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2019 Corporate Counsel Institute (CCI) Agenda

7:30 am - 8:00 am	REGISTRATION, CONTINENTAL BREAKFAST & VISIT EXHIBITS
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8:10 am - 9:00 am	YOU'RE MY LAWYER, RIGHT? AND OTHER TRICK QUESTIONS FOR IN-HOUSE COUNSEL ON ATTORNEY-CLIENT PRIVILEGE (1.0 Hours Ethics) Greensfelder, Hemker & Gale, PC Erwin O. Switzer, Officer, Greensfelder, Hemker & Gale PC Doug Richmond, Managing Director, Aon Professional Services Moderator: Kevin T. McLaughlin, Officer, Greensfelder, Hemker & Gale, PC
9:10 am - 10:00 am	BUILDING BLOCKS: PRACTICAL APPLICATIONS FOR BLOCK-CHAIN AND CRYPTOCURRENCY Thompson Coburn Jennifer Post, Partner, Thompson Coburn Greg Mennerick, Partner, Thompson Coburn Stanton Huntington, General Counsel, Medici Ventures, Inc. Kenneth Salomon, Partner, Thompson Coburn
10:00 am - 10:20 am	BREAK & VISIT EXHIBITS
10:20 am - 11:10 am	THE LITIGATION BUSINESS: SMART USE OF ALTERNATIVE BILLING AND THIRD-PARTY LITIGATION FINANCING Husch Blackwell Douglas J. Schmidt, Partner, Husch Blackwell Angela Quinn, Chief Client Officer, Husch Blackwell Alyx Pattison, Vice President, Burford Capital
11:20 am - 12:10 pm	LEGAL COMPETENCE IN THE AGE OF HEIGHTENED STANDARDS - COUNSEL'S SECURITY INCIDENT RESPONSE ROLE Armstrong Teasdale, LLP Daniel C. Nelson, Partner, Armstrong Teasdale, LLP Jeffrey Schultz, Partner, Armstrong Teasdale, LLP Jeff Tucker, Corporate Counsel, Enterprise Holdings, Inc. Donna Stamp, Assistant Vice President Global Privacy, Enterprise Holdings, Inc.
12:10 - 1:20 pm	LUNCH Saint Louis Regional Development The Honorable Lyda Krewson, Mayor, City of Saint Louis The Honorable Jimmie M. Edwards, Director of Public Safety, City of Saint Louis

1:30 pm - 2:20 pm	LABOR & EMPLOYMENT LAW HOT TOPICS: TWO YEARS INTO THE TRUMP ADMINISTRATION AND UNDER FIFTY DIFFERENT STATE ADMINISTRATIONS Ogletree, Deakins, Nash, Smoak & Stewart, P.C. James M. Paul, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. Gregg M. Lemley, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. Nathan Harris, Head Labor and Employment Counsel, Mercy Health
2:30 pm - 3:20 pm	BREAKOUT SESSION A ARE YOU TAKING ADVANTAGE OF OR BEING TAKEN ADVANTAGE OF BY TRADE SECRET LAW? Stinson Leonard Street, LLP B. Scott Eidson, Partner, Stinson LLP Samir R. Mehta, Partner, Stinson LLP Paul I. Fleischut, Partner, Stinson LLP
2:30 pm - 3:20 pm	BREAKOUT SESSION B WHAT YOUR BUSINESS TEAM SHOULD KNOW AND WANTS TO KNOW ABOUT THE DEFINITIVE AGREEMENT Lewis Rice LLC Alfred J. Ludwig, Member, Lewis Rice LLC Elizabeth Minogue, Assistant General Counsel, M&A and Securities, Post Holdings, Inc.
3:20 pm - 3:40 pm	BREAK & VISIT EXHIBITS
3:40 pm - 5:10 pm	GENERAL COUNSEL PANEL - WHAT KEEPS THEM UP AT NIGHT? Monica Allen, Vice Chancellor and General Counsel, Washington University Matthew Geekie, Senior Vice President, Secretary & General Counsel, Graybar Electric Company, Inc. Francois Henriquez, II, Senior Vice President, General Counsel & Secretary, Federal Reserve Bank of St. Louis Keith Williamson, Executive Vice President, Secretary and General Counsel, Centene Corporation Moderated by: The Honorable Jimmie M. Edwards, Director of Public Safety, City of Saint Louis
5:10 pm - 6:00 pm	COCKTAIL RECEPTION

FACULTY

Monica Allen, Vice Chancellor and General Counsel, Washington University

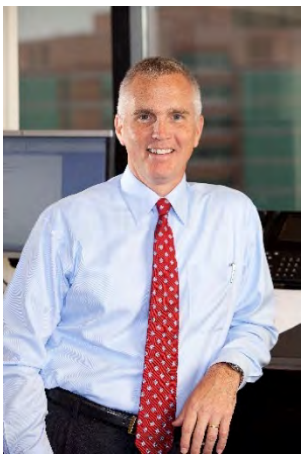
Ms. Allen is Vice Chancellor and General Counsel at Washington University in St. Louis. She was appointed to that position in July 2016, after serving as Associate Vice Chancellor, Deputy General Counsel and Chief Litigation Counsel. Before joining the University, Ms. Allen was a partner at Haar & Woods, LLP, where she specialized in complex litigation, handling a wide variety of professional liability claims and business and commercial disputes. Ms. Allen has also served as Senior Attorney at the Federal Reserve Bank of St. Louis. She began her legal career as a law clerk to the Honorable Jean C. Hamilton.

B. Scott Eidson, Partner, Stinson Leonard Street, LLP

Scott—who has a nationwide litigation practice focusing on complex intellectual property matters pending in state, federal and appellate courts—has successfully tried multi-million dollar patent, trademark, and trade secret cases for Fortune 500 companies. These victories led *Super Lawyers* to name him one of the top IP litigators in Missouri and Kansas. Also recognizing his litigation skills, Washington University School of Law, Scott's alma mater, invited him to serve as an adjunct professor. In this role, Scott teaches trademark litigation to upper level law students and LLMs. Prior to obtaining his J.D. at Washington University School of Law, Scott received a B.A. in English and B.S. in Biological Sciences, as well as an M.H.A. and M.B.A. in Finance from University of Missouri.

Paul I. Fleischut, Partner, Stinson Leonard Street, LLP

Paul assists businesses with intellectual property protection, including counseling in the areas of patents, trade secrets, and trademarks. His industry focus in the patent and trade secret areas is materials and chemistry, such as wear- and corrosion-resistant alloys and surface treatments, plastic films, ceramics for industrial and medical application, and performance chemistry for semiconductor, microelectronics, and functional plating applications. In trademarks, Paul counsels clients on selection, infringement and enforcement issues, and secures rights in the U.S. and internationally. He received his B.S. in Metallurgical Engineering from University of Missouri – Rolla and his J.D. from the University of Missouri School of Law.



Matthew Geekie, Senior Vice President, Secretary & General Counsel, Graybar Electric Company, Inc.
Matt Geekie is senior vice president, secretary and general counsel for Graybar, a leading distributor of electrical and communications products and related supply chain management and logistics services. A member of Graybar's board of directors, Geekie is responsible for corporate governance and the legal and risk management functions of the company. He also serves as Chairman of Graybar's Canadian subsidiary.

Geekie started his career as a trial lawyer at St. Louis firm Moser & Marsalek, next moving in-house to Siegel-Robert Inc. and later Blackwell Sanders Peper Martin (now Husch Blackwell). From there, he was appointed to assistant general counsel at Emerson, and then served as general counsel and secretary at XTRA Corporation, a Berkshire Hathaway subsidiary. He joined Graybar in 2008 as Deputy General Counsel and was elected to his current position later that year.

Geekie's broad-based legal experience includes corporate law, corporate governance, commercial and securities law, Sarbanes Oxley, ethics, intellectual property, product liability, export/import law and risk management. Under his leadership, Graybar achieved national recognition for excellence in corporate governance in 2015 and 2016.

Geekie is a native of St. Louis, and received both his law degree and undergraduate degree from Saint Louis University. He currently serves as Chairman of the Board of The Oasis Institute and on its Executive and Finance Committees; as Chairman of the Board of the St. Louis Community Foundation, as Chair of its Executive and Gift Acceptance Committee, and as a Member of its Finance and Audit Committee; and, as a Member of the Saint Louis Zoo Association Board and its Government Relations, Investment, Finance and Major Gifts Committees. He is also a member of the St. Louis/Chicago Regional FM Global Advisory Board. He is a member of Vistage Worldwide, Inc. and a former President of the Missouri Law Institute and Saint Louis Zoo Association Board.

He and his wife, Karen, have three children. In his free time, he enjoys reading, golf and exercise.

Nathan Harris, Head Labor and Employment Counsel, Mercy Health
Nate provides specialized expertise in labor and employment law. Prior to joining Mercy, he worked as a litigator at Ogletree Deakins representing employers across the country. Now, as Mercy's lead employment attorney, Nate represents Mercy in matters arising under federal, state and local laws, and resolves complex and non-routine labor, employment, and immigration issues. He represents and defends Mercy against claims before federal and state courts and before administrative agencies. Nate also oversees investigations by federal and state agencies. In partnership with operational leaders, Nate leads strategic changes to policies and procedures across the Ministry. He regularly counsels leaders on employment law issues, litigation avoidance, and operational improvements. Drawing upon his litigation experience,

Nate develops and implements legal compliance projects, training programs, and tools to better align HR practices with Mercy's Mission and values, while also mitigating legal risk.

François Henriquez, II, Senior Vice President, General Counsel & Secretary, Federal Reserve Bank of St. Louis

François Henriquez is senior vice president, general counsel, corporate secretary and ethics officer, effective February 1, 2019. Mr. Henriquez joined the Fed in September 2018.

Prior to joining the Fed, Mr. Henriquez was a partner in the Miami office of Shutts & Bowen LLP, where he was a member of the Financial Services Industry Practice Group, from 2012 to 2018. From 2009 to 2012, he was Acting President of U.S. Central Federal Credit Union, where he operated the institution in conservatorship on behalf of the federal government. Previously, he was that institution's senior vice president and general counsel, where he served on the management committee and was responsible for providing legal service and counsel on all areas of the company's operations, as well as being responsible for the company's corporate secretary function and governmental relations efforts.

Mr. Henriquez was an associate with a major law firm in New York for five years, and then was an associate and partner in two prominent Kansas City, Missouri-based law firms. Mr. Henriquez has been an adjunct professor at the University of Kansas School of Law, where he taught banking law. He has lectured or presented on corporate governance, financial institution regulatory matters, capitalization strategies, and other corporate legal issues.

Mr. Henriquez received a bachelor's degree in political science from Yale University and a J.D. degree from Columbia University School of Law.

Stanton Huntington, General Counsel, Medici Ventures, Inc.

Stanton Huntington is General Counsel at Medici Ventures, a wholly-owned subsidiary of Overstock.com, Inc. (OSTK) created to advance blockchain technology. Medici Ventures has invested in and provides support to a portfolio of 19 blockchain technology companies covering industries from identity management, to capital markets, property administration, money and banking, supply chain management, and voting systems. Huntington joined Overstock in 2014 shortly after the company began accepting bitcoin as payment and has contributed to its blockchain efforts ever since.

Gregg M. Lemley, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Mr. Lemley has practiced exclusively in the area of labor and employment law and related litigation since 1995. He concentrates his practice primarily in litigation of employment and employment related commercial disputes and employer counseling. He has represented employers in a wide range of litigation matters in both state and federal court, and before arbitrators, administrative law judges, and other tribunals in disputes involving alleged discrimination based on race, sex, age, religion, disability, national origin, and the FMLA, sexual and racial harassment, retaliation (including workers' compensation and whistleblower retaliation), tortious interference with contract, ERISA violations, LMRA claims, employment contract disputes and other employment related claims and commercial disputes, including numerous non-compete and non-solicitation disputes. He also has extensive experience representing client in class and collective action wage and hour claims brought under the FLSA and stage wage laws. He also has practiced before numerous state administrative hearing tribunals and has extensive experience in alternative dispute resolution, including mediation and early neutral evaluation.

Mr. Lemley also is a certified mediator for the Eastern and Western Districts of Missouri and for the State of Missouri. Additionally, he assists both private and public employers in the development, implementation and application of harassment, drug testing, family medical leave and a wide range of other personnel policies and in drafting and revising employee handbooks, and has counseled clients in developing overarching HR compliance plans, conducting HR compliance audits, engaging in mass layoffs and in evaluating employment and labor issues related to business combinations. Mr. Lemley has presented client seminars on topics ranging from harassment to employee evaluation, discipline and termination in light of state and federal employment laws, to proper hiring protocol, navigating employee leave laws, social media, workplace technologies and a broad range of other topics. Mr. Lemley also frequently addresses the television, radio and print media on a variety of employment related topics.

Mr. Lemley has been designated a 2009-present Missouri *Super Lawyer* based on peer surveys by Law & Politics recognizing him as among the top 5% of attorneys in Missouri. Mr. Lemley has been listed in *Chambers USA* since 2010, where he has been singled out as one of the top labor and employment lawyers in the country and for "delivering easily understandable advice and taking time to understand client interests fully," and highlighted for his work in wrongful termination and discrimination matters. Mr. Lemley has been listed in *Best Lawyers* since 2013, and is a 2017 and 2018 BTI Client Service MVP.

Alfred J. Ludwig, Member, Lewis Rice

Alfred J. Ludwig has a diverse transactional practice. Al represents a wide array of clients ranging from large, publicly traded companies to individuals and sole proprietorships in all aspects of business operations. His experience includes transaction structuring, operational diligence, development and compliance, mergers and acquisitions, commercial contracts, the processes that accompany startup business planning, and the dissolution of ongoing businesses at the end of their life cycle.

Al has a significant commercial real estate practice, including purchases and sales, development, construction, and the structuring of investment and ownership arrangements. He also represents owners and tenants in leasing transactions of all varieties.

Furthermore, Al represents lenders and borrowers in a range of financing transactions, with a special emphasis on marine and real estate financing. In addition to structuring and documenting loan transactions, he has experience in a variety of modification and workout arrangements, collections, and real and personal property foreclosure actions.

Al also has substantial experience in negotiating and accounting for information technology and related software licensing arrangements. This work includes the negotiation and drafting of cloud services agreements, hardware and software transfers on a stand-alone basis and in context of larger acquisitions, as well as highly complex technology licensing and development arrangements.

Al was selected for inclusion in *Missouri & Kansas Rising Stars*® in 2015 and 2017-2018.

Outside of work, Al is active in St. Louis's music scene as a jazz, bluegrass and rock bassist, and he devotes much of his free time to volunteering with the Episcopal Church.

Kevin T. McLaughlin, Officer, Greensfelder, Hemker & Gale, PC

Kevin T. McLaughlin is an officer at Greensfelder, Hemker & Gale, P.C. With a practice that handles a range of employment issues including traditional labor matters, he works with employers to navigate lawsuits, investigations and day-to-day human resources issues.

Kevin frequently defends employers and management in employment discrimination lawsuits, wage and hour class action lawsuits, ERISA litigation and demands for arbitration, as well as lawsuits concerning non-competition and confidentiality agreements. Kevin's practice includes work with clients in the construction, securities, retail and manufacturing industries, among others.

With extensive experience in traditional labor law, Kevin provides counsel to management with respect to union relations, labor arbitrations and collective bargaining agreements. His daily

practice includes assisting clients in their handling of employee discipline and termination. He also advises on compliance with employment laws such as Title VII, ERISA, the Americans with Disabilities Act, the Family & Medical Leave Act, the Age Discrimination in Employment Act and wage and hour laws, as well as their state law counterparts.

Kevin advises clients in conducting internal investigations of employee complaints of harassment and frequently addresses day-to-day human resources and employee benefits questions. He works with clients on employee handbooks, personnel policies, employment agreements, separation agreements and non-compete agreements.

The leader of the firm's Employment & Labor practice group and a former member of the firm's Board of Directors, Kevin frequently lectures on topics including payroll management, employee discharge and documentation, prevailing wage issues and managing union workers. He received a law degree from the University of Missouri and a bachelor's degree from Boston College. He is recognized by Chambers USA, Benchmark Litigation and Best Lawyers as a top Labor & Employment attorney.

Samir R. Mehta, Partner, Stinson Leonard Street, LLP
A lifelong technophile with years of experience in the software industry, Samir focuses his practice on high technology intellectual property matters and intellectual property litigation. Prior to becoming an attorney, he worked extensively in the software industry in technologies including storage management, data center automation, workflow automation, and smart grid analytics. Samir brings his rich technical background to bear in his work on all aspects of intellectual property services and particularly intellectual property litigation, post grant review, patent preparation, and prosecution. Samir received his B.S. in Economics and Computer Science from Duke University and his J.D. from Washington University School of Law, where he graduated *cum laude.*

Greg Mennerick, Partner, Thompson Coburn
Greg Mennerick is a partner in Thompson Coburn's Corporate and Securities group where he represents clients in mergers and acquisitions and sophisticated securities offerings, and offers advice on the wide range of regulatory and compliance issues affecting public and private companies.

Elizabeth Minogue, Assistant General Counsel, M&A and Securities, Post Holdings, Inc.

Elizabeth (Beth) Minogue serves as Assistant General Counsel, M&A and Securities at Post Holdings, Inc. She joined the company in 2016. At Post, Beth plays a lead role in the company's extensive merger and acquisition activities, including its acquisition of Bob Evans Farms in 2018 and its acquisition of Weetabix in 2017, as well as the separate capitalization of its private brands food business with a private equity firm in 2018. In addition, Beth manages Post's securities filings and is a strategic contributor in its numerous debt offerings and refinancings. She also has extensive experience with tax restructurings and corporate governance matters.

Prior to joining Post, Beth was an associate at Bryan Cave Leighton Paisner, where her practice focused on mergers and acquisitions, corporate finance and securities. She represented a wide variety of public and private companies on a broad range of domestic and international corporate matters, including mergers, business acquisitions and divestitures, corporate formations, restructurings, joint ventures and securities law compliance. Her deal profile included transactions for Bunge North America, Emerson, Monsanto, Ralcorp Holdings and Stifel Financial. She also served as the Associate Task Force Representative for the Bryan Cave Leighton Paisner St. Louis office and as a member of the Recruiting Committee.
Beth received a Bachelor's degree in Government from Georgetown University, *magna cum laude*, and her law degree from Vanderbilt University Law School, *Order of the Coif*. While at Vanderbilt, she served as Managing Editor of the Vanderbilt Law Review. Her civic activities include the Humane Society of Missouri Friends Council from 2016 to present.

Daniel C. Nelson, Partner,Armstrong Teasdale, LLP

Dan Nelson, a commercial litigator and a co-leader of the firm's Privacy and Data Security practice area, is among the few U.S. attorneys to hold the title of Certified Ethical Hacker (C|EH). Dan's combined interest in technology and desire to help clients protect their privacy and sensitive data motivated him to take the unusual step of becoming what's known as a "white hat" hacker. Dan is also a Certified Information Privacy Professional (CIPP/US) and serves as a data breach/cyber incident coach in the event of a cyberattack. His knowledge of both the technical details of breaches and the legal and business impacts enables him to provide clients a unique perspective.

Mary Nelson, General Counsel, Chief Legal Officer, St. Louis Community College

Mary E. Nelson is General Counsel and Chief Legal Officer for St. Louis Community College. She has served in that role since 2014, providing legal advice and counsel to the chancellor, Board of Trustees, and other officers and directors of the college, serving as its primary legal counsel in all areas. She monitors college adherence to city, county, state, and federal laws; drafts and reviews legal documents; provide in-service training, and coordinates college legal services. Her areas of responsibility include a wide range of legal issues, including labor and employment law, higher education law and compliance, real estate, tax, personal injury, intellectual property, Sunshine Law, and governance. She coordinates the college's legal services, overseeing and coordinating the work of outside law firms in litigation matters.

Mary has more than 30 years of experience in the public and private sectors, including stints in two mayoral administrations in St. Louis, positions in state government and partnerships in several firms. In 2015, she was appointed to serve on the Missouri State Highways and Transportation Commission. She was the first African-American woman appointed to Missouri's Administrative Hearing Commission, leaving that post to accept her current position with STLCC. Nelson served as president of the St. Louis Board of Police Commissioners, on the 2001 Missouri House of Representatives Reapportionment and Redistricting Commission and served two terms on the board of trustees of the University of Missouri's Law School Foundation. An active member of the Missouri Bar, Nelson has held leadership posts for the Bar Foundation Board of the Bar Association of Metropolitan St. Louis and the Mound City Bar Association. This year, she was honored as a recipient of a Missouri Lawyers Media Women's Justice Award and the Mound City Bar Association's Legal Legend Award.

She earned her law degree from the University of Missouri School of Law and bachelor's degree in political philosophy from Princeton University.

Alyx Pattison, Vice President, Burford Capital

Alyx Pattison is Vice President at Burford, focused on originating new business with law firms and corporate legal departments, based in Chicago.

Ms. Pattison has an extensive background in both law and politics, with well over a decade of experience as a litigator. Before joining Burford, she was the Founder and President of a political consulting business with a focus on providing legal advice and compliance for congressional campaigns. Prior to this, Ms. Pattison was a Partner in the litigation departments of AmLaw 100 firms, Akerman LLP and Katten Muchin Rosenman LLP, with a focus on defense of publicly traded companies in securities class actions, M&A litigation and shareholder derivative suits. Ms. Pattison has been actively involved with Women's Leadership and Diversity Committees.

James M. Paul, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Jim has extensive trial and appellate experience with handling labor and employment law litigation in federal and state courts, and before the Equal Employment Opportunity Commission, Department of Labor, Department of Justice, Missouri Commission on Human Rights, Illinois Department of Human Rights, and several other federal and state agencies. He has also earned the national Society for Human Resource Management's "SHRM-SCP" certification and regularly advises employers on all labor and human resource management issues in an effort to prevent or resolve employee issues before they escalate into legal disputes. As Co-Chair of the firm's Disability Access practice group, Jim advises clients regarding legal requirements for accommodating disabled individuals and defends Americans with Disabilities and Rehabilitation Act lawsuits nationally.

Prior to his private practice of law, Jim served as judicial law clerk to the Honorable Ray Price, Jr. of the Missouri Supreme Court and then as a Missouri Assistant Attorney General. As Assistant Attorney General, he represented the Missouri Department of Labor and Industrial Relations, the Missouri Division of Labor Standards, and the Missouri Commission on Human Rights by enforcing state discrimination and wage and hour laws. He also worked in Washington, D.C. on legislative issues for the late Missouri Governor Carnahan and has taught Trial Advocacy at Saint Louis University as an Adjunct Professor.

Jennifer Post, Partner, Thompson Coburn

Jennifer Post is a partner in Thompson Coburn's Corporate and Securities group where her practice encompasses all areas of general corporate and securities law, including private placements of equity and debt securities, mergers and acquisitions and venture capital fund formation. A member of the Firm's Management Committee, Jennifer founded Thompson Coburn's Blockchain and Digital Currency group. Jennifer advises her company clients in many aspects of their businesses: capital raising, acquisitions, licensing and distribution, equity compensation, joint ventures and strategic partnerships.

Angela Quinn, Chief Client Officer, Husch Blackwell

As the firm's Chief Client Officer, Angela is committed to ensuring that the firm's clients get exactly what they want and need – solutions that help them move forward.

Angela identifies ways the firm can add value and improve results for clients, whether by revising traditional service models or adopting innovative new strategies. She has been a leader in developing and implementing the firm's Legal Project Management program, working

closely with client teams to facilitate the delivery of less costly but more effective legal service. She also recognizes how important diverse teams are in securing the best results for clients.

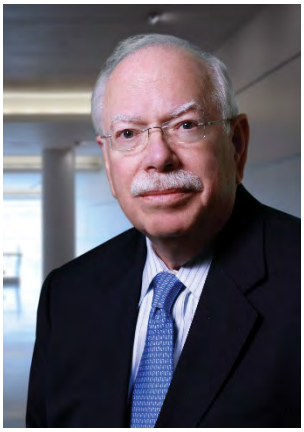
Angela leads the firm's client service, marketing, business development and pricing teams. Through education and thought leadership, she ensures that all members of the firm maintain absolute focus on providing the attention, knowledge and industry insights that will help clients advance their business interests.

During her decade as a practicing healthcare attorney and her previous leadership roles as Director of Strategic Growth and Director of Operations for a Husch Blackwell industry unit, Angela gained keen insight into client needs. Her broad experience, as well as her willingness to challenge the status quo and embrace bold strategies, uniquely equips Angela to lead firm initiatives that elevate the client experience.

Douglas Richmond, Managing Director, Aon Professional Services
Douglas R. Richmond is Managing Director of Aon's Professional Services Group, the world's leading broker of insurance for law firms. Doug consults with Aon's 275 law firm clients on professional responsibility and liability issues and leads Aon's loss prevention efforts for all professions.

Before joining Aon, Doug was a partner with Armstrong Teasdale in Kansas City, where he had a national trial and appellate practice. He tried over 40 major jury cases as "first chair" and was often engaged to handle appeals of cases tried by other lawyers. In 1998, he was named the nation's top defense lawyer in an insurance industry poll as reported in the publications *Inside Litigation* and *Of Counsel*. He is a member of the ABA's Standing Committee on Ethics & Professional Responsibility (2016–19). He is also a member of the American Bar Foundation, American Law Institute (ALI), American Board of Trial Advocates (ABOTA), International Association of Defense Counsel (IADC), and Federation of Defense and Corporate Counsel (FDCC). Doug has also been selected to The Best Lawyers in America in the areas of legal malpractice, personal injury litigation, and railroad law.

Doug is the lead author of the book *Professional Responsibility in Litigation* (2d ed. 2016) and the co-author of an insurance law treatise, *Understanding Insurance Law* (6th ed. 2018) and an insurance law casebook, *Cases and Materials on Insurance Law* (8th ed. 2018). He has published more than 60 articles in university law reviews, and many more articles in other scholarly and professional journals. Doug teaches legal ethics at the Northwestern University School of Law and insurance law and a seminar on liability insurance law at the University of Florida College of Law. He previously taught trial advocacy and insurance law at the University of Kansas School of Law and insurance law and a seminar on damages at the University of Missouri School of Law. Doug is also a regular NITA faculty member, teaching deposition and trial skills. He earned his law degree from the University of Kansas, an M. Ed. from the University of Nebraska, and a B.S. from Fort Hays State University.



Kenneth Salomon, Partner, Thompson Coburn
Ken Salomon is a partner in Thompson Coburn's Lobbying and Policy group where he helps clients in a variety of sectors—including e-commerce, higher education, technology, telecommunications, health care, and intellectual property—develop and implement winning lobbying strategies by crafting and implementing innovative approaches to affect the formation of public policy in the U.S. Congress and the administration.

Douglas J. Schmidt, Partner, Husch Blackwell
For more than 20 years, Doug has handled cases involving most aspects of litigation involving directors, officers and professionals. He has prosecuted and defended a number of cases relating to insurance coverage and bad faith issues and often consults with clients with regard to their insurance coverage issues. He has also defended merger targets and its directors and officers in the litigation that ensues following the announcement of the sale of a public company. A certified insurance receiver, Doug has broad experience as general and special counsel to the receivers of insolvent or financially troubled insurance companies. He has handled all aspects of receivership, including initial appointment of the receiver, claims resolution, reinsurance collection, transfers of blocks of business and marshalling and distribution of assets.

Doug has also investigated numerous claims and coverage disputes involving insurers, reinsurers, accountants, lawyers, actuaries and claimants. He has resolved outstanding issues through litigation to final adjudication or negotiated settlement, commutation or recapture agreements.

Doug has prosecuted and defended claims involving failed transactions, breach of contract and breaches of duty by directors and officers, reinsurers, brokers, accountants, lawyers and other professionals. Clients often call upon him during emergency and time sensitive situations to help ensure transactions are completed and prevent disastrous economic consequences. Doug has also prosecuted federal income tax refund claims for insolvent life insurance companies in federal district courts and circuit courts of appeal, and litigated various other issues against the federal government.

Jeffrey Schultz, Partner,Armstrong Teasdale, LLP

Jeff Schultz, a Certified Information Privacy Professional (CIPP/US), is co-leader of the firm's Privacy and Data Security practice area and former chair of The Missouri Bar's Technology and Computer Law Committee. He closely follows issues that stem from the use of technology, including laws governing cyber-behavior, privacy and discovery. When clients are faced with data theft or disclosure of confidential information, Jeff develops and implements strategies to control the situation and remedy the breach, frequently seeking and securing temporary restraining orders and preliminary and permanent injunctions to help safeguard businesses and their information. He assists clients across industries in responding to breaches and other computer incidents, including advising clients and developing strategies to comply with statutory and regulatory notice, disclosure, and remediation requirements.

Donna Stamp, Assistant Vice President Global Privacy, Enterprise Holdings, Inc.

Donna Stamp is the Assistant Vice President of Global Privacy and Data Governance with Enterprise Holdings, Inc. – the parent for the Enterprise, Alamo and National brands. She leads a global privacy team that supports all aspects of the company's customer and employee data uses, policies and best practices; incident response management; privacy program management; data protection compliance; and the emerging areas of digital and telematics. Donna has a degree in International Studies and holds CIPM certification.

Erwin O. Switzer, Officer, Greensfelder, Hemker & Gale PC

Erwin (Erv) O. Switzer is a litigation officer and general counsel at Greensfelder, Hemker & Gale, P.C. In his practice, he draws on decades of experience in commercial and government litigation, covering areas of law including consumer protection issues, governmental regulatory affairs and the appeals process. As Greensfelder's general counsel, he also advises on legal ethics on behalf of the firm and for outside clients.

For 11 years, Erv served as chief counsel in the Office of the Missouri Attorney General. There, he led litigation on matters including the Merchandising Practices Act, Telephone Consumer Protection Act, trade and securities regulations, antitrust compliance, civil rights, First Amendment law and taxation in state and federal trial and appellate courts throughout Missouri. He was involved in dozens of high-profile matters, including the

relocation of the Rams to St. Louis, representation of the Missouri Commissioner of Securities and Secretary of State, and litigation resulting in a ban against the sale of ephedra products in Missouri.

Erv frequently represents businesses facing consumer protection class action claims related to pricing and disclosure issues. In addition to handling the litigation aspect of such complaints, he guides clients through a proactive approach of reviewing consumer sales forms to make sure they comply with regulations, lessening the risk of future liability.

With his prosecutorial and government experience, Erv is well-positioned to conduct special investigations or serve as independent counsel, monitor or special committee member. He has also handled matters involving defense of attorney general investigations, student lending practices, deceptive advertising claims, Internet domain names and drafting legislation. He is co-chair of Greensfelder's appellate practice section and has briefed and argued dozens of appellate cases in state and federal courts.

Erv has significant community and leadership experience, including as a member of the Missouri Technology Corporation Board of Directors, St. Louis Board of Election Commissioners, St. Louis Board of Police Commissioners, St. Louis Housing Authority, Governor's Council on Disability and numerous other community and civic organizations. His professional recognitions include those from Benchmark Litigation, Best Lawyers and Super Lawyers.

Erv received his law and bachelor's degrees from Saint Louis University.

Jeff Tucker, Corporate Counsel, Enterprise Holdings, Inc.
For the past several years, Jeff has focused his practice on privacy and information security matters. Jeff joined Enterprise in 2017, where he provides legal support in areas such as GDPR, the California Consumer Privacy Act, data-driven business initiatives and strategy, employee privacy, incident response, vendor and customer agreements and the various rules and regulations governing transactional and marketing communications. At Enterprise, Jeff regularly deals with privacy and information security matters across a number of jurisdictions, including the U.S., Canada, Europe and Asia Pacific. Prior to Enterprise, Jeff served as Senior Counsel for Scottrade Financial Services, Inc. (2013-2016), Senior Counsel for Patriot Coal Corporation (2011-2013) and an associate attorney

in Bryan Cave's corporate finance and commercial transactions practice groups (2006-2011).

Keith Williamson, Executive Vice President, Secretary and General Counsel, Centene Corporation

An experienced business executive and corporate attorney, Keith joined Centene Corporation in November 2006 and currently serves as EVP, Secretary and General Counsel. Centene's health plans serve over 14 million members and offer a range of health insurance solutions to government-sponsored and commercial healthcare programs. The company has grown rapidly, with expected 2019 revenues of $70 billion. Keith is also on the board of PPL Corporation, a utility holding company operating in Kentucky, Pennsylvania and the United Kingdom.

Prior to Centene, Keith spent 18 years in Connecticut with Pitney Bowes, serving his last seven years as President of its Capital Services Division. Keith began his career as a tax lawyer with Covington & Burling in D.C. He later joined Reavis & McGrath (now Norton Rose Fulbright) in New York. Keith received his B.A. from Brown University, his J.D. and M.B.A. from Harvard University, and his LL.M. in taxation from NYU.

Keith is active with a number of professional, mentoring and social organizations, including the National Bar Association; the Consortium for Leadership Development, the Association of Corporate Counsel; Mound City Bar Association; Executive Leadership Council; 100 Black Men; Sigma Pi Phi; and the National Association of Guardsmen.

Civic activities include serving as board chair of the Urban League of Metro St. Louis; board chair of The Opportunity Trust; Collection Committee of the St. Louis Art Museum; executive committee of Mathew-Dickeys Boys & Girls Club; KIPP- St. Louis; and United Way. Recognitions include: the Missouri Lawyers 2017 "Corporate Counsel Award;" Savoy Magazine's "2018 Most Influential Black Lawyers;" and St. Louis Business Journal's 2017 "Corporate Counsel of the Year." Keith's daughter, Nicole, is a 2L at Harvard Law School.

YOU'RE MY LAWYER, RIGHT? AND OTHER TRICK QUESTIONS FOR IN-HOUSE COUNSEL ON ATTORNEY-CLIENT PRIVILEGE

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Understanding Fundamental Aspects of the Attorney-Client Privilege and Work Product Immunity

By

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I. INTRODUCTION

Confidentiality is central to the practice of law. Indeed, confidentiality is a good part of the bedrock on which both litigation and transactional practices are built.

Lawyers' duty to protect client information is variously embodied and enforced. For example, the attorney-client privilege is a critical component of evidence law and the work product doctrine provides important immunity against the discovery of lawyers' files and mental impressions in litigation. In fact, the attorney-client privilege is not absolute, it is narrowly construed and enforced, it is laden with exceptions, and it is easily waived. In many instances lawyers too casually assume the application of the privilege, or do not appreciate the ease with which it may be lost. Similarly, lawyers often are too quick to assume the application of work product immunity and overlook the fact that the client may waive it. It is against this backdrop that these materials examine key contours of the attorney-client privilege and work product doctrine.

II. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is one of the oldest common law privileges protecting confidential communications.[1] The "foundational building blocks"[2] of the attorney-client privilege were announced nearly 70 years ago in *United States v. United Shoe Machinery Corp*.[3] The *United Shoe* test provides that the privilege applies if:

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[1] Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998); Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW, 95 A.3d 1264, 1278 (Del. 2014); Worley v. Cent. Fla. YMCA, Inc., 228 So. 3d 18, 24 (Fla. 2017); Ctr. Partners, Ltd. v. Growth Head GP, LLC, 981 N.E.2d 345, 355 (Ill. 2012); Wemark v. State, 602 N.W.2d 810, 815 (Iowa 1999); State v. Gonzalez, 234 P.3d 1, 12 (Kan. 2010); Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 870 N.E.2d 33, 38 (Mass. 2007) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 34 (N.Y. 2016); *In re* Miller, 584 S.E.2d 772, 782 (N.C. 2003); Frease v. Glazer, 4 P.3d 56, 60 (Or. 2000); Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1263 (Pa. Super. Ct. 2007); *In re* XL Specialty Ins. Co., 373 S.W.3d 46, 49 (Tex. 2012) (quoting United States v. Zolin, 491 U.S. 554, 562 (1989)); Doe v. Maret, 984 P.2d 980, 982 (Utah 1999).

[2] Henry S. Bryans, *Employed Lawyers and the Attorney-Client Privilege – Parsing the Trade-Offs*, 47 U. TOL. L. REV. 109, 114 (2015).

[3] 89 F. Supp. 357 (D. Mass. 1950).

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[4]

Although the *United Shoe* test implies that the privilege covers only communications from the client to the attorney, confidential communications from an attorney to a client are also privileged.[5] The attorney-client privilege is a two-way street.

The Restatement (Third) of the Law Governing Lawyers articulates the elements of the attorney-client privilege more succinctly.[6] Section 68 provides that the privilege may be asserted "with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client."[7] "Privileged persons" include the client or prospective client, the lawyer, agents of the client or prospective client and the lawyer who facilitate communications between them, and agents of the lawyer who assist in the client's representation.[8]

The attorney-client privilege belongs to the client.[9] When a lawyer invokes the privilege to safeguard confidential communications, she does so as the client's agent—

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[4] *Id.* at 358–59.

[5] United States v. Christensen, 801 F.3d 970, 1007 (9th Cir. 2015) (applying federal privilege law); Byrd v. State, 929 S.W.2d 151, 154 (Ark. 1996); Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51, 60 (Conn. 1999); Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133, 137–38 (Del. Super. Ct. 1997); People v. Radojcic, 998 N.E.2d 1212, 1221 (Ill. 2013); Squealer Feeds v. Pickering, 530 N.W.2d 678, 684 (Iowa 1995); Rent Control Bd. v. Praught, 619 N.E.2d 346, 350 (Mass. App. Ct. 1993); Shorter v. State, 33 So. 3d 512, 516 (Miss. Ct. App. 2009) (quoting Hewes v. Langston, 853 So. 2d 1237, 1244 (Miss. 2003)); Palmer v. Farmers Ins. Exch., 861 P.2d 895, 906 (Mont. 1993); Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334, 341 (Nev. 2017); Gillard v. AIG Ins. Co., 15 A.3d 44, 59 (Pa. 2011); Giammarco v. Giammarco, 959 A.2d 531, 533 (R.I. 2008) (quoting Mortg. Guar. & Title Co. v. Cunha, 745 A.2d 156, 158–59 (R.I. 2000)); Dialysis Clinic, Inc. v. Medley, 567 S.W.3d 314, 318 (Tenn. 2019); Zink v. City of Mesa, 256 P.3d 384, 403 (Wash. Ct. App. 2011); State *ex rel*. Montpelier U.S. Ins. Co. v. Bloom, 757 S.E.2d 788, 994 (W. Va. 2014) (quoting FRANKLIN D. CLECKLEY ET AL., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 26(b)(1), at 693 (4th ed. 2012)).

[6] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000).

[7] *Id.*

[8] *Id.* § 70.

[9] Holt v. McCastlain, 182 S.W.3d 112, 117 (Ark. 2004); Fiduciary Tr. Int'l of Cal. v. Klein, 216 Cal. Rptr. 3d 61, 67 (Ct. App. 2017); Ctr. Partners, Ltd. v. Growth Head GP, LLC, 981 N.E.2d 345, 356 (Ill. 2012); Att'y Grievance Comm'n of Md. v. Powers, 164 A.3d 138, 151 (Md. 2017); Burnham v. Cleveland Clinic, 89 N.E.3d 536, 541 (Ohio 2016); Arnoldy v. Mahoney, 791 N.W.2d 645, 657 (S.D. 2010); *In re* XL Specialty Ins. Co., 373 S.W.3d 46, 49 (Tex. 2012); *see also* DeCurtis v. Visconti, Boren & Campbell, Ltd., 152 A.3d 413, 424 (R.I. 2017) (holding that the lawyers did not have standing to assert their clients' attorney-

not as a holder of the privilege.[10] Similarly, if the lawyer waives the privilege, she does so only as the client's agent.[11]

The privilege attaches to initial consultations between attorneys and prospective clients, even if the client does not ultimately retain the attorney.[12] Thereafter, the client may invoke the privilege any time during the attorney-client relationship or after the relationship terminates.[13] The privilege even survives the client's death.[14]

Because the privilege attaches to communications, an otherwise privileged exchange between a client and a lawyer containing information that could be discovered by other means remains shielded from discovery.[15] There is, however, no blanket privilege covering all attorney-client communications.[16] The client must assert the privilege with respect to each communication in question, and the court hearing the matter must scrutinize each communication independently.[17] The party asserting the attorney-client privilege bears the burden of establishing its application to particular communications.[18] This is a fact-specific inquiry.[19] The form of the communication

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client privilege in an action of which the clients were unaware in an attempt to defend against their own alleged negligence).

[10] EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 26 (6th ed. 2017).

[11] *See, e.g.*, San Francisco Residence Club, Ltd. v. Baswell-Guthrie, 897 F. Supp. 2d 1122, 1216 (N.D. Ala. 2012) ("The principle that the client, and not the attorney, owns the privilege, means that [the clients] had the right to waive the privilege, and that waiver may be effected through their attorney, *i.e.*, their agent.").

[12] Barton v. United States Dist. Ct. for the Cent. Dist. of Cal., 410 F.3d 1104, 1111 (9th Cir. 2005) (applying California law); State v. Fodor, 880 P.2d 662, 669 (Ariz. Ct. App. 1994); Bank of Am., N.A. v. Super. Ct., 151 Cal. Rptr. 3d 526, 543–44 (Ct. App. 2013); Popp v. O'Neil, 730 N.E.2d 506, 511 (Ill. App. Ct. 2000); Lovell v. Winchester, 941 S.W.2d 466, 467 (Ky. 1997); Mixon v. State, 224 S.W.3d 206, 212 (Tex. App. 2007).

[13] *See* O'Boyle v. Borough of Longport, 94 A.3d 299, 309 (N.J. 2014) (noting that the privilege survives the termination of the attorney-client relationship).

[14] Swidler & Berlin v. United States, 524 U.S. 399, 405 (1998); Zook v. Pesce, 91 A.3d 1114, 1119 (Md. 2014); *see also In re* Miller, 584 S.E.2d 772, 779 (N.C. 2003) (collecting state court cases on this point).

[15] Costco Wholesale Corp. v. Super. Ct., 219 P.3d 736, 741 (Cal. 2009).

[16] DCP Midstream, LP v. Anadarko Petrol. Corp., 303 P.3d 1187, 1199 (Colo. 2013); *see also* Scott v. Peterson, 126 P.3d 1232, 1234 (Okla. 2005) ("[T]he mere status of an attorney-client relationship does not make every communication between attorney and client protected by the privilege.").

[17] Wesp v. Everson, 33 P.3d 191, 197 (Colo. 2001); Brown v. Katz, 868 N.E.2d 1159, 1167 (Ind. Ct. App. 2007).

[18] Cencast Servs., L.P. v. United States, 91 Fed. Cl. 496, 502 (Fed. Cl. 2010); Fox v. Alfini, 432 P.3d 596, 600 (Colo. 2018); *In re* Appraisal of Dole Food Co., 114 A.3d 541, 561 (Del. Ch. 2014) (quoting Moyer v. Moyer, 602 A.2d 68, 72 (Del. 1992)); Lender Processing Servs., Inc. v. Arch Ins. Co., 183 So. 3d 1052, 1059 (Fla. Dist. Ct. App. 2015); Kirk v. Ford Motor Co., 116 P.3d 27, 34 (Idaho 2005); Collins v. Braden, 384 S.W.3d 154, 161, 163 (Ky. 2012); Maldonado v. Kiewit La. Co., 152 So. 3d 909, 927 (La. Ct. App. 2014); Harris Mgmt., Inc. v. Coulombe, 151 A.3d 7, 16 (Me. 2016); Clair v. Clair, 982 N.E.2d 32, 40–41 (Mass. 2013); State *ex rel.* Koster v. Cain, 383 S.W.3d 105, 116 (Mo. Ct. App. 2012); State *ex rel.* AMISUB, Inc. v. Buckley, 618 N.W.2d 684, 694 (Neb. 2000); Bhandari v. Artesia Gen. Hosp., 317 P.3d 856, 860 (N.M. Ct. App. 2013); Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 34 (N.Y. 2016); State v. McNeill, 813 S.E.2d 797, 824 (N.C. 2018); *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004); Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188, 1191 (Wash. 2016); State *ex rel.* HCR

between the client and the lawyer is irrelevant to attorney-client privilege analysis as long as the communication otherwise qualifies as privileged. For example, the attorney-client privilege attaches to telephone calls, personal conversations, correspondence, notes, text messages, and e-mail messages.[20] Nonverbal communications between clients and lawyers—such as nods, gestures, and silence—may be privileged.[21]

A party seeking to protect written or electronic communications from discovery does not have to identify them as "privileged" or "confidential" for the attorney-client privilege to attach.[22] On the other hand, a party cannot shield a communication from discovery simply by branding it "confidential" or "privileged."[23] The test is whether a communication satisfies the elements necessary to establish the privilege—not how it is identified or labeled. Similarly, a client cannot cloak a communication in the attorney-client privilege simply by routing it through a lawyer or by copying a lawyer on the communication.[24] Again, a communication must bear all the hallmarks of the privilege for it to be protected.[25]

The attorney-client privilege benefits organizations as well as individuals. For example, corporations can assert the attorney-client privilege,[26] as can partnerships,[27] limited liability companies,[28] governmental bodies,[29] and trusts.[30] Organizations may claim the privilege with respect to communications with in-house counsel.[31]

Manorcare, LLC v. Stucky, 776 S.E.2d 271, 282 (W. Va. 2015); Dishman v. First Interstate Bank, 362 P.3d 360, 367 (Wyo. 2015).

[19] *State ex rel. Koster*, 383 S.W.3d at 118.

[20] *See* EPSTEIN, *supra* note 10, at 89 (stating that an attorney-client privileged communication "may be oral or written").

[21] *Id.*

[22] *See, e.g.*, Baptiste v. Cushman & Wakefield, Inc., No. 03Civ.2102(RCC)(THK), 2004 WL 330235, at *1–2 (S.D.N.Y. Feb. 20, 2004) (rejecting the argument that failing to label an e-mail message as privileged deprived it of privileged status); Blumenthal v. Kimber Mfg. Co., 826 A.2d 1088, 1098 (Conn. 2003) (discussing e-mail and stating that "[w]hether a document expressly is marked as 'confidential' is not dispositive, but is merely one factor a court may consider in determining confidentiality"); Chrysler Corp. v. Sheridan, No. 227511, 2001 WL 773099, at *3 (Mich. Ct. App. July 10, 2001) (involving the inadvertent disclosure of an e-mail message that was not identified as "privileged" or "confidential").

[23] *Blumenthal*, 826 A.2d at 1098.

[24] United States *ex rel.* Barko v. Halliburton Co., 74 F. Supp. 3d 183, 188 (D.D.C. 2014) (citing Minebea Corp. v. Papst, 228 F.R.D. 13, 21 (D.D.C. 2005)); Stopka v. Am. Family Mut. Ins. Co., 816 F. Supp. 2d 516, 528 (N.D. Ill. 2011) (quoting Equity Residential v. Kendall Risk Mgmt., Inc., 246 F.R.D. 557, 563 (N.D. Ill. 2007)); Opus Corp. v. Int'l Bus. Mach. Corp., 956 F. Supp. 1503, 1510 (D. Minn. 1996); U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994); Va. Elec. & Power Co. v. Westmoreland-LG & E Partners, 526 S.E.2d 750, 755 (Va. 2000).

[25] *Stopka*, 816 F. Supp. 2d at 528.

[26] *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 360 (3d Cir. 2007); St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 746 S.E.2d 98, 103 (Ga. 2013); Harris Mgmt., Inc. v. Coulombe, 151 A.3d 7, 15 (Me. 2016); State *ex rel.* HCR Manorcare, LLC v. Stucky, 776 S.E.2d 271, 282 (W. Va. 2015); Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188, 1191 (Wash. 2016).

[27] *See, e.g.*, *In re* Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994).

[28] *See, e.g.*, Carpenters Pension Tr. v. Lindquist Family LLC, No. C-13-01063 DMR, 2014 WL 1569195, at *3–4 (N.D. Cal. Apr. 18, 2014) (applying corporate attorney-client privilege law to an LLC);

In the organizational context, the most common problem is determining who among the entity's employees speaks on its behalf. This analysis is complicated by the fact that the group that constitutes the client for purposes of creating the attorney-client privilege is larger than the group that is permitted to assert or waive the privilege.[32] Courts have traditionally applied two tests to analyze organizational privilege claims: the "control group" test and the "subject matter" test. A few courts have adopted a third test that closely tracks the subject matter test,[33] and which is sometimes called the "modified subject matter test."[34]

Applying the control group test, communications must be made by an employee who is positioned "to control or take a substantial part in the determination of corporate action in response to legal advice" for the privilege to attach.[35] Only these employees qualify as the "client" for attorney-client privilege purposes.[36] The control group test essentially requires that the employee an attorney communicates with be a member of senior management for the communication to be privileged. The control group test has been criticized because it chills corporate communications, frustrates the purpose of the privilege by discouraging subordinate employees from sharing important information with corporate counsel, makes it difficult for corporate counsel to properly advise their clients and to ensure their clients' compliance with the law, and yields unpredictable results.[37] Nonetheless, a handful of jurisdictions adhere to this test.[38]

Montgomery v. eTreppid Techs., LLC, 548 F. Supp. 2d 1175, 1179–87 (D. Nev. 2008) (reasoning that an LLC should be treated like a corporation for federal common law attorney-client privilege purposes).

[29] *See, e.g.*, Sandra T.E. v. S. Berywn Sch. Dist. 100, 600 F.3d 612, 621 (7th Cir. 2010) ("The public interest is best served when agencies of the government have access to the confidential advice of counsel regarding the legal consequences of their . . . activities and how to conform their future operations to the requirements of the law."); Ardon v. City of Los Angeles, 366 P.3d 996, 1186 (Cal. 2016) (stating that the attorney-client privilege and work product immunity "apply to government entities as well as to private parties"); Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 870 N.E.2d 33, 38 (Mass. 2007) (stating that "confidential communications between public officers and employees and governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege" (footnote omitted)).

[30] Snow, Christensen & Martineau v. Lindberg, 299 P.3d 1058, 1066–67 (Utah 2013).

[31] Avid Tech., Inc. v. Media Gobbler, Inc., Civ. A. No. 14-13746-PBS, 2016 WL 696092, at *3 (D. Mass. Feb. 19, 2016); N.J. v. Sprint Corp., 258 F.R.D. 421, 425 (D. Kan. 2009); Fla. Marlins Baseball Club, LLC v. Certain Underwriters at Lloyd's London, 900 So. 2d 720, 721 (Fla. Dist. Ct. App. 2005); *St. Simon's Waterfront, LLC*, 746 S.E.2d at 103; RFF Family P'ship, LP v. Burns & Levinson, LP, 991 N.E.2d 1066, 1071 (Mass. 2013).

[32] There may further be overlapping or related questions about whether an employee's communications are covered by the individual employee's attorney-client privilege or whether the organization's attorney-client privilege applies. *See* Keefe v. Bernard, 774 N.W.2d 663, 669–72 (Iowa 2009) (discussing this overlap).

[33] *In re Bieter Co.*, 16 F.3d at 935–36.

[34] *See, e.g.*, Baisley v. Missiquoi Cemetary Ass'n, 708 A.2d 924, 931 (Vt. 1998) ("Following *Upjohn*, two tests have emerged to define the client in the corporate context: the subject-matter test, and the modified subject-matter test.").

[35] EPSTEIN, *supra* note 10, at 189.

[36] *Id.*

[37] Upjohn Co. v. United States, 449 U.S. 383, 391–93 (1981).

Some courts, perhaps recognizing the difficulties caused by strict application of the control group test, have loosened it. In *Becker v. ConAgra Foods, Inc.*,[39] for example, the court explained that under Illinois law, "[t]he privilege extends to a control group made up of those who act as decision-makers and those whose advisory role is such that a decision would not normally be made without his or her input, and whose opinion in fact forms the basis of any final decision by those with authority."[40] Thus, under this formulation of the control group test, the control group may extend beyond the actual corporate decision-makers. Even under this more liberal interpretation, however, the control group test does not protect as privileged lawyers' communications with employees who merely supply a corporation's decision-makers with facts.[41]

The subject matter test affords much broader privilege protection to corporate clients. Under the subject matter test as originally conceived, a communication with any employee may be privileged if it is intended to secure legal advice for the corporation, the employee is communicating with the lawyer at a superior's request or direction, and the employee's responsibilities include the subject of the communication.[42] Applying this test, the employee's position or rank is irrelevant to the privilege analysis.[43] The Supreme Court embraced the subject matter approach in *Upjohn Co. v. United States*,[44] which is regarded as "the foundational case on attorney-client privilege in the corporate environment,"[45] although the Court declined to formulate a specific test.[46] The *Upjohn* court's reticence has since led courts to reason that there are two forms of the subject matter test.[47] Regardless, it is clear following *Upjohn* that under the subject matter test, however it is articulated, a lawyer's confidential communications with any employee are privileged when they concern matters within the scope of the employee's responsibilities and the employee is aware that the communications are intended to enable or facilitate the lawyer's representation of the corporation.[48] Furthermore, any form of the subject matter test is superior to the

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[38] *See, e.g.*, Langdon v. Champion, 752 P.2d 999, 1002 (Alaska 1988) (referring to Alaska Rule of Evidence 503(a)(2)); Bridgeview Health Care Ctr., Ltd. v. State Farm Fire & Cas. Co., 10 N.E.2d 902, 908 (Ill. 2014) (applying Illinois law).

[39] Case No. 10-cv-952-MJR-PMF, 2011 U.S. Dist. LEXIS 101187 (S.D. Ill. Sept. 8, 2011).

[40] *Id.* at *3.

[41] THOMAS E. SPAHN, THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE: A PRACTITIONER'S GUIDE 108 (3d ed. 2013).

[42] EPSTEIN, *supra* note 10, at 189.

[43] *Id.*

[44] 449 U.S. 383 (1981).

[45] *In re* Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 527 (S.D.N.Y. 2015) (noting that in some cases, the privilege may apply to lawyers' communications with former employees of a corporation).

[46] *Upjohn*, 449 U.S. at 396.

[47] *See, e.g.*, Baisley v. Missiquoi Cemetary Ass'n, 708 A.2d 924, 931 (Vt. 1998) ("Following *Upjohn*, two tests have emerged to define the client in the corporate context: the subject-matter test, and the modified subject-matter test.").

[48] *See, e.g.*, Grand Canyon Skywalk Dev. LLC v. Cieslak, Nos. 2:15-cv-01189-JAD-GWF, 2:13-cv-00596-JAD-GWF, 2015 WL 4773585, at *8 (D. Nev. Aug. 13, 2015) ("*Upjohn* holds that the privilege applies

traditional formulation of the control group test because it recognizes that employees outside the corporate control group may be aware of facts that are essential to the corporation's need for, or reliance on, legal advice.[49] The subject matter test also more realistically reflects the manner in which organizations collect and process information, and the means by which they make decisions.[50]

The third test, which was formulated before the Supreme Court embraced the subject matter approach in *Upjohn*, is often called the "modified *Harper & Row* test," or the "*Diversified Industries* test," after the federal cases from which it derives: *Harper & Row Publishers, Inc. v. Decker*,[51] and *Diversified Industries, Inc. v. Meredith*.[52] As noted earlier, some courts describe it as the modified subject matter test.[53] Using this test:

> The attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[54]

The modified *Harper & Row* test or *Diversified Industries* test is basically the subject matter test with an additional limitation,[55] hence the modified subject matter test label. The obvious addition to the subject matter test is the "need to know" element.[56] As should be apparent, the "need" refers to an employee's need for the

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to communications with corporate employees, regardless of their position, when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation."); MGA Entm't, Inc. v. Nat'l Prods. Ltd., No. CV 10-07083 JAK (SSx), 2012 WL 3150532, at *2 (C.D. Cal. Aug. 2, 2012) ("According to the Supreme Court, the privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation."); United States v. Ghavami, 882 F. Supp. 2d 532, 538–39 (S.D.N.Y. 2012) ("Within a corporation . . . the attorney-client privilege protects communications by corporate employees to counsel for the corporation who is acting as a lawyer, as long as the communications are made at the direction of corporate superiors in order to secure legal advice and the employees are aware that they are being questioned in connection with the provision of such advice.").

[49] EPSTEIN, *supra* note 10, at 191.

[50] *Id.*

[51] 423 F.2d 487 (7th Cir. 1970).

[52] 572 F.2d 596 (8th Cir. 1977).

[53] *See, e.g.*, Baisley v. Missiquoi Cemetary Ass'n, 708 A.2d 924, 931 (Vt. 1998).

[54] *Meredith*, 572 F.2d at 609.

[55] Keefe v. Bernard, 774 N.W.2d 663, 671 (Iowa 2009).

[56] *See* S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 n.10 (Fla. 1994) ("In *Diversified Industries* . . . the court modified the subject matter test in an effort to focus on why the attorney was consulted. . . .").

lawyer's advice to perform her duties—not to the lawyer's need for the information known by the employee.[57]

With respect to partnerships, organizational structure may drive application of the privilege insofar as partners are concerned. In general partnerships, all partners may assert the privilege concerning communications with lawyers about partnership affairs.[58] Limited partnerships spawn differing views.[59] There is authority for the proposition that limited partners, like general partners, are co-holders of the partnership's attorney-client privilege.[60] There is also a competing view that limited partners are generally analogous to corporate shareholders, and therefore cannot invoke the limited partnership's privilege.[61] Under the latter approach, among the partners of a limited partnership, only the general partners may claim the partnership's attorney-client privilege.[62] Regardless of whether a partnership is general or limited, partnership employees may serve as its agents in making privileged communications.[63] Whether a partnership employee's communications with partnership counsel are privileged is generally evaluated under any of the tests applied to corporations.[64]

Courts narrowly or strictly construe the attorney-client privilege because it limits full disclosure of the truth.[65] For example, the privilege ordinarily does not protect a client's identity.[66] The privilege does not shield from discovery the mere fact that an

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[57] SPAHN, *supra* note 41, at 118.

[58] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (AM. LAW INST. 2000).

[59] Limited partnerships must be distinguished from limited liability partnerships ("LLPs"). An LLP is a general partnership that has registered as an LLP under a given state's laws to obtain statutory protections for its partners against personal liability. *See* Douglas R. Richmond, *The Partnership Paradigm and Law Firm Non-equity Partners*, 58 U. KAN. L. REV. 507, 507 n.2 (2010).

[60] *See, e.g.*, Roberts v. Keim, 123 F.R.D. 614, 625 (N.D. Cal. 1988) (concluding that limited partners and general partners were co-holders of the attorney-client privilege).

[61] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (AM. LAW INST. 2000).

[62] *Id.*

[63] *Id.*

[64] *See, e.g.*, *In re* Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994) (stating that although the *Diversified Industries* test is expressly applicable to corporations and their employees, it "is no less instructive as applied to a partnership, or some other client entity . . . and its employees"); United States v. Daugerdas, 757 F. Supp. 2d 364, 370 (S.D.N.Y. 2010) ("As an initial matter . . . Field's privilege claim is properly evaluated under the *Teamsters* standard [governing communications between corporate employees and corporate counsel], notwithstanding that BDO is a partnership rather than a corporation.").

[65] *In re* Pac. Pictures Corp., 679 F.3d 1121, 1126 (9th Cir. 2012); PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 838 A.2d 135, 167 (Conn. 2004); Ctr. Partners, Ltd. v. Growth Head GP, LLC, 981 N.E.2d 345, 356 (Ill. 2012); *In re* Bryan, 61 P.3d 641, 656 (Kan. 2003); Clair v. Clair, 982 N.E.2d 32, 40 (Mass. 2013); Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct., 280 P.3d 240, 245 (Mont. 2012); Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 34 (N.Y. 2016); Walton v. Mid-Atlantic Spine Specialists, P.C., 694 S.E.2d 545, 549 (Va. 2010) (quoting Commonwealth v. Edwards, 370 S.E.2d 296, 301 (Va. 1988)); Lane v. Sharp Packaging Sys., Inc., 640 N.W.2d 788, 798 (Wis. 2002) (quoting cases).

[66] Reiserer v. United States, 479 F.3d 1160, 1165–66 (9th Cir. 2007) (explaining why the clients' identities were not incriminating information so as to apply the privilege); United States v. BDO Seidman, 337 F.3d 802, 811 (7th Cir. 2003) (noting, however, that "the identity of a client may be privileged in the rare circumstance when so much of an actual confidential communication has been disclosed already that merely identifying the client will effectively disclose that communication"); United States v. Sindel, 53

attorney-client relationship exists, when that relationship began, the general nature of the services for which the client retained the attorney, or the terms and conditions of the attorney's engagement.[67] While the privilege protects the content of attorney-client communications from disclosure, it does not prevent disclosure of the facts communicated.[68] Those facts remain discoverable by other means.[69] Nor does the attorney-client privilege shield from discovery communications generated or received by an attorney acting in some other capacity,[70] or communications in which an attorney is giving business advice rather than legal advice.[71]

F.3d 874, 876 (8th Cir. 1995) (noting exceptions to this rule, all related to criminal consequences for the client); Tenet Healthcare Corp. v. La. Forum Corp., 538 S.E.2d 441, 444–45 (Ga. 2000) (noting two exceptions: (1) where identifying the client may expose her to criminal liability for prior acts about which she consulted the lawyer; and (2) where disclosure of the client's identity would reveal the substance of confidential attorney-client communications); Nester v. Jernigan, 908 So. 2d 145, 149 (Miss. 2005) (holding, however, that the privilege protected a client's identity because revealing the client's identity would reveal a confidential communication); Levy v. Senate of Pa., 65 A.3d 361, 371–72 (Pa. 2013) ("[W]hile a client's identity is generally not privileged, the attorney-client privilege may apply in cases where divulging the client's identity would disclose either the legal advice given or the confidential communications provided."); State v. Evergreen Freedom Found., 404 P.3d 618, 628 (Wash. Ct. App. 2017) ("Generally, the privilege does not protect the name of a client because that information is not a confidential communication. . . . A limited 'legal advice' exception may privilege a client's identity where disclosure of the client's name would implicate the client in criminal activity." (citations omitted)).

[67] *See, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977) (rejecting the privilege with respect to a law firm memorandum); Wise v. S. Tier Express, Inc., Case No. 2:15-cv-01219-APG-PAL, 2017 WL 8219076, at *1 (D. Nev. July 10, 2017) ("Identifying the date [the plaintiff] contacted or hired his attorney discloses an act, not the substance of a confidential communication. Consequently, the dates when [the plaintiff] contacted and hired his attorney are not privileged."); State *ex rel.* Koster v. Cain, 383 S.W.3d 105, 119 (Mo. Ct. App. 2012) ("[T]he great weight of authority on the subject recognizes that with rare exception, the mere fact of the existence of a relationship between an attorney and a client, and the nature of the fee arrangements between the attorney and a client are not attorney-client privileged communications."); 100 Harborview Dr. Condo. Council of Unit Owners v. Clark, 119 A.3d 87, 114–16 (Md. Ct. Spec. App. 2015) (explaining that attorneys' fee bills generally are not privileged, although allowing that some portions might be in the right case); Commonwealth v. Chmiel, 889 A.2d 501, 531–32 (Pa. 2005) (determining that a fee arrangement with a lawyer was not privileged). *But see* Los Angeles Cty. Bd. of Supervisors v. Super. Ct., 386 P.3d 773, 783 (Cal. 2016) (concluding that a lawyer's "invoice that reflects work in active and ongoing litigation" is privileged); State *ex rel.* Dawson v. Bloom-Carroll Local Sch. Dist., 959 N.E.2d 524, 529–30 (Ohio 2011) (explaining that to the extent narrative portions of attorney fee statements describe legal services performed for a client, they are protected by the attorney-client privilege because they represent communications from the attorney to the client about matters for which the attorney was retained).

[68] SodexoMAGIC, LLC v. Drexel Univ., 291 F. Supp. 3d 681, 685 (E.D. Pa. 2018); Hagans v. Gatorland Kubota, LLC/Sentry Ins., 45 So. 3d 73, 76 (Fla. Dist. Ct. App. 2010); Collins v. Braden, 384 S.W.3d 154, 159 (Ky. 2012); Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334, 341 (Nev. 2017); W. Horizons Living Ctrs. v. Feland, 853 N.W.2d 36, 41 (N.D. 2014); DeCurtis v. Visconti, Boren & Campbell, Ltd., 152 A.3d 413, 424 (R.I. 2017); Snow, Christensen & Martineau v. Lindberg, 299 P.3d 1058, 1070 (Utah 2013); Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188, 1191 (Wash. 2016).

[69] Collins v. Braden, 384 S.W.3d 154, 159 (Ky. 2012).

[70] *See, e.g.*, G & S Invs. v. Belman, 700 P.2d 1358, 1365 (Ariz. Ct. App. 1984) ("The privilege does not apply where one consults an attorney not as a lawyer but as a friend or business advisor."); Palmer v. Super. Ct., 180 Cal. Rptr. 3d 620, 628 (Ct. App. 2014) (stating that "no attorney-client relationship arises for purposes of the privilege if a person consults an attorney for nonlegal services or advice in the

Finally, and as indicated earlier, the client may waive the attorney-client privilege either voluntarily or by implication.[72] The most obvious example of a waiver is a client's intentional revelation of otherwise privileged information to a third party who is not necessary to the client's representation.[73] In a common scenario today, a person may impliedly waive the privilege by using his or her office e-mail to send an otherwise privileged communication, with the waiver resulting from the employer's claimed ownership of all e-mails sent and received via its system.[74] In any event, the party seeking to overcome the privilege generally bears the burden of establishing a

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attorney's capacity as a friend, rather than in his or her professional capacity as an attorney"); Nylen v. Nylen, 873 N.W.2d 76, 80–81 (S.D. 2015) (rejecting the defendant's attorney-client privilege claim where she communicated with the lawyer as a friend).

[71] Adair v. EQT Prod. Co., 285 F.R.D. 376, 380 (W.D. Va. 2012) (applying Virginia law); Costco Wholesale Corp. v. Super. Ct., 219 P.3d 736, 743 (Cal. 2009); Morris v. Spectra Energy Partners (DE) GP, LP, Civ. A. No. 12-110 VCG, 2018 WL 2095241, at *2 (Del. Ch. May 7, 2018); Gillard v. AIG Ins. Co., 15 A.3d 44, 78 n.8 (Pa. 2011).

[72] Cormack v. United States, 118 Fed. Cl. 39, 43 n.3 (Fed. Cl. 2014); State Farm Fire & Cas. Co. v. Griggs, 419 P.3d 572, 575 (Colo. 2018).

[73] *See* United States v. Tirado, 890 F.3d 36, 38 (1st Cir. 2018) (reasoning that the defendant's conversation with his lawyer in the presence of friends and relatives was not privileged); Fox v. Alfini, 432 P.3d 596, 601–03 (Colo. 2018) (applying an objective standard in determining that the plaintiff's parents' presence was not reasonably necessary for her consultation with her lawyer, meaning that a recording of the consultation was not privileged); Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct., 280 P.3d 240, 245 (Mont. 2012) ("Disclosure to third parties waives [the] attorney-client privilege unless disclosure is necessary for the client to obtain informed legal advice."); O'Boyle v. Borough of Longport, 94 A.3d 299, 309 (N.J. 2014) (stating that if "the third party is a person to whom disclosure of confidential attorney-client communications is necessary to advance the representation," there is no resulting waiver); Berens v. Berens, 785 S.E.2d 733, 740–41 (N.C. 2016) (stating that "communications between an attorney and client are not privileged if made in the presence of a third party because those communications are not confidential and because that person's presence constitutes a waiver," but then concluding that there was no waiver because the third party was the party's agent); Dialysis Clinic, Inc. v. Medley, 567 S.W.3d 314, 318 (Tenn. 2019) ("The attorney-client privilege, however, does not protect communications between attorneys and clients that take place in the presence of a third party or are divulged to a third party. . . . That said, when the third party is an agent of the client, the attorney-client privilege applies." (citations omitted)); Zink v. City of Mesa, 256 P.3d 384, 403 (Wash. Ct. App. 2011) (noting that there is no waiver where the third party is necessary for the communication). It is worth remembering that a client does not waive the attorney-client privilege merely by acknowledging that she received legal advice. Rather, a client waives the privilege only by disclosing the substance of her confidential communications with her lawyer. Md. Bd. of Physicians v. Geier, 123 A.3d 601, 625 n.26 (Md. Ct. Spec. App. 2015).

[74] *But see, e.g.*, Peerenboom v. Marvel Entm't, LLC, 50 N.Y.S.3d 49, 50 (App. Div. 2017) ("Given the lack of evidence that Marvel viewed any of Perlmutter's personal emails, and the lack of evidence of any other actual disclosure to a third party, Perlmutter's use of Marvel's email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections[.]" (citations omitted)).

waiver,[75] although some courts hold that that the party asserting the privilege bears the burden of establishing that it has not been waived.[76]

Although a lawyer is presumed to have authority to waive the privilege on a client's behalf, and many waiver cases pivot on a lawyer's conduct, only the client may waive the privilege.[77] Again, the privilege belongs to the client. A lawyer may not waive the privilege over a client's objection.[78] And, if a client has knowingly waived the privilege regarding a communication, a lawyer cannot later claim that the privilege applies to the disclosed information and attempt to withhold it on that basis.[79]

III. THE WORK PRODUCT DOCTRINE

In addition to the attorney-client privilege, key information may be protected as confidential under the work product doctrine. It's important to recognize, however, that the attorney-client privilege and the work product doctrine are separate and distinct.[80] Although courts and lawyers alike often describe the work product doctrine as the "work product privilege," it is actually a form of qualified immunity.[81]

Unlike the attorney-client privilege, which is the client's to assert, it is commonly said that the lawyer holds work product immunity.[82] It is unquestionably true that a lawyer may assert work product immunity on her own behalf.[83] An attorney does not waive work product protection by sharing her work product with the client.[84] But in fact, both the lawyer and the client hold work product immunity, and either may assert

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[75] *Fox*, 432 P.3d at 600; Yocabet v. UPMC Presbyterian, 113 A.3d 1012, 1019 (Pa. Super. Ct. 2015); Andrews v. Ridco, Inc., 863 N.W.2d 540, 547 (S.D. 2015); McAfee v. State, 467 S.W.3d 622, 643 (Tex. App. 2015); State *ex rel.* Med. Assur. of W. Va., Inc. v. Recht, 583 S.E.2d 80, 89 (W. Va. 2003).

[76] *See, e.g.*, United States v. Bolander, 722 F.3d 199, 222 (4th Cir. 2013); *In re* Grand Jury Investig., 902 N.E.2d 929, 932 (Mass. 2009); Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 35 (N.Y. 2016); Walton v. Mid-Atl. Spine Specialists, P.C., 694 S.E.2d 545, 549 (Va. 2010).

[77] McDermott Will & Emery LLP v. Super. Ct., 217 Cal. Rptr. 3d 47, 63 (Ct. App. 2017); People v. Delgadillo, 275 P.3d 772, 776 (Colo. App. 2012); Ctr. Partners, Ltd. v. Growth Head GP, LLC, 981 N.E.2d 345, 356 (Ill. 2012); Girl Scouts-W. Okla., Inc. v. Barringer-Thomson, 252 P.3d 844, 847 (Okla. 2011).

[78] *Ctr. Partners, Ltd.*, 981 N.E.2d at 356.

[79] San Francisco Residence Club, Inc. v. Baswell-Guthrie, 897 F. Supp. 2d 1122, 1214–16 (N.D. Ala. 2012) (involving the client's former attorney); Sorenson v. Riffo, Civ. No. 2:06-CV-749 TS, 2008 WL 2465454, at *3 (D. Utah June 16, 2008).

[80] Doe v. Twp. High Sch. Dist. 211, 34 N.E.3d 652, 670 (Ill. App. Ct. 2015) (quoting Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322, 326 (Ill. 1991)); Elkton Care Ctr. Assocs. Ltd. P'ship v. Quality Care Mgmt., Inc., 805 A.2d 1177, 1183 (Md. Ct. Spec. App. 2002).

[81] ACLU of N. Cal. v. United States, 880 F.3d 473, 484 n.8 (9th Cir. 2018); Anderson v. Marsh, 312 F.R.D. 584, 592 (E.D. Cal. 2015); Wachovia Bank, N.A. v. Clean River Corp., 631 S.E.2d 879, 884 (N.C. Ct. App. 2006) (quoting Velez v. Dick Keffer Pontiac-GMC Truck, Inc., 551 S.E.2d 873, 876 (N.C. Ct. App. 2001)).

[82] *See, e.g.*, OXY Res. Cal. LLC v. Super. Ct., 9 Cal. Rptr. 3d 621, 645 (Ct. App. 2004); Burnham v. Cleveland Clinic, 89 N.E.3d 536, 541 (Ohio 2016).

[83] Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 618 (7th Cir. 2010).

[84] *Id.*

it to avoid discovery.[85] Similarly, either the client or the lawyer may waive work product immunity, although only with respect to herself.[86]

A party claiming work product protection bears the burden of establishing that it applies to the information at issue.[87] "As with the attorney-client privilege, an assertion that a document [or other information] is protected by the work product doctrine must be established by specific facts and not conclusory statements."[88] A party "cannot create work product solely by the nomenclature used to entitle documents."[89] Simply labeling or describing a document as "work product" does not make it so,[90] nor does copying a lawyer on the document.[91]

The protection afforded by work product immunity is broader than that conferred by the attorney-client privilege in terms of the array of information it shields from discovery.[92] Work product immunity is not limited, as is the attorney-client privilege, to confidential communications between an attorney and a client.[93] The work product doctrine protects lawyers' effective trial preparation by immunizing certain information from discovery, including materials prepared by attorneys' agents.[94] The doctrine is rooted in courts' desire to foreclose unwarranted inquiries into attorneys' files and mental impressions in the guise of liberal discovery.[95]

In addition, and consistent with the purposes and contours of the work product doctrine generally, work product immunity is not necessarily waived by disclosure to a

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[85] *In re* Naranjo, 768 F.3d 332, 344 & n.17 (4th Cir. 2014); *In re* Grand Jury Subpoenas, 561 F.3d 408, 411 (5th Cir. 2009); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 924 n.15 (8th Cir. 1997); Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334, 347 (Nev. 2017).

[86] *In re* Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994); *see also* Hobley v. Burge, 433 F.3d 946, 949 (7th Cir. 2006) (suggesting, however, that a lawyer might be forced to surrender work product following a client's waiver if the lawyer's insistence on confidentiality harmed the client).

[87] Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1, 17 (1st Cir. 2012); Solis v. Food Emp'rs Labor Relations Ass'n, 644 F.3d 221, 232 (4th Cir. 2011); Entergy Ark., Inc. v. Francis, 549 S.W.3d 362, 371 (Ark. Ct. App. 2018).

[88] Adair v. EQT Prod. Co., 285 F.R.D. 376, 382 (W.D. Va. 2012).

[89] Henderson v. Newport Cty. Reg'l YMCA, 966 A.2d 1242, 1249 (R.I. 2009).

[90] *See, e.g.*, *In re* Google Inc., 462 F. App'x 975, 979 (Fed. Cir. 2012) (disregarding the description of an e-mail message as containing work product in light of the content of the message); Ledgin v. Blue Cross & Blue Shield of Kan. City, 166 F.R.D. 496, 499 (D. Kan. 1996) (describing a party's document stamp of "attorney work product" as a "self-serving embellishment" that did not preclude discovery).

[91] United States *ex rel.* Barko v. Halliburton Co., 74 F. Supp. 3d 183, 189 (D.D.C. 2014).

[92] *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 304 (6th Cir. 2002) (quoting *In re* Antitrust Grand Jury, 805 F.2d 155, 163 (6th Cir. 1986)); 100 Harborview Dr. Condo. Council of Unit Owners v. Clark, 119 A.3d 87, 113 (Md. Ct. Spec. App. 2015); Draggin' Y Cattle Co. v. Addink, 312 P.3d 451, 460 (Mont. 2013); Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334, 347 (Nev. 2017); State v. Lead Indus. Ass'n, Inc., 64 A.3d 1183, 1192 (R.I. 2013).

[93] Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 713 (6th Cir. 2006).

[94] *See, e.g., In re* Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003) (shielding communications with a trial strategy and deposition preparation consultant).

[95] *See* Hickman v. Taylor, 329 U.S. 495, 510 (1947).

third-party.[96] Rather, for disclosure to a third-party to waive work product protection, the third-party must be an adversary or a conduit to an adversary.[97] This distinction as to waiver is illustrated by a federal district court decision in the proceedings that culminated in the criminal conviction of celebrity homemaker Martha Stewart.[98]

During the time that Stewart was being investigated for alleged securities law violations, she sent an e-mail containing her factual recollection of certain events to her attorney. The next day, Stewart forwarded a copy of that e-mail to her adult daughter, Alexis Stewart.[99] The district court concluded that the contents of Stewart's e-mail to her attorney were originally entitled to the protections of both the attorney-client privilege and the work product doctrine, but that the act of forwarding the message to her daughter waived the attorney-client privilege as to the contents of the e-mail given that her daughter, despite being a close family member, was still a stranger to the attorney-client relationship.[100] The court, however, correctly concluded that the protections of the work product doctrine were not waived even though Stewart's daughter was not a person who would aid the litigation in any way.[101] The court explained that no work product waiver occurred because Stewart's daughter, described by Stewart as her closest confidante, was not likely to disclose the contents of the e-mail to Stewart's adversary in the litigation—the United States government.[102]

There are two categories or types of attorney work product: "fact" or "ordinary" work product, but better described as "tangible" work product; and "opinion" or "core" work product, sometimes termed "intangible" work product. To qualify as tangible work product, the material sought to be protected must be a document or tangible thing prepared in anticipation of litigation by or for a party, or by or for the party's representative.[103] "Opinion" work product refers to an attorney's conclusions, legal theories, mental impressions, or opinions.[104]

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[96] *See, e.g.*, *In re* Grand Jury Proceedings #3, 847 F.3d 157, 165 (3d Cir. 2017) (stating that although the target of a grand jury investigation, Doe, "waived the attorney-client privilege by forwarding the email to his accountant, the document still retained its work-product status because it was used to prepare for Doe's case against those suing him"); *In re* Lake Lotawana Cmty. Improvement Dist., 563 B.R. 909, 922 (Bankr. W.D. Mo. 2016) (stating that "[m]ere disclosure to a third party" does not waive work product immunity and concluding that a party did not waive work product protection through disclosure to a mediator).

[97] O'Boyle v. Borough of Longport, 94 A.3d 299, 313–18 (N.J. 2014); State v. Lead Indus. Ass'n, Inc., 64 A.3d 1183, 1196 (R.I. 2013); Kittitas Cty. v. Allphin, 416 P.3d 1232, 1241 (Wash. 2018).

[98] United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

[99] *Id.* at 463.

[100] *Id.* at 464.

[101] *Id.* at 468–69.

[102] *Id.* at 469.

[103] FED R. CIV. P. 26(b)(3).

[104] Entergy Ark., Inc. v. Francis, 549 S.W.3d 362, 371 (Ark. Ct. App. 2018) (quoting ARK. R. CIV. P. 26(b)(3); State *ex rel.* Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley, 898 S.W.2d 550, 552 (Mo. 1995).

The work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3) and its state counterparts.[105] Rule 26(b)(3) provides in pertinent part:

> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> > (i) they are otherwise discoverable under Rule 26(b)(1); and
> >
> > (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.[106]

Federal Rules of Criminal Procedure 16(a)(2) and (b)(2) codify work product immunity in criminal cases.[107]

As with the attorney-client privilege, work product protection is not absolute and may be waived,[108] although conduct that waives the privilege may not waive work product immunity.[109] Consequently, any alleged waiver of the two doctrines must be analyzed separately.[110]

As for the principle that work product immunity is not absolute, consider, for example, that it does not shield from discovery facts known by or shared with a

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[105] The Supreme Court's decision in *Hickman* provides protection for opinion work product independent of Rule 26(b)(3). United States v. Deloitte LLP, 610 F.3d 129, 136 (D.C. Cir. 2010). Because the work product doctrine has been codified in Rule 26, in federal courts work product immunity is governed by the uniform federal standard even in diversity cases. Pemberton v. Republic Servs., Inc., 308 F.R.D. 195, 200 (E.D. Mo. 2015); Feld v. Fireman's Fund Ins. Co., 991 F. Supp. 2d 242, 247 (D.D.C. 2013) (quoting United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988)).

[106] FED. R. CIV. P. 26(b)(3).

[107] FED. R. CRIM. P. 16(a)(2) & (b)(2).

[108] Hernandez v. Tanninen, 604 F.3d 1095, 1100 (9th Cir. 2010); *In re* EchoStar Commc'ns Corp., 448 F.3d 1294, 1301–02 (Fed. Cir. 2006); Ardon v. City of Los Angeles, 366 P.3d 996, 1001 (Cal. 2016).

[109] Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct., 280 P.3d 240, 248 (Mont. 2012); Kittitas Cty. v. Allphin, 416 P.3d 1232, 1241–43 (Wash. 2018).

[110] *In re* Kellogg, Brown & Root, Inc., 796 F.3d 137, 145 (D.C. Cir. 2015) (quoting EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 1027 (5th ed. 2007)); Doe v. Twp. High Sch. Dist. 211, 34 N.E.3d 652, 670 (Ill. App. Ct. 2015) (quoting Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322, 326 (Ill. 1991) (discussing waiver)).

lawyer.[111] Moreover, as Rule 26(b)(3) makes clear, a party may discover its adversary's tangible work product if it demonstrates substantial need of the materials to prepare its case and it is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[112] This standard is not easily met, however. The discovering party must specifically explain its need for the materials sought.[113] As for demonstrating undue hardship, the cost of obtaining comparable information by other means is almost never a basis for overcoming work product protection.[114] Whether immunity for tangible work product will be abrogated typically depends on available alternative sources of the information sought, the parties' relative resources, and the need to protect the target party's expectation of confidentiality.[115] Indeed, a party seeking to discover tangible work product must as a practical matter demonstrate for the court why alternative means of discovery are unsatisfactory.

In comparison to tangible work product, opinion work product receives almost absolute protection against discovery.[116] To discover an adversary's opinion work

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[111] Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care, 322 F.R.D. 571, 586 (S.D. Cal. 2017); Meltzer Contracting Co. LLC v. Stephens, 642 F. Supp. 2d 1192, 1204 (D. Haw. 2009); Whitlow v. Martin, 259 F.R.D. 349, 354 (C.D. Ill. 2009).

[112] In contrast, communications protected by the attorney-client privilege do not become discoverable by virtue of an inquiring party's inability to obtain the information from other sources. St. Luke Hosps., Inc. v. Kopowski, 160 S.W.3d 771, 776–77 (Ky. 2005). Nor are privileged materials discoverable based on the requesting party's "substantial need" for them. *See* United States v. Gonzalez, 669 F.3d 974, 981 (9th Cir. 2012) (quoting Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486, 1494–95 (9th Cir. 1989)); United States v. Wells Fargo Bank, N.A., 132 F. Supp. 3d 558, 563 (S.D.N.Y. 2015) (explaining that the attorney-client privilege cannot be overcome by a showing of sufficient need); Hagans v. Gatorland Kubota, LLC/Sentry Ins., 45 So. 3d 73, 76 (Fla. Dist. Ct. App. 2010) (referring to "need"); Collins v. Braden, 384 S.W.3d 154, 159 (Ky. 2012) (referring to "great need and hardship"). Discovery based on substantial need is permissible only with respect to tangible work product. Am. Re-Insurance Co. v. United States Fid. & Guar. Co., 837 N.Y.S.2d 616, 620–21 (App. Div. 2007). Likewise, "undue hardship" cannot be invoked to overcome the attorney-client privilege. *Hagans*, 45 So. 3d at 76.

[113] EPSTEIN, *supra* note 10, at 1201.

[114] *Id.* at 1221.

[115] *Id.* at 1223.

[116] Drummond Co. v. Conrad & Sherer, LLP, 885 F.3d 1324, 1335 (11th Cir. 2018) (quoting Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir. 1994)); Smith v. Scottsdale Ins. Co., 621 F. App'x 743, 746 (4th Cir. 2015) (quoting Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir. 1999)); Republic of Ecuador v. Mackay, 742 F.3d 860, 869 n.3 (9th Cir. 2014) (quoting *Deloitte LLP*, 610 F.3d at 135); *Deloitte LLP*, 610 F.3d at 135 (noting the characterization of opinion work product as "'virtually undiscoverable'") (quoting Director, Office of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304, 1307 (D.C. Cir. 1997)); *In re* Cendant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003) (quoting *In re* Ford Motor Co., 110 F.3d 954, 962 n.7 (3d Cir. 1997)); United States v. All Assets Held at Bank Julius Baer & Co., Ltd., 270 F. Supp. 3d 220, 223 (D.D.C. 2017) (calling opinion work product "'virtually undiscoverable'" (quoting *Director*, 124 F.3d at 1307)); *see also* Scott v. Peterson, 126 P.3d 1232, 1235 (Okla. 2005) (stating that opinion work product "is not discoverable except in extraordinary circumstances"). *But cf.* Chua v. Johnson, 784 S.E.2d 449, 454 (Ga. Ct. App. 2016) ("Unlike the qualified privilege afforded other work product, opinion work product is entitled to an absolute privilege and is therefore absolutely protected from disclosure."); TP Orthodontics, Inc. v. Kesling, 15 N.E.3d 985, 995 (Ind. 2014) (explaining that opinion work product is not discoverable); Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334, 347 (Nev. 2017) (quoting an earlier Nevada case in explaining that opinion work product is not

product, a party must demonstrate something far greater than the substantial need and undue hardship necessary to obtain tangible work product.[117] Opinion work product is discoverable only if the attorneys' conclusions, mental impressions, or opinions are at issue in the case and there is a compelling need for their discovery.[118] The circumstances in which this test is met are exceptional and rare,[119] such as where the material demonstrates that the lawyer engaged in illegal activities or committed fraud.[120] A court that allows the discovery of a lawyer's tangible work product must be careful to ensure that it does not also expose to discovery the lawyer's opinion work product.[121] There is, for example, a significant difference between a witness's statement and an attorney's notes concerning that statement, the latter being opinion work product and therefore strictly protected because they contain the attorney's mental impressions or reflect her case theories.[122]

In contrast to the attorney-client privilege, which is not limited to communications about litigation,[123] information must be generated or prepared "in anticipation of litigation" to qualify for work product immunity.[124] Materials prepared in anticipation of litigation retain their work product immunity even if litigation never

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discoverable under any circumstances); Henderson v. Newport Cty. Reg'l YMCA, 966 A.2d 1242, 1247 (R.I. 2009) (stating that opinion work product is absolutely immune from discovery); *In re* Nat'l Lloyds Ins. Co., 532 S.W.3d 794, 803–04 (Tex. 2017) (stating that opinion work product is not discoverable).

[117] *In re* Grand Jury Subpoenas, 265 F. Supp. 2d 321, 333 (S.D.N.Y. 2003).

[118] *See* Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992) (agreeing with other courts on this point).

[119] *In re Cendant Corp.*, 343 F.3d at 663; Henderson v. Holiday CVS, L.L.C., 269 F.R.D. 682, 688 (S.D. Fla. 2010) (quoting *Cox*, 17 F.3d at 1422).

[120] Baker v. Gen. Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000); *see, e.g.*, United States v. Christensen, 801 F.3d 970, 1010 (9th Cir. 2015) (concluding that work product immunity did not protect a lawyer's illegal attempt to obtain intimate personal information about an opponent in litigation as part of his trial preparation).

[121] State *ex rel.* Ford Motor Co. v. Westbrooke, 151 S.W.3d 364, 367 (Mo. 2004) (quoting MO. SUP. CT. R. 56.01(b)(3)); LaPorta v. Gloucester Cty. Bd. of Chosen Freeholders, 774 A.2d 545, 548 (N.J. Super. Ct. App. Div. 2001) (quoting Hickman v. Taylor, 329 U.S. 495 (1947)).

[122] Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 622 (7th Cir. 2010); *In re* Grand Jury Proceedings, 492 F.3d 976, 981–82 (8th Cir. 2007); Gruss v. Zwirn, 276 F.R.D. 115, 129–30 (S.D.N.Y. 2011); Keefe v. Bernard, 774 N.W.2d 663, 673–74 (Iowa 2009); Giannicos v. Bellevue Hosp. Med. Ctr., 793 N.Y.S.2d 893, 896 (Sup. Ct. 2005).

[123] *In re* Tex. Farmers Ins. Exch., 990 S.W.2d 337, 340 (Tex. App. 1999).

[124] Save Sunset Beach Coal. v. City of Honolulu, 78 P.3d 1, 20 (Haw. 2003); Brown v. Katz, 868 N.E.2d 1159, 1166 (Ind. Ct. App. 2007); Wichita Eagle & Beacon Pub. Co. v. Simmons, 50 P.3d 66, 85 (Kan. 2002); Miller v. J.B. Hunt Transp., Inc., 770 A.2d 1288, 1291–93 (N.J. Super. Ct. App. Div. 2001); State *ex rel.* Brandenburg v. Blackmer, 110 P.3d 66, 69 (N.M. 2005); Scott v. Peterson, 126 P.3d 1232, 1235 (Okla. 2005); Henderson v. Newport Cty. Reg'l YMCA, 966 A.2d 1242, 1247 (R.I. 2009); State *ex rel.* Montpelier U.S. Ins. Co. v. Bloom, 757 S.E.2d 788, 799–800 (W. Va. 2014) (quoting State *ex rel.* Erie Prop. & Cas. Co. v. Mazzone, 684 S.E.2d 31, 40 (W. Va. 2007)). *But see* Laguna Beach Cty. Water Dist. v. Super. Ct., 22 Cal. Rptr. 3d 387, 393 (Ct. App. 2004) (explaining that California law imposes no "anticipation of litigation" requirement fpor work product immunity); Estate of Paterno v. Nat'l Collegiate Athletic Ass'n, 168 A.3d 187, 201 (Pa. Super. Ct. 2017) (rejecting the assertion that under Pennsylvania law the work product doctrine is limited to materials prepared in anticipation of litigation).

ensues.[125] Documents prepared in the ordinary course of business, or that would have been prepared regardless of whether litigation was anticipated, however, are not entitled to work product immunity.[126]

As the anticipation of litigation requirement plainly signals, work product immunity attaches before litigation is initiated.[127] In fact, it is "not necessary that litigation be threatened or imminent, as long as the prospect of litigation is identifiable because of claims that have already arisen."[128] Some courts state the "anticipation of litigation" requirement a bit differently, holding that work product immunity attaches only if there is "a substantial probability that litigation will ensue."[129] Regardless of the test employed, the remote prospect of future litigation will not bring the work product doctrine into play.[130]

Of course, materials claimed to be work product may have been prepared for more than one purpose. For example, a lawyer or a lawyer's agent may create documents both for a business purpose and in anticipation of litigation. Courts approach this problem in one of two ways.[131] In some jurisdictions, a court must discern "the primary motivating purpose" behind the documents' creation.[132] "If the primary motivating purpose is other than to assist in pending or impending litigation," then the materials are not protected as work product.[133] Other jurisdictions have abandoned the primary motivating purpose test for a "because of" test.[134] Applying

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[125] EPSTEIN, *supra* note 12, at 1167.

[126] Solis v. Food Emp'rs Labor Relations Ass'n, 644 F.3d 221, 232 (4th Cir. 2011) (quoting Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992)); *In re* Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 221 (S.D.N.Y. 2001); *see, e.g.*, United States *ex rel.* Barko v. Halliburton Co., 74 F. Supp. 3d 183, 189 (D.D.C. 2014) (rejecting the defendant's work product claim where "the documents in question consist[ed] of ordinary business communications between non attorneys with an attorney or attorneys as additional recipients" and noting that just as "the addition of an attorney to a distribution list does not transform . . . documents into requests for legal advice, it does not transform them into documents prepared in anticipation of litigation").

[127] State v. Lead Indus. Ass'n, Inc., 64 A.3d 1183, 1193 (R.I. 2013).

[128] Nat'l Tank Co. v. 30th Judicial Dist. Ct., 851 S.W.2d 193, 205 (Tex. 1993).

[129] *Wichita Eagle & Beacon*, 50 P.3d at 85.

[130] Lamar Advert. of S.D., Inc. v. Kay, 267 F.R.D. 568, 577–78 (D.S.D. 2010); Sajda v. Brewton, 265 F.R.D. 334, 339 (N.D. Ind. 2009) (quoting Binks Mfg. Co. v. Nat'l Presto Indus., Inc., 709 F.2d 1109, 1120 (7th Cir. 1983)).

[131] Lawyers' work product does not automatically lose its protection because it is also intended to inform a client's business judgments influenced by the prospect of litigation. Miss. Pub. Emps. Ret. Sys. v. Boston Sci. Corp., 649 F.3d 5, 31 n.24 (1st Cir. 2011).

[132] Laney *ex rel.* Laney v. Schneider Nat'l Carriers, Inc., 259 F.R.D. 562, 566 (N.D. Okla. 2009); *In re* Pfizer Inc. Sec. Litig., No. 90 Civ. 1260 (SS), 1993 WL 561125, at *3 (S.D.N.Y. Dec. 23, 1993) (quoting cases); *Ex parte* Cryer, 814 So. 2d 239, 247 (Ala. 2001) (quoting cases); Heffron v. Dist. Ct. of Okla. Cty., 77 P.3d 1069, 1079 (Okla. 2003); Arnold v. City of Chattanooga, 19 S.W.3d 779, 784 (Tenn. Ct. App. 1999); State *ex rel.* Montpelier U.S. Ins. Co. v. Bloom, 757 S.E.2d 788, 800–02 (W. Va. 2014).

[133] *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125, at *3.

[134] *See, e.g.*, ACLU of N. Cal. v. United States Dep't of Justice, 880 F.3d 473, 485–86 (9th Cir. 2018); Waymo LLC v. Uber Techs., Inc., 870 F.3d 1350, 1362 (Fed. Cir. 2017) (quoting United States v. Richey, 632 F.3d 559, 568 (9th Cir. 2011)); F.T.C. v. Boehringer Ingelheim Pharms., Inc., 778 F.3d 142, 149 (D.C. 2015);

this test, "the work product doctrine can reach documents prepared 'because of litigation' even if they were prepared in connection with a business transaction or also served a business purpose."[135] Or, stated slightly differently, "material generated in anticipation of litigation may also be used for ordinary business purposes without losing its protected status."[136] In any event, this is a case- and fact-specific inquiry.[137]

Because the "because of" test affords broader protection against discovery, it better supports the purposes underlying work product immunity. Where courts have the ability to select between the two approaches when weighing the possible application of the work product doctrine, the "because of" test represents the better alternative and should therefore be adopted.

Finally, work product immunity extends to subsequent litigation.[138] If information was created in anticipation of litigation with respect to Case *A* and otherwise meets all of the work product criteria, it remains immune from discovery in Case *B*. Although there is some debate about whether the subsequent litigation must be closely related to the original litigation for work product immunity to attach in the second case, courts have generally avoided this distinction, and courts that have addressed the issue have not required a close relationship between the cases.[139] Indeed, work product immunity may attach even where the two cases are entirely unrelated.[140]

IV. CONCLUSION

Confidentiality obligations catch lawyers coming and going; that is, they may be narrower and more fragile than lawyers believe, or, on the other hand, they may sweep surprisingly broadly. Many lawyers and clients view the attorney-client privilege as

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Richey, 632 F.3d at 568; *In re* Prof'ls Direct Ins. Co., 578 F.3d 432, 439 (6th Cir. 2009); United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998); Logan v. Commercial Union Ins. Co., 96 F.3d 971, 976–77 (7th Cir. 1996); Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1258 (3d Cir. 1993); Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992); Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 690 N.W.2d 38, 48 (Iowa 2004); Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334, 347 (Nev. 2017).

[135] United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002).

[136] United States v. Deloitte LLP, 610 F.3d 129, 138 (D.C. Cir. 2010).

[137] *See, e.g.*, *In re Prof'ls Direct Ins. Co.*, 578 F.3d at 439 (observing that determining whether documents were prepared in anticipation of litigation required examination of the documents themselves and the context in which they were prepared).

[138] *Boehringer Ingelheim*, 778 F.3d at 149; Hobley v. Burge, 433 F.3d 946, 949 (7th Cir. 2006); Pamida, Inc. v. E.S. Originals, Inc., 281 F.3d 726, 731 (8th Cir. 2002); Frontier Ref., Inc. v. Gorman-Rupp Co., 136 F.3d 695, 703 (10th Cir. 1998); *In re* Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994); Maldonado v. State, 225 F.R.D. 120, 131 (D.N.J. 2004); Jicarilla Apache Nation v. United States, 88 Fed. Cl. 1, 9–10 (Fed. Cl. 2009); Wallace v. Eckert, Seamans, Cherin & Mellott, LLC, 57 A.3d 943, 959 (D.C. 2012); Butler v. Harter, 152 So. 3d 705, 711 (Fla. Dist. Ct. App. 2014) (quoting Alachua Gen. Hosp., Inc. v. Zimmer USA, Inc., 403 So. 2d 1087, 1088 (Fla. Dist. Ct. App. 1981)); Pappas v. Holloway, 787 P.2d 30, 37 (Wash. 1990).

[139] *See Frontier Ref., Inc.*, 136 F.3d at 703 (citing cases).

[140] *See, e.g.*, *Boehringer Ingelheim Pharms., Inc.*, 778 F.3d at 149 ("A document prepared as work product for one lawsuit will retain its protected status even in subsequent, unrelated litigation."); *Butler*, 152 So. 3d at 711 (requiring no relationship (quoting *Alachua Gen. Hosp.*, 403 So. 2d at 1088)).

sacrosanct. There is, however, much that the privilege does not protect. As a doctrine, the attorney-client privilege is fraught with exceptions and heavy with the potential for inadvertent waiver. While work product immunity is much harder for an adversary to overcome, it may be waived or otherwise lost on the right facts. In any event, lawyers must understand the many aspects of the attorney-client privilege and work product immunity. Lawyers' important duties to preserve clients' confidences are constantly tested, and the consequences of failing these tests are potentially significant.

GREENSFELDER
ATTORNEYS AT LAW

"You're My Lawyer, Right?" and Other Trick Questions for In-House Counsel

Mary Nelson, St. Louis Community College
Doug Richmond, Aon
Erv Switzer, Greensfelder
Kevin McLaughlin, Greensfelder - *moderator*

What if the CEO/boss asks for personal legal advice?

- Who wants to tell the boss "I can't help you"?
- Assume the conversation is not privileged, or get Bar Plan coverage and talk about it after hours or over lunch off of company property.
- Before undertaking a joint representation of an organization and an associated individual, counsel should evaluate whether the individual's conduct and interest are consistent with the company's.

GREENSFELDER
ATTORNEYS AT LAW

Yanez v. Plummer

- For in-house lawyers, it should be as familiar to you as *Miranda v. Arizona*.
  - Employee Yanez (witness to co-employee's work injury) sued in-house counsel Plummer
  - Plummer had defended Yanez's deposition and pointed out contradictions in his written statements
- There can be conflicts between employee-clients and employer-client.
- Does the in-house counsel have insurance?

GREENSFELDER ATTORNEYS AT LAW

Upjohn warnings

- Is the employee a client or not?
- It may depend on who is asking.

GREENSFELDER ATTORNEYS AT LAW

"Soliciting" employees to be their counsel for purposes of Rule 4.2

- Calling employees or former employees and saying "Do you want me to be your lawyer? The company will pay my fees."
- Some courts frown on that as violating soliciting rules and subverting informal discovery and the intent of Rule 4.2.

GREENSFELDER ATTORNEYS AT LAW

The ethics of joint representation

- *Rivera v. Lutheran Med. Ctr.*, 22 Misc. 3d 178, 185 (N.Y. Sup. Ct. 2008) (Lawyer violated the Code in soliciting employee witnesses as clients)
- *Matusick v. Erie County Water Auth.*, 2010 U.S. Dist. LEXIS 15161 (W.D.N.Y. Feb. 22, 2010) ("Defendants' counsel shall not solicit to represent any non-party non-policymaking ECWA employee at a deposition or meeting with plaintiff's counsel.")
- *Aspgren v. Montgomery Ward & Co.*, 1984 U.S. Dist. LEXIS 20927 (N.D. Ill. Dec. 27, 1984) (Court prohibited counsel from telling former employees that organization would pay for counsel at deposition until after the former employee decided he/she needed representation.)

GREENSFELDER ATTORNEYS AT LAW

Casual conversations and legal representation

- Make sure privilege or work product is not waived by consulting with colleagues or friends.
- In law firms, it is much more clear that there is no waiver by consulting with other members of the firm.
- In a corporate law department, silence on the issue leaves ambiguity.

GREENSFELDER
ATTORNEYS AT LAW

BUILDING BLOCKS: PRACTICAL APPLICATIONS FOR BLOCK-CHAIN AND CRYPTOCURRENCY

JENNIFER POST
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THOMPSON COBURN

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GENERAL COUNSEL
MEDICI VENTURES, INC.

KENNETH SALOMON
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NOTES

Building Blocks: Practical Applications for Blockchain and Cryptocurrency

Panel Discussion

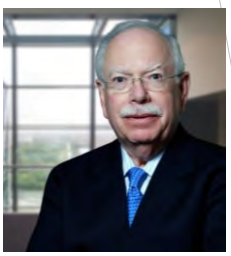
1

Panelists

Greg Mennerick
Partner
Thompson Coburn

Jennifer Post
Partner
Thompson Coburn

Stanton Huntington
General Counsel
Medici Ventures, Inc.



Ken Salomon
Partner
Thompson Coburn

2

NOTES

THE LITIGATION BUSINESS: SMART USE OF ALTERNATIVE BILLING AND THIRD-PARTY LITIGATION FINANCING

DOUGLAS J. SCHMIDT
PARTNER
HUSCH BLACKWELL

ANGELA QUINN
CHIEF CLIENT OFFICER
HUSCH BLACKWELL

ALYX PATTISON
VICE PRESIDENT
BURFORD CAPITAL

HUSCH BLACKWELL

NOTES

Introduction to legal finance

Corporate Counsel Institute

May 15, 2019
Ritz Carlton, St. Louis

Burford

1

"Hundreds of companies, increasingly from the Fortune 500, have used litigation finance, convinced it was in their interest."

– The New Yorker

2

Burford: The market leader

Our quality, scale and availability of capital are unparalleled

- Publicly traded on London Stock Exchange
- A current investment portfolio of $3.2 billion
- Highly experienced team
  - We've worked with most of the top firms in the world
  - Veterans of top law firms, banks, corporations
  - Investment diligence conducted in-house by experienced former litigators
- Innovative
  - Leader in new finance products
  - Flexible and client-oriented approach

3

Burford

3

Litigation finance defined

How companies from start-ups to the Fortune 500 are using litigation finance

- Value of litigation or arbitration claim is used to obtain financing
- Used by companies to
  - Fund legal fees or expenses
  - Finance portfolios of litigation
  - Transfer or share risk in matters
  - Monetize litigation assets at beginning of a case, or after judgment or appeal
  - Secure corporate debt facilities
  - Finance, sell, or collect uncollected judgments
  - Secure litigation-related insurance and risk solutions
  - Trace assets and enforce judgments against litigation debtors

2018 Litigation Finance Survey

4

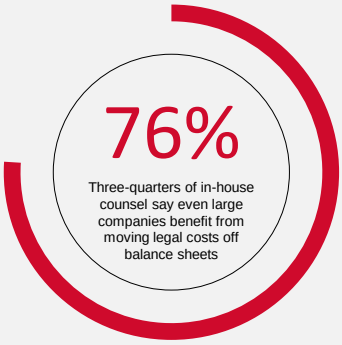
Burford

4

Profitability benefits

Finance addresses negative impact of litigation on corporate balance sheets

- Without financing, litigation reduces profits
  - Legal expenses are immediately recorded as expenses—reducing a company's profits and earnings
- Litigation recoveries are recorded "below the line" as non-recurring or extraordinary items
  - Permanently reduces EBITDA (because legal fees paid reduce EBITDA but recoveries occur below the EBITDA line)
- These can be extremely damaging outcomes for public companies or those seeking to go public or secure financing
- Litigation financing avoids these negative accounting effects
  - Moves costs off corporate balance sheets
  - No reduction of profits or EBITDA



2018 Litigation Finance Survey

5

Burford

5

Evolving use

Litigation finance is becoming corporate finance for law

- Financing embraced by GCs and CFOs as a tool of choice, with significantly better impact on corporate balance sheets than paying out of pocket
- Litigation serves as collateral to provide capital that may be used for broader business needs beyond legal fees and expenses
- Used both by plaintiffs and by defendants to move costs and risk off balance sheets and transform the litigation department into a profit center
- Increasingly moving from single case funding to financing portfolios of litigation and arbitration and other bespoke arrangements

2018 Litigation Finance Survey

6

Burford

6

Portfolio financing

Burford leads the industry in funding portfolios for law firms and clients

- Range of approaches to provide financing to litigation portfolios
- Benefits to companies
  - Capital can be used flexibly to finance fees and/or expenses across portfolio matters, or for broader business purposes
  - Lower pricing because risk is diversified
  - Lighter-touch case diligence
  - Accounting benefits
- Recent portfolios
  - $45 million investment with FTSE 20 company to fund litigation portfolio
  - £9 million investment with a leading professional services firm to fund a portfolio of insolvency cases
  - $100 million law firm investment across broad portfolio of complex commercial litigation
  - $50 million law firm investment for portfolio of arbitrations
  - $25 million law firm investment for portfolio of IP cases

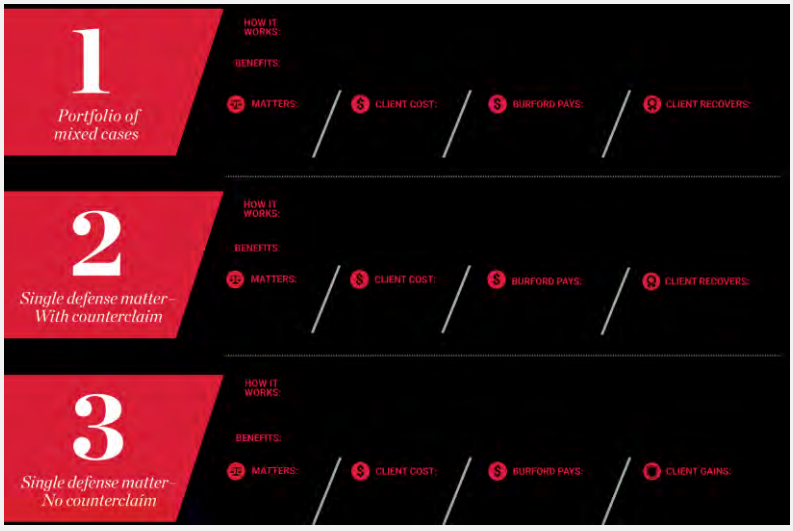
Burford FY 2018 Investor Presentation

7

Burford

7

Financing litigation defense: How it works



8

Burford

8

Case study: Moving legal costs off balance sheet

FTSE 20 company funded profit-enhancing claims with $45 million portfolio

CHALLENGE

A FTSE 20 company paid for the significant legal fees and expenses associated with litigation out-of-pocket—and suffered negative accounting consequences as a result. By financing litigation out of its own revenues, the company was reducing its operating profits, and sought a solution that would help take legal costs off its own balance sheet.

SOLUTION

Burford provided $45 million in financing backed by a portfolio of pending litigation matters, which transformed how the company managed litigation expense and provided multiple corporate benefits. Not only did the client have the flexibility to use Burford's capital either to relieve legal expense budget pressure or for corporate purposes unrelated to the litigation matters, but because the capital was provided on a nonrecourse basis, the client was entitled to book it as income as received, without waiting for the result of the underlying litigation matters. And, because the investment was structured around a portfolio of matters as opposed to a single case, Burford was able to offer attractive pricing commensurate with the lower risk profile.

Burford

9

Case study: Financing a litigation defense

A startup sought resources to mount a defense and pursue a counterclaim

CHALLENGE

The world's largest razor company, Gillette, brought suit against ShaveLogic, a startup that had yet to manufacture a single razor, alleging that the startup had misappropriated trade secrets and engaged in unfair competition, and that several former Gillette employees had breached their non-disclosure agreements. ShaveLogic denied all of Gillette's claims and counterclaimed that the latter had intentionally interfered with ShaveLogic's business relations and engaged in unfair trade practices. But while Gillette had the weight of its market share to sustain its suit, ShaveLogic was stripped of the financial resources it needed to build a business—or defend itself in court.

SOLUTION

Burford agreed to provide the resources needed to mount a vigorous defense as well as to pursue ShaveLogic's counterclaims on a non-recourse basis. If ShaveLogic prevailed in the litigation and maintained control of its patent and applications, Burford would earn its investment back and a return, to be paid from a combination of a settlement, if any, and/or future razor sales.

After both sides filed motions for summary judgment, the court ruled in favor of ShaveLogic, denying Gillette's motion and allowing ShaveLogic's counterclaims to proceed. Later, the remaining claims were dismissed after the parties reached an undisclosed settlement. *Gillette v. ShaveLogic* is a case study in how litigation finance works for the defense as well as the pursuit of claims. It illustrates how access to capital can level the playing field when resources are asymmetrical.

Burford

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Case study: Investing in growth

Rurelec monetized a pending claim to lower borrowing costs

CHALLENGE

Bolivia had expropriated Rurelec's facilities—and as the company was pursuing its claim through international arbitration, its credit profile had declined. Neither its expropriated properties nor its pending arbitration claim were recognized as assets by traditional lenders, and as a result, it faced increased costs to borrow that were hindering its growth.

SOLUTION

Burford was able to fashion an innovative solution that met Rurelec's business needs: crediting the value of the arbitration claim against Bolivia, Burford provided a fully recourse debt facility at rates well below market levels, with the debt discount balanced by a contingent interest in the arbitration outcome.

With the ability borrow at historical rates, Rurelec was able to invest in its growth even as it pursued—and later won—its arbitration claim.

Burford

Asset recovery

Unenforced judgments represent tens of millions in lost corporate value

- Many clients may win awards only to face an additional challenge in enforcing the judgment and monetizing their "legal paper"
- Burford's asset tracing and judgment enforcement team works with clients and firms to locate, freeze and secure assets relating to litigation and arbitration
- Burford can provide this service in conjunction with litigation and arbitration financing or as a stand-alone service
- Financing options include fee-for-service, hybrid/success fee, contingent arrangement or outright purchase of award or judgment
- Through Burford Law we offer the services of a practicing English solicitor who works hand in glove with enforcement specialists and international local counsel

2018 Litigation Finance Survey

Burford

Funder relationship

Burford acts as a passive provider of corporate finance

- No interference with lawyer/client relationship or obligations
  - Burford has no control over litigation strategy or settlement decisions
- Consideration of confidential and privileged information
  - Case law confirming work product protection applies to funder communications and documents
  - We're vigilant in managing diligence to avoid risking waiver of protected communications
- Reporting requirements for investments
  - Burford requires regular reporting of significant case developments
  - We may offer case-related advice but have no decision-making authority
- Investment process:
  - NDA
  - Initial case review
  - Due diligence
  - Ethical compliance
  - Investment approval
  - Negotiation of definitive documents

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Burford

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Investment criteria

How Burford evaluates potential investments

Common matters

- Commercial business-to-business disputes
- Contract, fraud, fiduciary duty, securities, antitrust, international arbitration, intellectual property and other commercial claims are well-suited

Investment size

- Minimum needed for fees and/or expenses $2 million at low end
- Average investment $10 million+
- Damages must be sufficient to support return for client, lawyers and funder
- Facilities up to $100 million

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Burford

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Investment process

What to expect when working with Burford

Case review	NDA, background documents reviewed
Diligence	Discussion of merits and economics, culminating in term sheet
Investment	Following approval by investment committee and definitive documentation

Burford

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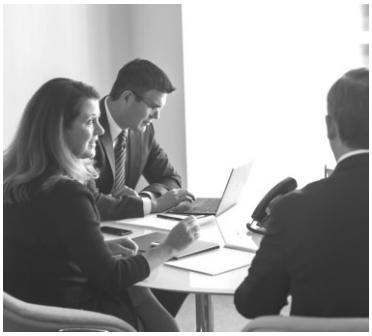
Investment pricing

How Burford prices its capital

- Commensurate with risk as determined in due diligence
- Structure often investment back plus a preferred return on investment first dollar, plus a percentage of award
- May also be structured as multiple of investment with time-based component
- Non-recourse capital is comparable in cost to private equity



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The Equity Project

An incentive to close the gender gap in law

- Gender gap in law leadership is persistent
  - Women comprise just 19% of equity partners, according to the ABA
  - 2016 research by Major, Lindsey & Africa: 44% gender pay gap at large US law firms
  - To date, only 5% of Burford's financed cases had a female lead litigator
- The Equity Project is a $50M pool of capital earmarked for women-led cases
  - Major, Lindsey & Africa identify origination as the #1 factor underlying pay differences
  - Earmarked capital creates an economic incentive for more equitable (and effective) team leadership
  - Matters will be evaluated under the same approach and standards as for all our investments
- Matters must have meaningful female leadership to qualify:
  - A woman litigator serves as first chair of the case;
  - A woman is serving as chair of the PSC or plaintiffs' lead counsel;
  - The law firm seeking financing—directly or via introduction to a client seeking financing—is a woman-owned law firm (more than 50% of the equity is owned by women);
  - Origination credit for the case, or for the entire client relationship, is credited to a female litigator; OR
  - A female partner is the client relationship manager

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Burford

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Why Burford?

We have unmatched capacity to structure and commit capital

- Team:
  - Burford has the deepest bench in litigation finance, with 100+ staff drawn from leading law firms and financial institutions
- Expertise:
  - In-house diligence performed by 50+ lawyers
- Scale:
  - With a current investment portfolio of $3.2 billion, Burford is the largest player by far
- Capital:
  - We have readily available capital that enables us to finance up to $100 million in a single vehicle

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Burford

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Who we are

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Burford

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Burford

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Burford

HUSCH BLACKWELL

Litigation Business

Smart Use of Alternate Billing and Third-Party Litigation Financing

Smart Use of Alternative Billing

A successful AFA is about a partnership between the firm and the client – working together, transparently, to achieve the client's litigation objective through a multifaceted approach

HUSCH BLACKWELL

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HB Case Studies

- Litigation Portfolio – Annual Flat Fee
- Reverse Contingency
- Flat Fee Litigation by Phase
- Holdback Arrangement
- Reduced Rates with Success Fee Tied to Results

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24

Six Factors for Successful AFAs

1. Trust
2. Strategic Alignment
3. Accurate Scoping
4. Tactical Staffing
5. Active Tracking and Matter Management
6. Consistent and Timely Communication

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25

Angela S. Quinn
Chief Client Officer

HUSCH BLACKWELL

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NOTES

LEGAL COMPETENCE IN THE AGE OF HEIGHTENED STANDARDS - COUNSEL'S SECURITY INCIDENT RESPONSE ROLE

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ENTERPRISE HOLDINGS, INC.

NOTES

Armstrong Teasdale

Counsel's Security Incident Response Role

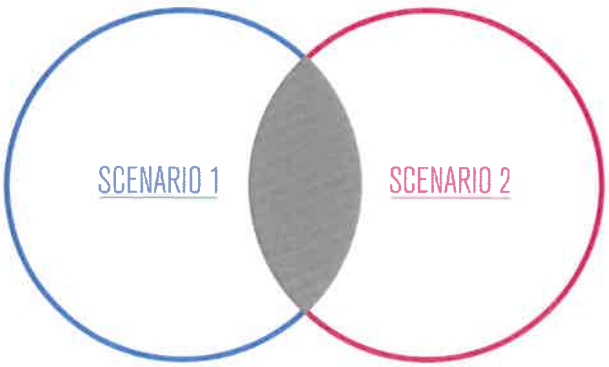
May 2019

Jeff Tucker, CIPP/US
Donna Stamp, CIPP/US
Daniel Nelson, CIPP/US, C|EH
Jeffrey Schultz, CIPP/US

Our Mission: Always exceed expectations through teamwork and excellent client service.

Common Scenarios

1. Company (data holder) did not intend to disclose the data
2. Company (data holder) intended to disclose the data
3. The gray area



Armstrong Teasdale

Threats Giving Rise to Scenario 1: Malicious Conduct and Negligent Conduct

- **Insider:** departing employees; data saved on mobile storage devices; shadow IT (performance issues may encourage this behavior); lost devices; weak passwords; partnerships or programming that cause unintended consequences
- **Outsider/Insider:** social engineering ("hacking the wetware")
- **Outsider: Malicious hackers**
  - Recent attacks exploit RDP implementation flaws
  - Credential theft a big concern
  - Even VPN may not provide sufficient protection on compromised public WiFi (gap in coverage at login can expose login credentials and other valuable information)

Armstrong Teasdale

Threats Giving Rise to Scenarios 2 and 3

- Lack of planning
- Unintended consequences
- Insufficient vetting or lack of control over third parties with whom data is shared

Armstrong Teasdale

Incident Response

1. **Preparation**
   - Conduct a risk assessment, select a team, and develop a plan
2. **Identification and Declaration of an Incident**
   - Identify affected resources and potential impact on business
3. **Containment and Eradication**
   - Forensic investigation to confirm network resources affected, identify network "containment" points, and preserve logs and other evidence
4. **Recovery**
   - Technical (restoration of resources, etc.) and business (communications with constituents, etc.)
5. **Lessons Learned**
   - Institute a formal requirement for post-action review

Armstrong Teasdale

1. Why involve legal counsel in incident response? Isn't it an IT job?

Also: What is counsel's role in ensuring that the guidelines for internal communications in a breach scenario properly protect privileged information while at the same time are not so restrictive as to hamper the company's ability to contain, investigate, and mitigate the event?

Armstrong Teasdale

2. When is a company officially in a reportable breach scenario? In other words, what degree of confidence does the company need to have in the facts at hand to believe it is in a reportable breach scenario?

Conversely: In what circumstances should a breach be reported even though notification is not legally required?

Armstrong Teasdale

3. What is legal counsel's responsibility if the business unit decides not to report an incident?

Armstrong Teasdale

4. In your view, what is the most critical factor in successful IR response?

Armstrong Teasdale

5. In your view, what is the biggest mistake in IR response?

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6. To be a successful lawyer in a breach scenario, a lawyer should have a good grasp of technology. How should a lawyer develop these competencies?

Armstrong Teasdale

Questions?

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NOTES

LABOR & EMPLOYMENT LAW HOT TOPICS: TWO YEARS INTO THE TRUMP ADMINISTRATION AND UNDER FIFTY DIFFERENT STATE ADMINISTRATIONS

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NOTES

LABOR & EMPLOYMENT LAW HOT TOPICS

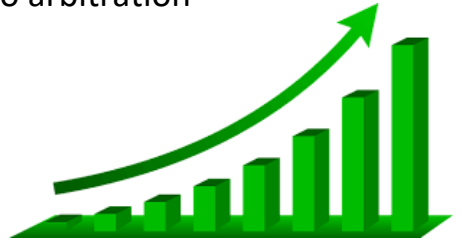
ACC Association of Corporate Counsel

Presented By:
Gregg M. Lemley and James M. Paul

1

The Shifting Landscape for Arbitration and Class Action Waivers

- 53.9 percent of nonunion private-sector employers use arbitration
- 65.1 percent of companies with 1,000 or more employees use arbitration
- 56.2 percent of private-sector non-union ***employees*** are subject to arbitration
- *Note: as of April 2018*



2

New Dawn for Arbitration Agreements in Missouri

- In *Soars v. Easter Seals Midwest,* 563 S.W.3d 111 (December 18, 2018), with a 5–2 majority, the court held that arbitration must be compelled by a trial court if the parties signed an arbitration agreement that contains a valid delegation clause mandating that the arbitrator has "exclusive authority to decide threshold issues of interpretation, applicability, enforceability, or formation."

easterseals
all abilities. limitless possibilities.

3

New Dawn for Arbitration Agreements in Missouri

- The court also explained that an initial offer of at-will employment (as opposed to mere "continued at-will employment) was consideration on which a contractual promise to arbitrate claims could be based.
- Court previously held, in *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. 2014), that continued at-will employment was not good consideration.
- Other issues pending, including electronic signatures!

4

Class Action Waivers

- Hotly anticipated case from the U.S. Supreme Court: *Epic Systems Corp. v. Lewis,* 138 S.Ct. 1612 (2018)
- Decision was a major victory for employers
- Resolved a circuit split that has been in place for six years
- Court held that class action waivers in arbitration agreements ARE enforceable

5

Class Action Waivers

- The Court's opinion came down in a 5-4 decision authored by Justice Gorsuch
- "Congress…instructed that arbitration agreements must be enforced as written. While Congress is…free to amend this judgment, we see nothing suggesting it did so in the NLRA – much less manifested a clear intention to displace the [FAA]."
- Favors long-standing deference to the FAA

6

Additional Arbitration Issues

- Three different cases on the enforceability of arbitration agreements decided by the U.S. Supreme Court:
  1. *New Prime, Inc. v. Oliveira*
  2. *Henry Schein, Inc. v. Archer and White Sales, Inc.*
  3. *Lamps Plus, Inc. v. Varela*

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Henry Schein, Inc. v. Archer and White Sales, Inc.

- Issue: whether a court can rule on arbitrability if the claim for arbitrability is "wholly groundless"
- Vacated and remanded, 9-0, in an opinion by Justice Kavanaugh on January 8, 2019
- The Court reiterated its prior decisions that parties to a contract have the ultimate say in whether to have an arbitrator or a court resolve disputes—not only the merits of disputes, but also questions of arbitrability. And courts must follow the parties' agreement to delegate those issues to the arbitrator.

8

New Prime, Inc. v. Oliveira

- Issue: whether the FAA exclusion applies to independent contractors in transportation industry
- Affirmed, 8-0, in an opinion by Justice Gorsuch on January 15, 2019. Justice Ginsburg filed a concurring opinion.
- Even an independent contractor falls under the FAA's exclusion for "contracts of employment of . . . workers engaged in . . . interstate commerce."
- The court of appeals was correct that it lacked authority under the Act to order arbitration.

9

Lamps Plus, Inc. v. Varela

- Issue: whether class arbitration is permissible if agreement is silent on class proceedings
- Reversed and remanded, 5-4, in an opinion by Chief Justice Roberts on April 24, 2019.
- Court held that the arbitration agreement between Varela and his employer, Lamps Plus, which contained only general language commonly used in arbitration agreements, did not provide the necessary contractual basis for compelling class arbitration.
- So . . . all of our work drafting class action waivers no longer matters?!

10

Encino Motorcars v. Navarro

- Decided April 2, 2018
- Holding
  - Auto dealer service advisors are exempt
  - Rejects long-standing rule that FLSA exemptions should be narrowly construed
- Interest
  - Without a presumption against exemptions, it should be easier to establish that an exemption applies.
  - Close calls are no longer defeats for the employer!

11

Fort Bend County v. Davis

- Issue – Whether the "exhaustion" requirement that a plaintiff file a Title VII claim with the EEOC prior to filing in court is "jurisdictional"
- Status – Argued 4/22/19
- Interest – If the "exhaustion" requirement is not jurisdictional, then employers may be subject to lawsuits they otherwise would not and that the EEOC has never processed

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EEOC v. R.G. & G.R. Harris Funeral Homes
Bostock v. Clayton County Bd. of Comm'rs
Zarda v. Altitude Express, Inc.

- Issue – Whether the Title VII prohibition against sex discrimination includes discrimination because of sexual orientation and gender identity
- Status – Cert. petitions all granted April 22, 2019
- Interest – Does an employer that discriminates based on sexual orientation or identity violate federal law?

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#MeToo = more training

14

New Mandatory Training Requirements California

- By January 1, 2020, California employers with five or more employees must provide:
  - at least 2 hours of sexual harassment prevention training to all supervisory employees; and
  - at least 1 hour of sexual harassment prevention training to all non-supervisory employees.

15

New Mandatory Training Requirements New York

- Effective October 9, 2018, all employers in New York State will be required to provide annual anti-harassment training to all employees.
- The NYSDOL issued a model sexual harassment prevention training program.
- Employers must adopt the model or implement a training program that equals or exceeds the minimum standards provided by the model training.

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Independent Contractor Crackdown

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California's New Independent Contractor Test

- **Facts**: Delivery drivers sued Dynamex, a package and document delivery company, alleging they were misclassified as independent contractors, and that Dynamex violated (a) Wage Order No. 9 (transportation industry) and (b) Labor Code sections.
- **Issue**: What standard applies in determining whether workers should be classified as employees or as independent contractors for purposes of California wage orders?
- **Held**: When determining whether a worker was employed under a wage order, the ***hiring entity*** must prove ***each factor*** in the ABC test. ***Dynamex Operations West, Inc. v. Superior Court of Los Angeles,* 416 P.3d 1 (April 30, 2018)**

Dynamex

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California's New Independent Contractor Test

Prong A: The worker is free from the ***control and direction*** of the hirer in connection with the performance of the work, both ***under the contract*** and ***in fact***; and,

Prong B: The worker performs ***work that is outside of the usual course*** of the hiring entity's business;

Note on Prong B: One important factor will be what the hiring entity says about itself:

- Example: Where newspaper defined its business as "publishing **and distributing**" a daily newspaper, carriers performed services in the usual course of the business under Prong B.
  Athol Daily News v. Bd. Of Review Of Div. Of Employment And Training, 786 N.E.2d 365, 372 (2003).

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California's New Independent Contractor Test

Prong C: The worker is customarily engaged in independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

- Has the worker *actually* established own business?
- Advertising, business cards, business licenses, invoices

20

California's New Independent Contractor Test

- Changes analysis of determining whether someone is an independent contractor.
- Tougher because <u>each</u> prong can be dispositive, whereas other tests allow factors to be weighed.

21

California's New Independent Contractor Test

- Does the B prong of the ABC test ("suffer or permit to work" standard) effectively end independent contractor status in California (unless you are a plumber or electrician)?
- Does *Dynamex* affect joint employer questions?

22

Independent Contractor Audits

- Audit independent contractor relationships to determine where there might be a weakness.
- Review any agreements between Company and independent contractors and potentially revise.
- Determine how critical the independent contractors are for business (and whether it makes business sense to convert to employees).
- How are other companies addressing the issue in your industry?

23

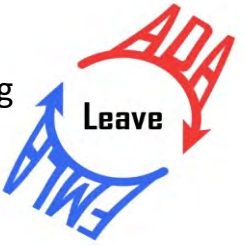
Marijuana Is a Nationwide Concern

- Over 70% of Americans live in states permitting at least some marijuana use

24

ADA/FMLA Considerations

- No duty to accommodate illegal drug use
- Recovering addict protections
- May have a duty to engage in the interactive process if there is reason to believe the employee is disabled
- May have to consider whether FMLA or other leave is appropriate for underlying medical condition



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ADA/FMLA Implications

- Do employers have to accommodate an employee's use of medical marijuana?
- Would this be an undue burden?
- Is the use of marijuana a direct threat?

26

Missouri Amendment 2

- Amends the Missouri Constitution to:
  - Legalize medical marijuana for medical purposes
  - Tax revenues!

27

Missouri Amendment 2

- Applications for state licenses will be available on June 4th
  - Cultivation facility
  - Extraction facility
  - Dispensary

28

90

Illinois Law Is Similar

- Medical Marijuana Card Holders:
  - Employers cannot refuse to hire
  - Employers cannot discharge merely for possessing a card
- "Don't ask, don't tell" during hiring process
- Can prohibit employees from using or being impaired at work

29

Can employees get high on the job?

- Employees may not bring a cause of action for wrongful discharge or discrimination because the employer:
  - (1) prohibited the employee from being under the influence of marijuana while at work; or
  - (2) disciplined the employee for attempting to work while under the influence of marijuana.

30

Workplace Safety

- **DFWA** (Drug-Free Workplace Act) applies to certain federal contract/grant recipients
  - Does not require drug testing in the workplace
  - Does not require employers to fire employees for positive drug test
  - **Requires** continuous good faith efforts to maintain a drug-free workplace
- Reasonable suspicion is paramount
- OSHA General Duty Clause

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Practice Pointers

- Legalization ≠ accommodation
- Duty to provide safe workplace paramount
  - No state restricts employer prohibition on recreational use affecting work activities
  - Beware "lawful off-duty conduct" litigation
  - Drug testing policies must be uniformly enforced to avoid discrimination

32

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Practice Pointers

- Establish and communicate clear drug policies
- Employers may enforce drug testing policies to exclude employees who test positive for marijuana (note anti-discrimination states)
- Beware of ADA risks when a test is positive for prescription drugs

33

Use Your Reasonable Accommodation Forms!

- Provide employee with request form and medical certification form if:
  - employee approaches you and divulges medical marijuana use
    - Does it matter whether it's before or after a drug test request?

-OR-

  - employee tests positive for marijuana

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35

ARE YOU TAKING ADVANTAGE OF OR BEING TAKEN ADVANTAGE OF BY TRADE SECRET LAW?

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NOTES

STINSON

Are You Taking Advantage of or *Being Taken Advantage* of by Trade Secret Law?

Samir Mehta, Scott Eidson, and Paul Fleischut

STINSON LLP \ STINSON.COM



1

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Hey… Can You Keep a Secret?

Photo by Scuola Materna Paolina; "whisper" is free to license under Creative Commons.

2

2

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Keeping a Secret is Hard…

"Three may keep a secret, if two of them are dead."

—Benjamin Franklin

3

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… but not impossible.

"A secret's worth depends on the people from whom it must be kept."

—Carlos Ruiz Zafón

Some secrets are worth keeping.

4

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We Need to Talk About Trade Secrets

- This is a Discussion We Need to Have
  - It Implicates Almost Every Company
  - It Implicates Many Parts of Your Business
- Key Topics:
  - What is a Trade Secret?
  - What isn't a Trade Secret?
  - Why is the Use of Trade Secrets Becoming More Popular?
  - How Do I Know When My Company Has a Trade Secret?
  - What Do I Protect a Trade Secret?
  - How do I Take Advantage of Trade Secret Law?
  - How do I Avoid Trade Secret Law Taking Advantage of My Company?
- Scenarios

5

5

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What is a Trade Secret?

- Generally, a trade secret is defined as:

  information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

  (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

  (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

  UTSA

6

6

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How is a Trade Secret Different from Other IP?

- Intellectual Property That is *not* Filed For with the Government
- Not Time Limited
  - Unlike Patents and Copyrights
- Scope of Protection is Limited
  - Only Misappropriation if Someone Uses *Improper Means* to Access, Use, or Benefit from Your Trade Secret
  - If Someone Independently Discovers Your Secret, You Have No Remedy
  - If You Fail to Adequately Protect Your Secret, Or Identify it Too Late, You Have No Remedy
  - Most Information is *Not* Trade Secret
- Scope of Protection is Less Certain than Other IP
  - You Only Know How it Stands Up When You Assert It

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What **Isn't** a Trade Secret?

- A Trade Secret is *Not:*
  - A Vague or Abstract Concept
    - Abstract concepts cannot be tied to an economic value necessary to constitute a trade secret. *Surgidev Corp. v. Eye Technology, Inc.*, 648 F.Supp. 661, 687 n.8 (D. Minn. 1986), aff'd 828 F.2d 452 (8th Cir. 1987).
  - Parallel to Patent

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What **Isn't** a Trade Secret?

- A Trade Secret is *Not:*
  - Information That is Obtained From Others
    - The Information Must Be Created by the Holder and is Not a Secret if It Can Be Reasonably Accessed From Another. *Tension Envelope Corporation v. JBM Envelope Company*, 876 F.3d 1112 (8th Cir. Dec. 8, 2017)
  - The Secret Must Be Yours

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What **Isn't** a Trade Secret?

- A Trade Secret is *Not:*
  - Information without Clear, *Independent* Commercial Value
    - "It must be something real that can be applied in a business to provide it with some competitive advantage." *Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1266 (7th Cir. 1992).
  - The Value Must Connect to the Fact that the Information is Kept Secret
    - There Must Be a Competitive Advantage

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What **Isn't** a Trade Secret?

- A Trade Secret is *Not:*
  - Any Information Generated by a Company
    - Courts Disfavor Generally Claiming All Internal Information is Trade Secret
    - The Trade Secrets Need to Be Clearly Defined to a Business
    - The Trade Secrets Must Be the Subject of Reasonable Efforts to Maintain the Secrecy
  - Any "Confidential" Information
    - Confidentiality and Trade Secrecy are Distinct
  - Information that is Known to the Public

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Origins of the Modern Trade Secret Law

- For Years, Trade Secret Law Existed at Common Law
- The Implementations Were Not Uniform
- Starting in the late 1970s, the Uniform Trade Secrets Act was Pushed to Promote Trade Secret Protection as an Alternative to the Patent System:

"A valid patent provides a legal monopoly for seventeen years in exchange for public disclosure of an invention.
If, however, the courts ultimately decide that the Patent Office improperly issued a patent, an invention has been disclosed to competitors with no corresponding benefit.
In view of the substantial number of patents that the courts invalidate, many businesses now elect to protect commercially valuable information by *relying on the state trade secret protection law*."
Uniform Trade Secrets Act, Prefatory Note

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Federal Trade Secret Law

- Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836
  - Provides a Civil Cause of Action in Federal Court for Trade Secret Theft
- Litigation Immediately Began Under the Act
  - Clients Attracted to Federal Court
- Misappropriation Must Post-Date DTSA or Be Ongoing:
  - *Roeslein & Assocs. v. Elgin* (holding that the DTSA applies to trade secret misappropriation that continues after the DTSA's enactment date, even if misappropriation began before the enactment date). 2018 U.S. Dist. LEXIS 34000, (E.D. MO March 2, 2018).
- Attorneys' Fees and Exemplary Damages Provisions
  - Companies Must Provide Whistleblower Notice Pursuant to Statute to Qualify in Employee Agreements and Contractor/Consultant Agreements

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Why Is Trade Secret Use/Litigation Increasing?

- Because They Offer Broader and Different Protection Than Patents Can, Some Clients Are Moving In This Direction
  - Certain Software May Be More Suitable for Trade Secret
  - Financial Inventions and Business Processes May Be More Suitable for Trade Secret
  - Certain Information Is Simply Ineligible for Patents and Trade Secrets Are Being Recognized For Providing Better Coverage
- Because of the Availability of Federal Courts and More Avenues for Fees
- Because Forensic Information Has Greatly Improved and Misappropriation Is More Detectable

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Who Protects a Trade Secret? You Do.

- A Business is in Charge of Keeping its Own Trade Secrets Safe
- If You Do Not Take Steps to Keep the Trade Secret Safe…
  - You Do Not Have a Trade Secret
- State and Federal Statutes Provide Causes of Action and Injunctive Relief If Your Trade Secret is Wrongfully Misappropriated
  - Because of Nature of Trade Secrets, Undoing Damages May Be Impossible.

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How Do I Protect My Trade Secret?

- The Trade Secret Must Be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy"
- Reasonable Under the Circumstances Makes the Test a Relative One
  - Compare to Industry Norms
  - Compare Efforts to Alleged Value of Trade Secret

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How Do I Protect My Trade Secret?

- Consider the Type of Information Involved, How it is Shared, and with Whom and:
  - Whether You Could Prove who Had Access and Who did Not
  - Whether Those with Access Knew it was Secret
  - Whether the Information was Marked and Discussed as Being Secret with Appropriate Parties
  - Whether Steps were Taken to Ensure Public Information was Minimized in the Secret
- Actual Security
  - Locks
  - Security Personnel
  - Passwords and Credentials
  - Encryption

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Not "**readily** ascertainable by proper **means**"

- Trade Secret Law Does Not Bar Legal Reverse Engineering
- Improper Means Requires Taking a Step that Violates a Right of the Holder
  - Contractual Right—esp. Licenses, Partner, Employee Agreements
  - Torts
  - Criminal
- If the Secret Could Be Learned Through Normal Industry Tools, this Could Mean Readily Ascertainable

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How Do You Know If You Have A Trade Secret?

- The Goal of IP is to Create Market Barriers to Entry for Valuable Assets
  - How do you Protect Your Best Competitive Advantage?
- Scrutinize Your Company to Find What Your Edge Is
- What Do You Do that No One Else Does, and What Part of that is Secret?
- Think Broadly:
  - Trade Secrets Can Be in a Variety of Forms:
    - "information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process"
    - Financial Data
    - Pure Algorithms
  - Think About Trade Secrets vs. Patents
    - Do You Want a Shot at a Longer Term?

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But Don't Overclaim It

- Pigs Get Fat, Hogs Get Slaughtered
- Remember that the Secret Needs to Be Clear, and It Needs to Be Secret
- Resist the Temptation to Make Everything Secret
- Remember that Your Company Evolves
  - Ideas that Are Secret Today May Not Be Tomorrow
  - Revisit Your Secrets and Update Them—Drop Things That Have Entered the Public Domain
- Diligence Will Help You Down the Road
- Consider How to Document Well

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Trade Secrets Vs. Patents

- How Can We Think About This?
- First, It is *Possible* to Have a Trade Secret on a Portion of an Invention and a Patent on Another Portion
  - This May Be Useful, But Be Careful
- Think Realistically About Your Goals and Disclosure Plans

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How to Avoid Problems with Trade Secrets

- Avoid a New Employee Divulging a Former Employer's Trade Secrets
- Be Careful with Switching Vendors or Clients with Whom You Have Co-Developed Products
- For Current Employees/Partners/Contractors:
  - Make Sure You Have a Trade Secret Policy in Contracts
  - Make Sure Whistleblower Provisions are Included
  - Make Sure the Trade Secrets are Regularly Marked or Noticed
- For True Third-Parties:
  - Make Sure Your Data Security is Strong
  - Make Sure You Have Processes to Audit Trade Secret Access
- Consider the Next Scenarios

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Hiring Scenario

- A Great New Senior Engineer Comes to the Company from a Competitor… and She Has a Lot of Ideas from the Day One…

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Departing Employee Scenario

- A Strong, Senior Employee is Planning to Leave and Has Given Notice… and You Believe He's Going to a Competitor…

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Working With Vendors or Clients

- You Worked for Years with a Software Vendor who Built You a Customized Software Based on Your Needs But the Relationship has Worsened… and You Want to Build or By a New Product…
- Reverse: Your Client Used Your Software for Years and Now Wants to Build their Own Product…

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Takeaways

- Protection:
  - Do an Internal Audit to Find Out What Your Trade Secrets Might Be
    - Whittle it Down and Keep it Focused
    - Make Sure Public Information is Minimized
  - Document Your Secrets and Limit Access
  - Take Additional Security Measures Consistent with Your Industry
- Avoiding Litigation:
  - Watch for New Hires from Competitors
    - Quarantine if Necessary
  - Watch for Departing Employees
    - Advise Departing Employees with Trade Secret Access of Concerns
  - Partners
    - Be Clear and Document Your Development Process and Rights

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NOTES

WHAT YOUR BUSINESS TEAM SHOULD KNOW AND WANTS TO KNOW ABOUT THE DEFINITIVE AGREEMENT

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NOTES

What Your Business Team Should Know and Wants to Know About the Definitive Agreement

May 15, 2019

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TOPICS FOR DISCUSSION

- Basics
- Risk Allocation
- Covenants
- Certainty of Closing

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BASICS

- Deal Structure
- Purchase Price
- Other Consideration
- Purchase Price Adjustments

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BASICS: DEAL STRUCTURE

- Asset Purchase
  - Assumed Assets and Liabilities
  - Excluded Assets and Liabilities
- Stock Purchase
- Merger
- Other Variations

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BASICS: PURCHASE PRICE

- Method and Timing
- Delayed/Contingent Consideration
  - Earnouts
  - Promissory Note

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BASICS: OTHER CONSIDERATION

- Stock Consideration
- Liability/Debt Assumption
- Employment Agreements

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BASICS: PURCHASE PRICE ADJUSTMENTS

- Working Capital
  - Methodology/Accounting Principles
    - Current Assets
    - Current Liabilities
    - Inventory
  - Deviations from GAAP
  - Target Working Capital Number

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BASICS: PURCHASE PRICE ADJUSTMENTS (cont.)

- Indebtedness
- Transaction Expenses
  - Deferred Compensation
  - Options
- Taxes
- Others

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RISK ALLOCATION

- Representations and Warranties
- Survival
- Indemnification

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RISK ALLOCATION: REPRESENTATIONS AND WARRANTIES

- Substance
  - "Fundamental Reps"
  - Financial Statements
  - Assets
    - Scope
    - Quality
    - Sufficiency

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RISK ALLOCATION: REPRESENTATIONS AND WARRANTIES (cont.)

- Substance
  - Operations
    - Inventory
    - Top 10 Customers and Suppliers
    - Products Liability
    - Legal Proceedings
  - Sufficiency of Funds/Financing

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RISK ALLOCATION: REPRESENTATIONS AND WARRANTIES (cont.)

- Diligence versus Scheduling Burden
- Exceptions
- Qualifications
  - Definition of "Knowledge"
  - Time and Materiality

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RISK ALLOCATION: SURVIVAL

- Public or "Public Style"
- Surviving Representations
  - Survival Period
- Rep and Warranty Insurance
  - Retention Amounts
  - Carve-outs

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RISK ALLOCATION: INDEMNIFICATION

- "Unknown Risks" - Representations and Warranties
  - Fundamental Representations
  - Caps
  - Baskets/Deductibles
  - "Scrape"
  - Sandbagging
- Covenants

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RISK ALLOCATION: INDEMNIFICATION (cont.)

- Specific Indemnification
  - Taxes
  - "Known Risks"
- Joint versus Several Liability
- Source of Recovery
  - Escrow/Holdback
  - Guarantors
  - Rep and Warranty Insurance

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COVENANTS

- Pre-Closing Performance
- Restrictions
- Post-Closing Obligations

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COVENANTS: PRE-CLOSING PERFORMANCE

- Conduct of Business
  - Restrictions
  - Exclusions
- No Shop
- Consents and Approvals
  - Stockholders
  - Governmental Authorities
  - Other Third Parties
- Financing

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COVENANTS: RESTRICTIONS

- Confidentiality
- Non-Competition/Non-Solicitation
- Publicity

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COVENANTS: CLOSING/ POST-CLOSING OBLIGATIONS

- Employees and Employee Benefits
- Taxes
  - Elections
- Transition Services/Supply Agreements
- IP Licensing/Use
- Specific Deliveries

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CERTAINTY OF CLOSING

- Closing Conditions
- Timing
- Termination Rights

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CERTAINTY OF CLOSING: CLOSING CONDITIONS

- Standard Conditions
  - Effect of Reps and Warranties
  - Effect of Schedule Updates
- Governmental Approvals

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CERTAINTY OF CLOSING: CLOSING CONDITIONS (cont.)

- Third Parties
  - Consents
  - Employment Agreements
  - Noncompetition Agreements
  - Releases
- Other Specific Conditions

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CERTAINTY OF CLOSING: TIMING

- Signing and Closing
- Satisfaction of Closing Conditions
- Drop Dead Date

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CERTAINTY OF CLOSING: TERMINATION RIGHTS

- Grounds for Termination
- Remedies/Consequences
  - Break-Up/Reverse Break-Up Fees
  - Expenses

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QUESTIONS?

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What Your Business Team Should
Know and Wants to Know
About the Definitive Agreement

May 15, 2019

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