answer goes on to state, “Even with the lack of specificity, tax footnotes included in financial statements, including FIN 48 Disclosures, should be carefully reviewed and analyzed as part of the audit planning process.

The second question and answer in the memorandum addresses the impact of FIN 48 on the IRS’ TAW Policy. While the answer states that FIN 48 Workpapers are TAWs, and therefore, subject to the policy of restraint, FIN 48 Disclosures are another matter. “On the other hand, FIN 48 Disclosures reported in quarterly and/or annual financial statements, and any other public documents, are not subject to the policy of restraint, and should be considered by examiners and others when conducting risk assessments.”

A number of the questions and answers address taxpayers’ concerns about obtaining certainty on tax issues more quickly through closing agreements, restricted consents to extend the statute of limitations, and the IRS’ pre-filing programs (Industry Issue Resolution, Pre-filing Agreements, Advance Pricing Agreements, and Compliance Audit Program) and post-filing programs (Joint Audit Plan, LIFE, Advance Issue Resolution, Appeals Fast Track Program, Accelerated Issue Resolution, and Early Referral to Appeals). In this regard, the memorandum notes, “We can remind taxpayers that candor, transparency and the right motivations, coupled with programs and processes we have in place today can quickly generate certainty on tax issues.”
Question and Answer #8 addresses the situation in which a transaction that has closed becomes a Listed Transaction. Under the Jobs Creation Act, the statute of limitations is extended until one calendar year after the IRS receives proper disclosure of Listed Transactions. In the case of a closed transaction that becomes a Listed Transaction, the answer states that, until one year after proper disclosure to the IRS, interest must be accrued in the P&L on the unrecognized tax benefit (perhaps all of the benefit because the "more likely than not" threshold may not have been met) under the rules of FIN 48, and the tax benefit taken on the tax return will never be recognizable in the financial statements. As a result, each year the accrued interest increases and the P&L is negatively affected.

The memorandum states that LMSB has consulted FASB on this point and FASB agrees that this is the result. The memorandum advises that "it may be a good practice to remind taxpayers about this provision affecting Listed Transactions and the way they impact on the application of FIN 48 in their financial statements."

It is clear from the memoranda that the IRS is preparing its LMSB examiners to focus carefully on FIN 48 Disclosures. The statement that LMSB is evaluating the policy of restraint with respect to FIN 48 Workpapers suggests that LMSB examiners may be increasing their requests for FIN 48 Workpapers. LMSB has created a "TAW Cadre whose members are available to assist with the review of documents received in response to TAW IDRs [information document requests]. The primary objective of the Cadre is to assist LMSB examiners in determining whether items received fulfill the IDR, whether additional documents should be requested, and in considering the risk assessment related to the review of those tax accrual workpapers."

g. Disclosure of Work Product to Non-Testifying Experts

As explained above, specially retained litigation-related non-testifying experts are subject to discovery only under "exceptional circumstances." Fed. R. Civ. P. 26(b)(4)(B).

- This very narrow discovery standard generally allows the sharing of work product (even opinion work product) with a non-testifying expert without fear of waiver.

h. Disclosure of Work Product to Testifying Experts

Courts have always recognized that fact work product provided to a testifying expert may be discovered by the adversary.
The key uncertainty involves the discoverability of opinion work product (a distinction discussed above) that a lawyer or client shares with a testifying expert.

- The work product rule clearly provides heightened protection from discovery for opinion work product (discussed above).

- However, the rules also permit discovery (to one extent or another) of a testifying expert.

- Moreover, simple fairness might indicate that a litigant should be entitled to explore all of the information that has been provided to the adversary's testifying expert.

Before 1993, federal courts debated whether opinion work product shared with a testifying expert was subject to discovery -- the majority of federal courts answered "yes."

A 1993 amendment to the Federal Rules now requires that testifying experts disclose "the data or other information considered by the witness in forming the opinions." Fed. R. Civ. P. 26(a)(2)(B) (emphasis added).


Under this approach, the only grounds for withholding from discovery any opinion work product shared with the testifying expert is that the expert did not review the material. Constr. Indus. Servs. Corp. v. Hanover Ins. Co., 206 F.R.D. 43 (E.D.N.Y. 2002).

- However, a litigant relying on this exception must clearly establish that the testifying expert never reviewed the material. Tri-State Outdoor Media Group, Inc. v. Official Comm. of Unsecured Creditors to Tri-State Outdoor Media Group, Inc., 283 B.R. 358, 365 (Bankr. M.D. Ga. 2002).

Some states did not change their rules to match the 1993 Federal Rules change -- so the situation in those states is much like the pre-1993 situation under the Federal Rules.

- Crowe Countryside Realty Assocs., Co. v. Novare Eng'rs, Inc., 891 A.2d 838 (R.I. 2006) (holding that under Rhode Island law sharing opinion work product with a testifying expert did not cause a waiver); Helton v. Kincaid, 2005 Ohio 2794, at ¶ 16 (Ohio Ct. App. 2005) (noting the debate, and
concluding that "we agree with those courts who have determined that
work product does not lose its protected status simply because it is
disseminated to an expert").

- Litigants in states which did not change their rules might face differing
  standards in Federal court and state court.

2. Implied Waiver

Most courts apply the implied waiver doctrine to work product, meaning that
taking certain positions can waive the work product protection.

- Examples include: relying on advice of counsel (Brennan v. Western Nat'l Mut.
  mental state "at issue" (Tribune Co. v. Purcigliotti, No. 93CIV.7222 LAP THK,
  investigation of a sexual harassment charge as a defense to the allegations
  lawyer as a factual or expert witness (Sorenson v. H&R Block, Inc., 197 F.R.D.
  206 (D. Mass. 2000)); asserting a "qualified immunity" affirmative defense
  a bad faith insurance case that implicate a lawyer's activities (Charlotte Motor
  Speedway, Inc. v. Int'l Ins. Co., 125 F.R.D. 127 (M.D.N.C. 1989)); asserting a
defense based on the adequacy of an investigation (Jones v. Scientific Colors,
  Inc., Nos. 99 C 1959 & 00 C 1071, 2001 U.S. Dist. LEXIS 10633 (N.D. Ill. July 9,
  2001)); arguing ignorance of a claim that would start the statute of limitations
2000)); suing a former lawyer for malpractice (thus waiving the opinion work
product that would otherwise cover successor counsel's work) (Rutgard v.
Haynes, 185 F.R.D. 596, 601 (S.D. Cal. 1999)); seeking attorney fees. Tonti
LEXIS 5748, at *6-7 (E.D. La. Apr. 26, 2000).

- A recent case took a very broad and troubling view of this issue. In re Royal
(finding that Royal Ahold had waived the work product doctrine covering
witness interview memoranda by disclosing "information obtained from the
witness interviews" to: (1) "the public in [Royal Ahold's] Form 20-F filing with
the SEC"; and (2) to the plaintiffs by giving them some of the reports;
explaining that "to the extent that Royal Ahold offensively has disclosed
information pertaining to its internal investigation in order to improve its
position with investors, financial institutions, and the regulatory agencies, it
also implicitly has waived its right to assert work product privilege as to the
underlying memoranda supporting its disclosures"; ordering the company to
produce all interview memoranda "containing factual information underlying the public disclosures, including the 20-F and the investigative reports provided to plaintiffs" -- "unless a specific showing of opinion work product can be made to the court").

3. Subject Matter Waiver

As explained above, many differences between the work product doctrine and the attorney-client privilege reflect themselves in differing rules governing such important matters as the level of protection and waiver.

- These differences are also reflected in the doctrine of subject matter waiver.

Some courts find that waiver of the work product protection results in a subject matter waiver, while others do not. *Chiron Corp. v. Genentech, Inc.*, 179 F. Supp. 2d 1182 (E.D. Cal. 2001); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370 (Fed. Cir. 2001).

4. Inapplicability of the Work Product Doctrine to Trial Documents

Whether analyzed under the work product doctrine's applicability *ab initio* or as an implied waiver issue, it is obvious that the work product doctrine does not protect the identity of documents that a litigant intends to use at trial -- such as a list of intended exhibits. *Northup v. Acken*, 865 So. 2d 1267 (Fla. 2004).

- If an adversary requests such information early in the pre-trial process, perhaps a timing objection would be appropriate -- but a litigant cannot refuse to comply with mandated pre-trial disclosures by arguing that the selection of exhibits reflects opinion work product.

- Only one court seems to have taken this concept to the logical extreme, prohibiting a litigant from putting on evidence at trial if the litigant claimed some protection in refusing to provide the evidence during discovery. *Arthrocare Corp. v. Smith & Nephew, Inc.*, 310 F. Supp. 2d 638 (D. Del. 2004).

5. Efforts to Change the Harsh Waiver Rules

At the end of the section on attorney-client privilege waiver (above), this outline addresses recent efforts to avoid the current harsh waiver rules.

- Most of these efforts would also reduce or eliminate the waiver effect of intentionally sharing work product with the government or inadvertently producing work product during litigation.
• Although sharing work product does not automatically cause a waive of that protection, the changes discussed above apply in contexts in which the disclosure would normally waive both the work product protection and the attorney-client privilege (disclosing work product to an adversary -- an investigating governmental agency or a litigation adversary seeking the production of documents).