



ATTORNEY-CLIENT PRIVILEGE UPDATE: CURRENT AND RECURRING ISSUES

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Approved by the Board of Regents
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ATTORNEY-CLIENT PRIVILEGE UPDATE: CURRENT AND RECURRING ISSUES¹

This White Paper addresses a number of recurring issues concerning the attorney-client privilege. It focuses primarily on the scope and reach of the privilege and the circumstances in which a waiver may occur due to the involvement of, or disclosure to, certain categories of persons. The cases cited are intended to serve as illustrative examples of the relevant issues, and do not encompass or survey the law applicable to all jurisdictions.

1. Agents of the lawyer.

Those individuals employed by and working under the direct supervision and control of the attorney are included within the scope of the attorney-client privilege. This includes the attorney's paralegals, clerks, stenographers, summer associates, investigators, secretaries, and other attorneys. *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 70 cmt. g (Am. Law Inst. 2000). One court has suggested that the agency rule is limited to “ministerial agents of the attorney (such as clerks or stenographers) whose assistance is *essential* in the ordinary performance of legal services.” *F.T.C. v. TRW, Inc.*, 479 F.Supp. 160, 163 n.7 (D.D.C. 1979), *aff'd* 628 F.2d 207 (D.C. Cir. 1980) (emphasis added). Another court held that in order to be an agent of an attorney, the three fundamental requirements of an agency relationship must be satisfied: “First, an agent must have the power to affect the legal relations of the principal and others. Next, the agent is a fiduciary who works on behalf of the principal and primarily for his benefit. Last, the principal has the right to control the conduct of the agent.” *Henderson v. Nat’l R.R. Passenger Corp.*, 113 F.R.D. 502, 509 (N.D. Ill. 1986) (citations omitted).

In practice, however, the privilege has generally been extended beyond these narrow readings. The assistance need not be considered absolutely essential to the ordinary performance of legal services for the individual providing such assistance to fall within the scope of the privilege. *See, e.g., U.S. v. Koerber*, No. 2:09-cr-302 CW, 2011 WL 2174355, at *9 (D. Utah June 2, 2011) (“At the time Mr. Koerber gave Ms. Taylor the letter, she was acting as his executive assistant. Mr. Koerber gave Ms. Taylor the letter for the purpose of proof reading it and returning it to him before he sent it to Mr. Moore for his legal review. Initially, federal courts have held [that] the passing [of] a communication to a secretary does not waive privilege.”). Nor is a finding of legal agency typically required. The standard for determining who qualifies as an agent is amorphous, and different courts have used different words — ranging from “necessary,” “needed,” “indispensable,” “required,” and “highly useful” — in establishing a threshold for the level of assistance being sought by the attorney. *See* Paul R. Rice, ATTORNEY-CLIENT PRIVILEGE IN THE U.S. § 3:4 (database updated December 2017); Cal. Evid. Code § 952 (no waiver where [information is] disclosed to those third persons who are present to further the interest of the client).

In recent years, the rise in corporate employment of paralegals in legal departments has forced courts to address how the privilege should extend to the work product of fairly autonomous

¹ This update was prepared by the Attorney-Client Relations Committee of the American College of Trial Lawyers. It is current as of August, 2017.

paralegals. The critical question appears to be the level of supervision that attorneys exercise over the work of paralegals. *See, e.g., Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 76 (S.D.N.Y. 2010) (finding paralegal's *opinions* on potential trademark *opinions* not protected by attorney-client privilege because it was not established "that an attorney participated in the communication[s]"; the fact that attorney was copied on emails was insufficient to support the extension of the privilege).

2. Communications with non-employee agents or functional equivalents of clients.

A line of cases has developed for the principle that the privilege will apply to communications made between the lawyer and a third party if the third party is necessary for the attorney to render legal advice to the client, because the third party is an agent or the functional equivalent of the client. *See In re Bieter Co.*, 16 F.3d 929, 937 (8th Cir. 1994) ("[W]hen applying the attorney-client privilege to a corporation or partnership, it is inappropriate to distinguish between those on the client's payroll and those who are instead . . . employed as independent contractors."). In *In re Bieter*, the leading case in this area, an independent contractor for the client who secured tenants for a real estate development, worked with architects, consultants, and counsel, and appeared before city council and planning commissions, was deemed to be a representative of the client for purposes of applying the attorney-client privilege. *Id.* In propounding this view, the *Bieter* court said that "too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely." *Id.* at 937-38.

Thus, courts have recognized that the privilege umbrella extends to protect communications of counsel with persons performing a variety of functions on behalf of clients, if such persons, although not employed by the client, are the "functional equivalent[s]" of the client. A court's inquiry under the functional equivalence standard is very fact-specific. *Compare ExportImport Bank v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (concluding that communications with financial advisor were not protected under functional equivalence doctrine because no sufficient showing was made that consultant had primary responsibility for a key corporate job, had close and continuous relationship with company's principals on matters critical to company's litigation position, or likely possessed information possessed by no one else at the company), *with In re Adelphia Commc'ns Corp.*, No. 02-41729 (REG), 2007 Bankr. Lexis 660 (Bankr. S.D.N.Y. Feb. 20, 2007) (holding that outside consultant was functional employee because the consultant had substantial responsibility for client relationship, was primary contact for this relationship, was authorized to speak on behalf of company, and interacted with company's employees "just like any other employee"), and *In re Bristol-Myers Squibb Sec. Litig.*, No. 00-1990 (SRC), 2003 U.S. Dist. Lexis 26985 (D.N.J. June 25, 2003) (setting forth a four-part test to evaluate whether a consultant is a "functional employee") *with In re Flonase Antitrust Litig.*, 879 F.Supp.2d 454, 459-60 (E.D. Pa. 2012) (rejecting the strict four-part test, and accepting "The broad approach to determining whether an independent consultant is the functional equivalent of an employee reflects the privilege analysis in *Upjohn*² by focusing its inquiry on whether the communications at issue were kept confidential and made for the purpose of obtaining or providing legal advice.").

2 *Upjohn Co. v. U.S.*, 449 U.S. 383, 398 (1981).

As noted by the court in *In re Flonase Antitrust Litigation*, *supra*, the broad approach “reflects the reality that ‘corporations increasingly conduct their business not merely through regular employees but also through a variety of independent contractors retained for specific purposes.’” *Id.* at 460. [See Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 269 (5th ed. 2007).] “To apply a narrow construction of the privilege to communications involving independent consultants would be ‘too restrictive’ to be realistic in today’s marketplace, where businesses frequently hire contractors and still expect to be able to seek legal advice.” *Id.* See also *Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436, 439-40 (D. Md. 2005) (determining that financial consultant was functional equivalent of client in connection with communications to secure legal advice); *In re Currency Conversion Fee Antitrust Litig.*, No. MDL 1409, M 21-95, 2003 WL 22389169, at *1-3 (S.D.N.Y. Oct. 21, 2003) (holding that computer service company supporting credit card issuer did not meet “functional equivalence” test because it was simply a provider of “standard trade services”); *Horton v. U.S.*, 204 F.R.D. 670, 673 (D. Col. 2002) (concluding, in action concerning alleged release of contaminants on property, that a contract stating that third party was plaintiff’s agent for managing property and “self-serving” letter written from plaintiff to third party after litigation ensued did not establish that third party was functional equivalent of client for purpose of managing litigation). Compare *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 21719 (S.D.N.Y. 2001) (finding communications by inside and outside counsel with public relations firm privileged because public relations firm was functional equivalent of in-house public relations department, with authority to make decisions and statements, and to seek and receive legal advice concerning its duties) with *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 432 (S.D.N.Y. 2013) (client “has not shown that the activities [public relations consultant] was performing were part of [counsel’s] efforts to conduct ‘public advocacy on behalf of’ [client] in relation to this lawsuit. Indeed, [consultant] was retained before this litigation began. Moreover, it was not called upon to perform a specific litigation task that the attorneys needed to accomplish in order to advance their litigation goals—let alone a task that could be characterized as relating to the ‘administration of justice.’ Rather, it was involved in a wide variety of public relations activities aimed at burnishing [client’s] image.”); *Energy Capital Corp. v. U.S.*, 45 Fed. Cl. 481, 491-92 (Ct. Cl. 2000) (adopting rule recognized in *Bieter*, but declining to extend privilege to third-party consultants in absence of factual proof of agency for party claiming privilege).

Courts have also addressed situations in which the privilege has been seen as being improperly asserted by lawyers communicating in business capacities. For example, in *Genentech, Inc. v. Trs. of Univ. of Pa.*, No. C 10-2037 PSG, 2011 WL 5079531 (N.D. Cal. Oct. 24, 2011), the CEO of a corporation, who was also a patent attorney, communicated with an outside consultant who could have been regarded as a “functional employee” of the company. However, the court found that the CEO’s communications were made for a business, rather than a legal, purpose. As such, these communications were not protected by the attorney-client privilege. This limitation has also been applied to perceived over-reaching of in-house counsel to prevent disclosure of what are essentially business, or non-legal, communications. *Genentech* was distinguished by *Schaeffer v. Gregory Vill. Partners, L.P.*, No. 13-cv-04358-JST, 2015 WL 166860, at *6 (N.D. Cal., Jan. 12, 2015), which held that a non-employee acted as “the public face of the company and [who] provided information to Gregory Village’s legal staff that was useful and necessary to evaluate legal strategy for the company going forward. [The non-employee] acted as Gregory Village’s functional employee for the purposes of the attorney-client privilege.”

3. Third parties necessary to facilitate communication/advice.

The privilege has also been extended to protect communications involving, or shared with, a third party to the attorney-client relationship when the third party's involvement was necessary to facilitate communication between the client and the attorney and the rendering of legal advice. This extension originally applied to third parties who were literally necessary to facilitate communication between the client and an attorney, such as an interpreter (*e.g.*, *Hawes v. State*, 7 So. 302, 313 (Ala. 1890) (“[A]n interpreter, intermediary, agent, or clerk of an attorney, through whom communications between attorney and client are made, stands upon the same footing as his principal, and will not be allowed to divulge any fact coming to his knowledge as the conduit of information between them.”)). The literal translation function remains part of the doctrine today *e.g.*, *Farahmand v. Jamshidi*, No. Civ.A.04-542(JDB), 2005 WL 331601, at *2-3 (D.D.C. Feb. 11, 2005) (holding that there was no waiver of privilege concerning client's notes, originally in Farsi, prepared for conference with attorney, when relative attended conference in order to translate communications between lawyer and client); *U.S. v. Salamanca*, 244 F.Supp.2d 1023, 1025 (D.S.D. 2003) (finding a translator to be the agent of an attorney because the translator “literally became the voice through which [the client] and his attorney could speak”).

The original rationale has now been extended to other, non-linguistic “translations” of information to assist communication or representation in a privileged environment. The leading case is *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961), in which the presence of an accountant during discussions between the attorney and the client did not waive the privilege because the accountant was necessary to help the attorney understand the client's situation and render legal advice. The court explained:

Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege . . . ; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.

Id. at 922. The *Kovel* doctrine, also sometimes called the derivative attorney-client privilege, has been applied in many different contexts. Generally, two interpretive approaches have been applied to *Kovel's* agency theory — the narrow approach and the broad approach. See Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Party Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 746-47 (2009) (remarking that “the common thread for applying a narrow interpretation of *Kovel* is the ability to analogize the third-party consultant's role to that of a translator” while the broad interpretation is premised on third parties “who provide services that merely *facilitate* the attorney's ability to render legal advice”) (emphasis added). Presented below is an overview of the application of *Kovel* in several different contexts:

A. Appraisers.

An appraiser who worked closely with a bank regarding the plaintiffs collateral and provided information important to the bank's strategy in dealing with the plaintiff was properly

included in the scope of the attorney-client privilege with regard to discussions at a meeting with the bank and the bank's attorney. *Steele v. First Nat'l Bank*, Civ. A. No. 980-1592-B, 1992 WL 123818 at *2 (D. Kan. May 26, 1992). See also *Bernardo v. C.I.R.*, 104 T.C. 677, 685-86 (1995) (finding the work of an appraiser to be protected by attorney-client privilege when the appraiser provided estimates and a draft appraisal, at the attorney's direction, concerning a potential charitable donation to be made by the attorney's client).

Recently, the U.S. Court of Appeals for the Ninth Circuit held that an appraiser's report was not protected by the attorney-client privilege. *U.S. v. Richey*, 632 F.3d 559 (9th Cir. 2011). In *Richey*, an appraiser prepared an appraisal report that was to be filed with the taxpayer's tax return, as required by IRS regulations. *Id.* at 562. The report said that "this report may not include full discussion of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser's opinion of value. Supporting documentation concerning the data, reasoning, and analyses is retained in the appraiser's file." *Id.* at 563. In reversing the district court's holding that this additional data was protected by the attorney-client privilege, the Ninth Circuit noted that "any communication related to the preparation and drafting of the appraisal for submission to the IRS was not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value of the Easement." *Id.* at 567.

B. Accountants.

A number of cases have held that the participation of accountants in attorney-client communications does not waive privilege. *Kovel*, discussed above, is undoubtedly the seminal case concerning the role of accountants. See also *Grand Jury Proc. Under Seal v. U.S.*, 947 F.2d 1188, 1190-91 (4th Cir. 1991) (holding that communications involving accountant were protected); *U.S. v. Judson*, 322 F.2d 460, 462-63 (9th Cir. 1963) (determining that attorney-client privilege protected document prepared by accountant and communicated to attorney when accountant's role was to "facilitate an accurate and complete consultation between the client and the attorney about the former's financial picture"); *In re U.S. Healthcare, Inc. Sec. Litig.*, No. 88-0559, 1989 WL 11068, at *2-3 (E.D. Pa. Feb. 8, 1989) (concluding that accountant's presence at meeting with attorney and his client did not result in waiver of the attorney-client privilege when the accountant's expertise was necessary to render legal advice).

But when the accountant's participation is not for the purpose of facilitating legal advice, the communication is not protected. See, e.g., *Cavallaro v. U.S.*, 284 F.3d 236, 240, 249 (1st Cir. 2002) (finding that the *Kovel* doctrine requires that an accountant's involvement be at least "highly useful" and more than just "useful and convenient"; thus, documents in accounting firm's possession arising out of attorney-client meetings or other communications were not privileged); *Summit Ltd. v. Levy*, 111 F.R.D. 40, 41-42 (S.D.N.Y. 1986) (holding that document constituting communication with lawyer that was shared with accountant in connection with regular financial counseling, rather than the seeking of legal advice, was not privileged); *Columbia Data Prods., Inc. v. Autonomy Corp. Ltd.*, No. 11-12077-NMG, 2012 WL 6212898, *15 (D. Mass. Dec. 12, 2012) (setting forth a three-part test for when a communication is protected). In *Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1198 (Mass. 2009), the Massachusetts Supreme Judicial Court subscribed to a narrow interpretation of *Kovel* (favorably citing *Cavallaro v. U.S.*, *supra*), finding that "[the attorney's] affidavit and the [Arthur] Andersen memoranda demonstrate that [the attorney's] purpose

in consulting Andersen was to obtain advice about Massachusetts tax law, not to assist [him] with comprehending his client's information." *See also Callaway Golf Co. v. Screen Actors Guild*, No. 07-0373-LAB(LSP), 2009 WL 81387, at *2 (S.D. Cal. Jan. 12, 2009) (audit firm hired to examine contracts not protected by attorney-client privilege); *Schlicksup v. Caterpillar, Inc.*, No. 09-CV-1208, 2011 WL 4007670, at *4 (C.D. Ill. Sept. 9, 2011) ("[E]ven if these communications were made by a lawyer, many of them would still not be protected by the attorney-client privilege. Proposals on tax-saving strategies and the creation, analysis and implementation of business ideas to bolster the bottom line are not confidential communications of legal advice."). The *Kovel* line of cases deals only with the situation in which an accountant was acting as an attorney's agent, as opposed to the accountant acting as the client's agent. *See Kovel*, 296 F.2d at 922 n.4. However, the latter circumstance is protected as well. *See Evergreen Trading, LLC v. U.S.*, 80 Fed. Cl. 122, 141 (2007) (where accountant acts as agent for the client, "communications by the accountant to the attorney are viewed as equivalent to communications being made by the client to the attorney.").

C. Investment bankers/financial consultants.

In *Calvin Klein Trademark Tr. v. Wachner*, 124 F.Supp.2d 207, 209 (S.D.N.Y. 2000), the court followed *Kovel* to hold that communications in connection with the preparation of offering memoranda and other disclosure documents concerning a possible sale, involving company representatives, counsel and an investment banking firm, were privileged. Upon *in camera* review of the documents and a privilege log, the court found:

[T]he documents . . . involve, in one way or another, joint discussions among CKI [the company], Lazard [investment banking firm], and Wachtell [counsel], as to what CKI was legally required to disclose to prospective purchasers at various stages of negotiations. While Warnaco argues that Lazard's inclusion in the discussions waived the attorney-client privilege that would otherwise apply to the documents that reflect those discussions, it is clear to the Court that Lazard's roles in participating in those discussions and helping draft these documents, to the extent such roles were more than ministerial, involved rendering expert advice as to what a reasonable business person would consider "material" in this context. "Materiality" in this regard is a mixed question of fact and law, which a responsible law firm in Wachtell's place would not be able to adequately resolve without the benefit of an investment banker's expert assessment of which facts were "material" from a business person's perspective. Lazard was therefore serving, so far as these documents are concerned, an interpretive function . . . akin to the accountant in . . . [*Kovel*].

Id. at 209. Thus, inclusion of the investment banking firm in the privileged conversation to the extent necessary to supply investment banking expertise to assist the lawyer in advising the client (on legal, not business issues) did not destroy privilege. *Id.* *See also Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, No. 01 Civ. 8854(LTS)(THK), 2006 WL 1004472, at *3-4, *6-7, *9 (S.D.N.Y. Apr. 17, 2006) (those communications involving or shared with financial advisor in the role of assisting counsel are within attorney-client privilege; others constituting

business communications are not); *Apsley v. The Boeing Co.*, No. 05-1368-MLB, 2008 WL 191418, 2008 U.S. Dist. LEXIS 5274 (D. Kan. Jan. 22, 2008) (communications between client and financial consultant, where the client was advised as to the need for legal advice in connection with the services being provided to the client by the consultant, was in the context of securing legal advice and did not waive the attorney-client privilege). Recently, in *In re Refco Sec. Litig. v. Sugrue*, 280 F.R.D. 102, 105 (S.D.N.Y. 2011), the court was unconvinced that a third-party consultant with over 40 years of experience in the industry was necessary to the lawyer's ability to understand a client's materials. As such, the privilege did not extend to these materials. *Id.*

D. Public relations consultants.

Numerous cases have addressed the application of the privilege to communications including public relations consultants, and have come to different conclusions depending on the degree to which the proponent could show the importance of the Consultant Communications to the legal advice to the client. *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002) (attorney-client privilege extends to communications with public relations and governmental affairs consultants to deal with issues intertwined with legal issues); *Am. Legacy Found. v. Lorillard Tobacco Co.*, No. Civ.A. 19406, 2004 WL 2521289, at *4-5 (Del. Ch. Nov. 3, 2004) (confidential communications with public relations firm may be protected by attorney-client privilege in certain circumstances; proponent of privilege failed to establish factual predicate); *In re Grand Jury Subpoenas*, 265 F.Supp.2d 321, 332 (S.D.N.Y. 2003) (confidential communications between lawyers and public relations consultants for purpose of giving or receiving advice directed to handling client's legal problems are protected by attorney-client privilege); *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No. 02 Civ.7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003) (proponent of privilege failed to establish that purpose of communications with public relations advisor was to facilitate legal advice or to further a role materially different than that of an ordinary public relations advisor, noting that "[a] media campaign is not a litigation strategy.").

E. Other.

In *U.S. v. Mejia*, 655 F.3d 126, 133 (2d Cir. 2011), the court held that a prisoner's use of his sister to relay a communication to his lawyer was neither necessary nor likely useful to the prisoner's representation because he could have directly contacted his lawyer. Accordingly, a prison recording of the conversation between the prisoner and his sister was admissible. *See also MLC Auto., LLC v. Town of Southern Pines*, No. 1:05cv1078, 2007 WL 128945, at *34 (M.D.N.C. Jan. 11, 2007) (communications with engineer to assist counsel in providing legal advice are within attorney-client privilege).

F. Limitations/qualifications.

There are additional limitations on the application of the privilege in the context of communications involving a third party. For example, communications directly between a client and the client's consultant or expert outside the context of attorney-client communications are not protected. *See, e.g., Grand Jury Proc.*, 947 F.2d at 1191 (communications between client and accountant prior to consultation with attorney were not privileged). Similarly, communications between an attorney and a third-party consultant (at least when that consultant is not the "functional

equivalent” of the client) outside the context of assisting in communications between the lawyer and client may not be protected by the attorney-client privilege. *See, e.g., Sokol v. Wyeth, Inc.*, No. 07 Civ. 8442(SHS)(KNF), 2008 WL 3166662, at *8 (S.D.N.Y. Aug. 4, 2008) (finding that consultant retained prior to attorney being retained could not offer legal advice because “[l]egal advice cannot be given by one who is not an attorney and no attorney-client privilege is afforded to any advice purporting to be legal from one who is not an attorney”).

In *U.S. v. Ackert*, which is generally regarded as the basis for a narrow interpretation of *Kovel*, the attorney-client privilege did not apply when an attorney communicated directly with an investment banker to gather information necessary to give legal advice to his client. *U.S. v. Ackert*, 169 F.3d 136, 139-40 (2d Cir. 1999) (communication between attorney and investment banker not shielded by the attorney-client privilege solely because communication was important to the attorney’s ability to represent the client, if the investment banker was not translating information or facilitating communication); *see also Banco do Brasil, S.A. v. 275 Washington St. Corp.*, No. 09-11343-NMG, 2012 WL 1247756, at *8 (D. Mass. Apr. 12, 2012) (“In the instant case, Ms. Ou was not hired to assist counsel in rendering legal advice — she was hired to rent the Premises. In addition, while Attorney Hammer asserts that Ms. Ou provided him with information which he used in providing legal advice to the Trust, communications from a third-party ‘that constitute independent information and expertise for the attorney to use in representing his or her client are not protected by the attorney-client privilege.’) (quoting *Comcast Corp.*, 901 N.E.2d at 1198).

In addition, even if the presence of the third party does not waive the privilege, there is still the general privilege requirement that the communication be sufficiently connected to the rendering of legal advice. “That clients were at a meeting with counsel in which legal advice was being requested and/or received does not mean that everything said at the meeting is privileged.” *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 619 (D. Kan. 2001) (privilege does not protect discussions at committee meeting attended by counsel unless communication was between committee and counsel for the purpose of obtaining legal advice) (citation omitted). When the ultimate goal of the client is a business goal, it is not obvious that all communications on this subject to which the attorneys were privy was made for the purpose of generating legal advice. If there is a meeting between an attorney, a client, and a third party such as an investment banker, only the communications concerning legal advice are protected. *Id.* at 619; *see also Kovel*, 296 F.2d at 922 (“What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from* the lawyer. If what is sought is not legal advice but only accounting service . . . , or if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists.”) (emphasis added) (internal citations omitted).

4. Intra-organizational communications not involving lawyer.

The conveyance of otherwise privileged communications by non-lawyers to others within the client organization who have a need for the communications does not waive the privilege. In *F.T.C. v. GlaxoSmithKline*, 294 F.3d at 147-48, the court held that privileged documents that were subject to limited intra-corporate distribution retained the privilege despite the absence of a showing by the corporation that each employee or contractor who received the documents had a specific “need to know” the information, if the documents “related generally to the employees’ corporate duties.” “The Company’s burden is to show that it limited its dissemination of the documents in keeping with their

asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein.” *Id.* at 147. The Court’s protection of documents “shared with its public relations and government affairs consultants” is both somewhat outside the scope of this section and less certain today. *See also Apsley v. Boeing Co.*, No. 05-1368-MLB, 2008 U.S. Dist. LEXIS 99515, at *9 (D. Kan. Dec. 9, 2008) (attorney-client privilege is not lost merely because employee conveys the legal communication to another employee); *Baptiste v. Cushman & Wakefield, Inc.*, No. 03Civ.2102(RCC)(THK), 2004 U.S. Dist. LEXIS 2579, at *5-8 (S.D.N.Y. Feb. 20, 2004) (email by non-lawyer corporate employee disseminating information and advice given by lawyer to other non-lawyer employees with responsibility for the subject matter did not lose privileged status); “It is of no moment that the e-mail was not authored by an attorney or addressed to an attorney.” *Id.* at *7.); close analysis of emails resulting in production of one paragraph in which a non-attorney was “simply conveying to his colleagues his own impressions and frustrations about Plaintiff’s conduct on the job.” *Id.* at *8-9. *Nat’l Educ. Training Grp. v. Skillsoft Corp.*, No. M8-85 (WHP), 1999 U.S. Dist. LEXIS 8680, at *10 (S.D.N.Y. June 9, 1999) (noting cases that hold that intra-corporate distribution of legal advice received from counsel does not necessarily vitiate privilege, even if relayed indirectly through other corporate personnel, but holding that notes of third-party recipient who did not meet client-agency test were not privileged). The case addressed protection for handwritten notes taken by an employee of an investment banking entity which acquired an interest in one of the defendants, entitled to designate two board members. One of that investment banker’s managing directors served as a board member. His assistant attended and took notes of board meetings for him. No attorneys were present at those board meetings, but the board discussed the legal advice of its counsel which was summarized in redacted portions of those notes. The Court found the note taker’s presence “useful,” but not “necessary” and therefore not privileged. *Id.* at *14. However, the notes were found to be protected as work product. *Id.* at *17. State Law was applied to determine the privilege issue; federal law to determine the work product issue. *Id.* at *17-18.

Other courts have imposed on the company a requirement to prove that the recipients had a “need to know” in addition to a responsibility for the subject matter. However, even in these cases, the courts’ focus usually remains on whether the information was restricted to a proper circle of confidentiality. *See, e.g., Wellnx Life Sci., Inc. v. Iovate Health Sci. Res., Inc.*, 06 Civ. 7785 (PKC), 2007 U.S. Dist. LEXIS 39290, at *11-12 (S.D.N.Y. May 22, 2007) (evidentiary hearing required to determine whether document had been treated with sufficient care so as not to waive confidentiality). The case also discussed who should bear the burden to come forward with facts to show waiver — and placed that burden on the opponent of the privilege claim. *Id.* at *15. For example, in *Clarke v. JP Morgan Chase & Co.*, 08 Civ. 02400 (CM) (DF), 2009 U.S. Dist. LEXIS 30719, at *5-7 (S.D.N.Y. Apr. 10, 2009), the court held that when a communication circulated to employees did not indicate that it was to be maintained in confidence, and its confidential nature or status as confidential legal advice was not apparent from its face, there was no reasonable expectation of confidentiality on the part of the client.

The privilege has been extended to information exchanged between corporate actors in the absence of lawyers before a communication to counsel, when the purpose is to seek legal advice or assist counsel. *Carl Zeiss Vision Int’l GmbH v. Signet Armorlite, Inc.*, No. 07-cv-0894-DMS (POR), 2009 U.S. Dist. LEXIS 111877, at *17-21 (S.D. Cal. Dec. 1, 2009) (memoranda of non-legal patent review committee protected as privileged because purpose was to obtain legal advice from counsel); *Williams v. Sprint/United Mgmt. Co.*, 238 F.R.D. 633, 638 (D. Kan. 2006) (privilege preserved on

documents exchanged among human resources personnel where such documents were made to gather information to aid, counsel, or to secure advice; cases surveyed). The documents involved were password protected, and the password was “available only to HR and Legal Department personnel....” *Id.* at 641. *Carl Zeiss Vision*, 2009 U.S. Dist. LEXIS 111877, at *22. The “legal advice” element has also been at issue when documents asserted as privileged have been simultaneously circulated to legal and non-legal personnel within an organization. *See In re Buspirone Antitrust Litig.*, 211 F.R.D. 249, 252-55 (S.D.N.Y. 2002) (simultaneous circulation of information to lawyers and key business personnel did not vitiate privilege when circulation to business personnel was not for separate business purpose; simultaneous circulation cases reviewed).

5. Disclosures among separate entities in corporate family.

“There is overwhelming case law supporting the proposition that the existence of communications of privileged information between a parent and its subsidiary does not constitute a waiver of an applicable privilege.” *In re 15375 Mem’l Corp.*, No. 06-10859, 2007 Bankr. LEXIS 610, at *6-7 (Bankr. Del. Mar. 1, 2007) (communications regarding bankruptcy shared with affiliates remained privileged). Some courts have reached this result in a summary fashion based upon the existence of a close relationship between the entities, *e.g.*, *Brigham Young Univ. v. Pfizer, Inc.*, No. 2:06-cv-890 TS, 2011 U.S. Dist. LEXIS 76317, at *17-18 (D. Utah July 12, 2011) (although separate corporate entities, relationship between LDS Church and BYU was different than a third-party relationship in which privilege would be lost); *JA Apparel Corp. v. Abboud*, 07 Civ. 7787 (THK), 2008 U.S. Dist. LEXIS 1825, at *5-7 (S.D.N.Y. Jan. 10, 2008) (presence of employee of corporate owner of 98% of subsidiary did not, by itself, vitiate privilege), while others have relied upon the corporate affiliate’s “legal interest” in the communication at issue. *E.g.*, *Cary Oil Co., Inc. v. MG Refining & Mktg., Inc.*, No. 99 Civ. 1725VMDFE, 2000 WL 1800750, at *6 (S.D.N.Y. Dec. 7, 2000) (subsidiary does not waive privilege by making disclosures to corporate parent with legal interest in communication). Still other courts have examined the question using the language of “common interest” analysis. *E.g.*, *Mitsui Sumitomo Ins. Co. v. Sony Corp. of Am.*, No. 09-21208-CIV-GOLD/GOODMAN, 2011 U.S. Dist. LEXIS 74148, at *13-15 (S.D. Fla. July 11, 2011) (privilege preserved where various corporate entities shared common legal interests with their parent companies); *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 473-74 (S.D.N.Y. 2003) (status of two companies as subsidiaries of common corporate parent not dispositive as to whether privilege preserved on inter-corporate communications where there was no representation by common counsel or proof of common legal interest). *See also Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 192 F.R.D. 263, 269 (N.D. Ill. 2000) (consultant and representative of corporate parent and subsidiary were part of “control-group” for purposes of privileged communications); *Egiazyar*, 290 F.R.D. 421 (holding the common-interest rule did not protect communications between former politician and his public relations firm.).

6. Responses to auditors’ requests/communications with auditors.

Generally, the attorney-client privilege is waived as to information provided to auditors, who are neither serving as the “functional equivalent[s]” of the client in handling the litigation, nor interpreting information to facilitate communications between the lawyer and client (*see* exceptions to waiver discussed in topics 2 and 3 above). *See, e.g.*, *U.S. v. El Paso Co.*, 682 F.2d 530, 540 (5th Cir. 1982); *In re Honeywell Int’l, Inc. Sec. Litig.*, 230 F.R.D. 293, 298 (S.D.N.Y. 2003); *First Fed. Sav.*

Bank of Hegewisch v. U.S., 55 Fed. Cl. 263, 268 (2003); *Ferko v. NASCAR*, 218 F.R.D. 125, 134 (E.D. Tex. 2003).

However, a majority of cases have held that disclosure of privileged information to auditors does not waive work product protection. The determining factor for finding protection is the court's interpretation of the term "prepared in anticipation of litigation." In *El Paso*, 682 F.2d at 542-43 the court noted that while the litigation need not be imminent, the "primary motivating purpose behind the creation of the document" had to be to "aid in possible future litigation" (citing *U.S. v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981)). In *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176 (N.D. Ill. 2006) the court rejected *El Paso*'s "aid in litigation" test. The *Lawrence Jaffe* court held it sufficient for work product protection that audit letters were prepared "because of the prospect of litigation," and that it was not necessary that the materials be prepared to aid in litigation. *Id.* at 179-81. The "aid in" litigation test continues to be followed in the Fifth Circuit. See *In re Kaiser Aluminum & Chem. Co. v. U.S. Dep't of Labor*, 214 F.3d 586, 593 (5th Cir. 2000). The "because of litigation" test is followed in the First, Second, Third, Fourth, Seventh, Eighth and D.C. Circuits. See *State of Maine v. Dep't of Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *U.S. v. Adlman*, 134 F.3d 1194, 1202-3 (2d Cir. 1998); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987); *U.S. v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010). One District Court in the Eleventh Circuit stated it would follow the "because of" test if the appropriate case came before it. See *Regions Fin. Corp. & Subsidiaries v. U.S.*, No. 2:06-CV-00895-RDP, 2008 U.S. Dist. LEXIS 41940 (N.D. Ala., May 8, 2008).

With respect to waiver, the courts are more uniform, generally finding that provision of documents to auditors does not waive the work product privilege "because it does not substantially increase the opportunity for potential adversaries to obtain the information." *U.S. v. Textron Inc.*, 507 F.Supp.2d 138, 152 (D.R.I. 2007), *vacated on other grounds*, 577 F.3d 21 (1st Cir. 2009). In *Lawrence Jaffe*, 237 F.R.D. at 183, the court held there was no waiver even though the auditor served in a public watchdog role with certain independence because disclosure of litigation reports to the auditor did not substantially increase the opportunity for potential adversaries to obtain the information. See also *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2006 WL 2850049, at *1-2 (N.D. Cal. Oct. 5, 2006) (disclosure of document to corporate auditor did not constitute a waiver of work product protection); *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 445-49 (S.D.N.Y. 2004); *Laguna Beach Cty. Water Dist. v. Superior Ct.*, 22 Cal. Rptr. 3d 387, 392 (Cal. App. 2004). But see *Medinol, Ltd. v. Boston Sci. Corp.*, 214 F.R.D. 113, 115-17 (S.D.N.Y. 2002) (disclosure of documents to auditors in connection with annual audit waives work product protection because of auditors' necessary independence from company and absence of any litigation-related purpose).

For an excellent discussion of the work product doctrine and its application to documents provided to auditors, see Judge Torruella's dissent in *U.S. v. Textron Inc.*, 577 F.3d 21, 32-43 (1st Cir. 2009).

7. Disclosures concerning litigation to potential purchaser of client.

There is a split in the relatively undeveloped case law concerning whether disclosure of privileged information from and about the seller to the purchaser as part of pre-transaction due diligence waives privilege protection for the material disclosed. Most of cases appear to reject the notion that such disclosure constitutes waiver, at least where the disclosure has been made under agreements that limit dissemination. *See, e.g., Tenneco Packaging Specialty and Consumer Prods., Inc. v. S.C. Johnson & Son, Inc.*, No. 98 C 2679, 1999 WL 754748, at *2 (N.D. Ill. Sept. 14, 1999) (disclosure of patent opinion in connection with due diligence for asset purchase agreement encompassing the patent did not waive privilege, because of common legal interest of buyer and seller, and steps taken to insure confidentiality and limited dissemination); *Rayman v. Am. Charter Fed. Sav. & Loan Ass'n*, 148 F.R.D. 647, 651-55 (D. Neb. 1993) (litigation reports shared during merger negotiations retained privileged status because of common legal interest); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 309-12 (N.D. Cal. 1987) (disclosure of patent opinion letter to prospective purchaser of business division did not waive attorney-client privilege because of common legal interest and steps taken to preserve confidentiality), *Britesmile, Inc. v. Discus Dental, Inc.*, No. C 02-3220 JSW (JL), 2004 WL 2271589 (N.D. Cal. 2004) (following *Hewlett-Packard*). *But see SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 512-13 (D. Conn. 1976) (privilege waived as to information of one party to joint venture shared with other venture party in negotiations concerning acquisition of interest; parties negotiating arms' length business transaction were adverse, and therefore did not have sufficiently common legal interest in subject matter of antitrust risk), *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (holding that confidential communications can be shared without waiving privilege only if parties have "a common legal, as opposed to commercial, interest.")

8. Communications with former employees of client.

The attorney-client privilege continues to protect privileged communications between counsel and organizational employees that take place during the employment relationship, even after the employment relationship terminates. One important application of this principle is that, although there is no ethical prohibition against ex parte contacts with unrepresented former employees of an adverse party by an opposing counsel, counsel must take steps to ensure that no inquiry is made into matters protected by the continuing attorney-client privilege. *See e.g., XTL-NH, Inc. v. N.H. State Liquor Comm'n*, No. 2013-CV-00119, 2013 N.H. Super. LEXIS 24, at * 12 (N.H. Super. Dec. 31, 2013) (Ex parte interviews of former employees of adverse party are not prohibited but counsel must "refrain from asking questions that would likely reveal information protected by the attorney-client privilege."); *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 32 A.D.3d 284, 285-86, 820 N.Y.S.2d 54 (N.Y. App. 2006), *aff'd* 8 N.Y.3d 506, 868 N.Y.S.2d 527 (2007) (Although "ex parte interviews of adversary's former employees are neither unethical nor legally prohibited, some courts have acknowledged a necessary limitation on this rule, namely, that the attorney must avoid obtaining any privileged information from the adversary's former employee...."); *see generally*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 100, cmts. g & i (Am. Law Inst. 2000) ("Contact with a former employee or agent ordinarily is permitted" but "[a] lawyer may not seek confidential information during the course of an otherwise permissible communication.")

With few exceptions, federal courts applying federal common law hold that post-employment

communications between organizational counsel and former employees also are protected by the attorney-client privilege so long as the communications are limited to the knowledge or information the employee obtained during his or her prior employment. See, e.g. *In re Allen v. McGraw*, 106 F.3d 582, 606 (4th Cir. 1997); *In re Coordinated Pretrial Proc. In Petroleum Prod. Antitrust Litig.*, 658 F.2d 1355, 1361, n.7 (9th Cir. 1981); *Weber v. FUJIFILM Med. Sys., U.S.A.*, No. 3:10 CV 401(JBA), 2011 U.S. Dist. LEXIS 82340, at *25-26 (D. Conn. July 27, 2011); *Gioe v. AT & T Inc.*, No. CV 09-4545(LDW)(AKT), 2010 U.S. Dist. LEXIS 99066, at *4 (E.D. N.Y. Sept. 20, 2010); *Cool v. BorgWarner Diversified Transmission Prods.*, No. IP 02-960-C(B/S), 2003 U.S. Dist. LEXIS 20137, at *6 (S.D. Ind. Oct. 29, 2003); *Surles v. Air France*, No. 00CIV5004RMBFM, 2001 U.S. Dist. LEXIS 10048, at * 6 (S.D.N.Y. July 19, 2001); *Indergit v. Rite Aid Corp.*, 08 Civ. 9361 (JPO)(HBP), 2016 U.S. Dist. LEXIS 150565, at *11 (S.D.N.Y. Oct. 31, 2016); *Hanover Ins. Co. v. Plaquemines Par. Gov't.*, 304 F.R.D. 494, 498-99 (E.D. La. 2015). These cases rely on the United States Supreme Court's statement in *Upjohn Co.*, 449 U.S. at 395, that in order for an attorney to effectively advise a corporate client the attorney must be able to marshal the facts from those employees directly involved in the actions or incidents giving rise to the dispute, regardless of their position in the corporation. The lower federal courts recognize that the privilege must extend to communications with former employees as well because it is often the case that the person with the critical knowledge of the facts is no longer employed by the organization.

The majority view in state court decisions and federal court decisions applying state law in diversity cases also extends the privilege to post-employment communications between a former employee and organizational counsel. See, e.g., *In re Flonase Antitrust Litig.*, 723 F.Supp.2d 761, 764-65 (E.D. Pa. 2010); *E.I. Du Pont de Nemours & Co. v. Medtronic Vascular, Inc.*, C.A. No. N10C-09-058 JRS CCLD, 2012 Del. Super. LEXIS 129, at *19-20 (Del. Super. Ct. March 13, 2012); *Bernard v. Brookfield Props. Corp.*, Nos. 107211/08, 190078/08, 2012 N.Y. Misc. LEXIS 2993, at *12-13 (N.Y. Sup. Ct. June 15, 2012); *Salgy-Knapp v. Cirrus Design Corp.*, No. A03-654, 2004 Minn. App. LEXIS 107, at *10 (Minn. Ct. App. Feb. 3, 2004); *Notopoulos v. Hartford Hosp.*, No. CV 940544706, 1996 Conn. Super. LEXIS 644, at *2 (Conn. Super. Ct. March 12, 1996); *Mickel v. Huntington Bank of Toledo*, C.A. No. L-82-099, 1982 Ohio App. LEXIS 11621, at *6 (6th Dist. July 2, 1982).

A few courts, however, have been unwilling to distinguish a former employee from any other third party who might have pertinent information about a lawsuit, and have held the privilege does not apply to post-employment communications between organizational counsel or does not apply absent unique circumstances. See e.g., *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (diversity action applying Michigan law); *Clark Equip. Co. v. Lift Parts Mfg. Co., Inc.*, No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457, at *14 (N.D. Ill. Oct. 1, 1985) (applying federal common law); *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 781, 381 P.3d 1188 (2016).

The scope of the privilege, however, is narrower for former employees. Except where the former employee is independently represented by the organization's counsel, the privilege will not necessarily protect communications between counsel and the former employee that go beyond the information available to the former employee during his or her employment. *Gioe*, 2010 U.S. Dist. LEXIS 99066, at *5 (citing *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41-42 (D. Conn. 1999)). Thus, for example, if during preparing the former employee for deposition, organizational counsel gives the former employee new information previously unknown to the employee, or tells him or her what

other employee deponents have testified to, those communications will not be privileged. *Peralta*, 190 F.R.D. at 41; *Winthrop Res. Corp. v. CommScope, Inc. of N.C.*, No. 5:11-CV-172, 2014 U.S. Dist. LEXIS 158413, at *9-10 (W.D.N.C. Nov. 7, 2014) (citing *Peralta*, 190 F.R.D. at 40-42. Likewise, if the counsel advises the former employee during a deposition break, the substance of their discussion may be discoverable. *Id.* at *10-11; see also *U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp.2d 554, 558 (E.D. Pa. 2004). These limitations may be avoided if counsel enters into a representation agreement establishing an independent attorney-client relationship with the former employee; however, some courts hold that independent representation will not preserve the privilege if the organization bears the attorney's fees for representing the former client. *Compare Pastura v. Caremark*, No. 1:11-cv-400, 2012 U.S. Dist. LEXIS 94084, at *7 (S.D. Ohio July 9, 2012) (pre-deposition discussions protected due to independent representation of former employee) with *Gary Friedrich Enters., LLC v. Marvel Enters., Inc.*, No. 08 Civ. 1533(BSJ)(JCF), 2011 U.S. Dist. LEXIS 54154, at *11-12 (S.D.N.Y. May 20, 2011) (independent privilege does not exist for "volunteered representation" by corporate counsel where corporation assumes the cost of former employee's representation).

Even if the attorney-client privilege does not attach to post-employment, pre-deposition communications, the communications nevertheless may be shielded from discovery to the extent work-product protection applies. See *In re Terrorist Attacks on Sept. 11, 2001*, No. 03 MDL 1570(GBD)(FM), 2008 U.S. Dist. LEXIS 45751, at *16 (S.D.N.Y. May 21, 2008).

9. Disclosures to refresh witness recollections.

Federal Rule of Evidence 612 provides that an adverse party is entitled to production of a document used by a witness to refresh recollection before or while testifying, if the court in its discretion determines that the interests of justice require disclosure. A balancing test based upon this rule has also been applied about privileged documents reviewed by witnesses in preparation for a deposition. *Medtronic Xomed, Inc. v. Gyrus ENT LLC*, No. 304CV400J32MCR, 2006 WL 786425, at *4 (M.D. Fla. Mar. 27, 2006) (party seeking production of work product reviewed by deponent failed to prove that witness's recollection had been refreshed, or that witness relied on the document in testifying). Several courts have noted a tension between Rule 612 and the work product doctrine, holding that the Rule does not obviate the need for a party seeking to override the work product doctrine to prove "substantial need" or "undue hardship." *Id.* at *5-6. See also *In re Managed Care Litig.*, 415 F. Supp. 2d 1378, 1380-81 (S.D. Fla. 2006) (explaining that courts have used different approaches to resolve tension between the need for information to ensure opportunity for effective cross-examination under Rule 612 and assertions of privilege; rejecting rule of older cases imposing automatic waiver of attorney-client privilege and holding deposition testimony at issue did not result in waiver); *Woodward v. Avondale Indus., Inc.*, No. CIV.A. 99-2771, 2000 WL 385513, at *2-3 (E.D. La. Apr. 14, 2000) (balancing test favored production of work product document when witness relied heavily on it in deposition testimony, it primarily included facts and did not contain opinion work product, and it had been relied upon by witness to prepare affidavit already disclosed).

10. Disclosures to testifying experts.

A major change in the treatment of information and materials provided to testifying experts occurred on December 1, 2010, when new amendments to Federal Rule of Civil Procedure

26 took effect. The overhaul of Rule 26 significantly expanded protection from discovery for communications between attorneys and their testifying experts to increase candor between counsel and experts, and to rein in the practice of hiring dual experts, which had developed in response to the expansive disclosure requirements under the previous version of Rule 26. *See generally* Arthur J. Clarke, *An Update on the New Federal Expert Discovery Rule: The Expert's Perspective*, 23 ENVTL. CLAIMS J. 214 (2011); Damon W.D. Wright, *Expert Discovery Returns to the Past*, THE FED. LAW., Jan. 2011, at 32. For example, Rule 26 now generally protects from discovery “drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.” Fed. R. Civ. P. 26(b)(4)(B).

Furthermore, the 2010 amendments effected significant changes in the disclosure requirements applicable to reporting testifying experts—experts who must submit a report of their opinions and conclusions under Rule 26(a)(2)(B). All communications between a reporting testifying expert and the attorney of the party retaining the expert are now protected from disclosure “regardless of the form of the communications, except to the extent that the communications (i) relate to compensation for the expert’s study or testimony; (ii) identify facts or data that the party’s attorney provided and that the expert *considered* in forming the opinions to be expressed; or (iii) identify assumptions that the party’s attorney provided and that the expert *relied on* in forming the opinions to be expressed.” Fed. R. Civ. P. 26(b)(4)(C) (emphasis added).

Therefore, the rationale for broad disclosure, which courts relied upon under the previous version of Rule 26— that “because any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver [of attorney-client privilege and work product protection] to the same extent as with any other disclosure,” *In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (stating majority opinion among courts under 1993 amendments to Rule 26) — should no longer be persuasive. Instead, otherwise privileged (through the attorney-client privilege) or protected (under the work product doctrine) communications will not have to be disclosed until the other side can meet more stringent criteria for demonstrating need for the material. *See, e.g., Sara Lee Corp. v. Kraft Foods, Inc.*, 273 F.R.D. 416 (N.D. Ill. 2011). In *Sara Lee*, the court found that even assuming a marketing expert was in the reporting-testifying category, communications between that expert and defense counsel, which “arguably may have been discoverable under the pre-amendment Rule 26” no longer had to be disclosed because they did not identify facts, data, or assumptions for purposes of Rule 26(b)(4)(C), and thus received the work-product protection of Rule 26(b)(3). *Id.* at 420-21. Thus, under the new amendments, the communications were only discoverable if the requesting party could show that it “ha[d] substantial need for the materials to prepare its case and [could not], without undue hardship, obtain their substantial equivalent by other means.” *Id.* at 421 (citing Fed. R. Civ. P. 26(b)(3)(A)(ii)).

This expanded protection, however, generally does not apply to communications with testifying experts who do *not* have to provide a report under Rule 26(a)(2)(B) because they are either fact witnesses or so-called “treating physicians” who provide information intermixed with expert opinions. *See U.S. v. Sierra Pac. Indus.*, No. CIV-09-2445 KJM EFB, 2011 WL 2119078, at *3-6 (E.D. Cal. May 26, 2011) (carefully reviewing minutes of Civil Rules Advisory Committee meeting on 2010 amendments and concluding that “[t]he minutes . . . show that the committee did not intend that communications between a party’s counsel and non-reporting experts generally be

protected”). Therefore, “the law prior to the date of the [2010] amendment determines whether [a party has] waived applicable protections” of communications with testifying, non-reporting experts. *Id.* at *7-10 (canvassing Ninth Circuit law on waiver of privileges and work product protection, finding that waiver was generally found when materials were disclosed to non-reporting testifying experts, and rejecting New Jersey authority to the contrary in *Graco v. PMC Global*, No. 08-1304 (FLW), 2011 WL 666056, at *13-15 (D.N.J. Feb. 14, 2011), because it did not provide “persuasive reason for rejecting” Ninth Circuit decisions). The *Sierra Pacific* court left open the possibility that certain kinds of non-reporting testifying witnesses could be entitled to more protection than others, *supra.* at 10, but resolution of this issue will have to await further case law. *But see Graco*, 2011 WL 666056, at *13-15 (generally applying same protections to both reporting and non-reporting testifying witnesses).

11. Communications by employees with counsel using employer’s email system.

A. Communications by electronic means generally.

By its nature communication by email or text between an attorney and client creates a record — likely permanent — of potentially privileged information that can easily be disseminated to or accessed by third persons. While earlier forms of communication might be recorded or intercepted, access to the content of telephone conversations or documents sent by mail is difficult and protected by custom and law.³ Attorneys can confidently communicate with their clients by these means with little concern about confidentiality or that attorney-client privilege will be waived. However, as the use of email has become ubiquitous in modern legal practice, concerns have grown about the propriety of using this mode of correspondence to exchange confidential information with clients. As a consequence, the ABA Committee on Ethics & Professional Responsibility has published three formal opinions relating to an attorney’s duty to protect confidential client information in the context of e-mail communications.⁴ In 1999, the Committee concluded that transmission of information relating to client representation by unencrypted e-mail was consistent with an attorney’s obligation to protect client confidences, since that mode of transmission “affords a reasonable expectation of privacy from a technological and legal standpoint.”⁵ In 2011, the Committee sounded a cautionary note, and found that an attorney should warn her client of the risk of sending or receiving electronic communications using a computer or other device or e-mail account where there is significant risk that a third party may gain access, in particular in situations where the client is likely to use a device or system that could be monitored by his or her employer.⁶ By 2017 the Committee’s view had evolved to the point that it declared that transmission of information relating to client representation over the internet could occur without violating the Model Rules of Professional Conduct *where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access.*⁷ Additionally, the Opinion notes that “special security precautions” may be required to protect such

3 See, e.g., *Ex Parte Jackson*, 96 U.S. 727 (1877) (Letters and sealed packages); *California v. Greenwood*, 486 U.S. 35 (1988), 108 S. Ct. 1625, 100 L. Ed. 2d 30 (Telephone conversations); *In re Application for Pen Register and Trap/Trace Device*, 396 F.Supp.2d 747 (S.D.Texas 2005) (Interpreting Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, (19.86) - Content of cell phone transmission protected).

4 ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999), 11-459 (2011) and 17-477 (2017).

5 ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999) at p. 1.

6 ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011) at p. 1.

7 ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 17-477 (2017) at p. 1.

communications when required by agreement with the client, or “when the nature of the information requires a higher degree of security.”⁸ Determining whether “special security precautions” may be needed necessarily requires a “fact-specific approach to business security obligations”⁹ by a lawyer who is knowledgeable of the “benefits and risks associated with relevant technology.”¹⁰ This knowledgeable lawyer also has a duty to consider the possibility that attorney/client privilege may be lost if the client “uses computers or other devices subject to the access or control of a third party” and may be required to “warn a client of the dangers associated with such a method of communication.”¹¹

B. Privilege Waiver in the context of employer-furnished systems.

In federal court, unless state law provides the rule of decision with respect to an element of a claim or defense, pursuant to Federal Rule of Evidence 501, federal common law on privileges controls. *See, e.g., In re Royce Homes*, 449 B.R. 709, 721-22 (Bankr. S.D. Tex. 2011) (relying on Rule 501, as interpreted by the U.S. Court of Appeals for the Fifth Circuit, to determine that because Bankruptcy Rule 2004 examinations are governed by federal bankruptcy law, not state law, federal common law governed privilege claims in that case). “The application of the attorney-client privilege is a ‘question of fact, to be determined in the light of the purpose of the privilege and guided by judicial precedents.’”¹² Under federal common law, waiver of the attorney-client privilege can be effected by “disclosure [of communications] inconsistent with an intent that communications remain confidential.” *In re Royce Homes*, 449 B.R. at 724, 733. In the context of attorney-client communications through an electronic system provided by the client’s employer, “[T]he overarching consideration in determining whether a communication is privileged is whether the individual had an objectively reasonable expectation that his or her communications were confidential...” *Bingham v. Baycare Health Sys.*, No: 8:14-cv-73-T-23JSS, 2016 WL 3917513 at *2 (M.D. Florida July 20, 2016).

When analyzing whether an employee has a reasonable expectation of confidentiality in personal e-mail communications transmitted or stored on a company computer, courts have analogized to an employee’s Fourth Amendment right to privacy in the contents of his office computer... As with a Fourth Amendment right to privacy, an employee asserting attorney-client confidentiality must show that (1) he has a “subjective expectation of privacy” (2) that “society accepts as objectively reasonable.”

U.S. ex rel. Ray v. GSD&M Idea City L.L.C., No. 3:11-cv-1154-O, 2012 WL 12925016 (N.D. Texas May 15, 2012), citations omitted.

8 Id.

9 Id. at p. 4.

10 Id. at p. 2, citing Comment [8] to Model Rule 1.1. As of September 2017, 28 states have adopted ethical rules that impose a duty of technological competence. *See* <http://www.lawsitesblog.com/2015/03/11-states-have-adopted-ethical-duty-of-technology-competence.html> (last visited Dec. 21, 2017).

11 Id. at p. 7, citing Op. 11-459 (2011), *supra*.

12 *EEOC v. BDO USA, L.L.P.*, 856 F.3d 356, 361 (5th Cir. May 8, 2017) (quoting *In re Auclair*, 961 F.2d 65, 68 (5th Cir. 1992) (quoting *Hodges, Grant & Kaufmann v. U.S.*, 449 U.S. 383, 396 (1981))).

Most courts undertaking such an analysis cite the four-factor balancing test set forth in *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 258 (Bankr. S.D.N.Y. 2005).¹³ Those factors are: (1) whether the employer maintains a policy banning personal use; (2) whether the employer monitors the use of the employer’s computer or emails; (3) whether third parties have a right of access to the employer’s computers or emails; and (4) whether the employer notifies the employee — or the employee is aware — of the use and monitoring policies. *Id.* at 257.¹⁴ See also *Holmes v. Petrovich Dev. Co.*, 191 Cal. App. 4th 1047, 1068-72 (2011) (applying provisions of California Evidence Code similar to the *Asia Global* test but finding that communications that did not meet such test were not confidential to begin with, and thus no privilege applied).

The *Asia Global* court acknowledged the question “whether the employee has a reasonable expectation of privacy must be decided on a case-by-case basis.” *Asia Global*, 322 B.R. at 257; see also *EEOC v. BDO, L.L.P.*, 856 F.3d 356 (Determining the applicability of the privilege is a “highly fact specific” inquiry, and the party asserting the privilege bears the burden of proof.); *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 320 (N.J. 2010) (reviewing cases that have applied the *Asia Global* factors and acknowledging “the fact-specific nature of the inquiry involved and the magnitude of different facts that can affect the outcome in a given case”); *In re Info. Mgmt. Servs. Inc. Derivative Litig.*, 81 A.3d 278, 286-87 (Del. Ch. 2013) (emphasizing case-by-case nature of *Asia Global* test and noting that “[n]o one factor is dispositive”). Numerous courts have since applied the objective reasonableness test as enunciated in *Asia Global*, or closely similar variants. The application of that test has not resulted in consistent results. The courts applying the test have often differed with respect to the factual circumstances that are dispositive. Compare, e.g., *Curto v. Med. World Commc’ns, Inc.*, No. 03CV6327 (DRH)(MLO), 2006 WL 1318387, at *1 (E.D.N.Y. May 15, 2006) (The employer’s monitoring policy stated that “[e]mployees should not have an expectation of privacy in anything they create, store, send, or receive on the computer system.” The court found that plaintiff nonetheless had a reasonable expectation of privacy and had not waived her attorney-client privilege with respect to personal files stored on a company-owned computer because, *inter alia*, the employer had never enforced its computer usage policy and the employee, who worked from home, had attempted to delete private emails from her company laptop upon surrendering it in exchange for a new model.), with *U.S. v. Finazzo*, No. 10-CR-457 (RRM)(RML), 2013 WL 619572, at *9 (E.D.N.Y. Feb. 19, 2013) (Where an employer has clearly and explicitly reserved the right to monitor work email, “[m]ost courts have concluded such reservation of the right to review destroys any reasonable expectation of privacy, whether or not the employer routinely reviews ... e-mails.”). As a result, the case law on the objective reasonableness of an employee’s expectation of confidentiality is neither consistent nor predictable. See generally *In re Royce Homes*, 449 B.R. at 735-41 (collecting cases applying *Asia Global* test); *In re Info. Mgmt. Servs. Inc. Derivative Litig.*, 81 A.3d at 287-92 (collecting cases applying *Asia Global* test).

13 See *Goldstein v. Colborne Acquisition Co.*, 873 F.Supp.2d 932, 935 (N.D. Ill. 2012) (describing the four-factor test from *Asia Global* as the “most oft-quoted” test for determining whether an employee’s use of a company’s email system destroys the attorney-client privilege).

14 Some courts have added a fifth factor to the test, inquiring into how a particular employer interpreted or enforced its computer usage policy. See, e.g., *U.S. v. Hatfield*, No. 06-CR-0550 (JS), 2009 WL 3806300, at *9-10 (E.D.N.Y. Nov. 13, 2009); *DeGeer v. Gillis*, No. 09 C 6974, 2010 WL 3732132, at *9 (N.D. Ill. Sep. 17, 2010) (referencing *U.S. v. Hatfield* and its five factors). But see *Bingham*, 2016 WL 3917513 at *5, (Explicit policy disclaiming any expectation of privacy prevailed, even if employer rarely monitored e-mail accounts.)

As noted above, the objective reasonableness test has not been unanimously embraced. A minority of courts have taken a more rigid and formalistic approach when confronting this issue. Rather than focusing on the facts surrounding the employee's expectation of confidentiality and the reasonableness of those expectations under the circumstances, these decisions have relied upon the fact that the communications necessarily lacked actual confidentiality because employers had access to them.

For example, in *Long v. Marubeni Am. Corp.*, No. 05Civ.639(GEL)(KNF), 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006) plaintiffs used company-issued computers to send emails to their personal attorney via private, password-protected email accounts. The defendant's employee handbook, which one of the plaintiffs had helped prepare, prohibited personal use and explicitly advised that the company retained the right to monitor any matter "'stored in, created, received, or sent over the e-mail, voice mail, word processing, and/or internet systems provided' by [the defendant]." *Id.* at *3 (alteration in original). The court held that the emails in question were not privileged under those circumstances because plaintiffs "knew or should have known" of the employee handbook policy and therefore knew or should have known that the communications were not confidential. *Id.* ("[P]laintiffs disregarded the admonishment voluntarily and, therefore, have stripped from the e-mail messages referenced above the confidential cloak with which they claim those communications were covered."). Because the emails thus were not confidential, the court found that the attorney-client privilege could not attach. *Id.* Similarly, in *Bingham v. Baycare Health Sys.*, 2016 WL 3917513, an employee had received via his personal email account a message that contained links to documents his attorney had uploaded to a private cloud storage account. To access the linked documents, the employee forwarded the message to his work email account. The employer's Personnel Handbook clearly stated that "all communications composed, sent, received, or stored on [Employer's] communications system are, and remain, the property of [Employer], and are not the private property of any employee, even if the employee has used his or her own personal computer, tablet, cell phone or other personal device." *Bingham*, at *5. Further, the policy "explicitly warned that it 'creates no expectation of privacy concerning such messages,' and that the 'confidentiality of any message should not be assumed.'" *Id.* The *Bingham* court found that the employee — who had the burden of proving the confidentiality of the message — had not done so: "Plaintiff's subjective belief that [Employer] rarely monitored employee e-mails, standing alone, is insufficient to meet his burden." *Id.* at *6. See also *Scott v. Beth Israel Med. Ctr.*, 847 N.Y.S.2d 436 (Sup. Ct. 2007) (finding that employer's ability to monitor of attorney-client communications rendered the communications non-confidential and thus non-privileged); *Holmes*, 119 Cal. Rptr. 3d at 895, 898 (finding that emails between a former employee and her attorney sent from her work computer were not protected by the attorney-client privilege "because they were not private" given the company's monitoring policy, and holding that the fact that the company never actually accessed or monitored employees' computers was "immaterial" to its analysis).

In contrast, several recent cases have denied attempts to strip attorney-client privilege from employees' electronic communications despite the presence of "no expectation of privacy" warnings. For example, the supreme court of New Jersey, in *Stengart* 201 N.J. at 320, held that an employee had not waived her attorney-client privilege by communicating with her attorney using a private Yahoo email account that she accessed via the internet using an employer-furnished laptop. She never saved her Yahoo ID or password on the laptop. After leaving the company, she initiated a lawsuit against her former employer, alleging she was constructively discharged because of a

hostile work environment. The employer engaged a forensic expert who retrieved information from the laptop's hard drive. This information included copies of web pages she had visited, including those relating to her Yahoo mail account. The court found that the scope of the employer's policy concerning use of company's computing systems was "not entirely clear," and that the employee denied that she had been made aware that her browser history was being recorded and retained. After reviewing many cases interpreting the *Asia Global* factors and noting the fact-specific nature of its inquiry, the court concluded that the employee did have a reasonable expectation of privacy and upheld the attorney-client privilege. According to the court, the employee had both a subjective belief that her messages sent through her private, password-protected email account were confidential, and her belief was objectively reasonable considering the ambiguous language in the employer's policy with regard to the status of private web-based email accounts. *See also Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548 (S.D.N.Y. 2008).

Considering the *Stengart* court's analysis, it may be that both the subjective and objective requirements of the "reasonable expectation" test could be met if the employee uses widely available encryption tools to preclude unauthorized access to the content of her emails. ABA Opinion 99-413 (1999) restricts its analysis to "unencrypted" email. ABA Opinion 477 (2017) suggests that encryption of data may be considered to provide "reasonable electronic security." However, in the context of an employer-furnished computer system, encryption may not be effective to mask an email's metadata (addressee, time sent, etc.), and could also be thwarted by certain monitoring techniques that could be implemented in the workplace, such as keystroke recorders ("keyloggers") or other means of capturing message content prior to encryption.¹⁵

12. Communications about drafts and other matters disclosed in final form.

Most courts protect drafts of documents exchanged between a client and lawyer as privileged communications, even though the final product is intended to be published to third parties, so long as the drafts otherwise satisfy the privilege requirements. *See generally*, Paul R. Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 5.12, n. 2 (2016), *see, e.g., Roth v. Aon Corp.*, 254 F.R.D. 538, 541 (N.D. Ill. 2009) ("Indeed, most courts have found that even when a final product is disclosed to the public, the underlying privilege attached to drafts of the final product remains intact."). To be entitled to the privilege, the draft must contain confidential information disclosed by a client to an attorney for obtaining legal assistance or the attorney's legal advice or opinions, and the communication must "be made in confidence of the relationship and under circumstances from which it may reasonably be assumed that the communication will remain in confidence." *Schenet v. Anderson*, 678 F.Supp. 1280, 1281-1282 (E.D. Mich. 1988); *see also, U.S. v. Davita, Inc.*, 301 F.R.D. 676, 683 (N.D. Ga. 2014) ("The Court generally finds that the attorney-client privilege applies to confidential, non-public drafts of documents which were prepared by an attorney at the request of the client; communications attaching a draft to an attorney with a request for legal advice regarding its content; or communications that contain notes or comments of the attorney reflecting legal advice regarding a document's content.")

¹⁵ Whether use of such techniques is permissible or may give rise to claims against employers based violation of laws intended to protect the privacy of electronic communications is beyond the scope of this paper. This question is the subject of ongoing debate. *See, e.g., Rene v. G.F. Fishers, Inc.*, 817 F.Supp.2d 1090 (S.D. Indiana 2011) (analyzing keylogging in the context of federal and state "wiretap" laws); *Shefts v. Petrakis*, No. 10-cv-1104, 2012 WL 4049484 (C.D. Ill. Sept. 13, 2012).

The key distinction is between the confidential communication and the substance of the information that is later disclosed publicly. “[T]he attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all documents reflecting such information, to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons...The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.” *Schenet*, 678 F.Supp. at *1283-84; *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997) (drafts are considered privileged “if they were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version” that is disseminated.) See, e.g., *Johnson v. Ford Motor Co.*, No. 3:13-cv-06529, 2015 U.S. Dist. LEXIS 119886, at *162-164 (S.D. W. Va. Sept. 3, 2015) (holding that email correspondence seeking legal advice from counsel as to propriety and risks of statements in attached draft reports and investigative materials were privileged but that attached documents were not privileged because they were identical to the final reports and investigative materials released by the client); *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, Cause No. 99 C 1174, 2001 U.S. Dist. LEXIS 17602, at *17 (N.D. Ill. Oct. 16, 2001) (“[E]ven assuming, *arguendo*, that the final versions of the contract terms were presented to RJR’s sales staff in 1996, it is the substance of the communication between the lawyer and the client regarding the proposed terms that is protected, not the contract terms that ultimately appeared.”).

Courts have protected the confidentiality of drafts, meeting the threshold privilege requirements, notwithstanding the subsequent dissemination of a final product, in a wide variety of contexts, including, for example: preliminary drafts of contracts, *Muller v. Walt Disney Prods.*, 871 F.Supp. 678, 682 (S.D.N.Y. 1994); draft settlement agreements, *N.V. Organon v. Elan Pharm., Inc.*, No. 99 Civ. 11674, 2000 U.S. Dist. LEXIS 5629, *5-6 (S.D.N.Y. May 1, 2000); drafts of tender offers, *Schenet*, 678 F.Supp. at 1283-1284; corporate reorganization plans, *Lee v. Chi. Youth Ctrs.*, No. 12 C 9245, 2014 U.S. Dist. LEXIS 184506, *6 (N.D. Ill. Aug. 6, 2014); drafts of letters intended to be sent to third parties, *Slaven v. Great Am. Ins. Co.*, 83 F.Supp.3d 789, 802-803 (N.D. Ill. 2015); *Keating v. McCahill*, No. 11-518, 2012 U.S. Dist. LEXIS 91179, *20-28 (E.D. Pa. June 28, 2012); *Am. Nat’l Bank & Trust Co. v. AXA Client Solutions, LLC*, No. 00 C 6786, 2002 U.S. Dist. LEXIS 4805, *7 (N.D. Ill. Mar. 20, 2002); preliminary drafts of opinion letters, *Durand v. Hanover Ins. Grp., Inc.*, No. 3:07-CV-00130-HBB, 2016 U.S. Dist. LEXIS 143064, *68 (W.D. Ky. Oct. 14, 2016); drafts of SEC Form 10-K reports and other SEC filings, *Roth*, 254 F.R.D. at 541; *Smith v. Unilife Corp.*, No. 13-5101, 2015 U.S. Dist. LEXIS 18755, *9 (E.D. Pa. Feb. 13, 2015); *United Food & Com. Workers Union v. Chesapeake Energy Corp.*, No. CIV-09-1114-D, 2012 U.S. Dist. LEXIS 86913, *28 (W.D. Okla. June 22, 2012); draft press releases, *Id.*; and drafts of memorandum evaluating competitive bid responses, *XTL-NH, Inc. v. N.H. State Liquor Comm’n & Exel, Inc.*, No. 2013-cv-119, 2015 N.H. Super. LEXIS 10, *1 (N.H. Super. Ct. Oct. 28, 2015).

Some areas, however, remain unsettled. For example, there continues to be a split of authority in the patent context. Some courts hold that draft patent applications are privileged, while others hold that they are discoverable. Compare *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 145 F.R.D. 298, 303 (E.D.N.Y. May 22, 1992) (A draft patent application is a “communication that consists largely of technical information that an agent of a client provides to the client’s representative before the PTO so that that representative can pass along technical information to the PTO.”) (quoting *Quantum Corp. v. Western Digital Corp.*, Nos. C-89-1812 WHO & C-89-1856 WHO,

1990 WL 357245, *3, (N.D. Cal. Jan. 26, 1990), quoting *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 542 (N.D. Cal. 1987)) with *In re Rivastigmine Patent Litig.* (MDL No. 1661), 237 F.R.D. 69, 86 (S.D.N.Y. 2006) (holding the attorney-client privilege generally applies to draft patent applications, amendments, and supporting affidavits, notwithstanding the final submission to the USPTO).

There also is a significant split of authority in the bankruptcy context. The disagreement, however, focuses more on the threshold privilege analysis than the waiver analysis. Some courts follow a bright-line rule that information transmitted by the client to the attorney for purposes of drafting bankruptcy schedules and statements of financial affairs is never privileged because the client has no reasonable expectation of confidentiality. See e.g., *In re Tarkington*, No. 10-00012-8-JRL, 2010 Bankr. LEXIS 1208, at *7 (E.D.N.C. Apr. 2, 2010) (“Attorney-client privilege does not extend to information disclosed during the preparation of a bankruptcy petition or schedules.”); *U.S. v. Naegele*, 468 F.Supp.2d 165, 171 (D.D.C. 2007) (draft bankruptcy filings are non-privileged); *In re Wilkerson*, 393 B.R.734, 742-743 (Bankr. D. Colo. 2007) (questionnaire completed prior to bankruptcy filing is non-privileged); *In re Eddy*, 304 B.R. 591, 596 (Bankr. D. Mass 2004) (“A debtor has no reasonable expectation that information will be kept confidential if it must be disclosed in bankruptcy filings.”). Other courts adopt a broader view and hold communications between a client and his bankruptcy attorney regarding the completion of such schedules and statements are “necessarily protected” by the attorney-client privilege. *In re Stoutamire*, 201 B.R. 592, 596 (Bankr. S.D. Ga. Sept. 30, 1996). Yet others suggest a fact-specific analysis of the debtor’s subjective expectation of confidentiality and, if this threshold privilege requirement is satisfied, hold the privilege is not waived by the filing of the final schedule or statement of financial affairs. See, *In re McDowell*, 483 B.R. 471, 486-492 (Bankr. S.D. Tex. Nov. 16, 2012).

Finally, it is important to note that drafts of documents disseminated to third parties in final form may be entitled to work product protection, even though they do not satisfy the requirements for attorney-client privilege protection. *ePlus Inc. v. Lawson Software, Inc.*, No. 3:09cv620, 2012 U.S. Dist. LEXIS 177616, *23 (E.D. Va. Dec. 14, 2012) (noting the “general view that the waiver of the work product protection as to the final draft of a document does not constitute a waiver of the earlier versions of the draft.” (citing *In re N.Y. Renu with Moistureloc Prod. Liab. Litig.*, No. 766,000/2007, 2009 U.S. Dist. LEXIS 80446, at *40 (D.S.C. July 1, 2009) (noting the “better view, and the modern trend, is to hold that waiver by disclosure of a final document does not operate as a waiver of the drafts that are work product”)).

A common application of this principle is the protection afforded draft affidavits and declarations prepared by counsel for third-party witnesses for which there is no attorney-client privilege. Courts have held that unsigned drafts of witness statements or affidavits prepared in anticipation of litigation, as well as information concerning the process leading to the execution of final, signed affidavits, are deserving of work product protection. See *Fine v. ESPN, Inc.*, No. 5:12-CV-0836 (LEK/DEP), 2014 U.S. Dist. LEXIS 192519, at *5, n.2 (N.D.N.Y. Oct. 15, 2014) (citing *Randleman v. Fidelity Nat’l Title Ins. Co.*, 251 F.R.D. 281, 285 (N.D. Ohio 2008); *Tuttle v. Tyco Elecs. Installation Servs., Inc.*, No. 2:06-CV-0581, 2007 U.S. Dist. LEXIS 95527, (S.D. Ohio, Dec. 21, 2007); see also 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2024, n.23 (3d ed. 2010) (“Recent cases have generally held that draft affidavits, and communications with counsel relating to affidavits, are covered by the work-product rule.”) (citing *Randleman, supra*).

13. Disclosures to government agencies and selective waiver.

Companies under investigation have faced considerable pressure from government agencies, such as the SEC or the Department of Justice, to cooperate in an investigation by providing privileged information in order to obtain more favorable treatment. The companies often later maintain in related civil litigation that such cooperation should not constitute waiver of the privileged information for all purposes and should be deemed only a limited or “selective” waiver applicable to the investigation itself. The majority of jurisdictions have rejected the concept of selective waiver. *See In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012); *In re Qwest Commc’ns Int’l, Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002). There may be fewer such situations in the future because the pressure on corporations to waive privilege has lessened. In August of 2008, the DOJ announced the withdrawal of its “McNulty Memorandum” and issued new corporate charging guidelines providing that credit for cooperation will not depend upon whether a corporation has waived privilege or work product protections (credit is supposed to depend on the disclosure of facts without regard to waiver) and prohibiting prosecutors from requesting the disclosure of non-factual attorney-client privileged communications and work product, except in cases involving the crime-fraud exception and the advice-of-counsel defense.¹⁶

In 2008, Rule 502 was added to the Federal Rules of Evidence. Although it does not change selective waiver issues, it ostensibly prevents a corporation’s voluntary waiver of certain privileged material in a government investigation from constituting a broader, subject-matter waiver of other previously undisclosed privileged materials, unless “they ought in fairness to be considered together.” Federal courts interpreting Rule 502(a) have noted that the rule did not alter the previous body of law regarding the appropriateness of subject-matter waiver in cases where a “privilege holder seeks to use disclosed material for advantage in the litigation but to invoke the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials.” *U.S. Airline Pilots Assoc. v. Pension Benefit Guar. Corp.*, 274 F.R.D. 28, 32 (D.D.C. 2011) (quotations omitted). In addition, courts have held that a party’s reliance on the reasonable cause defense constitutes a subject matter waiver of work product and attorney-client protected materials related to the defense. *See New Phoenix Sunrise Corp. v. C.I.R.*, 408 Fed.Appx. 908, 919 (6th Cir. 2010). Although Rule 502 does not provide for selective waiver, the rule does allow the party disclosing protected materials to control the timing of any waiver through the use of a protective order pursuant to Rule 502(d). *See In re Pac. Pictures Corp.*, 679 F.3d at 1129.

14. Inadvertent disclosure during discovery.

With the rise of electronic discovery the problem of inadvertent disclosure of privileged materials during discovery has become more acute. Most courts have taken a moderate approach to determining whether a waiver has occurred, considering five factors: (1) reasonableness of precautions taken; (2) time taken to rectify the error; (3) scope of discovery; (4) extent of disclosure; and (5) fairness. *See Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL-DJW, 2006 WL 1867478, at *9-10 (D. Kan. July 1, 2006); *Wallace v. Beech Aircraft Corp.*, 179 F.R.D. 313, 314 (D. Kan. 1998); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985);

Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985).

New Federal Rule of Evidence 502 also addresses inadvertent disclosure. Under Rule 502(b), an inadvertent disclosure does not operate as a waiver if the privilege holder took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. The enactment of Rule 502(b) has served to at least partially abrogate prior case law which held that any disclosure of privileged documents, even if inadvertent, resulted in waiver of the privilege. *See Williams v. District of Columbia*, 806 F.Supp.2d 44, 48 (D.D.C. 2011). The commentary to Rule 502 points out that the rule is flexible enough to accommodate the multi-factor approaches courts have used, noting that many of the factors relate to the reasonableness of the producing party's efforts to protect privileged information. The commentary further notes that Rule 502(d) contemplates enforcement of the so-called "claw-back" and "quick peek" arrangements which are designed to allow parties to agree on practical approaches to document productions without the risk of waiver. Rule 502(e) provides, however, that agreements between parties to limit the effect of waiver by disclosure can bind only the parties to the agreement unless the agreement is made part of a court order.

In addition, the American Bar Association's Model Rule of Professional Conduct 4.4(b) requires a lawyer who receives a document relating to the representation of the lawyer's client to promptly notify the sender if the lawyer knows or reasonably should know that the document was inadvertently sent. A majority of jurisdictions have adopted a version of Model Rule 4.4(b). The only states which have not adopted Rule 4.4(b) are California, Georgia, Hawaii, Massachusetts, Michigan, North Dakota, Texas, Virginia, and West Virginia.

15. Current Validity of the Fiduciary Exception

The fiduciary duty exception to the attorney-client privilege limits the extent to which the privilege can be asserted by a fiduciary to protect legal advice related to the exercise of fiduciary duties. It was first established as a principle of trust law by the English courts in the 19th Century. "The rule was that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice." *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 170 (2011).

American courts did not begin to adopt the fiduciary exception until the 1970's. *Id.* at 171-173. It was first recognized in *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970), in which the federal circuit court, applying federal common law, held that shareholders, upon a showing of "good cause," could discover legal advice given to corporate management. Subsequently, the Delaware Chancery Court, at a time when the attorney-client privilege was established by Delaware common law, held that trust beneficiaries seeking to compel the trustee to reimburse the estate for breaches of fiduciary duty could compel the production a legal memorandum regarding the administration of the trust and withheld on the basis of attorney-client privilege. *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 713-715 (Del Ch. 1976). The courts articulate two rationales for adopting the fiduciary exception: first, that the trustee is merely the representation of the trust beneficiaries, who are the "real clients" for the purpose of legal advice relation to the trust, *Jicarilla Apache Nation*, 564 U.S. at 190-191 (J. Sotomeyer, dissenting), and, second, that the fiduciary's duty of full disclosure to the beneficiary trumps the protection of the trustee's confidence in the attorney. *Id.* at 201. Applying these rationales, American courts have extended the fiduciary

privilege beyond the traditional trust context to shareholder derivative actions and the administration of employee benefit plans, subject to the Employee Retirement Income Security Act of 1974 (“ERISA”).

The fiduciary exception to the attorney-client privilege is well-recognized in the federal common law. Seven federal circuit courts recognize the exception, although they strictly limit its application to purely fiduciary matters. *See, e.g. Solis v Food Emplrs Labor Relations Ass’n*, 644 F.3d 221, 224-225 (4th Cir. 2011) (recognizing exception in context of ERISA enforcement action); *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 232-234 (3rd Cir. 2007) (recognizing exception in ERISA context, but holding that it does not extend to communications between plan insurer and plan attorney regarding benefits claims); *Bland v. Fiatallis N. Am. Inc.*, 401 F.3d 779, 787-788 (7th Cir. 2005) (recognizing exception in ERISA context, but finding that it does not apply to communications related to plan amendments); *U.S. v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999) (recognizing exception in ERISA context, but finding that it does not apply to advice sought to protect fiduciary from liability); *In re Long Island Lighting Co.*, 129 F.3d 268, 271-272 (2nd Cir. 1997) (recognizing exception in ERISA context but limiting it to matters related to plan management and administration, while preserving privilege as to matters related to plan design and amendment); *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 645 (5th Cir. 1992) (recognizing that an ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration, but holding information sought protected by work product privilege); *Fausek v. White*, 965 F.2d 126, 132-33 (6th Cir. 1992) (following *Garner* to hold that “when shareholders present a colorable claim of fraud or criminal activity that is inimical to their interests as shareholders, they must be given an opportunity to establish good cause why the attorney-client privilege should not be invoked in their particular case.”); *Garner*, 430 F.2d at 1103-1104 (exception applies in shareholder derivative actions upon a showing of “good cause”). Whether the exception applies to the work product doctrine, however, is unsettled. *See Murphy v. Gorman*, 271 F.R.D. 296, 311-313 (D.N.M. 2010) (collecting cases).

The fiduciary exception has received mixed results in the states, and the result often turns on whether the state law permits judicially-created exceptions to the statutory law or rules of evidence governing the privilege. State courts typically decline to recognize the privilege when the state legislature or state Supreme court has enacted, by statute or rule, specific exceptions to the attorney-client privilege, finding that if the fiduciary exception is justified, it should be instituted by a statutory or rule amendment. *See e.g. Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or. 476, 501, 326 P.3d 1181, 1195 (2014) (refusing to recognize fiduciary exception because state evidence rule was intended as a complete enumeration of exceptions to attorney client privilege); *Murphy*, 271 F.R.D. at 306-309 (Law of privilege is rule-bound in New Mexico and court cannot engage in ad hoc rule-making.); *Wells Fargo Bank v. Superior Ct.*, 22 Cal.4th 201, 209, 990 P.2d 591, 596 (2000) (“What courts in other jurisdictions give as common law privileges they may take away as exceptions. We, in contrast, do not enjoy the freedom to restrict California’s statutory attorney-client privilege based on notions of policy or ad hoc justification.”); *Huie v. DeShazo*, 922 S.W.2d 920, 925 (Tex. 1996) (“If the special role of a fiduciary does justify such an exception, it should be instituted as an amendment to Rule 503 through the rulemaking process.”)

State legislatures, however, seem reluctant to exercise their authority to embrace the fiduciary exception. After the South Carolina Court of Appeals applied the *Riggs Nat’l. Bank v. Zimmer*

fiduciary exception analysis in *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005), the South Carolina legislature enacted S.C. Code Ann. § 62-1-110, expressly to reject the holding in *Riggs Nat'l. Bank v. Zimmer* as applied in *Floyd*. See 2008 S.C. Acts 211, 2007 S.C. H.B. 3605, 2007 S.C. R. 250. The Florida legislature followed suit. Two Florida courts recognized and applied the fiduciary exception. See, *Jacob v. Barton*, 877 So.2d 935 (Fla. Dist. Ct. App. 2004) (trustee fiduciary); *Tripp v. Salkovitz*, 919 So.2d 716 (Fla. Dist. Ct. App. 2006) (guardian fiduciary). In 2011, the Florida legislature rejected the fiduciary exception, by adopting Section 90.5021(2), which provides that “[a] communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure . . . to the same extent as if the client were not acting as a fiduciary.” See 2011 Fla. ALS 183, 2011 Fla. Laws ch. 183, Fla. H.B. 325.

Only a limited number of state courts permitted to create judicial exceptions to the attorney-client privilege have addressed the fiduciary exception. And the results again are mixed. Compare, *In re Pittsburgh History & Landmarks Found.*, No. 113 C.D. 2016, 2017 Pa. Commw. LEXIS 116, at *41 (Commw. Ct. Apr. 21, 2017) (adopting a “nuanced *Garner*-based exception” for derivative actions); *NAMA Holdings, LLC v. Greenberg Traurig LLP*, 2015 NY Slip. Op. 07346, ¶ 8; 133 A.D.3d 46, 56, 18 N.Y.S. 3d 1, 9 (App. Div.) (“The *Garner* test remains viable, and it strikes the appropriate balance between respect for the privilege and the need for disclosure; therefore, we adopt it here.”); *In re Kipnis Section 3.4 Trust*, 235 Ariz. 153, 159, 329 P.3d 1055, 1061 (Ariz. App. 2014) (adopting the exception, citing RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. f. (Am. Law Inst. 2007)); *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1278 (Del. 2014) (adopting fiduciary exception in the context of plenary stockholder/corporation proceeding and shareholders’ right to inspect books and records of corporation); *Mennen v. Wilmington Tr. Co.*, No. 8432-ML, 2013 Del. Ch. LEXIS 204, at *9 (Ch. July 25, 2013) (stating that “reasoning in *Riggs* was not superseded or abrogated by subsequent changes to Delaware law”) and *Matter of Bank of NY Mellon*, 42 Misc.3d 171, 176, 977 N.Y.S.2d 560, 565 (Sup. Ct. 2013) (applying exception in context of indentured trustee) with *St. Simons Waterfront LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 746 S.E.2d 98 (2013) (declining to adopt exception in the law firm in-house counsel context); *Heisenger v. Cleary*, No. X04HHDCV126049497S, 2014 Conn. Super. LEXIS 1835, at *8-9 (Super. Ct. July 29, 2014) (declining to adopt the exception in the traditional trust context, finding “the policy reasons for a ‘fiduciary exception’ that are often cited in many cases seem less than significant and are . . . ultimately unconvincing.”); *Huie*, 922 S.W.2d at 925 (rejecting “real client” basis for exception because “under Texas law at least, the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries.”) Recognizing that “courts are split because of the important values that are in tension on this question,” the National Conference of Commissioners on Uniform State Laws determined to leave the issue open for further consideration by the courts. See Uniform Trust Code, § 813, comment (2006).

16. Recognition of the privilege in intra-law firm communications with in-house counsel concerning a current client of the firm.

It has become commonplace for law firms to employ in-house counsel to assist their firm’s attorneys with professional responsibility compliance and client management issues. A growing number of state appellate courts have recognized that the attorney-client privilege applies to confidential communications between a law firm’s in-house counsel and the law firm’s attorneys, even where the firm’s client brings a malpractice action and seeks to discover communications with

in-house counsel.¹⁷ This trend roughly coincided with the ABA House of Delegates' adoption in 2013 of Resolution 103, which observed that "the attorney-client privilege for consultations with in-house counsel is critical to ensuring that attorneys and other law firm personnel receive the best possible advice on complicated legal and ethical issues" and further noted that "any conflict of interest arising out of a law firm's consultation with its in-house counsel regarding the firm's representation of a then-current client and a potentially viable claim the client may have against the firm does not create an exception to the attorney-client privilege. . . ."¹⁸ Consistent with the ABA's position, state appellate courts have recently rejected the "fiduciary exception" or "current client" exception to the attorney-client privilege, often reasoning that such exceptions are not contained in the state's privilege statute or are inconsistent with common law application of privilege.¹⁹

This trend represents a change in direction. An earlier line of mostly federal district court cases held that the fiduciary exception or ethical obligations precluded a law firm from enforcing the attorney-client privilege as to advice its lawyers received from a law firm's in-house counsel

¹⁷ *Stock v. Schnader Harrison Segal & Lewis LLP*, 35 N.Y.S.3d 31, 32-33, 142 A.D.3d 210, 212 (2016) (holding that attorneys who sought advice of law firm's in-house counsel on ethical obligations to a firm client may invoke attorney-client privilege to resist the client's demand for the disclosure); *Crimson Trace Corp.*, 355 Or. at 502 (rejecting application of any "fiduciary" exception to the privilege because Oregon did not provide for such exception, thus protecting intra-firm communications); *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 715, 991 N.E.2d 1066, 1076 (2013) (while a client is entitled to full and fair disclosure of facts that are relevant to the representation, a client is not entitled to revelation of the law firm's privileged communications with in-house or outside counsel where those facts were presented and the sound legal advice was formulated if those communications were conducted for the law firm's own defense against the client's adverse claims.); *St. Simons Waterfront*, 293 Ga. at 425-426 (concluding that the potential existence of an imputed conflict of interest between in-house counsel and the firm client is not a persuasive basis for abrogating the attorney-client privilege between in-house counsel of a law firm and the firm's attorneys); *Palmer v. Superior Ct.*, 231 Cal. App. 4th 1214, 1232, 180 Cal. Rptr. 3d 620, 634 (2014) (affirming that California does not recognize a fiduciary exception to privilege that would compel intra-firm communications); *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶38 966 N.E.2d 523, 537 (declining to apply the fiduciary-duty exception to the attorney-client privilege when it is not currently the law in Illinois, thus protecting intra-law firm communications from disclosure); *Coloplast A/S & Coloplast Corp. v. Spell Pless Sauro, PC*, No. 27-CV-12-12601, 2013 Minn. Dist. LEXIS 45, *17 (Minn. Dist. Ct. 2013) (citing *REF Family P'ship*, 465 Mass. at 715).

¹⁸ ABA, Resolution 103 (Policy adopted Aug., 2013), available at http://www.americanbar.org/content/dam/aba/directories/policy/2013w_hod_annual_meeting_103.doccx.authcheckdam

¹⁹ *Palmer*, 231 Cal. App. 4th at 1232 (noting that California statute does not recognize a fiduciary exception to privilege); *Crimson Trace Corp.*, 355 Or. at 502 (noting that Oregon privilege statute did not provide for such exceptions).

regarding a client of the firm.²⁰ In general, these earlier cases held that when a law firm's attorneys consult with in-house counsel about a current client, a conflict of interest is imputed to in-house counsel. The justification behind these decisions began to wane with the recognition that convenient access to in-house counsel at a law firm furthers compliance with the firm's obligations to clients.²¹

20 *In re Sunrise Secs. Litig.*, 130 F.R.D. 560, 597 (E.D. Pa. 1989) (holding that a law firm's communication with in-house counsel is not protected by the attorney-client privilege if the communication implicates or creates a conflict, in violation of Rule 1.7, between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication); *E-Pass Techs., Inc. v. Moses & Singer, LLP*, No. C09-5967 EMC (JSC), 2011 U.S. Dist. LEXIS 96231, *10 (N.D. Cal. Aug. 26, 2011) (stating that if a law firm intends to separately—and confidentially—represent itself on a fees motion against a client, then it has a duty to disclose this conflict and obtain the client's consent to continued representation); *Hope for Families & Cmty. Serv. v. Warren*, No. 3:06-CV-1113-WKW [WO], 2009 U.S. Dist. LEXIS 5253, *111 (M.D. Ala. Jan. 26, 2009) (rejecting attorney-client privilege where an attorney seeks internal firm advice about a matter involving a law firm client in which another attorney has a financial interest); *SonicBlue Claims LLC v. Portside Growth and Opportunity Fund (In re SonicBlue Inc.)*, No. 07-5082, 2008 Bankr. LEXIS 181, *29 (Bankr. N.D. Cal. Jan. 18, 2008) (holding that in addition to a law firm's ethical duties of loyalty, in the bankruptcy setting, a law firm has a duty to remain disinterested and not to represent any adverse interests); *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 U.S. Dist. LEXIS 17482, *20-21 (N.D. Cal. Feb. 21, 2007) (declaring that while consultation with an in-house ethics adviser is confidential, once a law firm learns that a client may have a claim against the firm or that the firm needs client consent in order to commence or continue another client representation, then the firm should disclose to the client the firm's conclusions with respect to those ethical issues); *Asset Funding Grp., LLC v. Adams & Reese, LLP*, No. 07-2965, 2009 U.S. Dist. LEXIS 48420, *9 (E.D. La. June 4, 2009) (holding that a firm may assert the in-house privilege against its client with respect to communications regarding intra-firm ethical consultations unless and until the firm learns that its representation of the client conflicts with another client's interests, requiring an express waiver by the clients or the firm's cessation of representation of the clients); *Burns ex rel. Off. of Pub. Guardian, v. Hale & Dorr LLP*, 242 F.R.D. 170, 174 (D. Mass. 2007) (holding that the law firm could not assert the attorney-client privilege against the plaintiff with respect to any evidence relevant to their management or investment of the Trust Funds on plaintiff's behalf); *Koen Book Distribs. v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002) (stating that the fact that the plaintiffs may have retained other counsel when deciding to file legal malpractice suit against the law firm did not remove the conflict so long as the law firm also continued to represent plaintiffs); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F.Supp.2d 283, 283 (S.D.N.Y. 2002) (holding that a law firm could not invoke the attorney-client privilege against a current client when performing a conflict check in furtherance of representing that client); *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 334-335, 111 P.3d 866, 879 (Wash. Ct. App. 2005) (holding that when determining whether there is a conflict between the law firm's own interests and its fiduciary duty to plaintiff (client), it will be important for the court to focus on the timing and relationship between the parties).

21 *See, e.g. TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP*, No. 2:10-cv-226, 2011 U.S. Dist. LEXIS 10412, *29 (S.D. Ohio Feb. 3, 2011) (holding, in a legal malpractice suit, that the extension of the attorney-client privilege to intra-firm "loss prevention" communication promoted the affected attorneys' abilities to promptly seek advice and obtain it based on a complete disclosure of the circumstances that led them to believe that some loss prevention communication was warranted); *Nesse v. Pittman*, 206 F.R.D. 325, 331 (D.D.C. 2002) (where the lawyer tells one member of the law firm what she (the lawyer) has learned from another member of the firm, compelled disclosure violates the *Upjohn* proscription irrespective of the reason why the member of the firm sought the information or what use the latter will make of it); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F.Supp.255, 255 (S.D.N.Y. 1994) (stating that no principled reason appears for denying a comparable attorney-client privilege to a law partnership that elects to use a partner or associate as counsel of record in a litigated matter, thus not requiring disclosure of intra-firm communications); *Lama Holding Co. v. Shearman & Sterling*, No. 89-Civ. 3639 (KTD), 1991 U.S. Dist. LEXIS 7987, *3 (S.D.N.Y. June 14, 1991) (holding that it is undisputed that an attorney-client relationship can exist within a law firm, thus not requiring disclosure of intra-firm communications).

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