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ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

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Chapter 17

Scope Note

This chapter focuses on the attorney-client privilege and the work product doctrine, as well as the interplay between them. It begins with an extensive discussion of the attorney-client privilege, including the elements of the privilege, recognized exceptions, and the circumstances under which the privilege will be considered waived. It then discusses the work product doctrine and distinctions to be made with respect to the attorney-client privilege. The chapter concludes with a discussion of the practical considerations involved in deciding when to assert privileges and how to respond to an opponent's assertions.

ß 17.1 INTRODUCTION

The attorney-client privilege is grounded on the premise that in order to obtain informed legal advice, a client must be free to reveal information to an attorney without fear of disclosure. In re John Doe Grand Jury Investigation, 408 Mass. 480, 481-82, 562 N.E.2d 69, 70 (1990). The concept of the attorney-client privilege is among the oldest and most well founded in Anglo-American jurisprudence.

The work product doctrine has a different theoretical underpinning. This doctrine seeks to enhance the quality of professionalism within the legal field by preventing the disclosure of an attorney's thoughts and materials to the opposing party. Savoy v. Richard A. Currier Trucking, Inc., 176 F.R.D. 10, 13 (D. Mass. 1997).

This chapter explores the scope of protection offered by the attorney- client privilege and the work product doctrine, as well as the interplay between them.

ß 17.2 SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE

ß 17.2.1 Elements of the Privilege

There is not a significant body of Massachusetts case law interpreting the attorney-client privilege. Accordingly, Massachusetts courts have frequently relied on federal precedent. Cf., e.g., Doe v. Senechal, 431 Mass. 78, 81 n.8, 725 N.E.2d 225, 227 n.8 ("In construing our rules of civil procedure, we are guided by judicial interpretations of the cognate Federal rule 'absent compelling reasons to the contrary or significant differences in content.'") (quoting Van Christo Advertising, Inc. v. M/A-COM/LCS, 426 Mass. 410, 414, 688 N.E.2d 985, 989 (1998)), cert. denied, 531 U.S. 825 (2000); Reynolds Aluminum Bldg. Prods. Co. v. Leonard, 395 Mass. 255, 259-62, 480 N.E.2d 1, 4-6 (1985) (citing federal advisory committee notes and numerous federal cases). The First Circuit's characterization of the attorney-client privilege, based on John Henry Wigmore's treatise on evidence, is accorded great significance:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the

communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

United States of America v. Massachusetts Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997) (citing 8 John H. Wigmore, Evidence in Trials at Common Law [Wigmore on Evidence] ß 2292, at 554 (John T. McNaughton rev. ed. Little, Brown 1961)).

Practice Note

Notwithstanding the reference above to communications made "by the client" to the attorney, the attorney-client privilege also applies to communications made by the attorney to the client, provided the other conditions of the privilege are satisfied. See, e.g., American Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426, 430 (D. Mass. 1972) ("The attorney-client privilege extends to legal advice and opinions from an attorney to his client.").

The privilege extends to both oral and written communications made within the course of the confidential relationship. Given the importance of promoting open and honest communication between an attorney and a person seeking an attorney's counsel, the attorney-client privilege attaches at the initial consultation even if no subsequent legal representation occurs and no remuneration is sought or paid. Bays v. Theran, 418 Mass. 685, 690, 638 N.E.2d 720, 723 (1994); Commonwealth v. O'Brien, 377 Mass. 772, 775, 388 N.E.2d 658, 661 (1979).

Practice Note

It is important to note that the attorney-client privilege survives the client's death. Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1833) ("the mouth of the attorney shall be forever sealed"); Foster v. Hall, 29 Mass. (12 Pick.) 89, 93 (1831) (noting that a privileged communication "cannot be disclosed at any future time"). The Supreme Judicial Court emphatically affirmed this principle in the aftermath of the infamous Charles Stuart case, rejecting the Commonwealth's argument that "the privilege should be 'overridden' because [of] society's interest in ascertaining the truth." In re John Doe Grand Jury Investigation, 408 Mass. 480, 483, 562 N.E.2d 69, 71 (1990).

The protection of the privilege extends only to communications, not to the underlying facts. Savoy v. Richard A. Carrier Trucking, Inc., 176 F.R.D. 10 (D. Mass. 1997). A party need not reveal to an adverse party what he or she said or wrote to counsel but cannot decline to disclose relevant facts merely because those facts were related to an attorney. Massachusetts v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149, 152 (D. Mass. 1986).

It is the client, not the attorney, who holds the privilege. Subject to limited exceptions, the attorney may not disclose privileged information without the client's consent. Bermingham v. Thomas, 3 Mass. App. Ct. 742, 743, 326 N.E.2d 733, 734 (1975). Control of the privilege also extends to the following:

- the client's guardian or conservator;
- the personal representative of a deceased client; and
- the successor, trustee, or similar representative of a defunct corporation, association, or other organization.

In re John Doe Grand Jury Investigation, 408 Mass. 480, 483, 562 N.E.2d 69, 70 (1998); United States v. Sawyer, 878 F. Supp. 295, 296 (D. Mass. 1995).

Ethical Commentary

The attorney-client privilege is a subset of a larger body of law governing client confidences. The attorney-client privilege is part of the law of evidence and applies where an adversary is trying to obtain evidence from the client or the lawyer. The lawyer, however, has a broader duty not to reveal confidential client information except when expressly or impliedly authorized by the client or when permitted or required by law. Mass. R. Prof. C. 1.6(a). The confidentiality rule applies not only to matters that the client tells the lawyer in confidence-that is, those that fall within traditional notions of the attorney-client privilege-"but also to virtually all information relating to the representation, whatever its source." There are legal and common sense limitations to the duty of confidentiality, but

the lawyer should be aware that his or her duty to maintain client confidences is broader than the attorney-client privilege. Mass. R. Prof. C. 1.6(a) cmts. 5, 5A.

ß 17.2.2 Burden of Proof

The burden of establishing that the attorney-client privilege applies to a communication rests on the party asserting it. The privilege claimant must show not only that the attorney-client privilege exists, including establishing every element of the privilege, but also that the privilege has not been waived. In re Reorganization of Elec. Mut. Liab. Ins. Co., 425 Mass. 419, 421-22, 681 N.E.2d 838, 840-41 (1997). The assertion of privilege runs contrary to the mandate of full disclosure of relevant information. Therefore, the privilege is narrowly construed. Three Juveniles v. Commonwealth, 390 Mass. 357, 359-60, 453 N.E.2d 1203, 1205 (1983); Colonial Gas Co. v. Aetna Cas. & Sur. Co., 139 F.R.D. 269, 273 (D. Mass. 1991).

Judicial Commentary

Courts often carefully parse the issue of whether the claimant has sustained the burden of proof as to every element of the privilege and whether the privilege has been waived. See, e.g., Commonwealth v. Philip Morris, Inc., No. 95-7378J, 1998 WL 1248003 (Super. Ct. July 30, 1998) (Sosman, J.). For additional discussion of the waiver issue, see ß 17.4.1, below.

By the same token, exceptions to the privilege will also be narrowly construed. In Purcell v. District Attorney, 424 Mass. 109, 676 N.E.2d 436 (1997), a client, while consulting Attorney Purcell regarding the client's impending eviction proceeding, made threats that he would burn his apartment building. Attorney Purcell, after considering Rule 1.6(b)(1) of the Massachusetts Rules of Professional Conduct, decided to report the threat to the police in order to prevent the threatened crime. The client was arrested and indicted for attempted arson of a building. The district attorney's office subpoenaed Attorney Purcell to testify concerning the conversations he had with the client.

In ruling that Attorney Purcell did not have to testify, the Supreme Judicial Court held that the crime-fraud exception to the attorney-client privilege did not apply to the threats made by the client, absent evidence that the client's purpose in informing the attorney of his intention to commit arson was to obtain legal advice or legal assistance in furtherance of the crime. Purcell v. District Attorney, 424 Mass. at 115, 676 N.E.2d at 440. It was clear that the client was not seeking such advice from Attorney Purcell, and the Supreme Judicial Court held that

> unless the crime-fraud exception applies, the attorney-client privilege should apply to communications concerning possible future, as well as past, criminal conduct, because an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under the ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct.

Purcell v. District Attorney, 424 Mass. at 116, 676 N.E.2d at 441.

ß 17.2.3 Corporate or Organizational Client

The starting point for analyzing the scope of the attorney-client privilege in the context of a corporate client is the principle that the definition of "client" includes an agent or employee of the client. Therefore, the privilege may extend to communication from an agent or employee to the attorney. Ellingsgard v. Silver, 352 Mass. 34, 40, 223 N.E.2d 813, 817 (1967). The more difficult issue concerns identifying which such communications are protected by the attorney-client privilege. A survey of the Massachusetts cases reflects that this process is very fact intensive.

Ethical Commentary

The Rules of Professional Conduct provide that a lawyer retained to represent an organization "represents the organization acting through its duly authorized constituents." Mass. R. Prof. C. 1.13(a). Although the attorney-client

privilege may apply to communications from agents of the organization, the organization, not the agents, is the lawyer's client. See Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 522, 536 N.E.2d 344, 348-49 (1989).

In Upjohn Co. v. United States, 449 U.S. 383 (1981), a case frequently cited by the Massachusetts courts, the United States Supreme Court ruled that the attorney-client privilege in the corporate context extends beyond communications between the corporate attorney and the corporation's "control group." The privilege will attach to communications between a corporation's attorney and its employees acting at the direction of corporate superiors to secure legal advice. Such communications will be privileged if

- they pertain to matters within the employees' corporate duties,
- the employees were sufficiently aware that information was sought from them in order to render or obtain legal advice, and
- the communications were considered confidential when made and were thereafter kept confidential by the corporation.

Upjohn Co. v. United States, 449 U.S. at 394. The key issue is not rank of the corporate employee. Rather, because the goal of the attorney-client privilege is to promote the free flow of information not only from the attorney to the client, but from the client to the attorney, the determining question is whether the employee has relevant information needed by the corporation's attorney. Upjohn Co. v. United States, 449 U.S. at 390-91.

Another important factor involving the corporate or organizational client is defining the actual client. This is because the privilege, and thus the ability to control disclosure, belongs to the client, who is not necessarily the person involved in the communication with the attorney. Edwards v. Massachusetts Bay Auth., 12 Mass. L. Rptr. 395 (Super. Ct. 2000). For example, communication between the owners, officers, directors, and employees of a business and that business's attorney is almost always sought by minority stockholders in derivative actions and breach of fiduciary duty cases. This is especially true in the context of small businesses, where the line between the best interests of the controlling shareholder or partner and those of the business is often blurred.

ß 17.2.4 Nature of the Communication

As described above, the attorney-client privilege attaches only if the advice sought and given is legal in nature. In-house attorneys and even outside counsel who are familiar with the corporate client's business will often be asked for advice that is not related to only legal matters. If the advice sought is not legal but business advice, the attorney-client privilege will not attach. Upjohn Co. v. United States, 449 U.S. 383, 390 (1981).

A key factor to be considered in determining whether the attorney is acting in his or her professional capacity as a lawyer is whether the task could have been readily performed by a non-lawyer. The analysis should include whether the function that the attorney is performing is a lawyer-related task, such as applying law to a set of facts, reviewing client conduct based on the effective law, or advising the client about status of or trends in the law.

The nature of the communication, not the setting, will control the applicability of the attorney-client privilege. For example, business correspondence, interoffice reports, file memoranda, and minutes of business meetings do not ordinarily qualify for the privilege, Oil Chem. & Atomic Workers Int'l Union v. American Home Prods., 790 F. Supp. 39, 41 (D.P.R. 1992), but this may depend on the identity of the individuals communicating and the subject matter of the communication. Likewise, a portion of the discussion in a board of directors' meeting may be privileged, while other portions would not be.

ß 17.2.5 Governmental Entities

Communications between attorneys and government or public agencies can be protected by the attorney-client privilege, so long as all other criteria are met. Absent a waiver, communication between a governmental official and the Attorney General's office pertaining to legal advice is not discoverable. Vigoda v. Barton, 348 Mass. 478, 485-86, 204 N.E.2d 441, 446 (1965).

Government documents that are not discoverable in litigation may sometimes be obtained, however, through the Massachusetts Public Records law, G.L. c. 66, ß 10, which does not provide an exception for attorney-client, work product, or other litigation-related materials. See General Elec. Co. v. Dep't of Envtl. Protection, 429 Mass. 798, 801, 711 N.E.2d 589, 592 (1999). In addition, the attorney-client privilege may be waived under certain circumstances relating to the Open Meeting Law, G.L. c. 39, ß 23B.

ß 17.3 EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE

In Massachusetts there are several exceptions to the attorney-client privilege. The privilege does not extend to the following situations:

• Furtherance of a crime or fraud. The Supreme Judicial Court has adopted the crime-fraud exception defined in the Proposed Massachusetts Rules of Evidence 502(d)(1): "[The attorney-client privilege will not apply if] the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." See Purcell v. District Attorney, 424 Mass. 109, 112, 676 N.E.2d 436, 439 (1997) (discussed in ß 17.2.2, above); Mass. R. Prof. C. 1.6(b)(1), (3) (exceptions to prevent the commission of a crime or fraud likely to result in substantial harm and "to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used"). • Decedent's intent. The communications of a decedent concerning who should succeed to his or her property are exempt from the privilege. Phillips v. Chase, 201 Mass. 444, 449, 87 N.E. 755, 757-58 (1909).

• Attorneys fees and wrongful conduct. As codified in Rule 1.6 of the Massachusetts Rules of Professional Conduct, the privilege does not apply

> to the extent the lawyer reasonably believes [that disclosure of the confidential information is] necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Mass. R. Prof. C. 1.6(b)(2). If a client assails his or her attorney's conduct, the privilege is inapplicable, on the theory that lawyers have a right to defend themselves. Commonwealth v. Woodberry, 26 Mass. App. Ct. 636, 637, 530 N.E.2d 1260, 1261 (1988) (construing former Massachusetts rule, Code of Professional Responsibility Disciplinary Rule 4-101(C)), review denied, 404 Mass. 1102, 536 N.E.2d 612 (1989).

• Joint clients. Communications of joint clients to their attorney are not privileged as against each other in an action between the clients. Beacon Oil Co. v. Perelis, 263 Mass. 288, 293, 160 N.E. 892, 894 (1928).

ß 17.4 WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

ß 17.4.1 Express Waiver

The attorney-client privilege is not absolute and may be waived by the client either expressly or implicitly. Commonwealth v. Woodberry, 26 Mass. App. Ct. 636, 637, 530 N.E.2d 1260, 1261 (1988), review denied, 404 Mass. 1102, 536 N.E.2d 612 (1989). The privilege is destroyed when communications are made in the presence of a nonnecessary agent of the attorney or client. Commonwealth v. Senior, 433 Mass. 453, 457, 744 N.E.2d 614, 617-18 (2001);Commonwealth v. Rosenberg, 410 Mass. 347, 354, 573 N.E.2d 949, 954 (1991); see also Drew v. Drew, 250 Mass. 41, 44-45, 144 N.E. 763, 764 (1924) (both marital and attorney-client privilege destroyed where copy of wife's letter to her attorney was shown to husband, husband's attorney, and husband's attorney's typist).

The attorney-client privilege extends to "those whose intervention is necessary to secure and facilitate the communication between attorney and client, as interpreters, agents, and attorneys' clerks." Foster v. Hall, 29 Mass. 89, 93 (1831) (citations and footnote omitted). The Supreme Judicial Court has recognized that "[t]he attorney-client privilege may extend to communications from the client's agent or employee to the attorney" but has never explained this proposition. Ellingsgard v. Silver, 352 Mass. 34, 40, 223 N.E.2d 813, 817 (1967). Recent superior

court decisions, however, have upheld this principle. See, e.g., Poteau v. Normandy Farms Family Campground, Inc., No. 97-02128, 2000 WL 1765424, at *3 n.7 (Mass. Super. Ct. Aug. 1, 2000) (Houston, J.) (quoting the above excerpt from Ellingsgard); Levine v. Marshall, No. 95-1504B, 1997 WL 416581, at *1 (Mass. Super. Ct. July 18, 1997) (King, J.) (citing Ellingsgard but also stating conclusively that the attorney-client privilege extends to confidential communications between a client or the client's representative and the client's lawyer or the lawyer's representative). The critical element is the necessity that the third party be present in order for the attorney to provide legal advice. See United States v. Randall, 194 F.R.D. 369, 372 (D. Mass. 1999) (holding that the attorney-client privilege "extends to communications made by the client to certain agents of the attorney, including an accountant, hired to assist the attorney in providing legal advice") (emphasis added); City of Worcester v. HCA Mgmt. Co., 839 F. Supp. 86, 88 (D. Mass. 1993) (holding that "[t]he privilege extends to communications made to a representative of the attorney for the sake of obtaining the attorney's advice").

A person also expressly waives the attorney-client privilege when he or she voluntarily discloses privileged material. "[T]he extent of a waiver which results from a disclosure turns on the particular circumstances in which the disclosure was made and the purpose for the disclosure." AMCA Int'l Corp. v. Phipard, 107 F.R.D. 39, 40 (D. Mass. 1985). It is important to note that "[a] voluntary disclosure of privileged material waives the privilege, not only in the forum or setting in which the voluntary disclosure is made but for all purposes in all settings." Commonwealth v. Philip Morris Inc., No. 95-7378J, 1998 WL 1248003, at *5 (Super. Ct. July 30, 1998) (Sosman, J.). A compelled disclosure of an allegedly privileged item is neither voluntary nor a waiver and will not, alone, defeat the privilege in any other forum. Commonwealth v. Philip Morris Inc., 1998 WL 1248003, at *5.

Practice Note

The designation of an attorney as a witness in response to a Rule 30(b)(6) deposition notice will not be deemed an automatic and general waiver of the attorney-client privilege. Colonial Gas Co. v. Aetna Cas. & Sur. Co., 139 F.R.D. 269, 273 (D. Mass. 1991) (holding that deposition by attorney to state agency did not waive attorney-client privilege where purpose of disclosure was to achieve settlement of dispute). Such a designation should be used cautiously, however, given the risk that it may be found more than a limited waiver.

ß 17.4.2 Implied or At Issue Waiver

One of the more commonly litigated exceptions to the attorney-client privilege is the "at issue" waiver of otherwise privileged communications. The Supreme Judicial Court recently accepted the general principle that a party may implicitly waive the attorney-client privilege by affirmative conduct, such as injecting certain claims or defenses into a case. Darius v City of Boston, 433 Mass. 274, 741 N.E.2d 52 (2001). In Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975), the court discussed implied waiver of the attorney-client privilege. A party is considered as having waived its privilege if

(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party;

(2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and

(3) application of the privilege would have denied the opposing party access to information vital to his defense. Hearn v. Rhay, 68 F.R.D. at 581.

Other courts have criticized this formulation or its application as too easily defeating the privilege. See, e.g., Wardleigh v. Second Judicial Dist. Court, 891 P.2d 1180, 1187 (Nev. 1995) (stating that Hearn undermines the policy of the attorney-client privilege); Aranson v. Schroeder, 671 A.2d 1023, 1030 (N.H. 1995) (finding criticisms of Hearn to be meritorious). Unfortunately, while acknowledging this split, the Supreme Judicial Court has declined to delineate the extent of the waiver. Rather, it cautioned that an "at issue" waiver, in circumstances where it is recognized, should not be tantamount to a blanket waiver of the entire attorney-client privilege in the case. Darius v City of Boston, 433 Mass. 274, 278-79, 741 N.E.2d 52, 55-56 (2001). By definition, it is a limited waiver of the privilege with respect to what has been put "at issue." "The difficulty lies not in recognizing that a party may implicitly waive the privilege in certain circumstances, but in identifying what those circumstances are and in formulating a workable rule for determining what constitutes an 'at issue' waiver in a given case." Darius v City of

Boston, 433 Mass. at 278, 741 N.E.2d at 55 (citation omitted).

ß 17.4.3 Inadvertent Disclosure

An inadvertent disclosure of privileged information will not necessarily constitute a waiver. Nevertheless, counsel should exercise great care in handling confidential materials. Although the traditional view has been that the privilege was destroyed once privileged information became public, the modern trend is that the privileged status of a communication or document is not lost when an attorney and client take reasonable precautions to ensure confidentiality. In re Reorganization of Elec. Mut. Liab. Ins. Co., 425 Mass. 419, 422, 681 N.E.2d 838, 841 (1997). This means that the privilege would not be lost if the privileged communication is overheard, intercepted, or leaked from an anonymous source, provided that reasonable precautions were taken against such inadvertent disclosure. In re Reorganization of Elec. Mut. Liab. Ins. Co., 425 Mass. at 423, 681 N.E.2d at 841. This modern trend against finding waiver based on the inadvertent disclosure of otherwise privileged material is particularly important in complex business litigation or other document-intensive cases where the sheer volume of documents increases the likelihood of an inadvertent disclosure.

Depending on the circumstances, however, the courts may find waiver even where precautions have been taken against disclosure. In a decision issued in January 2000, Chief Judge William G. Young of the United States District Court for the District of Massachusetts adopted a "middle test"-similar to the test employed by the Supreme Judicial Court in the Electric Mutual case-for handling cases of inadvertent waiver. Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287 (D. Mass.), appeal dismissed, 232 F.3d 905, 232 F.3d 906 (Fed. Cir. 2000). In applying this test, the court will examine

(1) the reasonableness of the precautions taken to prevent inadvertent disclosure,
(2) the amount of time it took the producing party to recognize its error,
(3) the scope of the production,
(4) the extent of the inadvertent disclosure, and
(5) the overriding interest of fairness and justice.

Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. at 292 (citation omitted). In reviewing the facts in the Amgen case, the court found that precautions against disclosure were inadequate and denied a motion seeking the return of mistakenly produced documents. Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. at 293.

Practice Note

Despite the possibility that privilege may survive the inadvertent disclosure of documents, practitioners should exercise great care in handling all confidential documents in litigation. As demonstrated in Amgen and elsewhere, courts will hold litigants accountable for inadvertent disclosure in cases where precautions are found to be inadequate. Counsel should also take note of Massachusetts Bar Association Ethics Committee Opinion 99-4 (Apr. 16, 1999), which held that if it is in the client's best interest, an attorney receiving a letter containing privileged material "should resist the opposing counsel's demand for return of the letter and should urge the tribunal to reject the claim of attorney-client privilege." But cf. Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. at 291 n.2 (indicating that the Massachusetts Bar Association opinion differed from American Bar Association opinions on the subject and was "widely criticized"; recipient counsel in Amgen was commended by the court for segregating the disputed documents and refraining from reviewing them further until the dispute was resolved).

ß 17.5 EFFECT OF ASSERTING ATTORNEY-CLIENT PRIVILEGE

Often too little time is spent considering the effect of the assertion of the attorney-client privilege. Where a party asserts the attorney-client privilege in a civil case, opposing counsel may comment on a party's claim of the privilege and argue to the jury that the claim is an implied admission that the privileged matter would be harmful to the party's case. Phillips v. Chase, 201 Mass. 444, 87 N.E. 755 (1909); see also Kaye v. Newhall, 356 Mass. 300, 249 N.E.2d 583 (1969) (noting that a claim of privilege may form the basis of adverse inference and comment in a civil case).

Practice Note

In view of this potential harm, thought should be given to the tactical effect of asserting the privilege, and potential problems should be addressed before trial through the use of motions for protective orders or motions in limine.

ß 17.6 JOINT DEFENSE PRIVILEGE

No Massachusetts appellate court has addressed the "joint defense privilege," which extends the attorney-client privilege to communications made in joint defense. This privilege, which is also referred to as the "pooledinformation" situation or "common interest doctrine," applies where different lawyers represent different clients who have some interest in common.

The Massachusetts Superior Court explained the attorney-client privilege in the context of a joint defense in a decision issued in November 2000. See American Auto. Ins. Co. v. J.P. Noonan Transp., Inc., 12 Mass. L. Rptr. 493 (Super. Ct. 2000). In American Automobile, Judge McHugh held that

> [w]hen two or more parties retain a common counsel, communications with that attorney are confidential and privileged as against all common adversaries. In addition, when defendants have engaged separate counsel who work together in a common defense, information exchanged between those counsel, or between the clients and the counsel, is privileged to the extent that the exchange is part of an ongoing and joint defense strategy.

American Auto. Ins. Co. v. J.P. Noonan Transp., Inc., 12 Mass. L. Rptr. at 499 (citations omitted).

In American Automobile, two insurers brought a subrogation claim against a petroleum carrier that allegedly contaminated their insured's property. The insurers refused to produce documents on claims of several privileges, including the joint defense privilege. In explaining the scope and purposes of the joint defense privilege, Judge McHugh stated:

> At a time and in an age where transactions and the litigation they produce are increasingly complex, I am of the opinion that the joint defense or common interest components of the attorney-client privilege are necessary to ensure, as a practical matter, that clients receive the fully informed advice the attorney-client privilege is designed to produce. Individuals or entities with joint or common interests simply cannot obtain such advice if their attorneys must proceed in splendid isolation and are prohibited from interacting with others for the purpose of determining whether and to what extent common measures for preservation of common interests are available, feasible and agreeable to all who may have such interests. I am of the opinion, in sum, that the privilege is fully consistent with the principles upon which the attorney-client privilege rests in Massachusetts and, in fact, is part of Massachusetts common law.

American Auto. Ins. Co. v. J.P. Noonan Transp., Inc., 12 Mass. L. Rptr. at 499-500.

Judicial Commentary

Although there are no Massachusetts appellate court cases that have addressed the joint defense privilege, Judge McHugh's opinion in the case just cited is such a careful analysis of the privilege and its application that it is likely to influence other superior court judges when deciding this issue.

ß 17.7 THE WORK PRODUCT DOCTRINE

The work product doctrine protects an attorney's trial preparation materials. The doctrine was formulated to "enhance the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowing by other parties as he prepares for the contest." Ward v. Peabody, 380 Mass. 805, 817, 405 N.E.2d 973, 980 (1980).

The work product doctrine protects "a document or tangible thing . . . which was prepared in anticipation of litigation, and . . . was prepared by or for a party, or by or for its representative." Pasteris v. Robillard, 121 F.R.D. 18, 20 (D. Mass. 1988) (quoting Fairbanks v. American Can Co., 110 F.R.D. 685, 687 n.1 (D. Mass. 1986); Compagnie Francaise D'Assurance v. Phillips Petroleum Co., 105 F.R.D. 16, 41 (S.D.N.Y.1984)). This typically includes witness interviews, witness statements, internal memoranda, correspondence, briefs, and other internal documents reflecting the attorney's own impressions and personal beliefs.

Practice Note

Do not overlook the significance of the phrase "in anticipation of litigation." The doctrine typically does not protect transactional attorney work product, such as paperwork generated in completing a business acquisition deal.

Although often overlooked, Mass. R. Civ. P. 26(b)(3) , by its express language, provides for two separate levels of work product protection. In general, a party may obtain discovery of an opponent's work product "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Mass. R. Civ. P. 26(b)(3). In ordering any such discovery, however, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Mass. R. Civ. P. 26(b)(3). Thus, on a proper showing a court may allow discovery of interviews and witness statements, for example, but is unlikely to allow discovery of an attorney's analysis of those materials.

Both the attorney and the client can assert the work product doctrine. Catino v. Travellers Ins. Co., 136 F.R.D. 534, 539 (D. Mass. 1991). The burden is on the party resisting discovery to demonstrate that the requested material constitutes work product. Colonial Gas Co. v. Aetna Cas. & Sur. Co., 139 F.R.D. 269 (D. Mass. 1991).

ß 17.8 DICHOTOMY BETWEEN ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

Although the work product doctrine and the attorney-client privilege are intertwined, they represent distinct forms of protection. Colonial Gas Co. v. Aetna Cas. & Sur. Co., 139 F.R.D. 269 (D. Mass. 1991). The most significant distinction is that the attorney-client privilege (unless waived) is absolute, whereas the work product doctrine is only a qualified privilege. As noted above, a claim of work product may be overcome if the party seeking the materials demonstrates a "substantial need" and shows that the "substantial equivalent" of the materials cannot be obtained without "undue hardship." Mass. R. Civ. P. 26(b)(3); Connelly v. Dun & Bradstreet, Inc., 96 F.R.D. 339, 343 (D. Mass. 1982). The court will, however, protect against disclosure of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Mass. R. Civ. P. 26(b)(3).

The work product doctrine is much broader than the attorney-client privilege. Colonial Gas Co. v. Aetna Cas. & Sur. Co., 139 F.R.D. 269 (D. Mass. 1991). The doctrine is designed not to protect a confidential relationship but rather to promote the adversary system by protecting the product of an attorney's work. The United States Supreme Court decision of Hickman v. Taylor,329 U.S. 495 (1947), remains the leading case on the work product doctrine, and its precepts are reflected in Mass. R. Civ. P. 26(b)(3) and Mass. R. Crim. P. 14(a)(5). The doctrine generally protects the work product of an attorney and the attorney's staff for matters created in preparation for litigation that is pending or reasonably anticipated in the future.

Judicial Commentary

Counsel often confuse these doctrines and attempt to assert them in an "and/or" fashion. Much like boilerplate objections to discovery requests, such assertions are met with skepticism by the courts.

In some respects, however, the work product doctrine receives treatment similar to that accorded the attorney-client privilege. As is the case with attorney-client privilege, work product protection may be waived based on conduct of the resisting party. The existence and extent of a waiver depends on the following three factors:

- whether the party claiming the privilege seeks to use it in a way that is inconsistent with the purpose of the privilege,
- whether the party claiming the privilege had a reasonable basis for believing that the disclosed materials would be kept confidential, and
- whether waiver of the privilege in these circumstances would trench on any policy elements inherent in the privilege.

Colonial Gas Co. v. Aetna Cas. & Sur. Co., 139 F.R.D. 269, 275 (D. Mass. 1991).

ß 17.9 PRACTICAL CONSIDERATIONS

ß 17.9.1 When to Assert the Attorney-Client and Work Product Privileges

Because any claimed privilege is almost certainly lost if privileged information is voluntarily disclosed, the privilege must be asserted in response to the first discovery request that seeks to discover communication or documentation protected by the attorney-client privilege or work product doctrine.

Practice Note

If you later determine that the assertion of the privilege was not well founded, has been waived, or should be waived, you can supplement or amend your discovery response.

A partial disclosure of otherwise privileged information may act as a waiver of other privileged communication that relates to the same topic or exchange. By way of example, a judge is unlikely to allow a party to testify regarding certain advice given by his or her attorney during a meeting but claim the privilege with respect to the other advice given in the same meeting.

Practice Note

If you discover that you have inadvertently provided privileged materials among the documents produced to the other side, you should immediately seek your opponent's agreement that the documents will not be used or further disclosed until the trial court rules on a motion seeking the return of the privileged materials. If opposing counsel refuses to provide such an assurance, you should consider an emergency motion. In any event, a motion seeking the return of all copies or summaries of the privileged documents should be filed with the court as soon as practicable. Delay in seeking relief from inadvertence is an element to be considered in the balancing process between attorney-client and work product protections and the mandate for liberal discovery. Amgen, Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 292 (D. Mass.), appeal dismissed, 232 F.3d 905, 232 F.3d 906 (Fed. Cir. 2000).

ß 17.9.2 What to Do When an Adverse Party Claims Attorney-Client Privilege or Work Product Protection

First, establish the record. If the privilege is being asserted in a deposition, ask the witness all of the questions for which you will later seek to compel answers. In the alternative, agree with opposing counsel and put on the record those categories of information that you seek to inquire about and about which opposing counsel is instructing the client not to answer. In the case of an objection regarding a request for production of documents or a third party's objection to a subpoena duces tecum, a privilege log is a must.

Practice Note

In the course of establishing the record, be sure to ask a series of foundation questions about the communications in question, addressing such areas as

- identity of other participants,
- topics discussed,
- documents memorializing the communications,
- who received copies,

• where the meeting occurred, and
• how long the meeting lasted.

Asking the other side to create a privilege log serves at least three purposes:
• Creating a privilege log requires the other side to review each document and identify the privilege at issue. Because the lawyer would rather initially err on the side of not disclosing privileged documents, such a review will likely lead the attorney to reassess the claimed privilege for at least some of the documents at the issue.
• The privilege log provides a good road map for the attorney conference required by Superior Court Rule 9C and Local Rule 37.1 of the United States District Court for the District of Massachusetts.
• The privilege log is an invaluable tool for a judge confronted with a motion to compel more than a few documents.

Judicial Commentary

Following preparation of a privilege log, the log is discussed between counsel pursuant to Rule 9C. It must contain enough information to be a true guide for that discussion and any subsequent motions to the court. See American Auto. Ins. Co. v. J.P. Noonan Transp., Inc., No. 970325, 12 Mass. L. Rptr. 493, 2000 WL 33171004 (Super. Ct. Nov. 16, 2000) (discussed in ß 17.6, above).

If you determine that a motion to compel is warranted, it is important to frame the issues for the judge and appear to be the reasonable party in the fight. Often it is possible to assert that the other side has asserted blanket attorney-client privilege or work product doctrine claim. Given that the judge is going to have to review the documents at issue to determine whether the opposing party's refusal to produce the documents is well founded, it helps to try to convince the judge that the other party is creating unnecessary work. As one superior court judge recently wrote in an unpublished opinion: "The documents now have been reviewed by this court-acting, it seems, much like a paralegal assistant . . . . To suggest that causing a busy Superior Court Justice to conduct this in camera exercise was a monumental and frustrating waste of time and resources is an understatement at best." ITT Sheraton Corp. v. Flatley, No. 98-4797E (Mass. Super. Ct. June 27, 2000) (Van Gestel, J.).

Given the time constraints encountered by superior court judges and their lack of resources, a judge in that frame of mind is more likely to order the production of documents than a judge who believes that the party resisting discovery has truly analyzed the documents and is not being overbroad in asserting the attorney-client privilege and work product protection.

Practice Note

In seeking to compel discovery, focus on claims that you are more likely to win, such as those involving the disclosure of underlying facts, information concerning discussions that do not relate to the communication of legal advice, and materials related to situations where the presence of nonclients has destroyed the privilege.

If the other side has in any way put the potentially privileged communication at issue through its claims or defenses, emphasize the unfairness of these competing positions. The attorney-client privilege and work product doctrine are to be used as a shield, not a sword. Sax v. Sax, 136 F.R.D. 542, 543 (D. Mass. 1991).

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Current Developments in Federal Civil Practice 2002

***7** PROTECTING CONFIDENTIAL LEGAL INFORMATION

Jerold S. Solovy
Joel J. Africk
David M. Greenwald
Michelle L. Patail
Anders C. Wick

***9** A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work-Product Doctrine

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***19 I. THE ATTORNEY-CLIENT PRIVILEGE**

Historically, the attorney-client privilege developed upon two assumptions: that good legal assistance requires full disclosure of a client's legal problems, and that a client will only reveal the details required for proper representation if her confidences are protected. See Fisher v. United States, 425 U.S. 391, 403 (1976). In response to these assumptions, the attorney-client privilege developed at common law to encourage free and open communication between client and lawyer, thus promoting informed, effective representation. 8 J. WIGMORE, EVIDENCE ß 2291 (J. McNaughton rev. 1961). Because the privilege obstructs the search for truth, however, it is construed narrowly. See, e.g., Fisher, 425 U.S. at 403; Haines v. Liggett Group, Inc., 975 F.2d 81, 84 (3d Cir. 1992) ("[S]ince the

privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose."); In re Grand Jury Proceedings Under Seal, 947 F.2d 1188 (4th Cir. 1991); JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827).

Over the years, the courts have provided several definitions of the attorney- client privilege. Judge Wyzanski provided the seminal definition in United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950). In general the privilege protects:

(A) a communication,
(B) made between privileged persons (i.e., attorney, client or agent),
(C) in confidence,
(D) for the purpose of obtaining or providing legal assistance for the client.

See In re Air Crash Disaster at Sioux City, 133 F.R.D. 515, 518 (N.D. Ill. 1990); Restatement (Third) of the Law Governing Lawyers ß 68 (hereinafter Rest. 3d) [FN1]; 8 J. Wigmore, Evidence ß 2292 (J. McNaughton rev. 1961). See also Coltec Industries, Inc. v. American Motorists Insurance Co., 197 F.R.D. 368, 370-71 (N.D. Ill. 2000) (Noting the elements as outlined by Wigmore: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications related to that purpose, (4) made ***20** in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.").

A. COMMUNICATIONS COVERED BY THE PRIVILEGE

Virtually all types of communications or exchanges between a client and attorney may be covered by the attorney-client privilege. Privileged communications include essentially any expression undertaken to convey information in confidence for the purpose of seeking or rendering legal advice. Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) (privilege extends to verbal statements, documents and tangible objects conveyed in confidence for the purpose of legal advice); 8 J. WIGMORE, EVIDENCE ß 2292 (J. McNaughton rev. 1961); REST. 3d ß 119.

1. Documents and Recorded Communications

The broad sweep of privileged communications encompasses not only verbal communications, but also documents or other records in which communications have been recorded. REST. 3D ß 69; C. MCCORMICK, EVIDENCE ß 89 (J. Strong 4th ed. 1992); 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5484 (1986).

However, documents do not become automatically privileged merely because they are communicated to an attorney. The privilege only protects those documents that reflect communications between an attorney and client. In re Grand Jury Subpoenas, 959 F.2d 1158 (2d Cir. 1992); Duttle v. Bandler & Kass, 127 F.R.D. 46, 52 (S.D.N.Y. 1989). Documents or other communications that a client transmits to a lawyer neither gain nor lose privileged status as a result of the transfer. Fisher v. United States, 425 U.S. 391, 404 (1976); C. MCCORMICK, EVIDENCE ß 89 (J. Strong 4th ed. 1992). Unless a pre-existing document was itself privileged before it was communicated to an attorney, it does not become privileged merely because of the transfer. Fisher, 425 U.S. at 391; C. MCCORMICK, EVIDENCE ß 89 (J. Strong 4th ed. 1992); 8 J. WIGMORE, EVIDENCE ß 2307 (J. McNaughton rev. 1961). Thus, a court will consider a pre- existing document to be privileged only if the document was kept confidential and was prepared to provide information to the lawyer in order to obtain legal advice.

In addition to written documents, other modes of communication may also be covered under the privilege. Thus, telephone, audio and video records or tapes may qualify as privileged communications. See C. MCCORMICK, EVIDENCE ß 89 (J. Strong 4th ed. 1992). In general, the mode of communication is not relevant to the determination of privilege. However, the method of communication may be relevant to a determination as to whether the communicator could reasonably expect the information would remain confidential. See REST. 3D ß 119 cmt. b; 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5484 n.254 (1986) (noting that it would be doubtful that a conversation on a cellular telephone which could be heard by anyone with a scanner would be confidential); Communications Must Be Confidential ß I(C), infra.

***21 2. Communicative Acts**

The attorney-client privilege includes non-verbal acts within its definition of protected communications. REST. 3D ß 69 cmt. e. A communicative act is one in which the privileged person's actions attempt to convey information such as a facial expression or nod of affirmance. See 8 J. WIGMORE, EVIDENCE ß 2306 (J. McNaughton rev.

1961); 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5484 (1986). Such acts are typically protected by the attorney- client privilege. However, not all acts are voluntary attempts at communicating. For example, physical characteristics, demeanor, complexion, sobriety, or dress are not communicative and would not be protected. See C. McCormick, Evidence ß 89 (J. Strong 4th ed. 1992). See also:

Gerald B. Lefcourt P.C. v. United States, 125 F.3d 79 (2d Cir. 1997). Information regarding the payment of fees is not privileged.

In re Grand Jury Proceedings, 13 F.3d 1293, 1296 (9th Cir. 1994). Attorney required to testify regarding client's expenditures, income producing activities and lifestyle during European vacation.

In re Grand Jury Proceedings, 791 F.2d 663 (8th Cir. 1986). An attorney could not claim the privilege to avoid testifying about the authenticity of a client's signature or to avoid identifying the client in a photograph.

United States v. Weger, 709 F.2d 1151 (7th Cir. 1983). The type style characteristics of a letter typed on a typewriter are not communicative and therefore not privileged.

Darrow v. Gunn, 594 F.2d 767, 774 (9th Cir. 1979). An attorney's observations of demeanor are not privileged unless based on a confidential communication.

United States v. Kendrick, 331 F.2d 110, 113-14 (4th Cir. 1964). Presence of a client's mustache is not a communicative act, and a lawyer cannot claim that such information is privileged.

Williams v. Chrans, 742 F. Supp. 472, 493 (N.D. Ill. 1990), aff'd, 945 F.2d 926 (7th Cir. 1991). Testimony by a legal clerk that the defendant was calm and articulate while a dead body was hidden in defendant's trunk did not violate the privilege.

Frieman v. USAir Group, Inc., Civ. A. No. 93-3142, 1994 WL 719643 (E.D. Pa. Dec. 22, 1994). Lawyer for client claiming permanent disability was compelled to testify regarding observations of client's physical condition and activities.

3. Fees, Identity and the "Last Link"

Some courts have carved out exceptions to the types of communications that are protected by the privilege and have denied protection to items such as the identity of the client, the fact of consultation, the payment of fees, and the details of retainer agreements. See 8 J. WIGMORE, EVIDENCE ß 2313 (J. McNaughton rev. 1961); 24 C. Wright & K. Graham. Federal Practice & Procedure ß 5484 (1986); Attorney's Disclosure, in Federal Proceedings, of Identity of Client as Violating Attorney-Client Privilege, 84 A.L.R. Fed. 852 (1987). These courts have reasoned that such routine items are not communicated in order to ***22** obtain legal services and that fear of disclosure of such information will not deter clients from providing these facts. See:

In re Grand Jury Proceedings, 204 F.3d 516, 519 (4th Cir. 2000). Client may not veil his identity with attorney-client privilege by voluntarily disclosing confidential communications which necessarily will be exposed by revealing client's identity.

United States v. Bauer, 132 F.3d 504, 508-09 (9th Cir. 1997). Identity of client, amount of fees paid, identification of payment by case name, general purpose of work performed, and whether client's testimony is the product of attorney coaching are not within attorney-client privilege.

In re Grand Jury Proceedings, 841 F.2d 230 (8th Cir. 1988). The identity of a third party paying the legal fees of another is not privileged.

In re Grand Jury Subpoenas, 803 F.2d 493 (9th Cir. 1986), corrected, 817 F.2d 64 (9th Cir. 1987). Identity of a non-client fee payer is not privileged.

In re Shargel, 742 F.2d 61, 62 (2d Cir. 1984). Information about fees is not protected.

In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975). Identity of client not privileged (see collection of cases at 670-71 n.2).

Allen v. West Point-Pepperell, Inc., 848 F. Supp. 423, 431 (S.D.N.Y. 1994). Terms of attorney's engagement not protected by attorney-client privilege.

Duttle v. Bandler & Kass, 127 F.R.D. 46, 52 (S.D.N.Y. 1989). Attorney's bills and documents concerning the termination of the attorney-client relationship were not privileged.

Condon v. Petacque, 90 F.R.D. 53, 54-55 (N.D. Ill. 1981). Fact of consultation and the dates legal services were performed are not privileged.

Ulrich v. Stukel, 689 N.E.2d 319, 327 (Ill. App. 1997). ("It is well- recognized that information regarding a client's fees generally is not a 'confidential communication' between an attorney and client, and thus is not protected by the attorney client privilege.")

Other courts and the Restatement have rejected a strictly categorical approach. See C. MCCORMICK, EVIDENCE ß 90 (J. Strong 4th ed. 1992); 24 C. Wright & K. Graham. Federal Practice & Procedure ß 5484, at 366 (1986);

Rest. 3d ß 69 cmt. g. Under this alternative approach, the attorney-client privilege applies if revealing the information would directly, or by obvious inference, reveal the content of a confidential communication from a privileged person (client, attorney or agent). See In re Witness before the Special March 1980 Grand Jury, 729 F.2d 489, 495 (7th Cir. 1984); Rest. 3d ß 69 cmt. g. Courts often refer to this approach as a "last link" exception. Under the "last link" doctrine a routine communication such as a client's identity is not protected unless it links the client to the case. See, e.g., In re Grand Jury Proceedings, 517 F.2d 666, 671 (5th Cir. 1975); NLRB v. Harvey, 349 F.2d 900, 905 (4th Cir. 1965); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) (an often-cited case but highly criticized as a misapplication of the doctrine).

It should be remembered that the purpose of the privilege is to encourage free disclosure; it does not act generally to protect clients from incrimination. See, e.g., ***23**In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986); In re Shargel, 742 F.2d 61, 62-63 (2d Cir. 1984). Thus, the privilege does not protect information that is merely invasive or inculpatory, and it is not enough that the communication provides the "last link" to incriminate the client. In re Grand Jury Proceedings, Cherney, 898 F.2d 565 (7th Cir. 1990). Instead, the only "last link" that implicates the privilege is the one that connects the client to a confidential communication or that exposes a confidential communication. See C. MCCORMICK, EVIDENCE ß 90 (J. Strong 4th ed. 1992). See:

In re Grand Jury Matter, No. 91-01386, 969 F.2d 995 (11th Cir. 1992). An attorney was ordered to reveal the identity of a client who paid with a counterfeit $100 bill. The court reasoned that the only "last link" provided by the identity information was to incriminate the client and not to reveal any confidences.

In re Grand Jury Matter (Special Grand Jury Narcotics) (Under Seal), 926 F.2d 348 (4th Cir. 1991). It is irrelevant that disclosure of a fee arrangement will implicate the client. The privilege only protects fee arrangements if they will reveal confidential communications.

But see:

Dean v. Dean, 607 So. 2d 494 (Fla. Dist. Ct. App. 1992). Court refused to order an attorney to disclose the identity of a client involved in a hit and run accident.

Sometimes the disclosure of even routine information can serve to expose client confidences instead of merely providing a link to the confidences. The attorney-client privilege also protects against this type of exposure. A common situation involving this aspect of the privilege arises when the motive of a client is revealed by the fact of consultation. See:

In re Grand Jury Proceedings, 204 F.3d 516, 520-22 (4th Cir. 2000). Where it "appeared that the client's identity was sufficiently intertwined with the client's confidences such that compelled disclosure of the former essentially disclosed the latter..." the attorney-client privilege would preclude an attorney from disclosing the client's identity, but where the client voluntarily discloses otherwise privileged information, such a privilege is lost as to the clients identity, even where the disclosure of his identity will link the client to the statement.

United States v. Ellis, 90 F.3d 447, 450-51 (11th Cir. 1996). Identity is protected only if its disclosure would lead to the uncovering of privileged information.

Ralls v. United States, 52 F.3d 223, 226 (9th Cir. 1995). Privilege applies when identity of payor or terms of engagement were so "inextricably intertwined" with confidential communications that revealing either the identity or the terms "would be tantamount to revealing a privileged communication."

In re Grand Jury Proceedings, 946 F.2d 746 (11th Cir. 1991). Revelation of a client's identity would expose his motive for seeking advice (i.e., a drug conspiracy investigation). Court further noted that the government's knowledge of this motive did not obviate the protection of the attorney- client privilege.

In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118 (5th Cir. 1990). Client's identity and fee arrangements are privileged if disclosure will reveal the confidential purpose for which client consulted attorney.

In re Grand Jury Proceedings, Cherney, 898 F.2d 565 (7th Cir. 1990). Grand jury sought the identity of third party who was paying the attorneys' fees of the person who was the target of its investigation. Seventh Circuit noted that fee information normally is not privileged, but that in this case revealing the payor's identity might ***24** disclose a confidential communication: the payor's motive for paying the fees of the target. Court held payor's identity was privileged.

In re Grand Jury Subpoenas, 906 F.2d 1485, 1492 (10th Cir. 1990). Fee information is not privileged unless it will disclose confidential client communications.

In re Two Grand Jury Subpoenae Duces Tecum Dated Aug. 21, 1985, 793 F.2d 69 (2d Cir. 1986). Privilege does not protect information about fee arrangements except when they involve prejudicial disclosure of confidential communications.

United States v. Strahl, 590 F.2d 10, 11 (1st Cir. 1978). Identity of client protected because disclosure would implicate the client "in the very criminal activity for which legal advice was sought" and penalize the seeking of advice.

Riddell Sports, Inc. v. Brooks, 158 F.R.D. 555, 560 (S.D.N.Y. 1994). Although attorney fee arrangements are ordinarily not protected, the privilege would apply to bills, ledgers, statements, time records and correspondence that reveal the client's motive in seeking representation or litigation strategy.

Brett v. Berkowitz, 706 A.2d 509, 515 (Del. 1998). Attorney specializing in divorce cases was not required to produce the names of his other clients to a client that sued the attorney for sexual harassment. "[T]he mere revelation of the [other clients' names] would reveal the confidential communication that [the clients] were seeking advice concerning a divorce." Id.

But see:

Gerald B. Lefcourt, P.C. v. United States, 125 F.3d 79, 87 (2d Cir. 1997). Though acknowledging the adoption of a "legal advice exception" in other circuits, the Second Circuit "all but categorically rejected it" in Vingelli v. United States (see below).

Vingelli v. United States, 992 F.2d 449 (2d Cir. 1993). Grand jury subpoenaed attorney to determine who was paying the fees for the defense of a convicted party. Attorney refused to disclose the client and fee information because it would reveal the purpose of the representation. Court found that the client could have consulted the attorney for a variety of reasons and that while the disclosure of the fee payor's identity might suggest the possibility of wrongdoing it would not reveal a confidential communication. Court also found that the fact that money was paid did not reveal any confidential communication and that the financial transfers were not made to obtain legal advice.

4. Knowledge of Underlying Facts Not Protected

While the privilege protects communications between privileged persons, it does not permit a party to resist disclosure of the facts underlying those communications. Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981); REST. 3D ß 69 cmt. d. The privilege creates a distinction between the contents of a lawyer-client communication and the contents of a client's memory or files. Id.. See also 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5484 (1986). Thus, the privilege will not protect a client from testifying about her recollections or records, only whether the client related them to her attorney. See:

In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992). Privilege protects communications and the fact of communication but not the underlying information contained in the communications.

***25 5. Real Evidence and Chain of Custody Not Protected**

A client's transmission of real evidence to an attorney does not constitute a communication and is not protected under the attorney-client privilege. Revealing such evidence merely serves to implicate the client and does not disclose confidential communications. As a result, a client cannot shield real evidence merely by giving it to his attorney. See In re January 1976 Grand Jury, 534 F.2d 719, 728 (7th Cir. 1976) (bank robbery proceeds not privileged); In re Ryder, 381 F.2d 713 (4th Cir. 1967) (concealing stolen money and sawed off shotgun resulted in suspension of attorney); State v. Bright, 676 So. 2d 189, 194 (La. Ct. App. 1996) (Privilege did not prevent court from ordering lawyer to produce incriminating diary given to him by defendant).

While the privilege cannot shield physical evidence from production, some courts have found that the privilege will protect the identity of the client who produced the incriminating evidence. See Fees, Identity and the Last Link ß I(A)(3), supra. See also:

State v. Green, 493 So. 2d 1178 (La. 1986). Defendant's attorney found the gun used in a shooting among defendant's possessions. Court held that attorney could not rely on the privilege to hide the gun since it was physical evidence and not protected. However, the attorney could not be forced to testify about the source of the gun (i.e., to establish the chain of custody).

People v. Nash, 341 N.W.2d 439 (Mich. 1983). Testimony which revealed that incriminating items were obtained from the office of the defendant's attorney violated the privilege.

However, many courts hold that the chain of custody for real evidence cannot be broken by an attorney's privileged silence. In Commonwealth v. Ferri, 599 A.2d 208 (Pa. Super. Ct. 1991), appeal denied, 627 A.2d 730 (Pa. 1993), a client turned soiled clothing over to his attorney, thus placing the attorney in the chain of custody. At trial, the court required the attorney to testify about his custody of the clothing in order to make it admissible into evidence. See also In re Grand Jury Matter No. 91-01386, 969 F.2d 995 (11th Cir. 1992) (source of physical evidence is not protected).

6. Communications from an Attorney to a Client Are Protected

The attorney-client privilege not only protects a client's disclosure to his attorney, it also shields the advice given to the client by the attorney. See, e.g., REV. UNIF. R. EVID. 502 (1986); REST. 3D ß 69 cmt. i. However, the courts are in disagreement about the scope of protection given to an attorney's advice. See, e.g., United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980) (noting two approaches). Two approaches are discussed in the following sections.

***26 a. The Narrow View: Only Advice Which Reveals Confidences Is** Privileged

Some courts have adopted a narrow view that communications from an attorney to a client are privileged only to the extent their disclosure reveals a confidential communication from the client. See:

Schlefer v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983). Confidential communication from attorney to client is protected when it is based on confidential information supplied by the client.

Walsh v. Northrop Grumman Corp., 165 F.R.D. 16, 18 (E.D.N.Y. 1996). Second Circuit "remains committed to the narrowest application of the privilege such that it protects only legal advice that discloses confidential information given to the lawyer by the client."

Republican Party of N.C. v. Martin, 136 F.R.D. 421, 426-27 (E.D.N.C. 1991). Privilege does not apply to legal advice that does not arguably reveal a client's confidences. Thus, attorney memoranda or letters without factual application to a client's case were not protected.

Gonzalez Crespo v. Wella Corp., 774 F. Supp. 688 (D.P.R. 1991). Privilege protects communications from client to attorney and those from attorney to client that would tend to reveal client's confidences.

North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 514 (M.D.N.C. 1986). Communications are protected by the privilege only if they tend to reveal confidential client communications.

Attorney General of United States v. Covington & Burling, 430 F. Supp. 1117, 1120-21 & n.1 (D.D.C. 1977). Attorney-client privilege protects communications from attorney to client only to the extent they reveal confidential communication from the client or would constitute, by subsequent communication, an admission by adoption.

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950). Attorney communications are privileged to the extent they are based on confidential communications from the client.

See also Brinton v. Department of State, 636 F.2d 600, 603 (D.C. Cir. 1980) ; United States v. Ramirez, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979); In re Fischel, 557 F.2d 209, 211 (9th Cir. 1977); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980); In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 388 (D.D.C. 1978); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 520-23 (D. Conn.), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976); United States v. IBM Corp., 66 F.R.D. 206, 211, 215 (S.D.N.Y. 1974).

b. The Broader View: Content Irrelevant To Determination Of Whether Communication Is Privileged

Other courts have rejected the narrow interpretation of the privilege and protect virtually all communications from attorney to client. In In re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981), the court recognized that there was a split of authority and rejected the narrow approach because it failed "to deal with the reality that lifting the cover from the advice will seldom leave covered the client's communication to his lawyer." Id. at 602. Instead, the court adopted a broader rule which protects any communication from an attorney to a client when made in the course of giving legal advice. Id.; see also UNIF. R. EVID. 502(b)(1) (1986).

***27** The Restatement also rejects the narrow rule that the privilege only protects communications that reveal client confidences. REST. 3D ß 69 cmt. i. Under the Restatement, a lawyer's advice to her client is privileged without regard to the source of the lawyer's information if the information meets the requirements of confidentiality and a legal purpose. For example, if a lawyer writes a letter to a client which gives tax advice, and the letter is based in part on information supplied by the client, in part on information gathered by the lawyer from third persons, and in part on the lawyer's legal research, under the broader approach of the Restatement, the privilege applies to the entire document even if the parts could be separated. REST. 3D ß 119 cmt. i, illus. 7. See:

United States v. Mobil Corp., 149 F.R.D. 533, 536 (N.D. Tex. 1993). Communications from attorney to client are protected.

United States v. Defazio, 899 F.2d 626 (7th Cir. 1990). Communications from attorney to client are privileged if they constitute legal advice or tend directly or indirectly to reveal the substance of a client confidence.

United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980). Attorney-client privilege applies to communications from attorney.

Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1974). Self- initiated attorney communications are

protected.

Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971). Communications from attorney to client are protected.

Spectrum Sys. Int'l Corp. v. Chemical Bank, 581 N.E.2d 1055 (N.Y. 1991). Under New York law an attorney's communication to a client is protected without regard to whether it implicates information that originally came from the client. Lawyer's factual report which contained material gathered from third party-interviews was held privileged.

See also:

Rossi v. Blue Cross & Blue Shield of Greater N.Y., 540 N.E.2d 703 (N.Y. 1989).

But see:

J.P. Foley & Co. v. Vanderbilt, 65 F.R.D. 523 (S.D.N.Y. 1974). Communications from attorney to client are covered by the privilege except for communications which are based on conversations with third parties.

c. Cases Where Lawyer Acts as a Conduit Are Not Protected

Although many communications from a lawyer to a client are protected by the privilege, there is an exception in instances where the lawyer acts merely as conduit for a third party's message to the client. Instances where the lawyer is acting only as a communicative link are not privileged, and either the lawyer or client can be required to disclose the communication. Dawson v. New York Life Ins. Co., 901 F. Supp. 1362, 1366-7 (N.D. Ill. 1995) (cases where attorney is acting as a conduit for factual data do not implicate the privilege); In re 3 Com Corp. Sec. Litig., No. C-89-20480, 1992 WL 456813 (N.D. Cal. Dec. 10, 1992) (same); REST. 3D ß 69 ***28** cmt. i; 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5478 (1986). In these cases, the purpose of the communication is not to obtain legal assistance and therefore the exchanges are not privileged. See Requirement of a Legal Purpose ß I(D), infra.

B. ONLY COMMUNICATIONS BETWEEN PRIVILEGED PERSONS ARE PROTECTED

There are three categories of people who are considered privileged persons:

(1) the client or prospective client,

(2) the lawyer, and

(3) the agents of the client and lawyer.

C. MCCORMICK, EVIDENCE ß 91 (J. Strong 4th ed. 1992); REST. 3D ß 70. To be privileged, both the person sending and the person receiving the communication must fit within one of these three categories. C. MCCORMICK, EVIDENCE ß 91 (J. Strong 4th ed. 1992); 8 J. WIGMORE, EVIDENCE ß 2327 (J. McNaughton rev. 1961). If either the communicating or receiving party is not a privileged person then the communication is not protected. See, e.g., United States v. Bernard, 877 F.2d 1463 (10th Cir. 1989). Thus, comments addressed to third parties do not come within the privilege. Similarly, the privilege does not apply to communications from third parties to a client, even if they are later communicated to the attorney by the client (however, these communications could become work-product -- see Work-Product Must be Prepared by or for a Lawyer ß IV(B), infra). In those cases where the client relates a communication to the attorney and it is impossible to separate the client's addition from the non-privileged person's comment then the entire communication would probably come within the privilege. See REST. 3D ß 70 cmt. b.

1. Defining the Client

a. Individual Clients

The client is generally defined as the intended and immediate beneficiary of the lawyer's services. To be considered a client for the purposes of invoking the attorney-client privilege two conditions must be met:

1) the client must communicate with the attorney to obtain legal advice, and

2) the client must interact with the attorney to advance the client's own interests.

See Wylie v. Marley Co., 891 F.2d 1463 (10th Cir. 1989); EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481, 1998 WL 778369 at *5 (S.D.N.Y. Nov. 6, 1998) (EEOC attorneys could not ***29** assert that a group of retirees were their clients during a period of time in the case when the retirees opposed the claim filed by the EEOC). Generally, a prospective client is considered to be a client for the purposes of establishing the attorney-client privilege. See In re Auclair, 961 F.2d 65 (5th Cir. 1992) (communications with group of prospective clients with a common interest can be covered by the privilege); In re Grand Jury Proceedings Under Seal, 947 F.2d 1188 (4th Cir. 1991); Lawyer Disciplinary Bd. v. Allen, 479 S.E.2d 317, 328 (W. Va. 1996) (rejecting proposed rule requiring attorneys to record calls with potential clients because such a role would raise "concerns regarding the attorney client privilege); REST.

3D ß 70; REV. UNIF. R. EVID. 502(b); C. MCCORMICK, EVIDENCE ß 88 (J. Strong 4th ed. 1992); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ß 503 (1991). The privilege would thus attach to communications made during an initial consultation with a prospective client even if no representation resulted.

In class actions, class representatives are generally considered to be clients of the class counsel. On the other hand, some courts have held that unnamed class members are not considered clients because they do not directly contact the lawyers for legal assistance. In that case, communications between class members who are not class representatives and class counsel may not be privileged. See Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 506, 517 (D. Or. 1982) (information collected confidentially by lawyer for class representatives from non-representative class members was not privileged). But see Connelly v. Dun & Bradstreet, Inc., 96 F.R.D. 339, 342 (D. Mass. 1982) (privilege applies to unnamed class member communications).

The fact that a fee is paid for legal services is irrelevant to the determination of privilege. REST. 3D ß 70 cmt. d; C. MCCORMICK, EVIDENCE ß 88 (J. Strong 4th ed. 1992). See also United Nat'l Records, Inc. v. MCA, Inc., 106 F.R.D. 39 (N.D. Ill. 1985); In re Grand Jury Proceedings, 663 F.2d 1057, 1060 (5th Cir. 1981), vacated on other grounds, 680 F.2d 1026 (5th Cir. 1982); People v. O'Connor, 447 N.Y.S.2d 553, 556 (App. Div. 1982). Thus, a person paying the legal fees for a third person is not aclient unless the payor also sought legal advice from the lawyer. See, e.g., In re Grand Jury Proceedings, Cherney, 898 F.2d 565 (7th Cir. 1990); Priest v. Hennessy, 409 N.E.2d 983 (N.Y. 1980). But see In re Grand Jury Proceedings, 841 F.2d 230, 231 n.2 (8th Cir. 1988) (privilege protects substance of confidential communications between a third party fee payer and a law firm).

b. Organizational Clients

Although the definition of a client is relatively straightforward for individuals, defining a "client" in an organizational setting is considerably more difficult. Because corporations may only communicate through their employees, it becomes important to determine who speaks for the corporation and is thus protected by the corporation's privilege as a client. See Interfaith Hous. Delaware, Inc. v. Town of Georgetown, No. 93-31, 1994 WL 17322 (D. Del. Jan. 12, 1994) (noting tension between corporation as an entity and its ability to act solely through natural persons); 24 C. Wright & K. Graham. Federal Practice & ***30** Procedure ß 5484, at 376 (1986). The analysis is further complicated because the group that is defined as the client for the purposes of creating the privilege is often more expansive than the group that is entitled to assert or waive the privilege. See Asserting the Privilege in Organizations ß I(E)(2), infra.

(1) Defining the Organizational Client - Upjohn

Historically, courts applying the attorney-client privilege to corporations struggled to determine which corporate employees most closely resembled the traditional "client" in an attorney-client relationship. In doing so, courts often found that the interaction between high-level officers and directors and corporate counsel approximated a traditional attorney-client relationship and was thus deserving of protection. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir. 1963) (in determining which employees constituted the client for privilege purposes the court applied a test called the "control group" test which designated only upper-level management as the client of corporate counsel and thus protected only the communications of upper-echelon management); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970). Courts reasoned that these managers not only sought legal advice for the organization but also caused the corporation to act on the advice that it received. However, for employees lower down on the corporation's organization chart, the relationship with organizational counsel tended to much less resemble a traditional client relationship. Moreover, conflicts between the interest of the employee and the organization frequently appeared.

The U.S. Supreme Court eventually rejected the "control group" test in federal cases in Upjohn Co. v. United States, 449 U.S. 383 (1981). Upjohn thrust privilege analysis in a new direction, and created a less structured definition of the corporate client. In that case, Upjohn disclosed to the SEC and IRS the results of an internal investigation conducted by both inside and outside counsel which uncovered some questionable payments by Upjohn to foreign officials. Based on this report, the IRS began an investigation and subpoenaed the questionnaires underlying the disclosed report. When Upjohn claimed privilege, the IRS initiated suit to enforce the subpoena. The Supreme Court found that the notes of the internal investigators' interviews with Upjohn's middle and lower management employees, who were clearly outside of Upjohn's "control group," were privileged. Id.

The Upjohn Court "decline[d] to lay down a broad rule" to govern the extent of the privilege's reach, and in so

doing rejected the control group test for determining the scope of the corporate attorney-client privilege. Id. at 386. In its place, the court set down five factors to guide courts in determining the validity of attorney-client privilege claims for communications between legal counsel and lower-echelon corporate employees:

(1) the information is necessary to supply the basis for legal advice to the corporation or was ordered to be communicated by superior officers;

***31** (2) the information was not available from "control group" management;

(3) the communications concerned matters within the scope of the employees' duties. But see Baxter Travenol Lab., Inc. v. Lemay, 89 F.R.D. 410, 412- 14 (S.D. Ohio 1981) (communications with a former employee hired solely for the purposes of assisting in litigation as a litigation consultant were protected even though the communications did not concern matters within the scope of the employee's duties);

(4) the employees were aware that they were being questioned in order for the corporation to secure legal advice; and

(5) the communications were considered confidential when made and kept confidential. But see Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674, 678 (S.D.N.Y. 1983) (privilege upheld without showing that the communications were made in reliance on an expectation of confidentiality).

Id. at 394-95. When each of these elements is met, a lower-echelon employee is considered a client under the attorney-client privilege, and the employee's communications with corporate counsel are privileged. Id.; Bruce v. Christian, 113 F.R.D. 554, 560 (S.D.N.Y. 1986) (privilege extends to employee communications on matters within the scope of their employment and when the employee is being questioned in confidence in order for employer to obtain legal advice).

Some jurisdictions place extra emphasis on the first element of the Upjohn test by requiring that a senior authority direct the lower-level employee to make the confidential communication. See Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co., 654 F. Supp. 1334, 1364-65 (D.D.C. 1986), aff'd in part, rev'd in part, 944 F.2d 940 (D.C. Cir. 1991) (no privilege for volunteered communications of a district manager who was not in the control group and who was not directed by his superiors to communicate with company attorneys). Other courts, and the Restatement, reject this approach and consider disclosures to be impliedly authorized if made in the interests of the corporation. See REST. 3D ß 73 cmt. h.

The test developed in Upjohn makes no distinction with regard to an agent's position or degree of decision-making responsibility. Instead, the privilege turns on whether the employee imparted information to the lawyer or received assistance from the lawyer on behalf of the organization. Upjohn, 449 U.S. at 394-95.

While much of the case law involves the application of Upjohn to corporations, the same standards apply to other organizations such as unincorporated associations, partnerships, and other for-profit or not-for- profit organizations. See Kneeland v. National Collegiate Athletic Ass'n, 650 F. Supp. 1076, 1087 (W.D. Tex.), rev'd on other grounds, ***32** 850 F.2d 224 (5th Cir. 1986) (privilege assumed to apply to unincorporated associations); REST. 3D ß 123.

State courts and federal courts sitting in exercise of diversity jurisdiction are not bound by the Upjohn decision and have adopted various tests for defining the organizational client. See State Court Definitions of the Organizational Client ß I(B)(1)(b)(4), infra.

Although Upjohn is controlling in federal courts applying federal law, the current Restatement espouses a slightly different articulation of the privilege, adopting a pre-Upjohn test known as the "subject matter" test, which was first developed in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), and modified in Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1977). Under this "subject matter" test, the privilege extends to communications of any agent or employee of the corporation so long as the communication relates to a subject matter for which the organization is seeking legal representation. Upjohn deems the subject matter of the communication to be merely one factor to consider.

(2) Representation of Individual Employees by Organizational Counsel

When an employee is deemed a part of the organizational client, the organization enjoys the protection of the privilege for that employee's communications. Likewise, if the corporation believes that it is in its best interest to waive its attorney-client privilege for the employee's communications, the communications are subject to discovery, unless the employee possesses an individual claim of attorney-client privilege.

To assert an individual claim of privilege over a communication between an employee and organizational counsel, the employee must independently prove the existence of each of the four traditional elements of a privilege claim (a communication, between privileged persons, in confidentiality, for the purpose of legal assistance). See United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985). See also REST. ß 73 cmt. j; Gregory I. Massing, Note, The Fifth Amendment, the Attorney-Client Privilege, and the Prosecution of White-Collar Crime, 75 VA. L. REV. 1179, 1196 (1989). In cases where the employee alleges that a personal attorney-client relationship exists with the organizational lawyer, the employee bears the burden of proving that the statements were made in the employee's individual capacity, and not in the employee's capacity as an employee of the organizational client. See Odmark v. Westside Bancorporation, Inc., 636 F. Supp. 552, 555 (W.D. Wash. 1986); In re Grand Jury Proceedings, 434 F. Supp. 648, 650 (E.D. Mich. 1977), aff'd, 570 F.2d 562 (6th Cir. 1978).

If counsel represents only the corporation and has informed the employee of that fact, the employee is not deemed to be a client of the corporate attorney and no individual privilege arises to protect the employee. See United States v. Demauro, 581 F.2d 50 (2d Cir. 1978) (employee unable to raise privilege when he could not prove that he believed counsel was ***33** representing him); REST. 3D ß 73 cmt. j. Moreover, counsel representing a corporation may not be under an affirmative obligation to advise a corporate employee of his right to retain personal counsel, even where the corporation's counsel plans to elicit statements that may criminally inculpate the employee. See United States v. Calhoon, 859 F. Supp. 1496, 1498 (M.D. Ga. 1994). As a result, the organization may be able to invoke the privilege for some communications while the employee cannot. For example, in United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985), several employees were questioned by their employer's counsel about laboratory safety studies. When the employees were later charged with making fraudulent statements and the employer sought to use their statements against them, the court found that the employees never sought nor inquired about individual representation, and that their employer's attorneys had neither believed nor represented to the employees that they were acting as counsel to the employees. As a result, no personal attorney-client relationship existed between the employees and counsel, and the court held that the employees could not assert the attorney-client privilege to suppress their own statements. Id.; see also Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124-25 (3d Cir. 1986).

If the organization has a conflict of interest with the employee, the organization's lawyer may not purport to represent both. See REST. 3D ß 73 cmt. j; Dual Representation ß IX(C)(1), infra. If the corporate attorney fails to make clear to an employee that the attorney is representing the corporation and not the employee, then the attorney may be disqualified from representing the corporation in later litigation against the employee. See e.g., Chase Manhattan Bank v. Higgerson, No. 17864/84, 1984 N.Y. Misc. LEXIS 3411 (N.Y. Sup. Ct. Oct. 11, 1984) (disqualifying counsel). However, an employee has the heavy burden of establishing that corporate counsel was providing dual representation to both the corporation and the individual. See, United States v. International Brotherhood of Teamsters, 119 F.3d 210, 217 (2d Cir. 1997) (employee failed to prove dual representation even though entity's attorneys "did not do all that they could have done to clarify the conflicts of interest that ... develop between organizations and their employees").

In In re Grand Jury Investigation No. 83-30557, 575 F. Supp. 777 (N.D. Ga. 1983), the court held that an employee seeking to prove that she was being represented individually by corporate counsel must show:

(1) the employee approached corporate counsel for the purpose of seeking legal advice;
(2) the employee made it clear that she was seeking advice in an individual capacity;
(3) counsel sought to communicate with the employee in an individual capacity, mindful of possible conflicts;
(4) the communications were confidential; and
***34** (5) the communications did not concern the employee's official duties or general affairs of the company.

See also In re Grand Jury Subpoenas, 144 F.3d 653, 659 (10th Cir. 1998) (hospital officers sufficiently established that the Hospital's attorneys represented them individually by testifying that each officer sought the advice of the attorneys in his individual capacity and confidential communications occurred between them regarding personal matters); United States v. International Brotherhood of Teamsters, 119 F.3d 210, 217 (2d Cir. 1997) (employee failed sufficiently to establish that he was being represented individually by his employer's counsel because he neither sought nor received legal advice from his employer's counsel on personal matters); In re Standard Fin. Management Corp., 79 B.R. 97 (Bankr. D. Mass. 1987) (recognizing factors (1) and (2) listed supra).

Some courts have lessened the showing an employee must make to prove that organizational counsel is personally

representing the employee. In these jurisdictions, if a lawyer fails to clarify that she is solely representing the organization, then the employee can assert the privilege if the employee reasonably believed that the lawyer represented the employee. United States v. Hart, No. Crim. A. 92-219, 1992 WL 348425 (E.D. La. Nov. 16, 1992) (employees reasonably believed that corporate counsel was representing them individually and therefore could invoke privilege). See also REST. 3D ß 14 cmt. f. But see United States v. International Brotherhood of Teamsters, 119 F.3d 210, 216 (2d Cir. 1997) (rejecting employee's assertion that the privilege should apply because he reasonably believed that employer's attorney was representing him in his individual capacity).

The ethical implications of organizational counsel representing individual employees is further discussed in Ethical Considerations: Dual Representation ß IX(C)(1), infra.

(3) Former Employees of Organizational Clients

A problem often arises when a former employee has communicated with an organization's attorney after his employment has ended, and the organization attempts to invoke the privilege to protect these exchanges. The courts disagree over whether communications between former employees and organizational counsel are privileged in these cases. Compare:

Upjohn Co. v. United States, 449 U.S. 383, 402-3 (1981). A communication is privileged when a former employee speaks at the direction of management with a corporate attorney about conduct or proposed conduct within the scope of her employment.

Allen v. McGraw, 106 F.3d 582, 606 (4th Cir. 1997). Privilege precluded inquiry into interview conducted by investigating attorney with former employee.

Favala v. Cumberland Eng'g Co., 17 F.3d 987 (7th Cir. 1994). The court held that a former employee could not be prevented from testifying but could not testify about communications with the company's attorney.

***35** Admiral Ins. Co. v. United States Dist. Court for Dist. of Ariz., 881 F.2d 1486 (9th Cir. 1989). Counsel interviewed two high-level managerial employees about pending securities litigation. After the interviews the two employees quit. The court found that the privilege extended to the former employees. Court noted that the employees knew at the time of the interviews that the communications were to secure legal advice for the corporation.

In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981). Privilege can apply to former employees.

Bank of New York v. Meridian Biao Bank Tanz., Ltd., No. 95 Civ. 4856, 1996 WL 490710 (S.D.N.Y. Aug. 27, 1996). Privilege applies to former employees.

Command Transp., Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94 (D. Mass. 1987). Applying Massachusetts law, the court found that former employees could come within the privilege.

With:

Infosystems, Inc. v. Ceridian Corp, 197 F.R.D. 303 (E.D. Mich. 2000). Except in very limited circumstances, "counsel's communications with a former employee of the client corporation generally should be treated no differently from communications with any other third-party fact witness." Those limited circumstances include situations in which a privileged communication occurred during the course of employment or "where the present day communication concerns a confidential matter that was uniquely within the knowledge of the former employee when he worked for the client corporation, such that counsel's communication with this former employee must be cloaked with the privilege in order for meaningful fact-gathering to occur."

The City of New York v. Coastal Oil New York, Inc., No. 96 Civ. 8667, 2000 U.S. Dist. LEXIS 1010 (S.D.N.Y. Feb. 7, 2000). The privilege did not apply to communications between in-house counsel and a former employee during deposition preparation where in-house counsel was not conducting an investigation.

Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999). Where former employee is unrepresented by former employer's counsel, privilege applies only to matters that former employee was aware of as a result of her employment. Information conveyed by counsel that goes beyond that is not protected by the attorney-client privilege, although the opinions and conclusions of counsel would be protected by the work-product doctrine.

Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 517 (N.D. Ill. 1990). Privilege did not apply because former employee's interest differed from ex-employer's interest. Analysis based in part on the more stringent control group test followed in Illinois.

Clark Equip. Co. v. Lift Parts Mfg. Co., Inc., No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457 (N.D. Ill. Sept. 30, 1985). The reasoning of Upjohn does not support extension of the attorney-client privilege to cover post-employment communications with former employees of a corporate client. Former employees do not share an identity of interest in the outcome of the litigation. Their willingness to provide information is unrelated to direction

from former corporate superiors, and they have no duty to their former employers to provide information. "It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit."

Generally, a former employee must have an agency obligation at the time he communicates with the organizational attorney for the communication to be privileged. See REST. 3D ß 73 cmt. e. Several courts have held the post-employment communications of senior officers concerning a matter within the scope of the former officers' duties to be privileged. See, e.g., ***36**Admiral Ins. Co., v. United States Dist. Court for Dist. of Ariz., 881 F.2d 1486 (9th Cir. 1989); In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 41 (D. Mass. 1987); Porter v. Arco Metals Co., 642 F. Supp. 1116 (D. Mont. 1986) (court allowed opposing counsel to interview former employees unless they had managerial responsibilities for the matter in question). Although it will generally be the case, many courts do not require the privileged information to have been acquired during employment. See Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988) (ex-employee who had personal involvement in the actions involved in the suit cannot be interviewed).

Because former employees are no longer agents of the corporate entity, corporate documents in their possession are not held in a representational capacity. Such employees, in response to discovery requests for production of the documents, may assert their Fifth Amendment rights and refuse to produce such documents where "the act of production is, itself, (1) compelled, (2) testimonial, and (3) incriminating." See In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d 173, 178 (2d Cir. 1999).

The issue of whether an attorney can ethically interview an opposing corporation's former employees is discussed in Ethical Considerations: Former Employees ß IX(C)(2), infra.

(4) State Court Definitions of the Organizational Client

Although many states have followed the United States Supreme Court's definition of the corporate client in Upjohn, the Upjohn opinion applies solely to federal courts applying federal law. See:

Tabas v. Bowden, No. Civ. A. 6619, 1982 WL 17820 (Del. Ch. Feb. 16, 1982). Upjohn cited favorably.

Macey v. Rollins Envtl. Services (N.J.), Inc., 432 A.2d 960, 961-64 (N.J. Super. Ct. App. Div. 1981). Citing Upjohn favorably, the court interpreted the state codification of the attorney-client privilege broadly and held that it protected communications between corporate counsel and the corporation's officers and employees.

State courts which have declined to follow Upjohn have established their own rules governing the application of the attorney-client privilege to corporations. Some states still follow the "control group" test. Under this test, only upper level management is considered a client for purposes of the attorney-client privilege. Thus, comments by lower-echelon employees to corporate counsel are unprotected. This test has been criticized because it fails to recognize that the division of functions in corporations often separates decision-makers from those knowing relevant facts. See Upjohn, 449 U.S. at 390-91. See also:

Dawson v. New York Life Ins. Co., 901 F. Supp. 1362, 1367 (N.D. Ill. 1995). Applying control group analysis under Illinois law.

Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994). Adopting rule similar to Upjohn, but holding that privilege did not apply where communications were not directed to lawyers, but to agents acting at the direction of lawyers.

***37** Alpha Beta Co. v. Superior Court (Sundy), 203 Cal. Rptr. 752, 756 (Cal. Ct. App. 1984). Attorney-client privilege will attach to communications with a corporate employee only where the employee is the natural person to be speaking for corporation with respect to the subject matter of the communications.

Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 256-58 (Ill. 1982). The court rejected the Upjohn approach and adopted the "control group" test, which protects communications between counsel and corporate decisionmakers or those "who substantially influence corporate decisions." Id. at 257. As a practical matter, the only communications which will ordinarily be protected are those made by top management who have the ability to make a final decision. Id.

Midwesco-Paschen Joint Venture v. Imo Indus. Inc., No. 1-92-3306, 1994 WL 370096 (Ill. App. Ct. July 15, 1994). The court expanded the control group test of Consolidated Coal to include two tiers of corporate employees whose communications with corporate counsel are protected: (1) the decision makers (i.e., top management), and (2) employees who directly advise top management. The court also found that more than a nominal fine should be

considered if the party has refused to comply with a discovery order without at least a colorable claim of privilege.

Hyams v. Evanston Hosp., 587 N.E.2d 1127 (Ill. App. Ct. 1992). Nurses were not part of control group in medical malpractice case.

Other courts have adopted different tests. Compare:

D.I. Chadbourne, Inc. v. Superior Court of San Francisco, 388 P.2d 700 (Cal. 1964). Eleven point test for determining when the privilege applies to a corporate client.

Shew v. Freedom of Info. Comm'n, 714 A.2d 664 (Conn. 1998). Four factor test applied. The second factor requires that a communication be made to the attorney by a current employee.

Marriott Corp. v. American Academy of Psychotherapists, Inc., 277 S.E.2d 785 (Ga. Ct. App. 1981) The court adopted the "subject matter" test of Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977). Under that test, communications are privileged so long as the communication relates to a subject matter for which the organization is seeking legal representation..

E.I. duPont de Nemours & Co. v. Forma-Pack, Inc., 718 A.2d 1129, 1139- 41 (Md. 1998). Court discussed the Upjohn test, the "subject matter" test, and a test recently articulated by the Florida Supreme Court, but declined to adopt "a particular set of criteria for the application of the privilege in the corporate context until we are required to do so."

Hubka v. Pennfield Township, 494 N.W.2d 800 (Mich. Ct. App. 1992). Court applied modified subject matter test.

Leer v. Chicago, M., St. P. & P. Ry., 308 N.W.2d 305, 308-09 (Minn. 1981). Court noted various tests for determining the identity of a corporate client, but failed to adopt any of them. Court held that the statements of an employee regarding an accident witnessed by the employee were not protected under any of the tests.

In re Ford Motor Co., 110 F.3d 954, 965 (3d Cir. 1997). Applying Pennsylvania law, the court held that a corporation may claim the privilege only for communications between its counsel and employees who have authority to act on its behalf.

One authority reports that as of 1997 eight states had explicitly adopted Upjohn (Alabama, Arizona, Arkansas, Colorado, Nevada, Oregon, Texas, and Vermont), eight states continued to apply the control group test (Alaska, Hawaii, Illinois, Maine, New Hampshire, North Dakota, Oklahoma, and South Dakota), and six follow a subject matter test (California, ***38** Florida, Kentucky, Louisiana, Mississippi, and Utah), while the highest courts of twenty-eight states had not definitively addressed the issue (Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, Wyoming, Georgia, Massachusetts, Michigan, Minnesota, Washington, and Wisconsin). See Brian E. Hamilton, Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege, 1997 Ann. Surv. Am. L. 629, 633-640 (1997).

c. Government Agencies As Clients.

Unlike private attorneys, attorneys for government agencies owe a duty to the public to ensure that laws are obeyed by governmental entities. Therefore, when the attorney-client privilege is asserted to prevent the production of communications between a government agency and the agency's attorney, special policy considerations may be taken into account by courts determining whether the privilege should apply. See In re Lindsey (Grand Jury Testimony), 158 F.3d 1263, 1272 (D.C. Cir. 1998).

For example, in Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) the Sixth Circuit found that "[t]he recognition of a governmental attorney-client privilege imposes the same costs as are imposed in the application of the corporate privilege, but with an added disadvantage. The governmental privilege stands squarely in conflict with the strong public interest in open and honest government." In Reed, the court held that communications that took place in a meeting between city council members and the city's attorney regarding the fire department's employee promotion practice were not protected by the attorney-client privilege because, in that context, the council members "were not clients at a meeting with their lawyer. Rather, they were elected officials investigating the reasons for executive behavior." Id. at 357.

The interest against a government attorney-client privilege is particularly prevalent in cases that involve allegations of criminal wrongdoing by public officials. In In re Lindsey (Grand Jury Testimony), 158 F.3d 1263, 1272 (D.C. Cir. 1998), while defining "the particular contours of the government attorney-client privilege", the D.C. Circuit found that "[w]ith respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar." In this case,

the court considered whether a White House attorney may refuse to appear before a federal grand jury to answer questions about possible criminal conduct of government officials within The Office of The President. Id. at 1110. The court rejected the White House attorney's attempt to assert the attorney-client privilege, concluding that the duty of government attorneys to ensure that laws be faithfully executed and the duty to report possible criminal violations pursuant to the Freedom of Information Act, 28 U.S.C. ß 535(b) (1994), weighed against recognition of a governmental attorney-client privilege in a Federal grand jury proceeding. Id.. See also In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997) ("We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental ***39** attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials.").

2. Defining the Lawyer

The second category of privileged persons is comprised of lawyers. See generally 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5480 (1986); Rest. 3d ß 72 cmt. e. Generally, courts have defined a "lawyer" for purposes of the attorney-client privilege as "a member of the bar of a court." See Allen v. West Point-Pepperell, Inc., 848 F. Supp. 423, 427 (S.D.N.Y. 1994). However, most courts hold that the attorney need not be a member of the local bar in order to claim the privilege; so long as the attorney is admitted to practice in some state or county. See Paper Converting Mach. Co. v. FMC Corp., 215 F. Supp. 249, 251 (E.D. Wis. 1963); Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 465 (S.D.N.Y. 1956).

a. In-House vs. Outside Counsel

Theoretically, for the purpose of asserting the attorney-client privilege, the determination of who is the attorney is straightforward, and the privilege treats in-house counsel and outside counsel equally. See:

Shelton v. American Motors Corp., 805 F.2d 1323, 1326 (8th Cir. 1986). In-house counsel is treated no differently than outside counsel.

In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984). Status as in-house counsel does not dilute privilege, but does require a clear showing that communications with in-house counsel were in a professional legal capacity.

Hartz Mountain Indus., Inc. v. Commissioner, 93 T.C. 521 (T.C. 1989). In-house counsel is treated the same as private counsel.

In re LTV Sec. Litig., 89 F.R.D. 595, 601 (N.D. Tex. 1981). Upjohn laid to rest suggestions that in-house counsel are to be treated differently from outside counsel with respect to activities in which they are engaged as attorneys.

Rossi v. Blue Cross & Blue Shield of Greater N.Y., 540 N.E.2d 703 (N.Y. 1989). In-house counsel is treated the same as outside counsel.

However, several courts in the last fifteen years have made it clear that they do treat in-house counsel differently when assessing the assertion of privilege. The fact that in-house counsel often plays multiple roles in the corporation has caused many courts to apply heightened scrutiny in determining whether the elements necessary for the privilege have been established. See Privilege Applies Only To Communications Made For The Purpose Of Securing Legal Advice ß I(D), infra.

In-house counsel can also be treated differently when determining whether the privilege has been waived. Generally, since the privilege belongs to the client, courts are ***40** unwilling to allow counsel to waive the privilege without implied, actual or apparent authority from the client. See Attorney Authority to Waiver Privilege ß I(G)(4), infra. However, since in-house counsel are agents of the organization itself, some courts have found that in- house counsel is capable of waiving the privilege for the organization. See Velsicol Chem. Corp. v. Parsons, 561 F.2d 671, 674 (7th Cir. 1977); In re Grand Jury Subpoenas Dated Dec. 18, 1981, 561 F. Supp. 1247, 1254 n.3 (E.D.N.Y. 1982).

b. Specially Appointed Counsel

The definition of a lawyer generally includes specially-appointed counsel. However, only communications to and from specially-appointed counsel acting in a legal capacity are entitled to protection. In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1036-37 (2d Cir. 1984); In re Grand Jury Proceedings, 658 F.2d 782, 784 (10th Cir. 1981). Where an attorney serves solely as an investigator and not as a legal advisor, the communications are not privileged. For example, in SEC v. Canadian Javelin Ltd., 451 F. Supp. 594 (D.D.C.), vacated, No. 76-2070 1978 WL 1139 (D.C. Cir. Jan. 13, 1978) (per curiam), the court held that no attorney-client relationship existed between the corporation and its special counsel. Id. at 596. Canadian Javelin was subject to an injunction which named an attorney as special independent counsel to the corporation's compliance committee. The

injunction gave the special counsel the obligation to review all information disseminated by the corporation, to take all reasonable steps to ensure compliance with the decree, and to notify the SEC and the corporation's board of directors in the event of non-compliance. Id. at 596. The injunction was silent as to the attorney-client privilege. Id. In its suit, the SEC moved for an order to compel deposition testimony from this specially appointed attorney. Id. at 595. The Canadian Javelin court concluded that no attorney-client relationship existed between the corporation and the special independent counsel. The court noted that special counsel was not appointed to render advice, but to monitor compliance. The court also observed that the corporation did not have any legitimate expectation of confidentiality because special counsel was obligated to disclose the corporation's activities to the SEC. Id.

A similar result was reached in a slightly different factual setting in Osterneck v. E.T. Barwick Industries, Inc., 82 F.R.D. 81 (N.D. Ga. 1979). In Osterneck, private party plaintiffs subpoenaed attorneys who had acted as special counsel to Barwick pursuant to an SEC consent decree. Id. at 82-83. The decree provided that the disclosure of any information or materials to the special counsel did not constitute a waiver of the attorney-client privilege. It further provided that any privileged material would be released to the SEC only upon a judicial determination that such disclosure would not constitute a waiver. Id. at 83. The attorneys who had acted as special counsel to Barwick refused to comply with the plaintiffs' subpoenas on the ground that the material requested was privileged. Id. However, the court granted plaintiffs' motion to compel the depositions when it concluded that special counsel was not retained to render legal advice but to investigate and report the facts. Id. at 85. In support of its holding, the court noted that only a very minute portion of the final report of special counsel consisted of legal advice. Id. at 85-86. See:

***41** Henderson v. National R.R. Passenger Corp., 113 F.R.D. 502 (N.D. Ill. 1986). Communications between employees and an attorney acting as an EEOC representative, who investigated claims and reported solely to the Amtrak legal department, were not privileged because the attorney did not work for Amtrak's benefit, and its employees "had no expectation of privacy." Id. at 509.

Some courts have taken a more expansive policy-based approach, and protect even non-legal investigative communications. One court has extended the privilege to an officer serving a hybrid role as privately retained counsel and government investigator. In In re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981), the court refused to allow discovery of the contents of communications with a "special officer" who was appointed pursuant to a consent decree with the SEC. Id. at 614-22. The consent decree required the corporation to cooperate in the officer's duty to furnish the SEC with all materials or information in his possession. Id. at 614-15. The corporation did not control the officer's activities. The court concluded that the bulk of the officer's work would be protected from disclosure under either role as counsel or investigator. Id. at 615-18. Although recognizing that the material was not privileged under traditional theories, the court emphasized the utility of special officers in SEC investigations and the benefits of having such officers. The court recognized that denying a claim of privilege in these cases would have discouraged corporations from self-investigation and would force the SEC to commit significantly greater resources to its investigations. Id. at 618-622.

For suggestions on maximizing the protection of the attorney-client privilege in this context see Recommendations for Preserving the Attorney-Client Privilege ß III, infra.

c. Accountants As Privileged Parties

The IRS Restructuring and Reform Act of 1998 purports with some limitations to extend the common-law attorney-client privilege to "federally authorized tax practitioner[s]" providing "tax advice" by amending the Internal Revenue Code ß 7525. As of the publishing date, only three reported federal cases cite the law, and only the Seventh Circuit has provided any analysis. See United States v. Frederick, 182 F.3d 496, 502 (7th Cir. 1999), cert. denied, 528 U.S. 1154, 120 S. Ct. 1197 (2000). See also Cavallaro v. United States, 153 F. Supp. 2d 52, 57 n.2 (N. Mass. 2001) (noting the existence of the law and that the case in question arose before its effective date); United States v. Randall, 194 F.R.D. 369, 372 n.3 (D. Mass. 1999) (same).

The effect of I.R.C. ß 7525 may not be substantial because it only attaches where an accountant, authorized to practice before the Internal Revenue Service, is involved in a civil matter before the Service or a federal court where the United States is a party, and then only applies to the same extent the common-law privilege would apply. Thus, it is only when an accountant is performing an attorney's work that the attorney-client privilege would apply. See Frederick, 182 F.3d at 502 ("Nothing in the new statute suggests that these nonlawyer practitioners are entitled to privilege when they are doing other than lawyers' work; and so the statute would not change our analysis even if it

were applicable to this case, which it is not, ***42** because it is applicable only to communications made on or after July 22, 1998, the date the statute was enacted."). See also Accountants as Privileged Agents, I.B.3.(b.), supra.

3. Defining Privileged Agents

a. Privileged Agents in General

In addition to clients and lawyers, the definition of privileged persons includes agents of the client and the lawyer who assist in the representation. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950); Claxton v. Thackston, 559 N.E.2d 82 (Ill. App. Ct. 1990) (communications between insured and insurer, and insured and agents of insurer are protected by privilege). Privileged agents include non-employees such as paralegals and investigators. The presence of these third party agents does not waive the privilege if their presence was to permit the client and lawyer to communicate effectively or to further the representation in some way. In re Grand Jury Investigation, 918 F.2d 374, 386 n.20 (3d Cir. 1990) (presence of agent does not abrogate privilege); Fed. R. Evid. 503(b)(4). Privileged agents are sometimes grouped into two categories: communicating and representing agents. See Rest. 3d ß 70 cmts. f, s, 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5483 (1986) (discussing communicating and source agents).

Both the lawyer and client typically will have communicating agents. These agents enable the lawyer and client to communicate effectively. 8 J. WIGMORE, EVIDENCE ß 2317 (J. McNaughton rev. 1961). The most common examples of communicating agents are employees such as couriers and secretaries. The presence of the communicating agent must be reasonably necessary or the privilege is waived. C. MCCORMICK, EVIDENCE ß 91 (J. Strong 4th ed. 1992); 24 C. Wright & K. Graham, Federal Practice & Procedure ß ß 5485-86 (1986). See also Kevlik v. Goldstein, 724 F.2d 844, 849 (1st Cir. 1984).

Representing agents include confidential assistants of the lawyer such as a file clerk or paralegal assistant. These agents are necessary for the operation of the lawyer's business. See United States v. Kovel, 296 F.2d 918, 921-22 (2d Cir. 1961) (secretaries, paralegals, legal assistants, stenographers or clerks are privileged agents); C. MCCORMICK, EVIDENCE ß 91 (J. Strong 4th ed. 1992); 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5482 (1986). Representing agents can also include any subordinate or agent of the attorney if the attorney uses the agent to facilitate legal advice and supervises the agent's actions. See Rest. ß 70 cmt. g. In general, an expert adviser retained by the attorney to aid the client would also fit within the group of privileged agents if consulted for the purpose of improving the client's comprehension of legal advice rendered by the attorney. Kovel, 296 F.2d at 921-22 (accountant hired by tax law firm to assist in interpreting client conversations was considered privileged agent); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950); Rest. ß 70 cmt. fIllus. 5. However, communications between an attorney and an expert advisor that are not intended to improve a client's comprehension of the legal advice but, instead, are used by the attorney to render legal advice, may not be protected by the ***43** attorney-client privilege. United States v. Ackert, 169 F.3d 136, 140 (2d Cir. 1999) (privilege did not attach to communications between counsel and advisor because advisor was not acting as an interpreter or translator to improve client's comprehension of legal advice). The person asserting the privilege has the burden of demonstrating that the agent was consulted for a professional reason and that the presence of the agent was reasonably necessary to further the client's interests on the particular matter. See von Bulow v. von Bulow, 811 F.2d 136, 146-47 (2d Cir. 1987). Compare:

In re Bieter Co., 16 F.3d 929 (8th Cir. 1994). Independent contractor cooperated with plaintiff's attorneys at plaintiff's direction for the purpose of securing legal advice. Court found the independent contractor acted as a representative of plaintiff and could invoke plaintiff's privilege for these communications.

In re Grand Jury Proceedings Under Seal, 947 F.2d 1188 (4th Cir. 1991). Client took his accountant with him to a meeting with a prospective attorney. The court held that the accountant was a privileged agent since his function was to assist the client in obtaining effective legal services.

United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989). Communications made to an accountant hired to assist the lawyer in a joint- defense are privileged if confidentiality is maintained.

United States v. McPartlin, 595 F.2d 1321, 1335-37 (7th Cir. 1979). Statement made to investigator employed by co-defendant's counsel is privileged.

Apex Mun. Fund v. N-Group Sec., 841 F. Supp. 1423 (S.D. Tex. 1993). Communications between a bond underwriter and its attorneys to assist the attorneys in preparing public offering statements were protected by the attorney-client privilege.

Clark v. City of Munster, 115 F.R.D. 609, 613 (N.D. Ind. 1987). Statement by client to an investigator hired by his attorney is privileged.

With:

In re Grand Jury Proceedings, Involving Thullen and Dvorak, 220 F.3d 568 (7th Cir. 2000). Court remanded case for further proceedings to determine whether accountants were hired by defense counsel to prepare tax returns or to assist counsel in providing legal advice. Material transmitted to an attorney or the attorney's agent for the purpose of using that information on a tax return is not privileged. On the other hand, information transmitted to an attorney or the attorney's agent is privileged if it was not intended for subsequent appearance on a tax return and was transmitted for the sole purpose of seeking legal advice. Documents used in both preparing tax returns and litigation are not privileged.

Claude P. Bamberger Int'l, Inc. v. Rohm and Haas Co., Civ. No. 96-1041, 1997 U.S. Dist. Lexis 22770 at *6 (D.N.J. Aug. 12, 1997). Memorandum summarizing communications between investigator and client's employees was not privileged because the purpose of the investigation was to search for business improprieties within the corporation rather than securing legal advice.

United States v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995). Communications between in-house counsel and accountant held not privileged where purpose was to seek tax advice rather than legal advice.

Samuels v. Mitchell, 155 F.R.D. 195 (N.D. Cal. 1994). Court held that privilege was waived where attorneys shared documents with accountants for purpose of keeping them abreast of developments in arbitration rather than for purposes of facilitating provision of legal advice.

Dabney v. Investment Corp. of Am., 82 F.R.D. 464, 465-66 (E.D. Pa. 1979). Privilege not available for communications with a law student who was not acting under the direct supervision of a member of the bar.

***44 b. Accountants As Privileged Agents**

Though generally not considered to be privileged parties, accountants are considered to be privileged agents where the accountant's role is to facilitate communication between the attorney and the client. This role is analogous to that of an interpreter; where the attorney and client "speak different languages," and the aid of an accountant will help the lawyer to understand the client's situation, the accountant is a privileged agent. See United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). Where a conversation with an agent is merely helpful to the client's defense, and does not help the attorney to understand the client's communication itself, the third-party's role is not that of a privileged agent. See United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999). Preparation of tax returns, for example, is an accounting function not meant to facilitate attorney-client communications. Communications with accountants for the purpose of filing out tax forms are not, therefore, privileged. See In re Grand Jury Proceedings, Involving Thullen and Dvorak, 220 F.3d 568, 571 (7th Cir. 2000) (holding that documents used both in preparation of tax returns and in litigation are not privileged). See also United States v. Frederick, 182 F.3d 496 (7th Cir. 1999), cert. denied, 528 U.S. 1154, 120 S. Ct. (2000). See also Accountants as Privileged Parties, I.B.2.(c), supra.

C. COMMUNICATIONS MUST BE INTENDED TO BE CONFIDENTIAL

1. Confidentiality in General

To remain privileged a communication must be made in confidence and kept confidential. The test is (1) whether the communicator, at the time the communication was made, intended for the information to remain secret from non- privileged persons, and (2) whether the parties involved maintained the secrecy of the communication. See Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992) (privilege protects verbal and written communications conveyed in confidence for purpose of legal advice); In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) (party must not be careless with confidentiality or the privilege will be waived); In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984) (party must intend to keep communication secret or privilege is waived).

Confidentiality is not destroyed because a non-privileged person knows a communication was made or independently knows the contents of the communication. See In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984) (disclosure of information contained in privileged communication is treated differently than disclosure of the communications themselves and may not waive the privilege); NCK Org., Ltd. v. Bregman, 542 F.2d 128, 133 (2d Cir. 1976) (noting in dictum that the privilege is not destroyed because the information in the privileged communication is known by an adversary). In fact, the contents of the communications need not themselves be secrets. In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 388-90 (D.D.C. 1978). Similarly, the protection of the privilege is not lost even if the receiving person knew the information before the communication was made.

***45** Instead the key is whether the communicating person intended only the receiving attorney or privileged agent

to learn of the contents as a result of the communication. See:

In re Grand Jury 83-2 John Doe No. 462 (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984). If client communicated information to attorney with the understanding it would be revealed to others, no confidentiality exists and the information is not protected by the privilege. In addition, the details underlying the communicated data will also not be privileged.

In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1036 n. 3 (2d Cir. 1984). Privilege will extend to draft memoranda containing confidential communications even though when put into a final version the information may be sent to third parties.

In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984). Privilege never attached to material because client gave information to the attorney intending that it be distributed to the public in a prospectus.

Frieman v. USAir Group, Inc., Civ. A. No. 93-3142, 1994 WL 719643 (E.D. Pa. Dec. 22, 1994). Only statements actually disclosed to non-privileged parties lose protected status.

Apex Mun. Fund v. N-Group Sec., 841 F. Supp. 1423, 1428 (S.D. Tex. 1993). Privilege as to statements made to an attorney for the purpose of preparing a public offering document is waived only to the extent that information in them actually appears in public documents.

Smith v. Armour Pharm. Co., 838 F. Supp. 1573 (S.D. Fla. 1993). Applying Florida law, court found that the fact that a memorandum from in-house counsel discussing the inevitability of litigation was widely circulated did not by itself provide sufficient grounds to negate the privilege.

United States v. Rivera, 837 F. Supp. 565 (S.D.N.Y. 1993). Information provided by aliens to law firm in order to prepare amnesty application was not privileged.

Gottlieb v. Wiles, 143 F.R.D. 241 (D. Colo. 1992). Interviews of corporate officers conducted by counsel were not privileged when the interviews were intended to be used in as part of an investigative report and the interviewees were notified of this fact. Neither the interviewers or interviewees had expectation that the interview information would remain confidential.

Schenet v. Anderson, 678 F. Supp. 1280, 1283 (E.D. Mich. 1988). Client provided information to his attorney so it could be included in a document to be disclosed. Court found that the information which was not actually disclosed in the final document remained protected.

Kobluk v. University of Minnesota, 574 N.W.2d 436, 444 (Minn. 1998). Draft of letter was protected because the draft was sent to attorney for the purpose of obtaining legal advice and the surrounding circumstances indicated that the draft was intended to be confidential.

Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584 (Del. Ch. 1986). Draft of publicly filed document can be privileged since confidential communications might be determined from the differences between the draft and final versions.

But see:

United States v. Lawless, 709 F.2d 485 (7th Cir. 1983). Information communicated to an attorney in order to prepare a document to file with a government agency is not privileged even if information not made part of the filing.

Disclosure in the presence of non-privileged persons destroys confidentiality and prevents the privilege from attaching. See United States v. Evans, 113 F.3d 1457, 1462-63 (7th Cir. 1997) ***46** (holding conversation between client and lawyer in front of client's friend present for emotional support not privileged); United States v. Bernard, 877 F.2d 1463, 1465 (10th Cir. 1989) (voluntary disclosure to third parties waives privilege); Sylgab Steel & Wire Corp. v. Imoco--Gateway Corp., 62 F.R.D. 454, 457-58 (N.D. Ill. 1974), aff'd, 534 F.2d 330 (7th Cir. 1976); C. MCCORMICK, EVIDENCE ß 91 (J. Strong 4th ed. 1992); Atwood v. Burlington Indus. Equity, Inc., 908 F. Supp. 319, 323 (M.D.N.C. 1995) (communications between attorney and client in the presence of a union representative held not privileged); cf. Charles Woods Television Corp. v. Capital Cities/ABC, Inc., 869 F.2d 1155 (8th Cir. 1989) (privileged communications between a client and lawyer do not become admissible at trial merely because the client's witnesses testify generally about the same subject area).

2. Confidentiality Within Organizations

For organizational clients, the courts have permitted "need-to-know" agents to have access to privileged documents without destroying confidentiality and relinquishing the privilege. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980); Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977); REST. 3D ß 73 cmt. g. The group of "need-to-know" agents is comprised of employees of the organization who reasonably need to know of the communication in order to act in the interest of the corporation. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) (applying a "need-to-know" test to find that indiscriminate circulation of a memorandum constituted disclosure); 24 C. Wright & K. Graham, Federal Practice &

Procedure ß 5484, at 380 (1986). In practice, "need-to-know" agentswill consist primarily of persons with responsibility for accepting or rejecting the lawyer's advice or acting on the recommendations of the lawyer. All those employees who would be held personally liable either financially or criminally, or who would benefit from the information (such as partners), will also generally be considered "need-to- know" agents. Rest. 3d ß 73 cmt. g.

Under the "need to know" doctrine, sharing documents with lower-echelon employees who need to know the information does not show an indifference to confidentiality and does not waive the protection of the privilege. See Upjohn Co. v. United States, 449 U.S. 383 (1981); 2 J. Weinstein & M. Berger, Evidence ∂ 503(b)[04] (1986). See also:

In re Grand Jury Subpoenas Dated Dec. 18, 1981, 561 F. Supp. 1247, 1254 (E.D.N.Y. 1982). Disclosure allowed to low-level employee who had direct responsibility over the subject matter.

Marriott Corp. v. American Academy of Psychotherapists, Inc., 277 S.E.2d 785, 790-92 (Ga. Ct. App. 1981). Decided less than one month after Upjohn and without citing it, the court set forth rules concerning the corporate client. In its test, the court set limits on the privilege which required that the communication not be disseminated "beyond those persons who, because of the corporate structure, need to know its contents." Id. 791-92.

Archer Daniels Midland Co. v. Koppers Co., 485 N.E.2d 1301, 1303 (Ill. App. Ct. 1985). Court upheld "need to know" sharing under the control group test.

***47 3. Internet E-Mail and Confidentiality**

The intent of the communicating party to maintain confidentiality may be inferred from the facts surrounding each communication. In general, indifference to confidentiality will be shown by the use of a medium in which the communicator knows it is impossible to exclude other listeners (such as radio). See REST. 3D ß 71 cmt. c. Similarly, a person who fails to take feasible precautions demonstrates an indifference to confidentiality. Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 n. 8 (N.D. Ill. 1982) (reasonable precautions must be taken to guard confidentiality); Blackmon v. State, 653 P.2d 669 (Alaska Ct. App. 1982) (attorney-client conversation overheard by a state trooper remained privileged where the circumstances showed that all reasonable precautions had been taken); Waste Management, Inc. v. International Surplus Lines Ins. Co., 596 N.E.2d 726 (Ill. App. Ct. 1992) (client did not intend letter to remain confidential as evidenced by the fact that it was distributed without any warnings of confidentiality and had been placed in the public record in a prior case); REST. 3D ß 71 cmt. d.

E-mail presents two challenges to the confidentiality of communications and the attorney-client privilege. Like other forms of communication, internet e- mail is susceptible to breaches of security in transmission. In addition, the ease with which e-mail is copied, transmitted to large numbers of people, and sometimes mistransmitted due to operator error, presents unique challenges to the confidentiality of e-mail communications.

Perhaps in response to these concerns, some early state bar decisions took the position that the use of e-mail violated the attorney's duty of confidentiality. Later opinions have generally expressed more comfort with the use of e-mail as the technology has become better understood. See ABA Formal Ethics Opinion 99-413, Protecting the Confidentiality of Unencrypted E-mail, n. 40 (1999) (noting such opinions). Compare Pa. Bar Ass'n Comm. on the Legal Ethics Op. 97-130 (1997) (rejecting the use of unencrypted e-mail absent client's consent); Iowa Bar Ass'n Op. 1997-1 (1997) (sensitive material should not be transmitted over non-secure networks); N.C. State Bar Op. 215 (1995) (cautioning against the use of e-mail); with D.C. Bar Op. 281 (1998) (finding the use of unencrypted e-mail to be consistent with confidentiality); New York State Bar Ass'n Comm. on Professional Ethics Op. 709 (1998) (same); Ill. State Bar Ass'n Advisory Op. on Professional Conduct No. 96-10 (1997) (absent "extraordinary" sensitivity, use of e-mail is consistent with the duty of confidentiality).

Though technologically susceptible to interception, e-mail is generally considered to be no less secure than other forms of communication, such as facsimile, telephone, and mail transmission, which are already utilized with an expectation of privacy. See ABA Formal Ethics Opinion 99-413 (1999). See also United States v. Maxwell, 45 M.J. 406, 417-19 (C.A.A.F. 1996) ("The fact that an unauthorized 'hacker' might intercept an e-mail message does not diminish the legitimate expectation of privacy in any way."). In reviewing various communications technologies, the ABA ethics committee compared e-mail favorably to facsimile technology, noting the security each offers in transmission, but the ease with which ***48** documents could be misdirected due to operator error. The ABA observed that "[a]uthority specifically stating that the use of fax machines is consistent with the duty of confidentiality is absent, perhaps because... courts assume the conclusion to be self-evident." Id. The same is likely true of e-mail, to which courts have extended privileged status without differentiation from other "documents." See, e.g., In re Grand

Jury Proceeding, 43 F.3d 966, 968 (5th Cir. 1994) (considering e-mail messages along with other documents); McCook Metals L.L.C. v. Alcoa, Inc., 192 F.R.D. 242, 255 (N.D. Ill. 2000) (holding e-mail correspondence between attorneys to be protected under the attorney-client privilege).

In the fourth amendment context, courts have held that the transmission of e- mail occurs with a reasonable expectation of privacy, but once received by the intended party, such an expectation disappears. Thus, an e-mail may be sent without an expectation of interception, but no such expectation as to the recipient's actions is appropriate. See United States v. Charbonneau, 979 F. Supp. 1177, 1184 (S.D. Ohio 1997); United States v. Maxwell, 45 M.J. 406, 417-19 (C.A.A.F. 1996).

The prudent attorney should therefore feel comfortable in taking advantage of the relative security and ease of use of e-mail technology, but bear in mind the risks associated both with accidental transmission to an unintended party and the ease with which the intended party may forward the e-mail to unprivileged persons. This concern may be particularly acute for in-house counsel, who may regularly send e-mail messages to large user or distribution groups that may include non-privileged employees.

Many attorneys have adopted the practice of placing a boiler-plate confidentiality notice on fax and e-mail transmissions. Such notices may prove valuable in the case of document mistransmission where another attorney becomes the unintended recipient. Several courts have held that an attorney's inspection of obviously privileged documents may lead to varying degrees of exclusion at trial, and potentially to sanctions as well. See Resolution Trust Corp. v. First America Bank, 868 F. Supp. 217 (W.D. Mich. 1994) (lawyer receiving materials on their face subject to attorney-client privilege has a duty to return them without examining further; ordering destruction of document and all copies, but noting that Michigan state rules would allow their introduction for impeachment); American Express v. Accu-Weather, Inc., Case No. 6485, 92 Civ. 705 1996 WL 346388 (S.D.N.Y. June 25, 1996) (where attorney received call indicating that soon to be delivered Federal Express package contained privileged information, and that the package should be returned, subsequent review of package and failure to return were sanctionable). Thus, to the extent that such boilerplate does put a receiving attorney on notice that he is in possession of privileged material, he may have an ethical obligation to cease review of the material and return it to the transmitting party.

***49 D. PRIVILEGE APPLIES ONLY TO COMMUNICATIONS MADE FOR THE PURPOSE OF** SECURING LEGAL ADVICE

1. Legal Purpose

The final requirement to establish the privilege is that the protected communication was made for the purpose of securing legal advice or assistance. See In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992) (privilege protects communications made in confidence to lawyer to obtain legal counsel). But see In re Lindsey (Grand Jury Testimony), 158 F.3d 1263, 1272 (D.C. Cir. 1998) (advice given by White House counsel to Office of the President "on political, strategic, or policy issues ... would not be shielded from disclosure by the attorney-client privilege.") A lawyer's initial consultation with a prospective client seeking legal assistance generally satisfies this requirement. United States v. Dennis, 843 F.2d 652, 656 (2d Cir. 1988).

Courts rely on a variety of factors in determining whether a legal purpose underlies a communication, including:
(1) the extent to which the attorney performs legal and non-legal work for the organization,
(2) the nature of the communication, and
(3) whether or not the attorney had previously provided legal assistance relating to the same matter.
See, e.g., 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5478 (1986); Rest. 3d ß 72 cmt. c. Communications motivated by business or financial purposes are not privileged. To establish the requisite legal purpose, the communication must be to or from a lawyer acting in her professional capacity as a lawyer. Moreover, the privilege protects only communications that relate to the specific matter on which the attorney's services have been sought, not unrelated communications. See:

Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992). Privilege protects confidential communications made to an attorney in a professional capacity.

United States v. Tedder, 801 F.2d 1437, 1442-43 (4th Cir. 1986). Although lawyer was a member of the firm representing the client, communications were made in the role of a friend rather than as an attorney and were unprotected.

United States v. Wilson, 798 F.2d 509, 513 (1st Cir. 1986). Lawyer functioned as a negotiator for a business deal rather than as a lawyer, and therefore the communications were unprivileged.

***50** Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., No. 93 Civ. 5125, 1996 WL 29392 at * 4 (S.D.N.Y. Jan. 25, 1996). The attorney-client privilege did not apply to communications made between an in-house attorney and his corporate client while the attorney was acting as a contract negotiator because the attorney was acting in a business capacity rather than executing a traditional function of an attorney.

In re Air Crash Disaster at Sioux City, 133 F.R.D. 515, 519 (N.D. Ill. 1990). No privilege applies if the role of the lawyer is minor or was intended merely to immunize documents from production.

E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 718 A.2d 1129, 1141- 42 (Md. 1998). Communications between corporation's in-house counsel and debt collection agency that were conducted for the purpose of collecting on a debt owed to the corporation were not privileged. The debt collection was a business function and a corporation cannot obtain protection for such business communications by "routing" those communications through its legal department.

2. Cases of Mixed Purpose

Often a problem of mixed purposes arises. For the privilege to apply in such cases, the communication between client and lawyer must be primarily for the purpose of providing legal assistance and not for another purpose. As long as the client's purpose was to gain some advantage from the lawyer's legal skills and training, the services will be considered legal in nature, despite the fact the client may also get other benefits such as business advice or friendship. See:

United States v. Bornstein, 977 F.2d 112 (4th Cir. 1992). Preparation of tax returns does not ordinarily constitute legal advice within the privilege. However, accounting services that are ancillary to legal advice may be privileged, and preparation of tax returns can fall within this area. Court remanded case to determine whether the defendant benefitted more from the attorney's services as an attorney or as an accountant-tax preparer. For other tax return cases see In re Grand Jury Subpoena Duces Tecum, 697 F.2d 277, 280 (10th Cir. 1983), and the cases cited therein.

Simon v. G.D. Searle & Co., 816 F.2d 397, 402-04 (8th Cir. 1987). Business documents were not privileged because they were provided to lawyer solely to keep her apprised of business matters.

In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984). To invoke the privilege there must be a clear showing that the communications with in-house counsel were in a legal rather than business capacity.

General Elec. Capital Corp. v. DirectTV, Inc., No. 3:97 CV 1901, 1998 U.S. Dist. LEXIS 18940 (D. Conn. Aug. 19, 1998). "When he acts as an advisor, the attorney must give predominantly legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice.... in the case where a lawyer responds to a request not made primarily for the purpose of securing legal advice, no privilege attaches to any part of the document."

United States v. Chevron, No. C-94-1885, 1996 U.S. Dist. LEXIS 4154 at * 6-7 (N.D. Cal. Mar. 13, 1996). A party seeking to withhold discovery based on the attorney-client privilege must prove that all communications it seeks to protect were made "primarily for the purpose of generating legal advice." "No privilege can attach to any communication as to which a business purpose would have served as a sufficient cause, i.e., any communication that would have been made because of a business purpose, even if there had been no perceived additional interest in securing legal advice. If the document was prepared for purposes of simultaneous review by legal and nonlegal personnel, it cannot be said that the primary purpose of the document is to secure legal advice."

***51** Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992). Privilege may be asserted for a meeting which was scheduled for a purpose other than facilitating the provision of professional legal services to the client.

Dunn v. State Farm Fire & Cas. Co., 122 F.R.D. 507, 509 (N.D. Miss. 1988), aff'd, 927 F.2d 869 (5th Cir. 1991). Merely assigning an attorney investigative tasks does not destroy his ability to make privileged communications.

In re Air Crash Disaster at Sioux City, 133 F.R.D. 515, 523 (N.D. Ill. 1990). Documents that do not seek legal advice and documents that seek both legal and non-legal advice are not privileged.

J.P. Foley & Co. v. Vanderbilt, 65 F.R.D. 523 (S.D.N.Y. 1974). When an attorney acts as a negotiator or business agent for the client, confidential communications are not privileged.

Lee v. Engle, No. Civ. A. 13323, 1995 WL 761222 (Del. Ch. Dec. 15, 1995) . Drafts of board meeting minutes and publicly filed documents protected because changes between the draft and final product may reflect confidential communication.

While the communication must have a legal purpose, the attorney-client privilege is not lost merely because the communication contains some non-legal information. See:

Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869 (5th Cir. 1991). Insurer's attorneys conducted an investigation

into the cause of a fire. Court found investigative tasks were related to the rendering of legal services and thus any communications involving the investigation were privileged.

Status Time Corp. v. Sharp Elec. Corp., 95 F.R.D. 27, 31 (S.D.N.Y. 1982). Communications of exclusively technical information to patent attorneys not privileged. Documents containing considerable amounts of technical information will be privileged if they are concerned primarily with a request for a provision of legal advice.

Crane Co. v. Goodyear Tire & Rubber Co., 27 Fed. R. Serv. 2d (Callaghan) 1058, 1059-60 (N.D. Ohio 1979). Inclusion of technical information in a communication to an attorney does not foreclose the privilege.

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (Mass. 1950). The privilege is not lost simply because some non-legal communications are included.

But the existence of the privilege and its protection of legal communications will not bring the non-legal communications within the privilege. See Thurmond v. Compaq Computer Corp., 198 F.R.D. 475, 483 (E.D. Tex. 2000). The attorney-client privilege does not reach facts within the client's knowledge, even if the client learned of those facts through communications with counsel.

When an attorney acts solely as a business advisor, negotiator, or scrivener, communications are not privileged since they do not have a legal purpose. In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984); United States v. Davis, 636 F.2d 1028 (5th Cir. 1981) (business adviser role is not privileged); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 517 (M.D.N.C. 1986); In re Diasonics Sec. Litig., 110 F.R.D. 570, 573 (D. Colo. 1986); SEC v. Gulf & W. Indus., Inc., 518 F. Supp. 675, 683 (D.D.C. 1981). Similarly, when a lawyer is merely providing factual information ***52** rather than legal advice, communications will not be protected. See Dawson v. New York Life Ins. Co., 901 F. Supp. 1362, 1366 (N.D. Ill. 1995).

Further, both the lawyer and the client must understand that the purpose is legal advice before the privilege will apply. See Pine Top Ins. Co. v. Alexander & Alexander Serv., Inc., No. 85 Civ. 9860, 1991 WL 221061 (S.D.N.Y. Oct. 7, 1991) (party asserting privilege must prove that both parties understood the conversation was for legal advice).

If a document is prepared for simultaneous review by legal and non-legal personnel, it is possible that the document will not be considered privileged. Courts have typically held that such documents were not prepared primarily for the purpose of providing legal advice. See:

United States v. Chevron, No. C-94-1885, 1996 U.S. Dist. LEXIS 4154 at * 6-7 (N.D. Cal. Mar. 13, 1996). If a document was prepared for purposes of simultaneous review by legal and nonlegal personnel, it cannot be said that the primary purpose of the document is to secure legal advice.

In re 3 Com Corp. Sec. Litig, No. C-89-20480, 1992 WL 456813 (N.D. Cal. Dec. 10, 1992) . Draft press release documents that were sent to counsel for review were not privileged since attorney's comments related to factual information and not legal advice.

North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511 (M.D.N.C. 1986). Court ordered production of documents drafted by non-legal management and sent to in-house counsel because, among other things, the documents were simultaneously sent to both legal and nonlegal personnel.

FTC v. TRW, Inc., 479 F. Supp. 160, 163 (D.D.C. 1979), aff'd, 628 F.2d 207 (D.C. Cir. 1980). Document that was prepared for legal and non-legal review was not considered to have been prepared primarily for purposes of obtaining legal advice.

Similarly, summary documents based on attorney-client communications, but which do not reveal any individual communications, may not be privileged if they were prepared for purposes other than securing legal advice. See:

Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987). The "risk management" documents prepared from privileged case reserve information for general business purposes were not privileged, at least to the extent that they revealed aggregate claims information and not individual privileged communications.

In re Hillsborough Holdings Corp., 132 B.R. 478 (Bankr. M.D. Fla. 1991). Privilege does not protect compilations of litigation data made by an attorney for business rather than legal purposes. Where counsel collected information on judgments against the company and insurance coverage, court held data were for the business purposes of accounting and insurance planning, and not for the purpose of seeking or providing legal advice.

The issue of mixed legal and business purposes arises frequently in the context of communications with in-house

counsel. The fact that in-house counsel often plays multiple roles in the corporation has caused many courts to apply heightened scrutiny in determining whether the elements of the attorney-client privilege have been established. While courts do not want to weaken the privilege, they are mindful that corporate clients could attempt to hide ***53** mountains of otherwise discoverable information behind a veil of secrecy by using in-house legal departments as conduits of otherwise unprivileged information. As a result, many courts impose a higher burden on in-house counsel to "clearly demonstrate" that advice was given in a legal capacity. See:

United States v. Adlman, 68 F.3d 1495 (2d Cir. 1995). In-house counsel who was also the company's Vice President for Taxes, resisted a summons served by the IRS for the production ofa preliminary and final draft of a memorandum prepared by the company's auditors. The court rejected counsel's assertion of the attorney-client privilege because counsel failed to demonstrate that the auditor's work in this instance was to provide legal rather than business advice. The court found that there was no contemporaneous documentation, such as a separate retainer agreement, supporting the position that the auditor, in this task alone, was working under a different arrangement from that which governed the rest of its work with the company.

Ames v. Black Entertainment Television, No. 98 Civ. 0226, 1998 U.S. Dist. LEXIS 18053 (S.D.N.Y. Nov. 18, 1998). In order to protect communications with in-house counsel, a company must meet the burden of "clearly showing" that in-house counsel "gave advice in her legal capacity, not in her capacity as a business advisor."

United States v. Chevron, No. C-94-1885, 1996 U.S. Dist. LEXIS 4154 at * 8-9 (N.D. Cal. Mar. 13, 1996). No presumption of privilege can be made with respect to documents generated by in-house counsel. "Some courts have applied a presumption that all communications to outside counsel are primarily related to legal advice." See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977). In this context, the presumption is logical since outside counsel would not ordinarily be involved in the business decisions of a corporation. However, the Diversified presumption cannot be applied to in-house counsel because in-house counsel are frequently involved in the business decisions of a company. While an attorney's status as in- house counsel does not dilute the attorney-client privilege (citing Upjohn), "a corporation must make a clear showing that in-house counsel's advice was given in a professional legal capacity."

Kramer v. Raymond Corp., No. 90-5026, 1992 U.S. Dist. LEXIS 7418 at *3- 4 (E.D. Pa. May 29, 1992). "The attorney-client privilege is construed narrowly. This is especially so when a corporate entity seeks to invoke the privilege to protect communications to in-house counsel. Because in-house counsel may play a dual role of legal advisor and business advisor, the privilege will apply only if the communication in question was made for the express purpose of securing legal not business advice."

Teltron, Inc. v. Alexander, 132 F.R.D. 394 (E.D. Pa. 1990). Teltron asserted the attorney-client privilege during the deposition of Siegel, who had been at various times Teltron's outside counsel, Executive VP and in- house counsel, and President. The court overruled assertions of privilege on the ground that Teltron had failed to meet its burden of proving that deposition questions sought legal advice rather than business advice on the ordinary business activities of the company. "As a general rule, an attorney who serves a client in a business capacity may not assert the attorney-client privilege because of the lack of a confidential relationship." When a corporation seeks to protect communications made by an attorney who serves the corporation in a legal and business capacity, the corporation "must clearly demonstrate" that advice was given in a professional legal capacity. This is to prevent a corporation from shielding business transactions "simply by funneling their communications through a licensed attorney."

3. Patents and Legal Advice

The majority rule prior to 1963 held that the attorney-client privilege did not extend to discussions between clients and patent attorneys because such attorneys were not regarded as being involved in "legal work." See McCook Metals, L.L.C. v. Alcoa, Inc., 192 F.R.D. 242, 248 (N.D. Ill. 2000); Zenith Radio Corp. v. Radio Corp. of America, 121 F. ***54** Supp. 792, 793 (D. Del. 1954). The Supreme Court's decision in Sperry v. Florida, 373 U.S. 379, 83 S. Ct. 1322 (1963) proved a watershed event, however, as the court detailed the capacities in which the patent attorney undertook to practice law.

Even after Sperry, however, the courts remained of two schools in extending the protection of the attorney-client privilege to information relayed to patent attorneys. In Jack Winter, Inc. v. Koratron Co., 50 F.R.D. 225 (N.D. Cal. 1970), the court held that factual information provided to an attorney as part of the patent prosecution process could not be protected by the privilege because such communications were simply made to be relayed to the Patent Office. Because the attorney acted as a mere "conduit" and lacked any discretion as to what information to pass on, there was no expectation of privacy in the communication, which precluded its privileged status. See id. at 228.

The Court of Claims, in Knogo Corp. v. United States, 213 U.S.P.Q. (BNA) 935 (Ct. Cl. 1980), took a more

expansive approach to the issue of attorney- client privilege in the patent context, holding that nearly all communications with such attorneys are privileged. See id. at 939. See also McCook, 192 F.R.D. at 250. The Knogo court reasoned that the patent attorney, in preparing the patent, is actively involved in securing the greatest possible protection for the client, and therefore the "conduit" theory oversimplified the attorney's role.

In In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 805-806 (Fed. Cir. 2000) , the Federal Circuit adopted the Knogo line of cases, holding that communications provided to a patent attorney for the purpose of obtaining legal advice, as embodied in an invention record, constitute protected communications. Even though the record contained portions not relevant to legal advice, such as the listing of prior art, the court held the entire communication protected, refusing to "dissect" the document to evaluate each part.

The Federal Circuit's decision in Spalding Sports is only controlling as to the other Circuits in matters unique to patent law. Thus, Spalding Sports is controlling with regard to documents, such as patent records, which only appear in the patent law context, but for other communications the procedural law of the individual Circuits will continue to control the availability of the privilege. See e.g., McCook, 192 F.R.D. at 251 (acknowledging Spalding Sports, and detailing the historic treatment of attorney-client privilege, but predicting that the Seventh Circuit will continue to apply a narrow construction to such issues). Nonetheless, the majority position is now that communications between clients and patent attorneys are protected to the same extent that the privilege would attach to conversations with non-patent attorneys. See, e.g., Softview Computer Products Corp. v. Haworth, Inc., No. 97 Civ. 8815, 2000 WL 351411, *2-3 (S.D.N.Y. Mar. 31, 2000) (following Spalding Sports); Messagephone, Inc. v. SVI Systems, Inc., No. 3-97- 1813H., 1998 WL 812397, *1 (N.D. Tex. Nov. 18, 1998) ("[T]he current and more widely accepted view is that communications between an inventor and his attorney are privileged to the same extent as any other attorney-client communication."); Applied Telematics, Inc. v. Sprint Communications, Inc., Civ. A. No. 94-4603, 1996 WL 539595, *2 (E.D. Penn. Sept. 18, 1996) ("The majority of courts have rejected the rationale ***55** of the [Jack Winter line of cases] and recognize that attorneys render legal advice in the traditional sense when helping inventors apply for patents.").

E. ASSERTING THE PRIVILEGE

1. Procedure for Asserting the Privilege

The proponent of the privilege must make a timely objection to the disclosure of a privileged communication before the communication is actually disclosed. Failure to object may have disastrous consequences for litigants because it may constitute a waiver of the privilege. See 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5507 (1986). See also:

Large v. Our Lady Of Mercy Medical Center, No. 94 Civ. 5986, 1998 WL 65995 at *4 (S.D.N.Y. Feb. 17, 1998). Producing privileged communications to opponent without noting objection to the production in a privilege log or in correspondence with the judge constituted waiver.

FDIC v. Ernst & Whinney, 137 F.R.D. 14, 19 (E.D. Tenn. 1991). Failure to object to the use of an inadvertently produced document constituted waiver.

Litton Sys., Inc. v. AT&T, 91 F.R.D. 574 (S.D.N.Y. 1981), aff'd, 700 F.2d 785 (2d Cir. 1983). Failure to assert the privilege constitutes waiver.

Baxter Travenol Lab., Inc. v. Abbott Lab., 117 F.R.D. 119, 120 (N.D. Ill. 1987). Failure to assert the privilege for several months when the party knew that inadvertently produced documents were in the hands of an opponent constituted waiver.

It is generally recognized that the privilege belongs to the client and that the client has the sole power to waive it. See Douglas v. DynMcDermott Petroleum Operations, Co., 144 F.3d 364, 372 (5th Cir. 1998) (in-house counsel breached ethical duties by revealing client confidences during the course of an investigation into alleged Title VII violations). However, an attorney may assert the privilege on the client's behalf. Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992).

A client will be prevented from invoking the privilege during discovery if (1) the client intends to waive the privilege later by using protected information at trial and (2) the opponent needs the information to defend against the revelations. See International Tel. and Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 186 (M. D. Fla. 1973).

A party asserting the privilege should provide an explanation of why the items are privileged and must prove the elements necessary to establish the privilege. United States v. Zolin, 491 U.S. 554 (1989); Hawkins v. Stables, 148

F.3d 379, 383 (4th Cir. 1998) (proponent of the privilege must prove all elements of the privilege are met); von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987) (proponent must prove all essential elements of the privilege); In re Unisys Corp. Retiree Medical Benefits ERISA Litig., No. MDL 969, 1994 WL 6883 (E.D. Pa. Jan. 6, 1994) (party invoking the privilege must establish that the elements ***56** of the privilege have been met); In re Perrier Bottled Water Litig., 138 F.R.D. 348, 351 (D. Conn. 1991) (same). Inadmissible evidence may be considered by the court while determining whether the preliminary facts of the privilege have been demonstrated by the proponent of the privilege. Fed. R. Evid. 104(a).

Blanket objections will not effectively assert the privilege. See Holifield v. United States, 909 F.2d 201, 203 (7th Cir. 1990) (blanket objection that the documents requested by the government in a subpoena were protected by the attorney-client privilege did not invoke the privilege); 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5507 (1986). For example, in Eureka Financial Corporation v. Hartford Accident and Indemnity Co., 136 F.R.D. 179, 186 (E.D. Cal. 1991), the District Court for the Eastern District of California found that the defendant's blanket objection to the discovery of privileged communications warranted sanctions against the defendant's counsel.

Mere conclusory assertions or vague representations of facts that are the basis for the privilege claim are also insufficient to meet the burden of establishing the attorney-client privilege. See United States v. Construction Prods. Research, Inc., 73 F.3d 464 (2d Cir. 1996) (if a party invoking a privilege does not provide sufficient detail -- through privilege log, affidavit or deposition testimony -- to demonstrate fulfillment of all of the legal requirements for application of the privilege, the claim will be rejected); Rosario v. Copacabana Night Club, Inc., No. 97 Civ. 2052, 1998 WL-273110 at *11 (S.D.N.Y. May 28, 1998) (plaintiff did not effectively assert the privilege by vaguely representing to the court that an attorney-client relationship may have existed at the time the communications in question were made); CSC Recovery Corp. v. Daido Steel Co., No. 94 Civ. 921-4, 1997 WL 661122 at *2 (S.D.N.Y. Oct. 22, 1997) (conclusory allegations that elements of privilege are met is insufficient to invoke the privilege).

There is also general agreement among the courts that an opponent of the privilege has the burden of the preliminary facts of exceptions to the privilege or the waiver of the privilege. 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5307 (1986).

a. Privilege Logs

The use of privilege logs and affidavits of the authors and recipients of the documents containing privileged communications are common ways in which the privilege is invoked. See CSC Recovery Corp. v. Daido Steel Co., No. 94 Civ. 9214, 1997 WL 273110 at *11 (S.D.N.Y. May 28, 1998) (privilege logs and affidavits were sufficient to assert the privilege). A privilege log should contain basic information about each separate document for which a party claims are protected by the privilege. See Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44 (N.D. Cal. 1971) (providing an example of a privilege log).

The case law reflects differing views about the detail to be included on a privilege log. In general, to be sufficient, a privilege log must set out: attorney and client, ***57** nature of the document, all receiving or sending persons or entities shown on the document, and the date the document was prepared or dated. See, e.g., Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44 (N.D. Cal. 1971). Other courts have required more detailed descriptions. See:

In re General Instrument Corp. Securities Litigation, 190 F.R.D. 527, 532 (N.D. Ill. 2000). "Case law, and Fed.R. Civ.P. 26(b)(5) should have made it clear to defendant, at some point over the last three years, that its privilege log was woefully deficient. When the plaintiff pointed out obvious flaws in the log, however, the defendant stridently refused to provide required information. It is apparent from review of the privilege log that defendants are under the mistaken impression either that plaintiffs must prove documents are not privileged, or that it is the court's burden to establish the applicability of the privilege as to defendant's documents. This is all the more clear now that defendant, in the eleventh hour, asks for an in camera inspection of the documents. Defendants have had all the opportunity afforded by the last three years to support their claims of attorney-client privilege. Even if we were to reject the application of the fiduciary exception to the attorney-client privilege, upon a close and studied review of the materials submitted by defendant, which includes defendant's privileged log, we would not grant an in camera inspection in this case. Defendant has had ample opportunity to carry its burden as to establishing the privilege and has failed."

Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., No. 95 Civ. 8833, 1998 WL 474206 at *2 (S.D.N.Y. Aug. 12, 1998). "The Court ... deplores the presentation of a privilege log arranged neither chronologically nor by subject matter, suggesting that the discovery documents, or the log, may have been arranged as a litigation tactic to

inconvenience opposing counsel, which, in this case, has the added result of making the court's review more difficult and more time-consuming."

Torres v. Kuzniasz, 936 F. Supp. 1201, 1208 (D.N.J. 1996). Party claiming privilege must specify the date of the documents, the author, the intended recipient, the names of all people given copies of the document, the subject of the document and the privilege or privileges asserted.

Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465 (S.D.N.Y. 1993). Typically a log will identify the parties to the withheld communication and "sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure." The Bowne court recognized that additional required information will typically be supplied by affidavit or deposition (such as the relationship of the listed parties to the litigation, the preservation of confidentiality, and the reason for disclosure to a party). The court concluded that a log which listed for each document the date, author, address, other recipients, the type of document (i.e., memo or letter), the type of protection claimed, and a very skeletal description of the subjects was insufficient.

Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 145 F.R.D. 84 (N.D. Ill. 1992). "For each document, the log should identify the date, the author and all recipients, along with their capacities. The log should also describe the document's subject matter, purpose for its production, and a specific explanation of why the document is privileged or immune from discovery. These categories, especially this last category, must be sufficiently detailed to allow the court to determine whether the discovery opponent has discharged its burden.... Accordingly, descriptions such as 'letter re claim,' 'analysis of claim' or 'report in anticipation of litigation' -- with which we have grown all too familiar -- will be insufficient. This may be burdensome, but it will provide a more accurate evaluation of a discovery opponent's claims and takes into consideration the fact that there are no presumptions operating in the discovery opponent's favor."

The December 1993 amendments to the Federal Rules of Civil Procedure now specifically provide guidance on the contents of a privilege log:

[A party] shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself ***58** privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fed. R. Civ. P. 26(b)(5) (1993 Amendments. See also Nevada Power Co. v. Monsanto Power Co., 151 F.R.D. 118, 121 (D. Nev. 1993). The Advisory Committee's Notes recognize that the amount and type of information required on a privilege log could be scaled back if voluminous materials are involved. Fed. R. Civ. P. 26(b)(5) advisory committee's note.

It is important to recognize the importance of the privilege log in discovery. Failure to provide sufficient detail in privilege logs may have severe consequences. For example, in In re General Instrument Corp. Securities Litigation, 190 F.R.D. 527, 532 (N.D. Ill. 2000), the District Court for the Northern District of Illinois ordered the defendant to produce 396 documents which the defendant claimed were privileged. The court's decision to compel the production of those documents was based on the fact that the defendant's privilege log contained "sketchy, cryptic, often mysterious descriptions of subject matter" which were insufficient to fulfill the defendant's burden of establishing the elements of the privilege for each document. Id. at 532. See also ConAgra, Inc. v. Arkwright Mutual Ins. Co., 32 F. Supp. 2d 1015, 1018 (N.D. Ill. 1999) (directing the defendant to produce 54 documents withheld and 10 additional documents initially produced in redacted form because the defendant failed to include sufficient descriptions of the documents in its privilege log to establish the privilege).

Because documents included on a privilege log may often be the most significant documents in a case, it is important to attend to issues regarding privilege logs early in a litigation to ensure that a party has all important discoverable documents by the time depositions begin. A party is required to claim privilege for documents produced in a timely manner. See Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 12 (1st Cir. 1991); In re DG Acquisition Corp., 151 F.3d 75, 84 (2d Cir. 1998) (party responding subpoena must assert privilege with 14 days.). While some courts will permit parties to submit privilege logs sometimes months after documents are produced leaving it to the parties to work out the when the logs should be exchanged, other courts may demand that the logs be disclosed at the time of the initial production or shortly thereafter. See First Savings Bank, F.S.B. v. First Bank System, Inc., 902 F. Supp. 1356, 1360 (D. Kan. 1995) rev'd on other grounds, 101 F.3d 645 (10th Cir. 1996) (Rule 26 "contemplates that the required notice and information is due upon a party withholding the claimed privileged material. Consequently ... the producing party must provided the [privilege log] at the time it is otherwise required to produce the documents.")

b. In Camera Review

Preliminary questions pertaining to the existence of the privilege are to be decided by the court. Fed. R. Evid. 104(a). At common law, a judge could not require disclosure of communications in order to make a determination of their privileged status. See 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5507 (1986). See also ***59** Calif. Evid. Code ß 915. However, in almost every case, federal courts have supported the power of the judge to order disclosure of documents to establish a claim of privilege. See:

United States v. Zolin, 491 U.S. 554, 568-69 (1989). "This Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for in camera inspection." (citing Kerr v. United States Dist. Court for the N. Dist. of Calif., 426 U.S. 394, 404-405 (1976)).

In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 125 n.2 (3d Cir. 1986). Upholding use of in camera inspection to prove privileged nature of documents.

In re Berkley & Co, 629 F.2d 548, 555 n.9 (8th Cir. 1980). Utilizing in camera inspection to determine if documents were privileged.

Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 475 (S.D.N.Y. 1993). In camera review is not to become a routine undertaking in lieu of an adequate privilege log, particularly when there are voluminous documents.

Nedlog Co. v. ARA Servs., Inc., 131 F.R.D. 116 (N.D. Ill. 1989). The court found that Zolin legitimizes the practice of requiring the submission of documents for in camera inspection.

In fact, some courts have held that it is within a district court's power to order the production of documents for in camera review, sua sponte. See, e.g., Federal Election Comm'n v. The Christian Coalition, 178 F.R.D. 456 (E.D. Va. 1998) (party's due process rights were not violated by district court's in camera review of purportedly privileged documents). Courts also have the discretion to reject a sua sponte party's request for in camera review particularly where it finds that review is unnecessary and a waste of judicial resources. See Guy v. United Healthcare Corp., 154 F.R.D. 172, 176 (S.D. Ohio 1993).

While in camera inspection may be used by a federal court to determine whether the privilege applies to certain documents, submitting documents to the court for in camera inspection may not be sufficient in and of itself to establish the attorney-client privilege. See Claude P. Bamberger Int'l, Inc. v. Rhom and Haas Co., Civ. No. 96-1041, 1997 U.S. Dist. Lexis 22770 at *3 (D.N.J. Aug. 12, 1997) (holding that "submission of the memorandum for an in camera review is not a substitute for the proper privilege log"). Because in camera inspection consumes the Court's time, parties should exercise care to ensure that in camera inspection is necessary to establish the privilege without revealing privileged information to an adversary. Unnecessary requests for in camera inspection will likely frustrate the court and have negative results. See, e.g., In re Uranium Antitrust Litigation, 552 F. Supp. 517, 518 (N.D. Ill. 1982) (directing parties to produce approximately 40,000 documents and denying request for in camera inspection of those documents where parties made only blanket assertions of privilege and noted in their briefs to the court that individual inspection of the documents by their senior attorneys for purposes of determining whether they were privileged would be too time consuming).

In cases where there is a dispute between the parties over whether an exception to the privilege applies to certain documents, the court may conduct an in camera review of the documents to determine whether the opponent of the privilege has sufficiently established an ***60** exception to the privilege applies. See In re General Motors Corp., 153 F.3d 714, 716 (8th Cir. 1998); In re Grand Jury Proceedings, 867 F.2d 539, 541 (9th Cir. 1989) (district courts may conduct an in camera review of evidence to determine applicability of the crime-fraud exception). In certain circumstances, a party may be required to make a threshold showing before obtaining in camera review. For example, in United States v. Zolin, 491 U.S. 554 (1989), the Supreme Court held that in order to obtain in camera review of documents for the purpose of establishing the crime-fraud exception to the attorney client privilege, a party must present evidence sufficient to support reasonable belief that in camera review may yield evidence establishing the applicability of the crime- fraud exception. See also In re Grand Jury Subpoena, 31 F.3d 826, 820 (9th Cir. 1994). In determining whether a party has met this threshold requirement, the court may only consider evidence offered by the party seeking in camera review for the purpose of establishing the crime-fraud exception. Therefore, contravailing evidence presented by the party asserting the privilege should not be considered by the court. Id.

c. Obtaining Appellate Review of A Court's Decision Rejecting A Claim of Privilege in Federal Courts.

Discovery orders directing a party to the litigation to disclose communications protected by the attorney-client privilege are not final orders immediately appealable pursuant to 28 U.S.C. ß 1291. However, in some instances, discovery orders directing non-parties to disclose privileged communications may be appealed immediately. See Perlman v. United States, 247 U.S. 7, 12-15 (1918); FDIC v. Ogden Corp., 202 F.3d 454, 460 (1st Cir. 2000) ("a substantial privilege claim that cannot effectively be tested by the privilege-holder through a contemptuous refusal ordinarily will qualify for immediate review if the claim otherwise would be lost").

When a court rejects a party's assertion of the attorney-client privilege, the party has several options. The first option is to wait for a final adjudication of the merits of the case and then appeal the decision. This option, however, provides no relief to parties who wish to maintain the confidentiality of a privileged communication. In addition, there are several avenues by which a party may obtain immediate appellate review of an interlocutory order directing the disclosure of privileged communications:

(1) Appeal From Contempt Citation.

The most common means of securing review of a discovery order directing the disclosure of privileged communication is to disobey the order, be held in contempt, and then appeal the contempt order. See, e.g., In re Richard Roe, Inc., 168 F.3d 69, 72 (2d Cir. 1999) (reversing district court order holding officers of two corporations in contempt for refusing to produce certain documents to a grand jury); In re Horn, 976 F.2d 1314, 1316 (9th Cir. 1992) (reversing contempt citation issued against attorney for failing to respond to subpoena duces ***61** tecum which sought material covered by the attorney- client privilege); 15B C. wright & A. miller, Federal Practice & Procedure ß 3914.23 (2d ed. 1991).

(2) MANDAMUS.

Immediate appellate review may be obtained by filing a petition for a writ of mandamus in the appellate court. "Mandamus provides the most direct route around the rule that generally bars final judgment appeals form discovery orders." 15B C. wright & A. miller, Federal Practice & Procedure ß 3914.23 (2d ed. 1991). While a writ of mandamus is an extraordinary remedy, some circuit courts have found that the potential irreversible harm that a party may incur if it is directed in error to turn over a privileged communication justifies the issuance of the writ. See, e.g., In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 804 (Fed. Cir. 2000) (issuing writ of mandamus vacating district court order directing the disclosure of patent invention record that was protected by the attorney-client privilege); Rhone-Poulenc Rorer Inc. v. Home Indemnity Co., 32 F.3d 851, 866 (3d Cir. 1994) (issuing writ of mandamus to vacate district court's order finding that plaintiff waived the attorney-client privilege); Chase Manhattan Bank v. Turner & Newall, P.L.C., 964 F.2d 159, 163 (2d Cir. 1992) (issuing mandamus to vacate order directing defendant to disclose privileged communications without the district court first determining the merits of the defendant's claim of privilege); In re Bieter Co., 16 F.3d 929, 931 (8th Cir. 1994) (issuing writ to vacate order compelling disclosure of privileged communications); In re Burlington Northern, Inc., 822 F.2d 518, 534 (5th Cir. 1987) (granting mandamus because district court compelled production of privileged documents without making proper factual determination).

In Chase Manhattan Bank, 964 F.2d at 166, the Court enumerated 3 factors as prerequisites for mandamus review of discovery orders directing the disclosure of privileged communications: "(i) an issue of importance and of first impression is raised; (ii) the privilege will be lost in the particular case if review must await a final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrines undermining the privilege." Id. at 163. See also In re Bieter Co., 16 F.3d 929, 931 (8th Cir. 1994) (adopting same three criteria); In re Burlington Northern, Inc., 822 F.2d at 534 (mandamus review appropriate where documents at issue went to heart of controversy, erroneous disclosure of documents could have been irreparable, and district court's order turned on legal questions appropriate for appellate review).

(3) Collateral Order Doctrine.

The collateral order doctrine provides a narrow exception to the general rule permitting appellate review of final orders only. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949). Pursuant to the collateral order doctrine, an appeal of a non-final order will lie if (1) the order from which the appellant appeals conclusively determines the disputed question; (2) the order resolves an important issue that is completely separate from the merits of the dispute; and (3) the order is effectively unreviewable on appeal from a final ***62** judgment. In re Ford

Motor Co., 110 F.3d 954, 957 (3d Cir. 1997). The Third Circuit has held that orders requiring the disclosure of privileged communications may be appealed pursuant to the collateral order doctrine. See In re Ford Motor Co., 110 F.3d at 957 (3d Cir. 1997) (order directing vehicle manufacturer to disclose documents related to development, marketing and safety of Bronco II was appealable under the collateral order doctrine). However, most courts maintain that pretrial discovery orders may not be immediately appealed pursuant to the collateral order doctrine. See Texaco Inc. v. Louisiana Land and Exploration Co., 995 F.2d 43, 44 (5th Cir. 1993) (order directing plaintiff to produce documents plaintiff claimed were protected by the privilege could not be appealed pursuant to the collateral order doctrine); Chase Manhattan Bank, 964 F.2d at 163 (denying appeal of order directing disclosure of privileged communication but issuing a writ of mandamus vacating the order).

(4) Permissive Interlocutory Appeal.

28 U.S.C. ß 1292(b) provides that a Federal Court of Appeals has discretion to consider an immediate appeal from an interlocutory order if the district court certifies in writing that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." There are few published opinions in which Section 1292(b) was used successfully by a party seeking appellate review of an order rejection an assertion of the privilege. See, e.g., In re Boileau, 736 F.2d 503, 504 (9th Cir. 1984) (accepting jurisdiction pursuant to Section 1292(b) to review order issued by bankruptcy court compelling debtor to produce privileged documents); Tennenbaum v. Deloitte & Touche, 77 F.3d 337, 339 (9th Cir. 1996) (accepting jurisdiction pursuant to Section 1292(b)).

2. Asserting the Privilege in Organizations

Generally, courts consider the power to assert an organization's privilege to rest in the controlling management of the organization. See C. MCCORMICK, EVIDENCE ß 93 (J. Strong 4th ed. 1992). In all cases, management can only assert the privilege on behalf of the organization, and may not assert the organization's privilege to protect the interests of individual officers or managers. See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124-25 (3d Cir. 1986); In re Grand Jury Proceedings, 434 F. Supp. 648 (E.D. Mich. 1977), aff'd, 570 F.2d 562 (6th Cir. 1978); United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996); Chronicle Publishing Co. v. Hantzis, 732 F. Supp. 270, 272-73 (D. Mass. 1990).

An employee or officer cannot assert the corporation's privilege if the corporation waives it. See In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124-25 (3d Cir. 1986). Likewise, an officer or employee cannot waive the corporation's privilege if the corporation asserts it. See State ex rel. Lause v. Adolf, 710 S.W.2d 362 (Mo. Ct. App. 1986) (fact that officer asserted advice of counsel defense did not waive corporation's privilege); In re Grand Jury Proceedings, 219 F.3d 175, 184 (2d Cir. 2000) (waiver of corporate attorney-***63** client privilege by corporate officer's testimony does not necessarily waive corporate privilege where officer was not communicating corporation's intent to waive).

When legal control of an organization passes to new management, the authority to assert or waive the attorney-client privilege flows with corporate control to the new management. See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) (bankruptcy trustee had the power to waive the corporation's privilege for pre-bankruptcy communications). Thus, when a corporation enters bankruptcy, the trustee in bankruptcy is empowered to assert or waive the attorney-client privilege. See id.

Following a bankruptcy, the authority to assert the attorney-client privilege resides in the entity holding all or substantially all of the debtor's assets. See Ramada Franchise System, Inc. v. Hotel of Gainesville Associates, 988 F. Supp 1460, 1464 (N.D. Ga. 1997); In re Crescent Beach Inn, 37 B.R 894, 896 (Bankr. D. Me. 1984).

Following a merger, the surviving corporation succeeds to the privileges of the successor corporations. See Rayman v. Am. Charter Fed. Sav. & Loan Ass'n, 148 F.R.D. 647, 652 (D. Neb. 1993); Chronicle Pub. Co. v. Hantzis, 732 F. Supp. 270 (D. Mass. 1990); O'Leary v. Purcell Co., 108 F.R.D. 641, 644 (M.D.N.C. 1985). Similarly, where a corporation purchases another corporation's subsidiary, the purchasing parent controls the privilege of the subsidiary. See Bass Pub. Ltd. Co. v. Promus Cos., 868 F. Supp. 615, 620 (S.D.N.Y. 1994); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 49 (S.D.N.Y. 1989); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841, 844 (N.D. Ill. 1988). Even in a criminal investigation, the privilege may be waived over a former parent's objection. See In re Grand Jury Proceedings, 902 F.2d 244 (4th Cir. 1990). Where the former parent

and the subsidiary are adversaries in litigation, neither party can invoke the attorney-client privilege against the other. See Glidden Co. v. Jandernoa, 173 F.R.D. 459, 475-76 (W.D. Mich. 1997).

At least one court has upheld the validity of a confidentiality agreement, contractually limiting the purchasing corporation's rights to access certain privileged materials relating to the merger transaction itself. See Tekni- Plex, Inc. v. Meyer & Landis, 89 N.Y.2d 123, 137-38, 674 N.E.2d 663, 671 (N.Y. 1996).

F. DURATION OF THE PRIVILEGE

In general, once the attorney-client privilege is created it can be invoked at any time unless it has been waived or is subject to an exception. See United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950). Recently, the Supreme Court reaffirmed the general rule that the privilege continues even after the termination of the attorney-client relationship and the death of the client. Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081 (1998) (holding that the privilege continued after the death of a client even where the privileged communications were relevant to a criminal proceeding). See also 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5498 (1986). After the client's death, the ***64** administrator or representative of the estate gains the power to assert or waive the deceased's privilege against third parties. 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5498 (1986). However, many courts refuse to enforce the privilege in will contests. See Remien v. Remien, No. 94 C 2407, 1996 WL 411387 at *3 (N.D. Ill. July 19, 1996); Stevens v. Thurston, 289 A.2d 398 (N.H. 1972); C. McCormick,Evidence ß 94 (J. Strong 4th ed. 1992).

For organizations, the general rule is that when the organization ceases to have legal existence such that no one can act in its behalf, the privilege terminates. See UNIF. R. EVID. 26(1); REST. 3D ß 123 cmt. k; 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5499 (1986).

G. WAIVING THE ATTORNEY-CLIENT PRIVILEGE

Even if all the prerequisites for establishing a claim of attorney-client privilege are met, a party can be found to have waived the protection afforded by the privilege. Whenever a client discloses confidential communications to third parties, including government agencies, the disclosure may constitute a waiver both as to the communication that has been disclosed, and other communications relating to the same subject. See Extent of Waiver ß I(G)(5), infra. In addition, a corporation may be found to have waived the privilege if it has used privileged communications in a manner inconsistent with maintaining their confidentiality.

1. The Terminology of Waiver

Once it has been determined that there has been a waiver, it is necessary to determine the scope of the protection that has been lost. The various types of waiver have been described (and will be referred to in this outline) as follows:

	Waiver for All Documents on Same Subject Matter	Waiver Only For Documents That Are Disclosed
Waiver for All Persons	Full Waiver	Partial Waiver
Waiver Only for Some Persons	Selective Waiver	Partial Selective Waiver

The terms full and partial waiver refer to the scope of the materials which are left unprotected when a waiver has occurred. Full waiver normally results from the disclosure of privileged materials to a non-privileged person. A finding of full waiver typically allows the party seeking discovery of an otherwise privileged document to discover any unrevealed portions of the communication and any related communications on the same subject matter that the court considers to be necessary for the party seeking discovery to obtain a complete ***65** understanding of the disclosed communication. A partial waiver removes privilege protection only for the disclosed communication itself and not for all related communications. Full and partial waiver are discussed in The Extent of Waiver ß I(G)(5), infra.

Selective waiver refers to the decision by the holder of the privilege to waive the privilege for some persons while preserving it toward the rest of the world. Selective waiver is discussed infra in ß I(G)(6) (disclosure to government agencies) and ß II (common interest extensions to the attorney- client privilege).

The intersection of the two types of waiver, herein called partial selective waiver, and the extent of waiver when information is disclosed to government agencies is discussed in ß I(G)(6)(b), infra.

It should be noted that courts have not been consistent in their terminology. Many courts have used the term "limited waiver" to refer to selective waiver. However, other courts have used "limited waiver" to denote partial waiver. In this summary, the term limited waiver is not used, and instead the terms partial and selective waiver are utilized throughout. See Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991) (noting the "limited waiver" mixup and adopting the terms partial and selective waiver). See also Note, Developments -- Privileged Communications, 98 HARV. L. REV. 1450 (1985).

2. Consent, Disclaimer & Defective Assertion

A client can relinquish the protection of the privilege in several ways. The easiest way to abandon the privilege is through consent. Consent acts as a waiver of the privilege and leaves the underlying communications unprotected. See generally In re von Bulow, 828 F.2d 94, 100-1 (2d Cir. 1987) (client's consent to publish privileged information in book about case resulted in waiver); C. McCormick, Evidence ß 93 (J. Strong 4th ed. 1992); 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5507 (1986). However, a party must possess the authority to waive the privilege for such a waiver to be effective. See United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996) (former employees lack ability to waive corporation's attorney-client privilege.)

Occasionally, a client waives the privilege voluntarily and later attempts to reassert it. In such cases, the client will generally be estopped from relying on the privilege if an adversary has detrimentally relied on the disclaimer or the interests of justice and fairness otherwise require waiver. See generally United States v. Blackburn, 446 F.2d 1089, 1091 (5th Cir. 1971) (defendant not permitted to reassert a privilege which he had already waived); 8 J. WIGMORE, EVIDENCE ß 2327 (J. McNaughton rev. 1961); 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5507, at 583 (1986).

Waiver can also occur when the client fails to assert the privilege effectively. For example, a client's failure to object during the presentation of evidence at a hearing or ***66** deposition may waive the privilege. See REST. 3D ß 78 cmt. e; C. MCCORMICK, EVIDENCE ß 93, at 343 (J. Strong 4th ed. 1992); Asserting the Privilege ß I(E), supra. Any failure of the client to guard the privilege jealously generally constitutes a waiver. See Intentional Disregard of Confidentiality ß I(G)(3)(a), infra.

In the corporate context, a question may arise regarding who has the authority to waive the privilege when the corporation's management, through counsel, makes it clear that the corporation does not intend to waive its privileges. In In re Grand Jury Proceedings, 219 F.3d 175 (2d Cir. 2000), the Second Circuit considered as a matter of first impression two issues: (1) whether a corporate officer can impliedly waive the corporation's attorney- client and work-product privileges in his grand jury testimony, even though the corporation has explicitly refused such a waiver; and if the answer is yes, (2) what factors a district court should consider in deciding whether a waiver has occurred. The case arose out of an ongoing grand jury investigation into allegedly illegal sales of firearms and other contraband by Doe Corp. In response to the grand jury's subpoena in which it formally requested Doe Corp. to waive its attorney-client and work-product privileges, Doe Corp. decided not to waive its privileges and so notified the government. 219 F.3d at 180. The grand jury subsequently subpoenaed four Doe Corp. employees, including its

CEO and its chief in-house counsel. Id. Although the CEO invoked the attorney- client privilege on several occasions during his testimony, he made eight references to counsel's advice, including a number of specific statements about counsel's recommendations. The government contended that Doe Corp. lost its privileges primarily as a result of the grand jury testimony of the CEO and counsel. Id. The trial court agreed and granted the government's motion to compel. In re Grand Jury Proceedings, 219 F.3d at 181-82.

The Second Circuit vacated the trial court's order and remanded for further review based on the detailed discussion in its opinion. Citing In re von Bulow, 828 F.2d 94, 103 (2d Cir. 1987), and United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991), the court acknowledged that implied waiver may be found where a privilege holder "asserts a claim that in fairness requires examination of protected communications." In re Grand Jury Proceedings, 219 F.3d at 182. Fairness considerations arise when a party attempts to use the privilege both as "a shield and a sword." Id. Ordinarily, the authority to assert and waive the corporation's privileges rests with the corporation's management and is normally exercised by its officers and directors. In re Grand Jury Proceedings, 219 F.3d 183-84, citation omitted. Unlike prior cases, however, in the case before the court the corporation clearly asserted its privilege, and did not deliberately disclose any privileged material, but its CEO, in contravention of the corporation's instructions, arguably waived that privilege in his grand jury testimony. In re Grand Jury Proceedings, 219 F.3d at 184.

The court rejected the parties' competing requests for a per se rule: Doe Corp. for a per se rule that a corporate officer cannot waive a privilege asserted by the corporation; the government for a per se rule that a waiver by an officer, particularly the founder, CEO and controlling shareholder, is for all intents and purposes the corporation's waiver. In re Grand Jury Proceedings, 219 F.3d at 185. Instead, implied waiver should be analyzed case- by-case ***67** based on "fairness principles." Id. Skeptical on the facts before it that the CEO's testimony had waived Doe Corp.'s privileges (In re Grand Jury Proceedings, 219 F.3d at 189), the court instructed the trial court to consider on remand, among other things, the following issues: (1) the CEO was subpoenaed on his individual capacity and not as a corporate representative; (2) the CEO's interest in exculpating his own conduct may have overridden his fidelity to the corporation; (3) the CEO was uncounseled and had no legal training; (4) Doe Corp. did not disclose privileged material to the government and did not take any affirmative steps to inject privileged materials into the litigation; and (5) the apparent lack of prejudice to the government. In re Grand Jury Proceedings, 219 F.3d 185-86, 189-90. "These circumstances viewed in isolation suggest to us it would be unfair to find, on the basis of witness's testimony, that Doe Corp. had waived its entitlement to preserve the confidentiality of its communications with its attorneys." In re Grand Jury Proceedings, 219 F.3d at 190.

In the event that the trial court found waiver on remand, the court indicated that only partial waiver may be appropriate: "as the animating principle behind waiver is fairness to the parties, if the court finds that the privilege was waived, then the waiver should be tailored to remedy the prejudice to the government." In re Grand Jury Proceedings, 219 F.3d at 188. Because the testimony was given before a grand jury, an "extrajudicial" context, limited waiver may be appropriate. In re Grand Jury Proceedings, 219 F.3d at 189. Limited waiver may also be appropriate because the testimony was given early in the grand jury proceedings, at a time when the government may have had other witnesses and evidence, thus limiting the prejudice to the government. Id.

3. Disclosure to Third Parties

a. Intentional Disregard of Confidentiality

To become privileged a communication must be made in confidence. See Communications Must Be Intended to be Confidential ß I(C), supra. To stay privileged, the communication must remain confidential. As a general rule, disclosure of privileged communications to a person outside the attorney-client relationship manifests indifference to confidentiality and waives the protection of the privilege. See In re Air Crash Disaster at Sioux City, 133 F.R.D. 515, 518 (N.D. Ill. 1990); First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160, 171 (E.D. Wis. 1980) (disclosures to other persons in the privileged relationship such as a privileged agent do not cause waiver); Dalen v. Ozite Corp., 594 N.E.2d 1365, 1370 (Ill. App. Ct. 1992) (disclosure inconsistent with confidentiality waives privilege). Disclosure to an attorney, where the attorney is not acting in a legal capacity, also causes a waiver. See United States v. Frederick, 182 F.3d 496, 500-02 (7th Cir. 1999), cert. denied, 528 U.S. 1154, 120 S. Ct. 1197 (2000). See also:

Nguyen v. Excel Corp., 197 F.3d 200, 207 (5th Cir. 1999). Selective disclosure of privileged information to third party not rendering legal services waives attorney-client privilege.

***68** Reed v. Baxter, 134 F.3d 351, 357-58 (6th Cir. 1998). Disclosure to attorney in the presence of a third party

negates confidentiality and constitutes waiver.

United States v. Evans, 113 F.3d 1457, 1462 (7th Cir. 1997). The attorney-client privilege does not apply to statements made between a client and his attorney in the presence of a third party who is not an agent of either the client or attorney.

United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981). Disclosures made in the presence of third parties removes confidentiality and results in waiver.

Piedmont Resolution L.L.C. v. Johnston, Rivlin & Foley, No. Civ. A. 96- 1605, 1997 WL 16071 (D.D.C. Jan. 13, 1997). Any voluntary disclosure of confidential communication to a third party is inconsistent with confidentiality and thus waives the privilege.

Feinberg v. Hibernia Corp., No. 90-4245, 1993 WL 92516 (E.D. La. Mar. 2, 1993). Corporation abandoned confidentiality when it gave banks free access to confidential loan materials as part of a due diligence search. Failure to restrict access to privileged materials resulted in waiver.

Stirum v. Whalen, 811 F. Supp. 78 (N.D.N.Y. 1993). Privilege cannot be used to prevent disclosure of communications that were conveyed between client and attorney in the presence of third parties or later released to third parties.

Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 697 (E.D. Va. 1987). The recipient of a memo from in-house counsel waives the privilege by disclosing it to an adversary.

Byrnes v. Jetnet Corp., 111 F.R.D. 68, 72 (M.D.N.C. 1986). A corporate client waives the privilege when it restates the substance of the privileged communications in an unprivileged internal communication.

Chubb Integrated Sys., Ltd. v. National Bank of Wash., 103 F.R.D. 52 (D.D.C. 1984). Disclosure of attorney-client communications to an adversary waived the privilege when the adversary learned the gist of the privileged communication. In this case, the privilege was waived even though the adversary was involved in litigation unrelated to the communication.

In these cases, the determinative factor is not the client's subjective intention to waive the privilege. 8 J. WIGMORE, EVIDENCE ß 2327 (J. McNaughton rev. 1961) ("A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder."). See also REST. 3D ß 79 cmt. f; C. MCCORMICK, EVIDENCE ß 93 (J. Strong 4th ed. 1992); 2 J. Weinstein & M. Berger, Evidence ∂ 511[02] (1986); accord Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981) (subjective intent is but one factor to consider). Instead, the court will inquire whether the client's acts were: (1) voluntary, and (2) substantially in disregard of confidentiality. Only voluntary acts can effectuate waiver. Thus, if the court finds that the client acted under duress or deception then the privilege will not be waived. Shields v. Sturm, Ruger & Co., 864 F.2d 379, 382 (5th Cir. 1989) (disclosure compelled by court does not waive privilege with respect to third parties); SEC v. Forma, 117 F.R.D. 516, 523 (S.D.N.Y. 1987) (deception by government makes disclosure involuntary and prevents waiver); Simpson v. Braider, 104 F.R.D. 512, 523 (D.D.C. 1985) (court should "be reluctant to find waiver" when testimony is given involuntarily ***69** as a result of a subpoena); State v. Schmidt, 474 So. 2d 899, 902-03 (Fla. Dist. Ct. App. 1985); Rest. 3d ß 79 cmt. e. The primary determination is whether the party has safeguarded the confidential nature of the communications. To make this finding, the court determines whether the client's acts and the circumstances of the case objectively demonstrate the proper respect for confidentiality. See:

Prudential Ins. Co. v. Turner & Newall, PLC, 137 F.R.D. 178 (D. Mass. 1991). The plaintiff waived privilege and work-product protection for documents in a third party's possession when the plaintiff reviewed its files and determined they contained privileged documents, but did not take steps to insure against the third party's disclosure of the document.

Waste Management, Inc. v. International Surplus Lines Ins. Co., 596 N.E.2d 726 (Ill. App. Ct. 1992). The fact that an internal letter had no indications that it should be kept confidential and had been accessible to the community in a public court file demonstrated waiver of privilege.

The extent to which privileged contents are revealed will also affect the waiver determination. To cause waiver, the non-privileged listener or receiver must learn a significant portion of the privileged communication. Chubb Integrated Sys., Ltd. v. National Bank of Wash., 103 F.R.D. 52 (D.D.C. 1984) (disclosure of attorney-client communications waives the privilege when the listener learns the gist of the privileged communication); In re M&L Business Mach. Co., 161 B.R. 689 (Bankr. D. Colo. 1993) (privilege is lost if the substance of the confidential communication is disclosed to a third party). Thus, referring in general terms to a prior conversation with an

attorney does not usually abrogate the privilege. See REST. 3D ß 79 cmt. e; see also:

United States v. O'Malley, 786 F.2d 786, 793-94 (7th Cir. 1986) Privilege attaches to communication of information rather than the information itself. "[A] client does not waive his attorney-client privilege merely by disclosing a subject which he had discussed with his attorney. In order to waive the privilege, the client must disclose the communication with the attorney itself."

Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co., No. 90 Civ. 7811, 1994 WL 392280 (S.D.N.Y. July 28), reargued, 1994 WL 510048 (Sept. 16, 1994). A party does not waive the privilege merely by disclosing the substance of an attorney's advice. The party must make a more detailed revelation of the advice or attempt to use the partial disclosure to the prejudice of the opposing side.

Rauh v. Coyne, 744 F. Supp. 1181 (D.D.C. 1990). Disclosure of a brief description of an internal investigation report does not waive the privilege for the report itself.

b. Disclosure to Auditors

In general, an auditor is considered a non-privileged party. Thus, disclosure of privileged information to auditors will waive the attorney-client privilege. See:

United States v. El Paso Co., 682 F.2d 530, 540 (5th Cir. 1982). Disclosure of tax pool analysis and underlying documentation to outside accountants for tax audit purposes waives attorney-client privilege.

In re John Doe Corp., 675 F.2d 482, 488-89 (2d Cir. 1982). Conversations between attorney and the corporation's accountant for the purpose of a financial statement audit waived the privilege with respect to the contents of the conversation.

***70** Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 24 (9th Cir. 1981). Disclosure of documents to an outside auditor is disclosure to a third party and waives the privilege.

Eglin Fed. Credit Union v. Cantor Fitzgerald Sec. Corp., 91 F.R.D. 414, 418-19 (N.D. Ga. 1981). Attorney-client privilege waived with respect to board minutes that had been made available to accountants for audit purposes.

c. Disclosure to Accountants

Though generally not considered to be privileged parties, accountants are considered to be privileged agents where the accountant's role is to facilitate communication between the attorney and the client. This role is analogous to that of an interpreter; where the attorney and client "speak different languages," and the aid of an accountant will help the lawyer to understand the client's situation, the accountant is a privileged agent. See United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). Where a conversation with an agent is merely helpful to the client's defense, and does help the attorney to understand the client's communication itself, the third-party's role is not that of a privileged agent. See United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999). Preparation of tax returns, for example, is an accounting function not meant to facilitate attorney-client communications. Communications with accountants for the purpose of filing out tax forms are not, therefore, privileged. See In re Grand Jury Proceedings, 220 F.3d 568, 571 (7th Cir. 2000) (holding that documents used both in preparation of tax returns and in litigation are not privileged). See also Accountants as Privileged Parties, ß I(B)(3)(c), supra.

4. Authority To Waive Privilege

In addition to the client, an attorney or other authorized agent also has the power to waive the privilege for the client. Interfaith Hous. Delaware, Inc. v. Town of Georgetown, No. 93-31, 1994 WL 17322 (D. Del. Jan. 12, 1994) (an agent can only waive a corporation's privilege if the agent is acting within the scope of her authority). A lawyer is generally considered to possess the implied authority to disclose confidential client communications in the course of representing the client. 8 J. WIGMORE, EVIDENCE ß 2325, at 632 (J. McNaughton rev. 1961); REST. 3D ß 79 cmt. c. See also United States v. Martin, 773 F.2d 579, 583-84 (4th Cir. 1985); Velsicol Chem. Corp. v. Parsons, 561 F.2d 671, 674-75 (7th Cir. 1977). As a result, a lawyer's disclosure of a communication in the course of conducting the case generally waives the privilege if the lawyer has the apparent or actual authority to disclose such information. See Kevlik v. Goldstein, 724 F.2d 844, 850 (1st Cir. 1984); C. MCCORMICK, EVIDENCE ß 93 (J. Strong 4th ed. 1992); 8 J. WIGMORE, EVIDENCE ß 2325 (J. McNaughton rev. 1961).

For organizational clients, the authority to waive the attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). The managers must exercise the privilege in a manner which is consistent with their fiduciary duties to act in the best interests of the corporation and not for themselves as individuals. Id. at 348-49. In- house counsel has also been found to possess the implied authority to waive the organization's ***71** privilege. See Velsicol Chem. Corp. v. Parsons, 561 F.2d 671, 674 (7th Cir. 1977); In re Grand Jury Subpoenas

Dated Dec. 18, 1981, 561 F. Supp. 1247, 1254 n.3 (E.D.N.Y. 1982). When control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. Id. at 349; In re Grand Jury Subpoenas 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989). Thus, a manager's power to waive the corporation's attorney-client privilege terminates when the manager loses his job. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985) (displaced personnel have no further control over the privilege); Allen v. Burns Fry, Ltd., No. 83 C 2915, 1987 WL 12199 (N.D. Ill. June 4, 1987). See also Asserting the Privilege in Organizations ß I(E)(2), supra.

5. The Extent of Waiver

Where a party has revealed a privileged communication the general rule is that the revealed communication and all materials related to the same subject matter are left unprotected (i.e., a full waiver results). See, e.g., In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel, 666 F. Supp. 1148 (N.D. Ill. 1987). See also:

In re Grand Jury Proceedings, 219 F.3d 175, 182-83 (2d Cir. 2000). A party may not selectively disclose privileged communications in support of a claim and then rely on the privilege to shield the remaining communication from the opposing party.

In re Grand Jury Proceedings, 78 F.3d 251, 254-256 (6th Cir. 1996). Selective disclosure to government investigators of attorney's advice related to several elements of a marketing plan waived privilege as to all information related to those elements, but not to the entire marketing plan.

In re Sealed Case, 877 F.2d 976, 981 (D.C. Cir. 1989). Inadvertent disclosure constituted a waiver not just for the document disclosed but also to all communications relating to the same subject matter.

United States v. Jones, 696 F.2d 1069 (4th Cir. 1982). Voluntary disclosures to a third party waive the privilege not only for the specific communication disclosed but also for all communications relating to the same subject.

In re Commercial Financial Services, Inc., 247 B.R. 828, 845-56 (Bankr. N.D. Okla. 2000). Subject matter waiver requires disclosure of all documents or information relating to the same subject matter as the material disclosed.

Fujisawa Pharmaceutical Co. v. Kapoor, 162 F.R.D. 539 (N.D. Ill. 1995). Identification of attorney as a potential witness by his client waived attorney-client privilege as to the subject matter of the attorney's expected testimony. Court, interpreting "subject matter" broadly, held that the privilege had been waived with respect to any information that may have influenced attorney's knowledge regarding his expected testimony, including information gathered by his law firm.

Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1103 (D. Del. 1990). Contested communications were not privileged since they related to the same subject previously disclosed by the client's other attorney.

Nye v. Sage Prods., Inc., 98 F.R.D. 452, 453 (N.D. Ill. 1982). Production of a party's communications with a previous attorney waived the privilege for communications with a current attorney on the same subject.

***72** Union Pac. Resources Co. v. Natural Gas Pipeline Co. of Am., No. 90 C 5378, 1993 WL 278526 (N.D. Ill. July 20, 1993). Full waiver results in loss of protection for communications revealed and past communications on the same matter. However, prospective communications remain protected.

In many cases the party has not blatantly repeated a confidential conversation, but has merely revealed a portion of the communicated information. The courts have struggled to determine when a disclosure has revealed so much detail that the privilege is effectively waived. See, e.g., In re International Harvester's Disposition of Wis. Steel, Nos. 81 C 7076, 82 C 6895, & 85 C 3521, 1987 WL 20408 (N.D. Ill. Nov. 20, 1987) (explaining that after a certain point of disclosure the opponent is entitled to see essentially the full file on the subject so that a full and fair evaluation of the disclosed information can be made). When the evidence shows that the client abandoned the protection of confidentiality, even a partial disclosure of a privileged communication will constitute full waiver. (See ß I(G)(1), supra, for a discussion of the terminology of waiver including full and partial waiver.) However, where a client has revealed only a factually isolated portion of a communication, then a partial waiver may result and related communications remain privileged. See:

In re von Bulow, 828 F.2d 94 (2d Cir. 1987). Where a client acquiesced in his attorney's publication of a book containing privileged information, the court held that only a partial waiver occurred. A client can impliedly waive the privilege and must take affirmative action to prevent disclosure once the disclosure is known to be imminent. However, extrajudicial disclosures that are not used to an adversary's disadvantage result in only partial disclosure and do not waive the privilege as to undisclosed portions.

Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 891 (S.D.N.Y. 1990). An insurance company did not fully waive the privilege for its insurance premium structure when it revealed documents that summarized counsel's opinion of the structure in conclusory and unrevealing terms. Use of such terms indicated an intention by the company to maintain confidentiality.

The extent of waiver is determined by analyzing whether the unrevealed portion of the communication is so related to the part that has been revealed that further disclosure would not significantly impinge on the client's interest in confidentiality (i.e., the client has revealed so much that he has no further reasonable expectation of confidentiality). In making this determination, the court will consider, among other factors, the temporal proximity of the portions, the presence or absence of other persons at disclosure, and the subjects covered in each portion. See:

In re von Bulow, 828 F.2d 94 (2d Cir. 1987). Disclosure of privileged material did not waive privilege beyond matters actually revealed.

Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981). Disclosure of documents provided to an outside auditor results in waiver only to communications about that matter, not to related matters within the same general topic.

Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1092 (D.N.J. 1996). Partial waiver applied where party gave third party "only a superficial glance at certain information, attempting to maintain the secrecy of the remainder."

Rauh v. Coyne, 744 F. Supp. 1181 (D.D.C. 1990). Disclosure of a brief description of an internal investigation report does not waive the privilege for the report itself.

***73** AMCA Int'l Corp. v. Phipard, 107 F.R.D. 39 (D. Mass. 1985). Disclosing a memo about the interpretation of some contracts waived the privilege for all communications concerning the letter, but not to all communications concerning the interpretation of the contract.

Compare:

In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988). A client made an inside investigation into alleged fraudulent accounting procedures and disclosed the results to the government to avoid indictment. The court found that the resulting waiver extended to non-disclosed materials, and even to undisclosed details underlying the published data. However, the court noted that there was only a partial waiver for opinion work-product.

Washington Post Co. v. United States Dep't of Air Force, 617 F. Supp. 602 (D.D.C. 1985). Disclosure that summarizes the evidence underlying an internal investigation waives the privilege.

Nevertheless, in some cases, fairness requires that even a partial waiver result in disclosure beyond the materials actually revealed. See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991). In the interest of fairness, full subject matter waiver will result from a partial disclosure in two instances: testimonial revelation and self-serving disclosure.

Testimonial Revelation: When a person testifies before a fact finder (e.g., a jury), partial disclosure of privileged communications almost always results in full disclosure. This is necessary to prevent the fact finder from being confused, misled, or being presented with an incomplete evidentiary picture. See, e.g., Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) (1986) (waiver is implied when a client testifies about a portion of a privileged communication); REST. 3D ß 79 cmt. f.

Self-Serving Disclosure: Disclosures which are self-serving will result in full disclosure. In these cases, fairness requires disclosure of the remainder of the communication to present a balanced account. See:

In re Sealed Case, 676 F.2d 793, 808-09 (D.C. Cir. 1982). When party reveals part of a privileged communication to gain an advantage in litigation, the party waives the privilege for all other communications on the same subject matter.

Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 208 (N.D. Ind. 1990). Inadvertent production of privileged communications results in waiver only for the disclosed document unless the disclosure was self serving.

Carte Blanche (Singapore) PTE, Ltd. v. Diners Club Int'l, Inc., 130 F.R.D. 28, 33 (S.D.N.Y. 1990). Where party reveals portion of document the privilege is waived for the rest of the document so as to make the disclosure complete.

First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 567-68 (S.D.N.Y. 1986). Waiver will be found for withheld information to "make the disclosure complete and not misleadingly one-sided."

***74 6. Selective Waiver Doctrine**

a. Disclosure to the Government

When litigants voluntarily disclose documents or communications to government agencies, the documents and

communications may lose the protection of the privilege and be subject to discovery by other parties, including private litigants. Corporations have argued that these voluntary disclosures to government agencies amount to a selective waiver of the privilege solely for the benefit of the public agency's review, and should not be considered as a waiver for purposes of private civil litigation (many cases use the term limited waiver rather than selective waiver -- for a discussion of terminology see ß I(G)(1), supra). Several courts have adopted this concept of selective waiver. See, e.g., In re M&L Business Mach. Co., 161 B.R. 689 (Bankr. D. Colo. 1993) (more likely to find waiver when the holder selectively discloses to the government then later tries to reassert the privilege against the government or a grand jury rather than against a private litigant).

In Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (en banc), a company furnished the SEC with an internal report that disclosed a "slush fund." The Eighth Circuit held that the disclosure amounted only to a selective waiver and refused to order the corporation to produce the report for inspection by private plaintiffs. The Eighth Circuit explained: "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." Id. at 611. See also United States v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990) (applying the reasoning of Meredith); United States v. Buco, No. Crim. 90-10252-H, 1991 WL 82459 (D. Mass. May 13, 1991) (disclosure to Office of Thrift Supervision did not waive privilege for internal investigation of banking violations); Schnell v. Schnall, 550 F. Supp. 650, 652-53 (S.D.N.Y. 1982) (public policy of encouraging disclosure to SEC compels finding of selective waiver).

A minority of courts have refused to recognize selective waiver for privileged documents unless the government mandated the creation and filing of the report. See Hardy v. New York News, Inc., 114 F.R.D. 633 (S.D.N.Y. 1987); Resnick v. American Dental Ass'n, 95 F.R.D. 372 (N.D. Ill. 1982).

Most courts have taken a narrow construction of the selective waiver doctrine, and have held that selective disclosure of a document to the government constitutes complete waiver of the privilege. As the D.C. Circuit observed in one of the early selective waiver cases, the privilege was not designed to allow a client "to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others." Permian Corp. v. United States, 665 F.2d 1214, 1219-20 (D.C. Cir. 1981). Similarly, in Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir. 1991), a corporation was being investigated by the government. The court held that the corporation's voluntary disclosure of privileged documents during this investigation fully waived any ***75** attorney-client or work-product privilege, even with respect to third parties in civil litigation. The court reasoned that the protection of the attorney-client privilege was not required to encourage corporations to make such disclosures to a government agency since the corporation would most likely share any exculpating documents with the government willingly, privileged or not, in order to obtain lenient treatment. Id.

In United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1st Cir. 1997), the First Circuit refused to adopt the selective waiver doctrine. The court held that MIT fully waived the privilege with respect to documents it disclosed to a government audit agency (the DCAA) pursuant to the terms of a contract that it had with the government. Neither the government's interest in obtaining privileged information nor MIT's interest in supporting its relationship with the government justified preserving the attorney-client privilege. The court noted: "But the general principle that disclosure normally negates the privilege is worth maintaining. To maintain it here makes the law more predictable and certainly eases its administration." Id. at 685. Acknowledging the difficulty created by government demands, the court stated: "... MIT chose to place itself in this position by becoming a government contractor." Id. at 686. Compare:

Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424-1426 (3d Cir. 1991). Noting the disagreement within the circuits and rejecting selective waiver because, unlike other exceptions to the waiver doctrine, selective disclosure does not facilitate disclosure to one's attorney, but facilitates disclosure to the government, thus extending privilege beyond its purpose.

In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988). A client conducted an internal investigation into alleged fraudulent accounting procedures and disclosed the results to the government to avoid indictment. The court found that this disclosure resulted in waiver for other civil litigation. The resulting waiver extended to non-disclosed materials, and even to undisclosed details underlying the published data. However, the court noted that there was only a partial waiver for opinion work-product.

In re Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984). Relying on Permian, the court found that a party waived the privilege by disclosing information to the SEC, despite the fact that the party's transmittal letter

stated that the documents were confidential and their submission of them to the SEC was not a waiver of any privilege.

In re Sealed Case, 676 F.2d 793, 824 (D.C. Cir. 1982). Court found that company had waived privilege by voluntarily submitting report of investigative counsel to the SEC. This waiver included any documentation necessary to evaluate the report.

Permian Corp. v. United States, 665 F.2d 1214, 1219-20 (D.C. Cir. 1981). Occidental Petroleum had produced a large number of documents to Mead under a stipulation that inadvertent production would not waive the attorney-client privilege. Occidental allowed the SEC access to these documents for an on- going SEC investigation under an agreement that prohibited certain further disclosures by the SEC. The Department of Energy then sought the disclosed documents from the SEC. The District of Columbia Circuit found that the disclosure of the documents to the SEC resulted in waiver. Id. at 1222. The court refused to find that the public policy to encourage cooperation with the SEC overrode the requirements of the privilege. Id. at 1220-22. It concluded that any privilege had been waived, stating "the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality." Id. at 1222.

***76** In re Columbia/HCA Healthcare Corp., 192 F.R.D. 575, 579 (M.D. Tenn. 2000). Entity disclosing documents and government agency receiving them "cannot negate a waiver simply by agreeing to do so."

Information Resources, Inc. v. Dun & Bradstreet Corp., 999 F. Supp. 591, 593 (S.D.N.Y. 1998). Voluntary disclosure of privileged information to government agency in order to "incite it to attack the informant's adversary" waives privilege.

Maryville Academy v. Loeb Rhoades & Co., 559 F. Supp. 7, 9 (N.D. Ill. 1982). Rejected concept of selective waiver and found party's disclosure to the government constituted full waiver of the privilege.

With:

McDonnell Douglas Corp. v. United States Equal Employment Opportunity Comm'n, 922 F. Supp. 235 (E.D. Mo. 1996). Disclosure of attorney-client privileged information to EEOC did not waive the privilege with respect to third parties. EEOC and producing party had agreed that production of privileged information to EEOC would not constitute waiver.

SEC v. Amster & Co., 126 F.R.D. 28, 30 (S.D.N.Y. 1989). Recognizing selective waiver if the party holding the privilege and the government have entered into a binding agreement protecting the privilege. See also Fox v. California Sierra Fin. Services, 120 F.R.D. 520, 526-27 (N.D. Cal. 1988).

b. Partial Selective Waiver: Extent of Selective Waiver

Production of privileged documents exposes a party not only to the risk that a disclosed document or communication will be subject to discovery by other parties, but also the risk that additional documents and communications relating to the same subject matter will also be left unprotected. The party seeking disclosure typically argues that the party asserting the privilege may not select only those portions of a confidential communication that it wants to disclose.

Decisions in this area depend on the particular facts of the case, including the importance of the additional documents for a fair assessment of the disclosures made voluntarily, the nature of the person or entity requesting the material, and the efforts taken by the producing party to limit disclosure of privileged materials. In any event, there is a substantial risk that disclosures to a government agency will result in a waiver both as to disclosed documents and non-disclosed documents regarding the same subject matter. But see:

United States v. Lipshy, 492 F. Supp. 35, 43-44 (N.D. Tex. 1979). Disclosures in a report to the IRS and on SEC Form 10-K concerning questionable political contributions did not result in a waiver of the attorney-client privilege with respect to all of the details underlying an investigative report prepared by the corporation.

In re Grand Jury Subpoena, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979). The court held that disclosure of an independent counsel's report to the SEC, grand jury, and IRS did not result in a waiver of the attorney-client privilege with respect to the underlying documentation. The court based its reasoning in part on the policy argument that voluntary cooperation with government agencies and grand juries might be significantly curtailed if cooperation amounted to a full waiver of the attorney-client privilege.

***77** Some courts have found a selective disclosure of otherwise privileged materials to constitute a full waiver of the privilege. The District of Columbia Circuit, in a case decided after Upjohn, found that selective disclosure fully waived the privilege. In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982). In In re Sealed Case, outside counsel for the defendant conducted an internal investigation into possible illegal foreign payments and submitted a final report to the SEC. The grand jury subpoenaed and received all but 38 of these documents. Id. at 803-04. The court of appeals

held that the privilege had been waived for of all the documents, including the 38 that had been withheld. It rejected the corporation's argument that disclosure would prompt corporations to avoid voluntary cooperation with the government, and found that the corporation had "attempted to manipulate its privilege, by withholding vital documents while making a great pretense of full disclosure of their contents." Id. at 825. However, the court did state that the SEC or any other government agency could expressly agree to limitations on further disclosure consistent with their legal responsibilities. Id. at 824. See also:

In re Martin Marietta Corp., 856 F.2d 619, 623-23 (4th Cir. 1988). Waiver extended to details underlying the information actually disclosed to the agency.

In re Weiss, 596 F.2d 1185, 1186 (4th Cir. 1979). The court compelled an attorney to testify before a grand jury because he already had testified and produced documents before the SEC.

In re M & L Business Mach. Co., 161 B.R. 689, (Bnkr. D. Colo. 1993). Bank produced documents to the U.S. Attorney under an express reservation of privilege and the U.S. Attorney agreed to treat the production as privileged and confidential. In a later suit, the court found selective waiver and upheld the privilege based on the confidentiality provision, the express reservation of rights, the fact that the disclosure was not self-serving (vs. a voluntary compliance program), and the fact that the bank's assertion of privilege was in a suit brought by a private litigant rather than the government.

Rauh v. Coyne, 744 F. Supp. 1181, 1185 (D.D.C. 1990). Disclosure of counsel's conclusion after an internal investigation did not waive work- product protection for the report and underlying materials.

Triax Co. v. United States, 11 Cl. Ct. 130, 134 (1986). Voluntary disclosure of privileged communications by the Air Force to the Government Accounting Office constituted full waiver of all communications on the same subject. However, the court adopted a narrow interpretation of which subject matter had been disclosed.

7. Inadvertent Disclosure

Sometimes a party inadvertently discloses privileged communications, particularly in cases where large numbers of documents are produced. The courts differ as to whether these disclosures waive the attorney-client privilege. Courts have generally followed one of three distinct approaches to attorney- client privilege waiver based on inadvertent disclosures: (1) the strict approach, (2) the "middle of the road" approach, and (3) the lenient approach. Gray v. Bicknell, 86 F.3d 1472, 1483 (8th Cir. 1996). Under the strict approach, adopted by the court in In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), any document produced, either intentionally or otherwise, loses its privileged status. Gray, 86 F.3d at 1483. The strict test has been criticized because it may chill communications between clients and ***78** attorneys. Id. Under the lenient approach, attorney-client privilege must be knowingly waived; a determination of inadvertence ends the inquiry. Id. This approach fosters open communications between client and attorney, but creates no incentive to maintain tight control over privileged material. Id. The majority of courts apply the middle approach, applying a case by case analysis to determine the reasonableness of the precautions taken to protect against disclosure and the actions taken to recover the communication. The middle approach strikes a balance between protecting attorney-client privilege and allowing, in certain situations, the unintended release of privileged documents to waive that privilege. Gray, 86 F.3d at 1484. The Restatement has collected several of the factors frequently used by courts to analyze inadvertent waiver pursuant to the middle approach:

(1) the relative importance of the communication (the more vital or harmful the disclosure, the greater the expected protection),

(2) the efficiency of the protective measures taken and any additional precautions that might have been taken,

(3) the circumstances under which the non-privileged person became aware of the information,

(4) the nature of the precautions customarily taken for such communications,

(5) whether disclosure occurred under externally-imposed pressures or time limits or the volume of documents,

(6) whether the disclosure occurred while the communication was in the hands of the client or lawyer or permissibly in the hands of a third person; and

(7) the degree to which the inadvertent disclosure has caused the communication to be known to non-privileged persons.

REST. 3D ß 79 cmt. h. See also Alldread v. City ofGrenada, 988 F.2d 1425 (5th Cir. 1993) (five factor reasonableness test for inadvertent production); Snap-On Inc. v. Hunter Eng'g Co., 29 F. Supp. 2d 965, 971 (E.D. Wis. 1998). Compare:

In re Grand Jury Proceedings, 219 F.3d 175, 183 (2d Cir. 2000). Where waiver is a result of inadvertent document disclosure, scope of waiver should be limited based on the circumstances and overall fairness, including prejudice to the opposing party.

Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 647-51 (9th Cir. 1978). Failure to screen out all privileged documents could be excused on the ground that the production was compelled rather than voluntary due

to the large number of documents produced on a tight schedule.

IBM v. United States, 471 F.2d 507, 509-11 (2d Cir. 1972), on reh'g, 480 F.2d 293 (2d Cir. 1973). No waiver occurred when the party asserting the privilege was ordered by the court to produce an extraordinary number of documents on an expedited basis and all reasonable precautions had been taken.

***79** McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163 (D. Md. 1998). Party did not waive the privilege by tearing up a document containing privileged communications and placing it into a trash can. Although additional precautions such as shredding could have been taken, tearing the document into 16 pieces and placing it in a private trash can were reasonable measures to maintain the confidentiality of the document.

Aramony v. United Way of America, 969 F. Supp. 226, 238 (S.D.N.Y. 1997). Inadvertent production of 99 pages of privileged documents that were included in a total of 65,500 pages of documents produced did not constitute waiver of the attorney-client privilege. The court analyzed the care taken by the party asserting the privilege in light of the following factors: "the reasonableness of the precautions taken to prevent inadvertent disclosure; the time taken to rectify the error; the scope of the discovery; the extent of the disclosure; overriding issues of fairness." Id. at 235.

Lloyds Bank PLC v. Republic of Equador, No. 96 Civ. 1789 DC., 1997 WL 96591 (S.D.N.Y Mar. 5, 1997). Inadvertent production of fifty privileged documents, comprising 227 pages, did not waive the privilege where reasonable measures were taken and counsel acted quickly to correct the error. "As a general matter ... 'inadvertent production will not waive the privilege unless the conduct of the producing party or its counsel evinced such extreme carelessness as to suggest that it was not concerned with the protection of the asserted privilege."' (citation omitted).

Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261 (D. Del. 1995). Privileged documents in voluminous production were tabbed with post-its, but certain privileged documents were produced when tabs fell off documents. Court ruled privilege not waived because attorney had taken reasonable steps to protect confidentiality, and a more stringent rule would punish client for attorney's carelessness.

Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936 (S.D. Fla. 1991). Inadvertent production of the transcript of a privileged communication was not a waiver when produced among thousands of documents.

Gramm v. Horsehead Indus., Inc., No. 87 Civ. 5122, 1990 WL 142404 (S.D.N.Y. Jan 25, 1990). A formeremployee possessed a privileged memo and produced it in response to a subpoena. He refused to disclose the memo but did not realize that a second copy was in another file. The court found that the unintended and erroneous disclosure was not a waiver.

Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1985). Inadvertent production of one privileged document among 75,000 produced pages does not waive the privilege where the party attempted to screen such documents from production.

With:

Amgen, Inc. v. Hoechst Marion Roussel, Inc., Misc. Docket Nos. 610, 611, 2000 U.S. App. LEXIS 5102 (Fed. Cir. Feb. 25, 2000). Where 3000 pages of privileged documents which were segregated in separate boxes on a separate shelf were mistakenly picked up by a copy vendor and copied along with non- privileged documents and produced to opposing counsel, the appellate court did not find that the trial court had committed error in finding inadvertent waiver.

Security and Exchange Commission v. Cassano, 189 F.R.D. 83 (S.D.N.Y. 1999). Where SEC produced one 100 page privileged document among 52 boxes of non-privileged documents, and SEC acted twelve days later to rectify the problem, the court held that there had been inadvertent waiver. The court found persuasive evidence that on the day of the document production opposing counsel asked an SEC paralegal to copy the privileged document immediately, the paralegal telephoned SEC counsel for approval, and SEC counsel did not review a copy of the document to find out why opposing counsel was so interested in it. "The circumstances of the request [to copy the document] clearly should have suggested to the SEC attorney that defense counsel had found what they regarded as gold at the end of the proverbial rainbow. Any attorney faced with such a request in comparable circumstances should have reviewed the document immediately, if only to find out what the other side thought so compelling.... Yet the SEC attorney authorized production ***80** of the document, sight unseen. Any other precautions that were taken, and there were some, fade into insignificance in the face of such carelessness."

In re Grand Jury Investigation of Ocean Trans., 604 F.2d 672, 674-78 (D.C. Cir. 1979). Where documents were produced in response to a grand jury subpoena with no indication of their privileged status there was a complete waiver.

Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 331 (N.D. Cal. 1985). Where there was a "complete failure to take reasonable precautions" an inadvertent production waived the privilege.

Chubb Integrated Sys., Ltd. v. National Bank of Wash., 103 F.R.D. 52, 67 (D.D.C. 1984). The weight of authority

recognizes that waiver can occur through inadvertence.
See also:
Genentech, Inc. v. U.S. International Trade Comm'n, 122 F.3d 1409 (Fed. Cir. 1997). Inadvertent waiver of 12,000 pages of privileged materials in a multi-district patent infringement suit in the U.S. District Court constituted a waiver for all purposes, including discovery in an International Trade Commission proceeding. "Once the attorney-client privilege has been waived, the privilege is generally lost for all purposes and in all forums." Id. at 1416.

In general, the client must take prompt and reasonable steps to recover a privileged document after an inadvertent disclosure is discovered. See Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981); C. MCCORMICK, EVIDENCE ß 93 (J. Strong 4th ed. 1992). In some cases, parties have made provision for inadvertent disclosure in protective orders. At least one court has acknowledged such an arrangement in dictum. See Chubb Integrated Sys., Ltd. v. National Bank of Wash., 103 F.R.D. 52, 68 (D.D.C. 1984) (court suggested that contractual agreements between the parties which provided that inadvertent disclosure of documents will not be a waiver would be enforceable against a signatory); REST. 3D ß 79 cmt. h. But see Snap-On Inc. v. Hunter Eng'g Co., 29 F. Supp. 2d 965, 971 (E.D. Wis. 1998) (refusing to grant preemptive order that provided that inadvertent disclosure would not result in waiver because there was not solid basis for the preemptive order in Seventh Circuit case law, the relevant jurisdiction for attorney-client privilege issues in the case).

The courts that have found waiver based on inadvertent disclosures are split over whether a full or partial waiver results. Compare:
Mergentime Corp. v. Washington Metro. Area Transp. Auth., 761 F. Supp. 1, 2 (D.D.C. 1991). Inadvertent production of notes waived the privilege for the notes but not for other related privileged documents.
Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 208 (N.D. Ind. 1990). Inadvertent production of privileged communications results in waiver only for the disclosed document unless the disclosure was self-serving.
With:
In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989). Inadvertent disclosure constitutes waiver not just for the single document disclosed but to all other communications relating to the same subject matter.
***81** Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18 (9th Cir. 1981). Even if inadvertent, voluntary disclosure constitutes waiver on all communications on the same subject.
First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160, 173-74 (E.D. Wis. 1980). Even inadvertent disclosure can waive the privilege for related documents.

To facilitate the rapid production of documents and reduce the risk that the inadvertent production of privileged material will result in an irrevocable loss of privilege, some litigants have submitted to extra-judicial confidentiality agreements. Such agreements provide that, in the event of an inadvertent production of privileged material, the party receiving such material will return the documents and decline to assert a waiver of privilege.

Where the producing party has not been "completely reckless," at least some courts have enforced such agreements. See United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co., Nos. 97 Civ. 6124, 98 Civ. 3099, 2000 WL 744369 (S.D.N.Y. June 8, 2000).

8. Involuntary Disclosure

Traditional attorney-client privilege analysis required absolute confidentiality in attorney-client communications. See 8 J. WIGMORE, EVIDENCE ß ß 2325-26. Thus, the client assumed the risk that some third party would obtain the otherwise privileged information, whether by surreptitiously overhearing the conversation, or by later theft. See In re Grand Jury Proceedings Involving Berkley and Co., 466 F. Supp. 863, 869 (D. Minn. 1979).

The modern trend has been to maintain the privilege where reasonable precautions have been taken against eavesdropping or theft. See id. (directing the government to turn over to the court for in camera review of privileged status documents stolen from a corporation and turned over to the government by a disgruntled former employee). See also In re Dayco Corp. Derivative Securities Litigation, 102 F.R.D. 468, 470 (S.D. Ohio 1984) (diary subject to attorney-client and work-product privilege remained privileged after publication of excerpts in a newspaper where no indication existed that the diary was voluntarily supplied to the paper).

Where, however, insufficient precautions have been taken, discovery by a third person may still result in waiver. For example, where privileged documents are placed in a trash can and thereafter recovered by a third party, some courts will find a waiver to have occurred. See Suburban Sew'N Sweep, Inc., v. Swiss-Bernina, Inc., 91 F.R.D. 254, 260 (N.D. Ill. 1981) (noting the "modern trend" toward finding a lack of waiver in "eavesdropper" cases, but concluding that "if the client or attorney fear such disclosure, it may be prevented by destroying the documents or rendering them unintelligible before placing them in a trash dumpster").

***82 9. "At Issue" Defenses**

The attorney-client privilege may be deemed waived when the privileged communication is itself an issue in the litigation. This occurs when the client alleges that she relied on the advice of counsel, misunderstood an agreement, diligently investigated a claim, or otherwise puts an attorney's advice into issue. See e.g., Peterson v. Wallace Computer Services, Inc., 984 F. Supp. 821, 825 (D. Vt. 1997) (defendant waived the attorney-client privilege with respect to notes and memoranda prepared for the defendant's attorney during the course of an internal investigation of sexual harassment complaints by asserting that it conducted an adequate investigation of plaintiff's complaints); REST. 3d ß 80(1)(b). See also Employment Discrimination Cases: "Issue Waiver, ß VIII, C(2), infra. Defenses to a criminal or civil action that the client's legal assistance was ineffective, negligent or wrongful would also waive the privilege. In re Continental Illinois Securities Litigation, 732 F.2d 1302, 1315 n.20 (7th Cir. 1984); Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974); United States v. Woodall, 438 F.2d 1317, 1324-25 (5th Cir. 1970); Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc., 703 N.E.2d 634, 639 (Ill. App. 1998). However, merely denying allegations in defending a lawsuit does not cause "at issue" waiver. North River Ins. Co. v. Philadelphia Reinsurance Corp., 797 F. Supp. 363 (D.N.J. 1992). Some courts have found that the at-issue waiver applies where a party asserts a position "the truth of which can only be assessed by examination of the privileged communication." Pereira v. United Jersey Bank, Nos. 94 Civ. 1565 & 1844, 1997 WL 773716 at *5 (S.D.N.Y. Dec. 11, 1997) (the attorney-client privilege was waived where defendant placed its knowledge and intent at issue and the defendant's in-house attorney played a major role in shaping and informing the defendant's knowledge and intent). Other courts have held that a party must affirmatively try to use the privileged communications to defend itself in the lawsuit in order to invoke the at-issue waiver. See:

Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co., 32 F.3d 851, 863-64 (3d Cir. 1994). Where the client makes the affirmative decision to place the advice of the attorney in issue, the privilege is waived.

United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990). In claiming that a party's attorney advised the party that an action was legal, party waived privilege as to attorney's testimony that he had in fact advised as to the action's illegality.

Harter v. University of Indianapolis, 5 F. Supp. 2d 657, 664-65 (S.D. Ind. 1998). Plaintiff, asserting a claim against his former employer under the Americans with Disabilities Act (ADA), did not waive the attorney-client privilege by alleging that his former employer failed to make reasonable accommodations for his disability through good faith negotiations with the plaintiff's attorney. While the plaintiff's claim placed his purported effort of making good-faith negotiations at issue, the plaintiff did not depend on privileged communications to make out his ADA claim.

In re Carter, 62 B.R. 1007 (Bankr. C.D. Cal. 1986). Trustee sued attorneys claiming that they had not rendered valuable services to the bankruptcy estates. When attorneys defended by claiming that they had provided valuable services, court found that no waiver had occurred since it was not attorneys who had put the value of the services in issue. The court held that "[s]killful pleadings may not render a privilege a nullity."

Chase Manhattan Bank N.A. v. Drysdale Sec. Corp., 587 F. Supp. 57 (S.D.N.Y 1984). No waiver occurs when plaintiff seeks to force waiver by using defendant's privileged communications to prove its case.

***83 a. Reliance on Advice of Counsel**

A client who claims that he acted pursuant to the advice of a lawyer cannot use the privilege to immunize that advice from scrutiny. See Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992); REST. 3D ß 79 cmt. c. Such a defense clearly places the lawyer's advice at issue and waives the privilege for all materials concerning the same subject matter. See C. MCCORMICK, EVIDENCE ß 93 (J. Strong. 4th ed. 1992). See also:

SRI Int'l, Inc. v. Advanced Tech. Lab., Inc., 127 F.3d 1462, 1465 (Fed. Cir. 1997). In a patent infringement case, plaintiffs can obtain patent opinions issued by defendant's counsel where defendant asserts defense of reliance on advice of counsel in order to prove willful infringement.

In re Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251 (6th Cir. 1996). The owner and president of a laboratory disclosed to government investigators that they had consulted Medicare attorney regarding certain charging practices reflected in the laboratory's marketing plan, and that they had relied on the attorney's advice. Court held that the

laboratory had waived the attorney-client privilege with respect to the specific aspect of the marketing plan discussed with investigators, but not with respect to other aspects of the marketing plan discussed with the attorney.

Glenmede Trust Co. v. Thompson, 56 F.3d 476 (3d Cir. 1995). Plaintiff shareholders were entitled to law firm's file concerning services provided to defendant corporation. Court concluded that defendant had waived the privilege for these materials by alleging that it had relied on the law firm's advice about tax regulations.

Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162-63 (9th Cir. 1992). Pennzoil claimed it had reasonably relied on counsel for its position that purchase of stock in Chevron would receive favorable tax treatment. Court stated that no attorney-client privilege existed for documents relating to counsel's position since the party cannot shield documents that could possibly refute the defense.

United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991). The court refused to permit party to testify that he believed in good faith based on advice of counsel that his actions were legal without being subject to cross-examination about the basis for this belief and the actual communications he had with his attorney.

Conkling v. Turner, 883 F.2d 431 (5th Cir. 1989). Plaintiff claimed that he did not know of the falsity of some information until his attorney notified him. Court found that attorney was subject to deposition because these privileged communications had been placed in issue by plaintiff.

McLaughlin v. Lunde Truck Sales, Inc., 714 F. Supp. 916 (N.D. Ill. 1989). Court found that a defense of good faith reliance on the advice of Department of Labor acted as waiver of the attorney-client privilege. Party cannot ask for an inference of good faith then use the privilege to shield information that could show there was no good faith reliance.

Hartz Mountain Indus., Inc. v. Commissioner, 93 T.C. 521 (T.C. 1989). In a dispute over whether a settlement was an ordinary or capital loss, plaintiff filed an affidavit which set forth its internal position concerning the intent behind the settlement. Court found that this placed in issue factual matters surrounding confidential communications and thus waived the attorney-client privilege.

***84** But see:

Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.), Inc., 111 F.R.D. 76 (S.D.N.Y. 1986). Privilege is waived when communications are themselves an issue in the litigation only where:

(1) the very subject of privileged communications is critically relevant to the issue to be litigated,

(2) there is a good faith basis for believing such essential privileged communications exist, and

(3) there is no other source of direct proof on the issue.

Implied waiver principle will not be expanded, however, to every case in which fraud or reliance is an issue, and the moving party alleges that a legal opinion was the actual impetus for his opponent's actions.

Barr Marine Prods. Co. v. Borg-Warner Corp., 84 F.R.D. 631, 635 (E.D. Pa. 1979). Affirmative "meeting competition" defense to an antitrust action does not directly implicate the advice of counsel defense, and therefore does not constitute a waiver.

b. Lack of Understanding

In some cases, a client may place communications with her attorney at issue by asserting a defense of lack of understanding of the terms or extent of an agreement. In Synalloy Corp. v. Gray, 142 F.R.D. 266 (D. Del. 1992), the court held that three conditions must be shown before an injected issue will be deemed to waive the privilege:

(1) the privilege was asserted due to the act of the asserting party (i.e., by filing suit);

(2) through the act of asserting the privilege, the asserting party puts confidential communications into issue by making them relevant; and

(3) the application of the privilege denies the non-asserting party access to information vital to its defense.

Synalloy Corp., 142 F.R.D. at 269. In Synalloy, the parties signed an agreement which extinguished all "pending claims" between them. The defendant claimed this agreement extinguished liability for a short swing profit claim. The plaintiff argued that under its understanding of the agreement the profit claim was not covered, and it would never have agreed to extinguish such a claim. The court held that the misunderstanding injected a new issue of inducement through fraudulent misrepresentation, and therefore the communications of the attorney would be required to determine reliance and lack of understanding. Thus, the court held that plaintiff waived the privilege by introducing this new issue to the litigation. Id. See also Sax v. Sax, 136 F.R.D. 542 (D. Mass. 1991) (asserting lack of mutual understanding of memorandum agreement waived attorney-client privilege); Pitney-Bowes, Inc. v. Mestre, 86 F.R.D. 444, 447 (S.D. Fla. 1980) (same).

c. Diligence and Fraudulent Concealment

The activities and communications of attorneys may also be placed in issue to prove or disprove an attorney's diligence. In ***85**New York v. Cedar Park Concrete Corp., 130 F.R.D. 16 (S.D.N.Y. 1990), the state claimed that

defendant's fraudulent concealment prevented detection of his acts and thus tolled the statute of limitations. The court determined that the state's correspondence, memoranda and attorney work papers were necessary to refute the defense of concealment. The court therefore found the privilege waived and ordered production of the papers relevant to the concealment period. See also:

Byers v. Burleson, 100 F.R.D. 436, 440 (D.D.C. 1983). Plaintiff asserted that the statute of limitations was tolled since his opponent had fraudulently concealed his activities. Court held that this waived the privilege for all communications relating to plaintiff's knowledge that a claim had arisen.

d. Extent of "At Issue" Waiver

In cases where a client has waived the privilege by placing privileged communications in issue, the scope of the resulting waiver extends to all of the communications bearing on that subject matter that the court deems necessary to litigate the issue fairly. However, waiver only affects those communications that address the issue raised by the client, and not related issues. See Pray v. The New York City Ballet, No. 96 Civ. 5723, 1998 U.S. Dist. Lexis 2010 at *4 (S.D.N.Y. Feb. 13, 1998) (privilege waived where defendant asserted as an affirmative defense to a sexual harassment claim that it took reasonable steps to remedy plaintiff's complaints by conducting an internal investigation, but only with respect to communications concerning the steps taken to carry out the investigation and not with respect to the advice given to the defendant by its attorneys before and after the internal investigation); REST. 3D ß 79 cmt. b. See also:

Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., No. 95 Civ. 8833, 1997 WL 801454 at *3 (S.D.N.Y. Dec. 31, 1997). A party is not permitted to waive the privilege with respect to documents that are favorable to the party's position, while, at the same time, withholding documents that are potentially adverse to its position. All documents relating to the information that the party placed in issue must be disclosed. "Particular solicitude," however, should be given to information "encompassing the attorney mental processes."'

Panter v. Marshall Field & Co., 80 F.R.D. 718, 720-21 (N.D. Ill. 1978). Waiver extends to all communications concerning the transaction for which advice was sought.

Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 928-29 (N.D. Cal. 1976) rev'd on other grounds sub nom. Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979). Advice of counsel defense waived the privilege for all documents and communications relating to the advice.

Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc., 703 N.E.2d 634, 639 (Ill. App. 1998). Privilege is waived "[w]hen a client asserts a claim of legal malpractice against former counsel and the facts reveal the client was represented by multiple attorneys priorto the alleged act of malpractice, [because] the substance of the legal advice given by all attorneys involved may be directly 'at issue' in the malpractice action against one of them." However, the privilege is waived only with respect to communications that could have contributed to the client's damages. Id. at 641.

***86 10. Witness Use of Documents**

a. Refreshing Recollection of Ordinary Witnesses

The attorney-client privilege may also be waived by using privileged documents for the purpose of refreshing the recollection of a witness. Rule 612 of the Federal Rules of Evidence (FRE) provides that "if a witness uses a writing to refresh memory for the purposes of testifying ... an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness." Under FRE 612, if the witness uses the communication to refresh or aid his testimony while he is actually testifying, then the privilege is waived and the court must order disclosure. Fed. R. Evid. 612(1). However, if the witness merely used the communication to refresh his recollection prior to testifying, the court has discretion to order disclosure in the interests of justice. Fed. R. Evid. 612(2). Courts and commentators have created different guidelines for the exercise of this discretion. See, e.g., 3 J. Weinstein & M. Berger, Weinstein's Evidence, ∂ 612[04] (1982 & Supp. Dec. 1982) (waiver should be found only when witness has consulted a writing embodying his own communication and his testimony discloses a significant part of the communication); Rest 3d ß 130 cmt. e (waiver should be found only in the uncommon circumstance when the document serves as a script for the witness' testimony in place of his own memory). See also:

Farm Credit Bank v. Huether, 454 N.W.2d 710, 718 (N.D. 1990). Waiver extends to a document specifically referred to while testifying but not to other documents in the same file.

Baker v. CNA Ins. Co., 123 F.R.D. 322, 327 (D. Mont. 1988). Use of privileged documents to refresh recollection prior to deposition does not constitute waiver unless the testimony disclosed the substance of a significant portion of the communication.

Leybold-Heraeus Techs., Inc. v. Midwest Instrument Co., 118 F.R.D. 609, 614 (E.D. Wis. 1987). Deponent who

uses privileged document to refresh his recollection before testifying waives the attorney-client privilege for the document.

James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 146 (D. Del. 1982). Plaintiff waived both attorney-client and work-product privileges for an attorney-assembled binder of non-privileged documents by using the binder to prepare witnesses for their depositions.

R.J. Hereley & Son Co. v. Stotler & Co., 87 F.R.D. 358, 359 (N.D. Ill. 1980). Attorney-client privilege waived by a deponent's use of a privileged document to refresh his recollection before testifying.

Wheeling-Pittsburgh Steel Corp. v. Underwriters Lab., Inc., 81 F.R.D. 8, 8-11 (N.D. Ill. 1978). Court ordered production of correspondence with attorney that witness used to refresh recollection prior to deposition.

However, courts are reluctant to order disclosure when a witness has merely looked at a document prior to testifying. See:

Leucadia,Inc. v. Reliance Ins. Co., 101 F.R.D. 674, 679 (S.D.N.Y. 1983). The court noted that the legislative history of the amendments to Federal Rule of Evidence 612 indicates that Congress did not intend to bar the assertion of the attorney-client privilege for writings used by a witness to refresh his memory. Court, ***87** therefore, held that the mere fact that a deposition witness "looked at" a document protected by the attorney-client privilege in preparation for a deposition is inadequate to destroy the privilege.

Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii) Ltd., 85 F.R.D. 118, 199-20 (W.D. Mo. 1980). Correspondence file of attorney-witness was not discoverable even though he "looked at" it prior to his deposition.

Compare:

Audiotext Communications Network, Inc. v. US Telecom, Inc., 164 F.R.D. 250, 254 (D. Kan. 1996). Notebook of privileged documents that witness "flipped through" the night before his deposition had an impact on witness' testimony because the witness testified that he was "astonished" that he had forgotten some of the items that were in the notebook.

Bank Hapoalim, B.M. v. American Home Assur. Co., No. 92 Civ. 3561, 1994 WL 119575 (S.D.N.Y. Apr. 6, 1994). Despite the fact that a witness testified he only "looked at" documents prior to deposition, the fact that he spent several hours reviewing them, was able to identify specific documents that he had reviewed, and displayed knowledge of the information contained in the documents showed that the documents impacted his testimony and should be produced.

In general, only a partial waiver results when a witness has used a document to refresh his recollection. The privilege is not waived for all other documents that relate to the document used to refresh recollection. Marshall v. United States Postal Serv., 88 F.R.D. 348, 380-81 (D.D.C. 1980) (privilege waived only as to documents used to refresh recollection, but not as to all communications on same subject). FRE 612 permits the court to inspect the communications in camera and excise portions unrelated to the subject matter of the testimony. See The Extent of Waiver ß I(G)(5), supra.

b. Use of Documents by Experts

Where privileged documents are disclosed to a testifying expert, the court must balance two competing considerations:

(1) the belief that adequate truth-finding requires litigants to have access to the information on which an expert opinion is based in order to verify that opinion; and

(2) the belief that attorney-client communications should be protected in order to encourage disclosure of the details necessary for good legal advice.

Courts typically resolve questions involving waiver of the privilege in such situations by balancing the interest of the discovering party against any prejudice from abrogation of the privilege. This generally leads to discovery of the information used by experts to form their opinions. See:

***88** The Herrick Co., Inc. v. Vetta Sports, No. 94 Civ. 0905, 1998 U.S. Dist. Lexis 14544 at *4 (S.D.N.Y. Sept. 14, 1998). "[A] party waives the attorney-client and work product privileges whenever it puts an attorney's opinion into issue, by calling the attorney as an expert witness or otherwise." Party waived privilege by designating its ethics consultant as its testifying legal ethics expert during the course of litigation. Id. at *10. The court ordered the production of all documents relating to the advice rendered by the expert to the party on the general subject matter of the expert's report filed with the court. Id. at *10-11.

In re E.I. du Pont de Nemours and Co. -- Benlate (R) Litigation, 918 F. Supp. 1524 (M.D. Ga 1995), rev'd on other grounds, 99 F.3d 363, 368 (11th Cir. 1996). An expert's reliance on summary data waives any privilege that might protect the more detailed underlying data.

Shadow Traffic Network v. Superior Court of L.A. County, 29 Cal. Rptr. 2d 693 (Cal. Ct. App. 1994). Court held that designation of an expert as a witness manifests the client's consent to disclosure of the privileged information formerly provided to the expert, and the privilege is therefore waived.

Coyle v. Estate of Simon, 588 A.2d 1293 (N.J. Super. App. Ct. Div. 1991). In medical malpractice case, copies of portions of the plaintiffs' written statements to their attorney were given to their expert. Court determined that the attorney-client privilege was waived after an in camera review showed that some of the statements were relevant to the expert's opinions.

See also:

The Work-Product Doctrine: Use of Documents by Witnesses and Experts, ß IV(F)(8), infra.

H. EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE

1. The Crime-Fraud Exception

The attorney-client privilege does not apply when a client consults a lawyer for the purpose of furthering an illegal or fraudulent act. Clark v. United States, 289 U.S. 1 (1933); In re Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986); In re Grand Jury Subpoenas Duces Tecum, 773 F.2d 204, 206 (8th Cir. 1985); United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984). The so-called "crime-fraud exception" removes the protection of the attorney-client privilege for communications concerning contemplated or continuing crimes or frauds. This exception encompasses criminal and fraudulent conduct based on action as well as inaction. See:

Craig v. A.H. Robins Co., 790 F.2d 1 (1st Cir. 1986). General counsel's advice to destroy documents after loss of court case was not privileged in later suit.

In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986). Communications made with intent to further violations of the Sherman Act held not privileged based on the crime-fraud exception.

In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038-39 (2d Cir. 1984). Fraudulent conveyance was a sufficient basis for application of the crime-fraud exception.

In re St. Johnsbury Trucking Co., 184 B.R. 446 (Bankr. D. Vt. 1995). Fraud on the court is sufficient basis for application of the crime-fraud exception.

***89** Irving Trust Co. v. Gomez, 100 F.R.D. 273 (S.D.N.Y. 1983). Intentional or reckless tort of refusing to release funds without a basis for belief that the customer was not entitled to his money was sufficient basis for application of the crime-fraud exception.

However, the crime-fraud exception does not apply to communications concerning crimes or frauds that occurred in the past. United States v. Zolin, 491 U.S. 554 (1989). Such communications remain protected. In cases where the communications at issue were made for the purpose of covering up past misconduct or obstructing justice, the privilege may be waived since these activities constitute a continuing offense. See:

In re Federal Grand Jury Proceedings, 89-10, 938 F.2d 1578 (11th Cir. 1991). Court held that the crime-fraud exception applies only to current or future illegal acts. Thus, the privilege protected a memorandum sent after the fraud was completed but which memorialized communications which occurred during the fraud. Court concluded that post-crime repetition or discussion of earlier communications can be privileged even though the original conversation would not have been privileged because of the crime-fraud exception.

Duttle v. Bandler & Kass, 127 F.R.D. 46 (S.D.N.Y. 1989). Court required disclosure of documents which showed attempt to pay off an adversary in civil litigation in order to get allegations of criminal fraud withdrawn.

After a party has invoked the attorney-client privilege, the person seeking to abrogate the privilege under the crime-fraud exception has the burden to present a prima facie case that the advice was obtained in furtherance of an illegal or fraudulent act. See In re Grand Jury Subpoena, 223 F.3d 213, 217 (3d Cir. 2000) (To establish crime-fraud exception, party seeking waiver must "make a prima facie showing that (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud.") (citation omitted); In re Grand Jury Subpoenas, 144 F.3d 653, 659-60 (10th Cir. 1998); In re Grand Jury, 845 F.2d 896 (11th Cir. 1988); In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038-39 (2d Cir. 1984); United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984); In re Grand Jury Proceedings, 689 F.2d 1351, 1352 (11th Cir. 1982); In re Campbell, 248 B.R. 435, 439 (Bankr. M.D. Fla. 2000); X Corp. v. Doe, 805 F. Supp. 1298 (E.D. Va. 1992); Coleman v. ABC, 106 F.R.D. 201, 207 (D.D.C. 1985). It is not necessary to show that the crime or fraud was actually completed -- only that the crime or fraud was the objective of the communication. In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984).

Courts have reached different conclusions on the burden of proof required by the prima facie case standard. See In re Feldberg, 862 F.2d 622 (7th Cir. 1988) (noting differences and finding that a prima facie case is shown by evidence sufficient to require an explanation by the party asserting the privilege). The U.S. Supreme Court has left open the question of what showing of proof must be made to establish the exception. United States v. Zolin, 491 U.S. 554, 563-64 n.7 (1989). At least two circuits have held that the party seeking to abrogate the privilege must demonstrate probable cause to believe that a crime or fraud was committed. In re Antitrust Grand Jury, 805 F.2d 155, 165-166 (6th Cir. 1986); In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995) (reversing district court for applying "relevant evidence" standard rather than more stringent "probable cause" standard.); ***90**In re Richard Roe, Inc., 168 F.3d 69, 71 (2d Cir. 1999) (again reversing the district court for failure to find probable cause); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032 (2d Cir. 1984) (standard requires probable cause to believe that a crime or fraud has been committed and that the communications were in furtherance thereof, or in other words that a prudent person has a reasonable basis to suspect the actual or attempted perpetration of a crime or fraud and that the communications were in furtherance thereof). The District of Columbia Circuit requires a showing which "offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985). See also Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) (prima facie showing made if party seeking discovery presents evidence which if believed by the fact-finder would be sufficient to support a finding that the elements of the crime-fraud exception are met); In re Grand Jury Subpoenas, 144 F.3d 653, 660-61 (10th Cir. 1998) (prima facie showing established by "substantial and competent evidence" that the defendant used its attorney's legal services in furtherance of a crime); Sound Video Unlimited, Inc. v. Video Shack, Inc., 661 F. Supp. 1482, 1486 (N.D. Ill. 1987). In practice, these standards may not be very different. Coleman v. ABC, 106 F.R.D. 201, 207 n.8 (D.D.C. 1985) (citing probable cause standard with approval). The Fifth Circuit regards such a prima facia case as requiring the showing of evidence, which if unrebutted, would result in a finding of fraud. See In re International Systems and Controls Corp. Securities Litigation, 693 F.2d 1235, 1242 (5th Cir. 1982); In re Campbell, 248 B.R. 435, 440 (Bankr. M.D. Fla. 1999),

In establishing a prima facie case, the court will generally examine evidence of the client's knowledge and intent to further the illegal act at the time the communication was made. See REST. 3D ß 82 cmt. f. The client's intent is determinative; the ignorance or knowledge of the attorney does not matter. In re Grand Jury Proceedings, 87 F.3d 377, 381-82 (9th Cir. 1996) (privilege is waived where communications were in furtherance of criminal activity, despite the fact that attorney was unaware of the criminal activity and may actually have hindered the attempted criminal activity); In re Grand Jury Investigation, 842 F.2d 1223 (11th Cir. 1987) (exception applies regardless of whether the attorney is aware of the client's improper purpose). See also United States v. Laurins, 857 F.2d 529 (9th Cir. 1988) (privilege waived for communications in which a client falsely told his attorney that documents were not in the country and the attorney repeated this claim to the IRS); In re Sealed Case, 754 F.2d 395, 402 (D.C. Cir. 1985); United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984); C. MCCORMICK, EVIDENCE ß 95 (J. Strong 4th ed. 1992); REST. 3D ß 82 cmt. f. In addition, the client must have had the guilty intent at the time the advice was sought. See United States v.Rakes, 136 F.3d 1, 4 (1st Cir. 1998) (communications between victim of extortion and attorney did not fall within scope of crime-fraud exception even though purpose of communication was to comply with demands of individuals involved in an extortion scheme); In re Grand Jury Subpoenas Duces Tecum, 773 F.2d 204 (8th Cir. 1985). But see In re Sealed Case, 754 F.2d 395 (D.C. Cir. 1985) (party not required to make specific showing of client's intent in consulting attorney when attorneys were "front men" in scheme to subvert the judicial process by destroying and altering evidence). In cases where the attorney is involved in the crime or fraud ***91** and the client is ignorant, then the client can assert the attorney-client privilege. In re Impounded Case (Law Firm), 879 F.2d 1211, 1214 (3d Cir. 1989). See also:

Loustalet v. Refco, Inc., 154 F.R.D. 243 (C.D. Cal. 1993). Third party witness retained attorney to assist in the preparation of a letter to the SEC which contained false statements. Court found that communications surrounding this letter were privileged since the client was consulting lawyer about the legality of his conduct and because it was the client, not the attorney, who had drafted the deceptive letter.

To establish the prima facie case, a link must also be drawn between the privileged communication and the crime or fraud. The communication must not merely relate to the crime or fraud, it must be in furtherance of it. See United States v. White, 887 F.2d 267 (D.C. Cir. 1989) (communication must be in furtherance of the crime or fraud not just related to the crime or fraud); In re Antitrust Grand Jury, 805 F.2d 155, 168 (6th Cir. 1986) ("[M]erely because some communications may be related to a crime is not enough to subject that communication to disclosure; the communication must have been made with an intent to further the crime"); Pritchard-Keang Nam Corp. v. Jaworski,

751 F.2d 277 (8th Cir. 1984) (report of the results of an investigation into questionable payments was not itself in furtherance of crime or fraud, and therefore was not subject to disclosure under the crime-fraud exception); In re Sealed Case, 676 F.2d 793, 815 n.91 (D.C. Cir. 1982) (discussing the different standards required by the Circuit to establish the closeness of this link).

In addition, the court may not rely solely on the privileged document itself to prove the crime-fraud exception. Instead, in United States v. Zolin, 491 U.S. at 554 (1989), the United States Supreme Court held that a party must make a preliminary showing before the court can conduct an in camera review. To make this showing, the movant must establish preliminary justification for a reasonable, good-faith belief that the communication is subject to the crime- fraud exception. Id. at 572. If this showing is made, the trial judge has the discretion to conduct an in camera examination of the entire communication. The judge is never required to conduct an in camera inspection. Id. See also:

United States ex rel Mayman v. Martin Marietta Corp., 886 F. Supp. 1243 (D. Md. 1995). A court cannot examine an otherwise privileged document in camera absent an adequate threshold prima facia showing. Court refuses to review privileged document that had been stolen from defendant by qui tam plaintiff who was former employee of defendant.

The crime-fraud exception can thus be proven during in camera inspection only after the moving party sets forth a factual basis sufficient for a reasonable person to conclude that such a review would establish the non-privileged nature of the documents. Id. In Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992), the court explored the relationship between (1) the burden to establish a prima facie case and (2) the showing required to justify an in camera review under Zolin. In the second showing, the court determines whether adequate evidence has been presented that in camera review will be fruitful. In making this determination, the court may consider only the presentation of the party challenging the privilege and seeking the in camera review. See In re Grand Jury Investigation, 974 F.2d 1068 (9th Cir. 1992) (judge does not have to consider evidence from the party opposing invocation ***92** of the crime-fraud exception when determining if the threshold for an in camera inspection has been met). If in camera review is deemed potentially useful under this showing, the court then examines the disputed material and weighs the evidence to determine if the prima facie burden has been met. When evaluating the prima facie case, the court must follow a more formal procedure and the party invoking the protection of the privilege must be given opportunity to be heard under due process. Haines, 975 F.2d at 90. See also:

In re Marriage of Decker, 606 N.E.2d 1094 (Ill. 1992). Illinois adopted the prima facie test of the U.S. Supreme Court in Zolin which requires that a judge first require a factual showing adequate to support a good faith belief by a reasonable person that an in camera review of the materials may establish the claim that the crime-fraud exception applies.

After the court determines that the crime-fraud exception applies, the privilege will not protect any communications made in furtherance of the fraud. However, the exception does not remove protection for other non-related communications. See In re Sealed Case, 676 F.2d 793, 814-15 (D.C. Cir. 1982); In re Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 61 n.19 (7th Cir. 1980); REST. 3D ß 82 cmt. g.

2. Exception for Suits Against Former Attorney

A client may also waive the privilege when he sues his former attorney. Laughner v. United States, 373 F.2d 326, 327 n.1 (5th Cir. 1967); REST. 3D ß 83; 8 J. WIGMORE, EVIDENCE ß 2327 (J. McNaughton rev. 1961); C. MCCORMICK, EVIDENCE ß 91 (J. Strong 4th ed. 1992). Thus, the privilege will not protect communications relevant to a dispute over compensation or whether a lawyer acted wrongfully or negligently. 2 J. Weinstein & M. Berger, Evidence ∂ 503(d)(3)[01] (1986); 24 C. Wright & K. Graham, Federal Practice & Procedure ß 5503 (1986). However, an attorney may not use privileged information offensively against a client. See e.g., Siedle v. Putnam Investments, Inc., 147 F.3d 7, 12 (1st Cir. 1998) (complaint filed by attorney against former client that included privileged information must be sealed by the court to protect the confidentiality of the privileged communications); In re Rindlisbacher, 225 B.R. 180 (B.A.P. 9th Cir. 1998) (action filed by attorney against former client that was based on privileged information the attorney obtained while representing the former client was barred by both the attorney's ethical obligations and his obligation pursuant to the attorney- client privilege to preserve client confidences). This exception acts as a selective waiver for the attorney only. The communications remain privileged to the rest of the world. See Rest. 3d ß 83 cmt. e. See also:

Industrial Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Elec. Co., 953 F.2d 1004 (5th Cir. 1992). Institution of a malpractice suit against one's attorney does not waive the attorney-client privilege with respect to

third parties. Moreover, a complaint is not waiver in itself since confidentiality is not compromised until those communications are actually revealed.

Cannon v. U.S. Acoustics Corp., 532 F.2d 1118, 1120 (7th Cir. 1976). Lawyers can employ privileged client information in fee claims against clients.

***93 3. Fiduciary Exception**

An exception to the attorney-client privilege has been developed for actions between an organization and the parties to whom it owes fiduciary duties. This exception originally started in the area of shareholder derivative actions where courts were reluctant to permit corporations to invoke the attorney- client privilege to shield information from shareholders. See Garner v. Wolfinbarger, 430 F.2d 1093, 1102-03 (5th Cir. 1970). However, the Garner doctrine has been expanded to non-derivative cases and has become an important and sometimes tricky exception to the attorney-client privilege.

a. The Garner Doctrine

In Garner v. Wolfinbarger, 430 F.2d 1093, (5th Cir. 1970) , perhaps the most influential decision in this area, the Fifth Circuit held in a shareholder derivative suit that:

[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.

Id. at 1103-04. The Garner court thus concluded that the protection of the privilege could be removed upon a showing of good cause. In reaching its decision, the court analogized the exception to the crime-fraud and joint-defense exceptions to the attorney-client privilege. Id. at 1102-03 (the joint-defense privilege is discussed in ß II(A), infra). Garner rationalized that a fiduciary relationship between the corporation and its shareholders creates a commonality of interest which precludes the corporation from asserting the attorney-client privilege against its shareholders. Id.

The Garner court set forth a number of factors relevant to the presence or absence of a shareholder's "good cause" to invoke the exception. Id. at 1104. A court should thus consider:

(1) The number of beneficiaries actively requesting the privileged communication and their share in the organization. See Fausek v. White, 965 F.2d 126 (6th Cir. 1992) (40% of shareholders sufficient); Ward v. Succession of Freeman, 854 F.2d 780 (5th Cir. 1988) (less than 4% of shareholders not sufficient).

(2) The substantiality of the beneficiaries' claim and whether there is an ulterior motive to place pressure on the organization.

(3) The good faith of the beneficiaries.

***94** (4) The apparent relevance of the requested communications to the beneficiaries' claim, and the extent to which the information is available from other non-privileged sources. See Fausek v. White, 965 F.2d 126 (6th Cir. 1992) (need uniqueness, not just convenience -- in this case, the desired material was not readily availableelsewhere, if at all); In re LTV Sec. Litig., 89 F.R.D. 595, 608 (N.D. Tex. 1981) (availability is an important factor, but true unavailability is needed -- ease and cheapness are not as important).

(5) The extent to which the beneficiaries' claim accuses the managers of the organization of clearly criminal or illegal acts.

(6) Whether the communication related to past acts or to future events.

(7) Whether the communication concerns advice about the litigation which has been brought by the beneficiaries. See Zitin v. Turley, No. Civ. 89- 2061, 1991 U.S. Dist. Lexis 10084 at *11 n.1 (D. Ariz. June 20, 1991) (Garner exception did not apply because communications that shareholders sought were not related to the decisions that gave rise to the shareholder's claims).

(8) The specificity of the beneficiaries' request.

(9) The extent to which the requested communications might contain trade secrets or other valuable information.

(10) The extent that protective orders will protect disclosure.

(11) Whether the decision not to waive the privilege was made by a disinterested group of officers or directors. See Garner, 430 F.2d at 1104. These factors are non-exclusive and of equal weight. Garner, 430 F.2d at 1104. Through this analysis, the court balances the injury that may result to the corporation from disclosure against (A) the benefit to be gained from the proper disposition of the litigation and (B) the rights of the shareholders. Id. at 1101.

In general, the burden is on the party seeking the otherwise privileged materials to show "good cause" to invoke the

fiduciary exception to the privilege. Martin v. Valley Nat'l Bank of Ariz., 140 F.R.D. 291, 323 (S.D.N.Y. 1991).

Most courts have followed Garner. See Fortson v. Winstead, McGuire, Sechrest & Ninick, 961 F.2d 469 (4th Cir. 1992) (even though limited partners could not establish good cause, the court recognized that the fiduciary exception could apply); Fausek v. White, 965 F.2d 126 (6th Cir. 1992) (recognizing that former shareholders had shown good cause to abrogate corporate privilege); In re General Instrument Corp. Securities Litigation, ***95**190 F.R.D. 527, 529 (N.D. Ill. 2000); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp 1357, 1363 (S.D.N.Y. 1983) (ordering disclosure in a case between a client and the bank that represented it in a real estate transaction); Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982) (ordering disclosure of communications between attorney and trustee pursuant to Garner); In re LTV Sec. Litig., 89 F.R.D. 595 (N.D. Tex. 1981); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 31-32 (N.D. Ill. 1980) (applying Garner but not finding good cause).

However, some federal courts have refused to follow Garner. See Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 390-91 (D. Conn. 1986) (rejecting the Garner doctrine); Milroy v. Hansen, 875 F. Supp. 646, 650- 52 (D. Neb. 1995) (denying request of a director and minority shareholder to obtain privileged documents, and stating that the Garner doctrine's "continued vitality is suspect").

Several state courts have also adopted the Garner rationale. See, e.g., Neusteter v. District Court of Denver, 675 P.2d 1 (Colo. 1984); Beard v. Ames, 468 N.Y.S.2d 253 (N.Y. App. Div. 1983). But see Hoiles v. Superior Court, 157 Cal. App. 3d 1192, 1199 (4th Dist. 1984) (rejecting Garner doctrine for shareholder derivative suits).

b. Extension of Garner Beyond Derivative Suits

The Garner doctrine originally arose in the context of the shareholder derivative suit. In a derivative suit, the shareholder purports to represent the corporation itself, and in such cases, there is a clear fiduciary duty owed by the directors and officers to the corporation. Recently, however, some courts have expanded the application of Garner to other areas where officers owe fiduciary duties to a company's shareholders. See:

Fausek v. White, 965 F.2d 126 (6th Cir. 1992). Minority shareholders brought direct action against the former majority shareholder for misrepresentations in valuing their stock. Shareholders sought to depose the attorney who advised the majority shareholder during the stock acquisition. Court found that Garner rationale applied even though the case was a direct action. It reasoned that Garner was not limited to derivative actions, but that the type of action was just a factor to consider in determining "good cause." Minority shareholders alleged that majority shareholder had become the alter ego of the corporation, and that he therefore had a fiduciary duty to plaintiffs which he could not circumvent by resorting to a claim of privilege. Court agreed that the majority shareholder owed a fiduciary duty to the minority, and found that Garner applies whenever the corporation stands in a fiduciary relationship to those seeking to abrogate the privilege. As a result, even though the corporation was not a named party to the case, the existence of the duty to the shareholders permitted an exception to the attorney-client privilege.

Ward v. Succession of Freeman, 854 F.2d 780, 786 (5th Cir. 1988). Refused to limit Garner to derivative actions. However, the court noted that it should be more difficult to show good cause in a non-derivative shareholder action because where shareholders seek to recover damages for themselves their motivations are more suspect and "more subject to careful scrutiny."

In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91 (S.D.N.Y. 1993). Court refused to limit Garner to derivative actions. It allowed shareholders in a class action against the corporation to discover corporate materials involving pending asbestos litigation.

***96** In re ML-Lee Acquisition Fund II, L.P., 848 F. Supp. 527, 564 (D. Del. 1994). Fact that a suit was not a derivative action was only one factor to consider under the Garner doctrine, and that factor alone did not preclude disclosure.

Nellis v. Air Line Pilots Ass'n., 144 F.R.D. 68 (E.D. Va. 1992). Court applied the fiduciary exception in a suit by union members against their national union. The court found that communications between union officials and union attorneys came within the exception.

Ferguson v. Lurie, 139 F.R.D. 362 (N.D. Ill. 1991). Court permitted limited partners suing for securities fraud to invoke Garner doctrine to obtain communications between the real estate limited partnership and its counsel.

Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 676-682 (D. Kan. 1986). Garner doctrine applied to grant former union members access to the attorney-client communications and work-product of the union.

Donovan v. Fitzsimmons, 90 F.R.D. 583, 584-87 (N.D. Ill. 1981). Secretary of Labor, bringing suit on behalf of beneficiaries of a pension fund, was granted access to privileged materials on the basis of Garner.

Broad v. Rockwell Int'l Corp., No. CA-3-74-437-D, 1977 WL 928 (N.D. Tex. Feb. 18, 1977). Garner rationale applied where corporation was sued by debenture holders.

In re Fuqua Indus., Inc., No. C.A. 11974, 1992 WL 296448 (Del. Ch. Oct. 8, 1992). Garner applies in a case involving breach of fiduciary duty through misrepresentations to shareholders.

Because courts have expanded the Garner doctrine to include other cases where a fiduciary duty is owed to constituents, courts usually require the shareholder in non-derivative actions to have been a shareholder when the alleged misfeasance or misrepresentations occurred. They reason that purchasers who acquired their interest after the wrongful actions took place were not owed any duty at the time, and therefore cannot show good cause. See Moskowitz v. Lopp, 128 F.R.D. 624, 637 (E.D. Pa. 1989); In re Atlantic Fin. Management Sec. Litig., 121 F.R.D. 141, 146 (D. Mass 1988); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357, 1363-64 (S.D.N.Y. 1983). Other courts will allow subsequent purchasers to invoke the Garner exception to the privilege. In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91 (S.D.N.Y. 1993); Cohen v. Uniroyal, Inc., 80 F.R.D. 480 (E.D. Pa. 1978) (Garner rationale applied in shareholder class action where plaintiffs were not shareholders at the time of the allegedly fraudulent conduct).

Though the Garner court did not use the word "fiduciary" in its analysis, some courts have extended the Garner doctrine to situations outside of the shareholder/corporate client context to include other fiduciary relationships. For example, in In re Baldwin-United Corp., 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984), the court held that a creditor's committee, in its fiduciary capacity, ought to "go about [its] duties without obscuring [its] reasons from the legitimate inquires of the beneficiaries." The court held that the Garner doctrine provided the best balance between the "creditor's right to information and the committee's need for confidentiality" and held that the committee should establish good cause for withholding privileged information from the creditors. In Dome Petroleum, Ltd v. Employers Mut. Liability Ins. Co. of Wisconsin, 131 F.R.D. 63 (D.N.J. 1990), the court extended the doctrine to apply to a dispute between an insurance subrogor and subrogee.

***97** The extension of the Garner doctrine has been particularly noteworthy in the context of pension plans, where courts have extended the doctrine to communications made by attorneys acting as employee benefits plan fiduciaries." See Wildbur v. ARCO Chemical Co., 974 F.2d 631 (5th Cir. 1992) ("When an attorney advises a plan administrator or other fiduciary concerning plan administration, the attorney's clients are the plan beneficiaries for whom the fiduciary acts, not the plan administrator."); Helt v. Metropolitan Dist. Comm'n, 113 F.R.D. 7, 9-10 (D. Conn. 1986) (Garner doctrine applied where beneficiary of a pension plan sought to discover correspondence between attorneys for the pension plan and the plan's trustee); Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982) (Court recognized that fiduciary exception could apply to allow beneficiary of a pension plan to discover the communications between attorneys for the pension plan and the plan's trustee).

However, in In re Long Island Lighting Co., 129 F.3d 268, 273 (2d Cir. 1997), the Second Circuit held that the fiduciary exception embodied in the Garner doctrine did not apply to communications between an employer and its counsel regarding amendments to an employee benefits plan even though the counsel was also the plan's fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA). While acknowledging that the fiduciary exception applied to communications made by an ERISA plan fiduciary that are intended to aid an employer in administering its benefits plan, the court concluded that the communications at issue were not related to the fiduciary obligations the attorney owed to the plan beneficiaries. Id. at 272. The court found that the employer did not waive the attorney-client privilege by employing the same attorney to handle both fiduciary and non-fiduciary matters pertaining to its benefits plan. Id.

Most courts have placed the burdens of production and persuasion on the plaintiff/shareholder/beneficiary to show good cause to invoke the Garner exception. See Garner, 430 F.2d at 1103-1104; Ward v. Succession of Freeman, 854 F.2d 780, 786 (5th Cir. 1988); Martin v. Valley Nat'l Bank of Ariz., 140 F.R.D. 291, 323 (S.D.N.Y. 1991).

While many courts have extended Garner beyond derivative actions, some courts have refused. The Ninth Circuit has limited Garner to derivative actions, and refused to create an exception for individual shareholder actions. Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 23 (9th Cir. 1981). In Weil, the court distinguished Weil's individual action from the derivative suit in Garner and therefore refused to grant a Garner exception. In addition, the court noted that Weil was a former, not present shareholder of the corporation. Despite

this fact, the court allowed the requested discovery based on a finding of waiver. See also Ward v. Succession of Freeman, 854 F.2d 780 (5th Cir. 1986) (recognizing that "good cause" is more difficult to establish in an individual suit, but rejecting Weil); Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 390-91 (D. Conn. 1986) (court rejected Garner doctrine in action brought directly against the corporation by shareholders); Opus Corp. v. IBM Corp., 956 F. Supp. 1503, 1509-10 (D. Minn. 1996) (the Garner doctrine did not apply ***98** to prevent a general partner from invoking the attorney-client privilege to protect disclosure of communications to other partners).

The Restatement favors an expansive application of the Garner doctrine for two reasons. First, the function of the directors and managers of an organization is to advance the interests of the shareholders, members, and beneficiaries, and thus they should not keep information from their constituents. Second, in litigation between the directors and officers and their constituents, the officers have an incentive to place their own interests above those of the organization in deciding whether to waive the privilege. REST. 3D ß 85 cmt. b. The Restatement thus sets out several factors that should be considered in order to invoke the exception in "organizational fiduciary" cases:

1) the extent to which beneficiaries seeking the information have interests that conflict with those of opposing or silent beneficiaries;
2) the substantiality of the beneficiaries' claim and whether the proceeding was brought for ulterior purpose;
3) the relevance of the communication to the beneficiaries' claim and the extent to which information it contains is available for nonprivileged sources;
4) whether the beneficiaries' claim asserts criminal, fraudulent, or similarly illegal acts;
5) whether the communication relates to future conduct of the organization that could be prejudiced;
6) whether the communication concerns the very litigation brought by the beneficiaries;
7) the specificity of the beneficiaries' request;
8) whether the communication involves trade secrets or other information that has value beyond its character as a client-lawyer communication;
9) the extent to which the court can employ protective orders to guard against abuse if the communication is revealed; and
10) whether the determination not to waive the privilege made on behalf of the organization was by a disinterested group of directors or officers.

REST. 3D ß 85 cmt. c.

***99 c. Disclosure of Special Litigation Committee Reports**

Special Litigation Committee (SLC) reports are likely to be discoverable upon a motion to terminate a derivative action. In Joy v. North, 692 F.2d 880, 893-94 (2d Cir. 1982), the court held that upon a motion to terminate, an SLC must disclose its report and supporting data since the motion to terminate operates as a waiver of the attorney-client privilege.

Similarly, in In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984), the trial court had ordered public disclosure of an SLC report upon the motion of several newspapers for access during a hearing on a motion to terminate. The Seventh Circuit declined to adopt a per se rule requiring disclosure of the SLC report upon a corporation's motion to terminate. Instead, the court held that the presumption of public access to information before the court outweighed the corporation's need for confidentiality. Id. at 1314.

In In re Perrigo Company, 128 F.3d 430 (6th Cir. 1997), the trial court held that a report prepared by an independent director that was protected by both the attorney-client privilege and the work product immunity would become a public record if submitted to the court by either party for consideration in connection with the corporation's motion to dismiss. The Sixth Circuit reversed, and held that while the report should be disclosed to other parties to the litigation under a protective order, it was "clear error ... to direct that simply ... submitting [the] report ... to ... the court ... automatically places it in the public domain." Id. at 441. The court explained that the trial court's order requiring automatic public disclosure left the corporation with the "choice of waiving the protection of the [r]eport or withdrawing its motion to dismiss" and that it would have "the effect of giving the derivative plaintiffs ... the untrammeled power to waive [the corporation's] protection." Id. at 438-39. However, the court did indicate that there may be some point where the trial court may, after a full hearing on the matter, conclude that public disclosure of the report or certain portions of the report is necessary for limited purposes. Id. at 441.

See also:

In re Dayco Corp. Derivative Sec. Litig., 99 F.R.D. 616, 619 (S.D. Ohio 1983). Privilege not waived when only

portions of the SLC's findings are released to the court and the public, and not the SLC report itself.

Abbey v. Computer & Communications Tech. Corp., No. 6941, 1983 WL 18005 (Del. Ch. Apr. 13, 1983). "Plaintiff will be limited to taking the deposition of the Special Litigation Committee with a view toward establishing just what was done in the course of its investigation, and why. This will include production of the documentary materials utilized or relied upon by the Committee during its investigation."

Watts v. Des Moines Register & Tribune, 525 F. Supp. 1311, 1329 (S.D. Iowa 1981). Shareholders may discover the bases for the SLC's conclusions but not why certain factors were or were not considered.

Additionally, many courts have found that disclosure of corporate internal investigations to the S.E.C. waives the privilege as to both the report and all of the underlying data on which the report is based. In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993); ***100** Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991). The rationale supporting waiver for reports disclosed to the S.E.C. is that the privilege does not allow a corporation to choose to disclose to certain adversaries but not to others; invariably, private litigants and the plaintiffs' bar are just as eager to obtain such a report as is the S.E.C. Two cases highlight the risk faced by companies that disclose internal investigation reports to the S.E.C. In In re Leslie Fay Cos. Securities Litigation, 152 F.R.D. 42 (S.D.N.Y. 1993), the Leslie Fay Company had disclosed a report prepared by an audit committee of the Leslie Fay Board of Directors after an investigation into alleged accounting irregularities. Subsequent to the S.E.C. disclosure, shareholders filed suit against the company and sought to obtain the audit committee report. The court held that although the report likely constituted attorney work-product, the company waived its privilege by disclosing the report to the S.E.C. Id. at 44. After obtaining the report, shareholders brought suit against Leslie Fay's outside auditors, BDO Seidman. To defend itself in that litigation, BDO requested production of the materials underlying the audit committees' report. BDO was able to overcome Leslie Fay's objection that those materials were protected by the attorney-client privilege and the work-product doctrine by arguing that the investigation was conducted for business purposes rather than in anticipation of litigation. The court found the fact that Leslie Fay had issued several press releases stating that the report was intended to allay creditors concerns demonstrated that the report was generated for a business purpose rather than a litigation purpose, and accordingly that the work-product protection did not attach. In re Leslie Fay Cos. Sec. Litig., 161 F.R.D. 274, 279 (S.D.N.Y. 1995). Similarly, the court found that the materials underlying the report were not protected by the attorney-client privilege, since Leslie Fay had waived the privilege by disclosing a report to the S.E.C. Id. at 283.

The court refused the protection of the attorney-client privilege or the work-product doctrine for similar reasons in In re Kidder Peabody Securities Litigation, No. 94 Civ. 3954, 1996 WL 263030 (S.D.N.Y. May 31, 1996). In Kidder, the court ruled that the investigation was not undertaken principally in anticipation of litigation, but was instead an "extended public relations effort by Kidder and G.E. to communicate the message that they were not directly at fault, and that they were not only cooperating with law enforcement investigations, but also pursuing their own inquiry to determine the cause of the problem." Id. at *3. The court based this conclusion largely on affidavits from Kidder's general counsel and outside counsel which stated that the report had been disclosed "to answer legitimate questions from the press, the public, Kidder's customers and counter-parties and G.E. shareholders as to how the Jett scheme was perpetrated and why it remained undiscovered until Apr. 1994." Id. at *3.

In contrast, the court in In re Woolworth Corp. Securities Class Action Litigation, No. Civ. 2217, 1996 WL 306576 (S.D.N.Y. June 7, 1996) heard facts similar to those in Leslie Fay and Kidder but reached an opposite conclusion. Woolworth had retained a private law firm as special legal counsel to investigate charges of accounting irregularities. The outside counsel conducted a lengthy interview and submitted a detailed report to the SEC on behalf of the Woolworth board of directors. Subsequently, the shareholder plaintiffs moved to compel ***101** production of the materials underlying the special committee report. As in Leslie Fay and Kidder, plaintiffs argued that the underlying materials should be discoverable because the investigation was conducted for a business purpose rather than for a litigation-related purpose. The court rejected plaintiffs' argument, finding that "applying a distinction between 'anticipation of litigation' and 'business purposes' is in this case artificial, unrealistic, and the line between is here essentially blurred to oblivion." Id. at *3. The Woolworth court also concluded that production of the report did not constitute a waiver as to the underlying materials. Id.

II. EXTENSIONS OF THE ATTORNEY-CLIENT PRIVILEGE BASED ON COMMON INTEREST

Courts have recognized several extensions of the attorney-client privilege which allow clients and lawyers with common interests to share privileged communications. See, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) (protection of privilege extended to communications between different persons or separate corporations when the communications are part of an on-going and joint effort to set up a common defense strategy); Gottlieb v. Wiles, 143 F.R.D. 241 (D. Colo. 1992) (no waiver occurs from exchange of privileged materials between persons with common interest); In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91, 102 (S.D.N.Y. 1993) (joint-defense privilege is an extension of the attorney-client privilege); FDIC v. Cheng, No. 3:90- CV-0353-H, 1992 WL 420877 (N.D. Tex. Dec. 2, 1992) (same). These common interest extensions do not themselves confer privilege status to any of the communications involved. Instead, they merely allow communications which are already privileged to be shared between commonly interested parties without causing waiver; the communications themselves must independently satisfy the elements of the privilege. Metro Wastewater Reclamation Dist. v. Continental Cas. Co., 142 F.R.D. 471, 478 (D. Colo. 1992). These extensions are a form of selective waiver which allow disclosure to some persons without waiving the privilege toward others. Unfortunately, courts have not been consistent in their terminology and many courts apply the terms common interest exception, common defense privilege, or joint-defense privilege to discuss a variety of related but different concepts. Basically, there are two types of sharing that courts often analyze under a common interest analysis:

1) Sharing betweenclients represented by the same lawyer: In this outline, the term joint-defense privilege is used for sharing arrangements where several clients share the same attorney. See Joint-Defense Privilege ß II(A), infra.

2) Sharing between clients represented by separate counsel: In this outline, the term common defense privilege is used for sharing arrangements between separately represented clients. See Common Defense Privilege ß II(B), infra. As noted, some courts use the term joint-defense privilege to cover this type of sharing also.

***102 A. JOINT-DEFENSE PRIVILEGE**

When two parties are represented by the same attorney, the co-clients may usually share communications with their common lawyer without destroying confidentiality. See United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20 (1st Cir. 1989); Waller v. Financial Corp. of Am., 828 F.2d 579 (9th Cir. 1987); United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985), In re Subpoenas Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984); Government of Virgin Islands v. Joseph, 685 F.2d 857 (3d Cir. 1982). This situation often occurs in criminal trials where co-conspirators or co- defendants utilize the same defense counsel. Under this arrangement, the joint communications remain privileged with respect to the rest of the world, and either client can assert the privilege against a third person. See United Coal Co. v. Powell Constr. Co., 839 F.2d 958 (3d Cir. 1988); C. MCCORMICK, EVIDENCE ß 91 (J. Strong 4th ed. 1992); REST. 3D ß 75. See also:

In re Auclair, 961 F.2d 65 (5th Cir. 1992). Joint-defense privilege applied to the communications by three individuals (grand jury witness, secretary and her husband) who consulted a single attorney on a matter of common interest with the intention to keep the communications confidential. Court noted that the existence of joint interest will be presumed from a joint pre-representation consultation meeting.

Sedalcek v. Morgan Whitney Trading Group, Inc., 795 F. Supp. 329 (C.D. Cal. 1992). Extended joint-defense doctrine to include joint prosecution arrangements.

United States v. Bicoastal Corp., No. 92-CR-261, 1992 U.S. Dist. LEXIS 21445 (N.D.N.Y. Sept. 28, 1992). Court refused to require defendant to disclose to the prosecution any facts relating to the existence or scope of a joint-defense agreement. The fact that agreement was in writing did not affect the privilege. Court did, however, analyze the representation to ensure there was not a wrongful conflict of interest in the joint representation.

But see:

Opus Corp. v. IBM Corp., 956 F. Supp. 1503, 1507 (D. Minn. 1996). Joint defense privilege did not apply even though same law firm represented both parties during the course of business negotiations because the representation of the parties "frequently had individualized, and substantially diverse, goals." At no point did the law firm serve the common or mutual interests of the parties. Under the joint defense privilege an attorney's representation of a limited partnership does not also constitute representation of each partner on an individualized basis.

The burden of establishing the existence of a specific agreement to pursue a joint-defense is on the party asserting the existence of the agreement. See In re Megan-Racine Associates, Inc., 189 B.R. 562, 571-72 (Bankr. N.D.N.Y. 1995) (burden on defendants to show joint-defense agreement); United States v. Gotti, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) (same). The joint defense privilege only applies where the parties seek representation for legal purposes; joint consultations with an attorney for business or other purposes are not protected. See In re Grand Jury Proceedings, 156 F.3d 1038, 1042-43 (10th Cir. 1998) (To establish a joint-defense privilege, party asserting privilege must show that: (1) the information arose in the course of a joint- defense effort in (2) the furtherance of

that effort); ***103** United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996) (joint defense privilege did not apply when parties consulted with attorney regarding public relations problems caused by criminal allegations). See Appendix B for a sample joint/common defense agreement.

1. Waiver by Consent

The parties to a joint-defense arrangement can voluntarily waive the privilege through consent. However, courts are split over who possesses the ability to confer such consent. Some courts hold that each client retains the ability to waive the privilege for communications that the client originated herself. American Mut. Liab. Ins. Co. v. Superior Court of Sacramento County, 38 Cal. App. 3d 579, 595 (Cal. Ct. App. 1974); 8 J. WIGMORE, EVIDENCE ß 2328 (J. Naughton rev. 1961). In this case, the non-originating co-client has no standing to object to waiver by the originating client. See generally REST. 3D ß 75 cmt. e.

Other courts require all co-clients to consent to a waiver. See In re Auclair, 961 F.2d 65 (5th Cir. 1992) (one of the jointly represented clients cannot waive the privilege for all the others); In re Grand Jury Subpoenas 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990) (joint-defense cannot be waived without the consent of all parties); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980); State v. Maxwell, 691 P.2d 1316, 1320 (Kan. 1984) (if third party seeks communications made in joint arrangement "none of several persons -- not even a majority -- can waive this privilege").

2. Waiver By Subsequent Litigation

The joint-defense privilege is waived in subsequent litigation between the co-clients. Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850, 855 (7th Cir. 1974); UNIF. R. EVID. 502(d)(5); 8 J. WIGMORE, EVIDENCE ß 2312, at 603-604 (J. Naughton rev. 1961); C. MCCORMICK, EVIDENCE ß 91 (J. Strong 4th ed. 1992). However, the resulting waiver is only a selective waiver since the communications remain privileged with respect to third parties. As a result, in inter-client litigation each client can reveal the joint communications against the other, but a third party cannot obtain access to the communications at all. See REST. 3D ß 75. To invoke this selective waiver, there must be actual adversary litigation to end the co-client relationship. See State v. Cascone, 487 A.2d 186, 189 (Conn. 1985). A mere change in one co-client's position will not constitute subsequent litigation. See People v. Abair, 228 P.2d 336, 340 (Cal. Ct. App. 1951) (turning state's witness does not waive privilege); REST. 3D ß 75 cmt. d.

3. Extent of Waiver

When waiver is demonstrated in a joint-defense arrangement, the extent of the waiver normally includes information concerning all relevant matters (i.e., full waiver). See REST. 3D ß 126 cmt. f. In contrast, waiver under the common- defense privilege reveals only the ***104** shared information and not all relevant matters (i.e., partial waiver, discussed in ß II(B)(3), infra).

B. COMMON DEFENSE PRIVILEGE

Most courts have been willing to expand the rationale of the joint-defense doctrine to include situations in which the clients are pursuing a common interest but do not share the same attorney. See, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) (protection of privilege extended to communications between different persons or separate corporations when the communications are part of an on-going and joint effort to set up a common defense strategy); In re Grand Jury Subpoenas 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990) (noting expansion from criminal co-defendants to other areas). See also UNIF. R. EVID. 502(b) (explicitly recognizing common defense extension to attorney-client privilege); United States v. Melvin, 650 F.2d 641, 645-46 (5th Cir. 1981) (recognizing sharing arrangement but finding it inapplicable to the facts); United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979); REST. 3D ß 76. Courts have used a variety of terms for these types of pooling/sharing arrangements including common interest privilege, common defense privilege and even joint-defense privilege. To establish a common defense arrangement, five requirements must be met:

(1) all participants must be pursuing a common defense in existing or anticipated litigation,

(2) the protected communications relate to a common issue,

(3) the sharing is intended to further existing or potential legal representation in pursuit of the common defense (civil, criminal, grand jury, etc.),

(4) the communications were made with an expectation of confidentiality, United States v. Bay State Ambulance and Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989) (rejecting claim under common defense privilege because there was no reasonable expectation of confidentiality due to the fact that the party provided the information

knowing it was requested in order to address questions raised by the FBI), and

(5) the privilege has not been waived.

See, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3d Cir. 1992) (party must show "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort and (3) the privilege has not been waived."); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986); United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979). The key requirement for a common defense arrangement is that the clients ***105** share a common interest that is either legal or strategic in character and work together actively to pursue that interest. See Work River Ins. Co. v. Columbia Cas. Co., No. 90 Civ. 2518, 1995 WL 5792 (S.D.N.Y. Jan 5, 1995) (The key to the common defense exception is not "whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal."). Business or commercial common interests will not support the privilege. See In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) (disclosure for commercial purposes is inconsistent with legal representation purpose). Bank Brussels Lambert v. Credit Lyonnaise, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (common defense doctrine "does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation"). See also:

In re Grand Jury Subpoenas 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990). Utilized the reasoning of Schwimmer to apply common-defense doctrine to an information pooling arrangement.

United States v. Stotts, 870 F.2d 288 (5th Cir. 1989). Statements made to co-defendant's attorney are privileged if they concern common issues and are intended to facilitate representation.

United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), vacated in part on other grounds, 842 F.2d 1135 (9th Cir. 1988) (en banc), aff'd in part and vacated in part on other grounds, 491 U.S. 554 (1989). Even where non-party is privy to information, has never been sued on the matter of common interest, and faces no immediate liability, non-party can still be found to have a common interest to invoke the privilege.

Waller v. Financial Corp. of Am., 828 F.2d 579 (9th Cir. 1987). Communications by client to his own lawyer remain privileged when the lawyer subsequently shares the information with co-defendants for the purpose of a common defense.

Sobol v. E.P. Dutton, Inc., 112 F.R.D. 99 (S.D.N.Y. 1986). Disclosure to commonly interested former employee did not waive privilege.

Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187 (N.D. Ill. 1985). Court recognized a pooling arrangement between plaintiffs who were pursuing separate actions in different states.

Roberts v. Carrier Corp., 107 F.R.D. 678, 686-88 (N.D. Ind. 1985). Sharing of information between sister corporations to defend lawsuit was covered by the common defense extension to attorney-client privilege.

But see:

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997). First Lady's conversations with her private attorney and attorneys from the Office of Counsel to the President are not protected by the common-interest doctrine. Although Mrs. Clinton may have had a reasonable belief that her conversations were privileged, the attorney-client privilege did not attach because the White House, as an institution, did not share a common interest with Mrs. Clinton, an individual official being investigated for wrong-doing by the Office of Independent Counsel.

Tribune Co. v. Purcigliotti, No. 93 Civ. 7222, 1997 WL 540810 at *3 (S.D.N.Y. Sept. 3, 1997). Standstill tolling agreement entered into by parties to a joint defense agreement was not privileged. "The mere assertion that the standstill agreement [was] part of a joint defense agreement ... fails to establish the basis for any privilege." Id. "If anything, the standstill agreement relate[d] to potential interests [between the parties] that [were] adverse, not common." Id.

***106** Though some courts and scholars have indicated that common defense clients need not possess entirely congruent common interests, see, e.g., Eisenberg v. Gagnon, 766 F.2d 770, 787-88 (3d Cir. 1985); REST. 3D ß 126 cmt. e., other courts require parties asserting a common interest privilege to share identical interests. See Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974) ("The key consideration is the nature of the interest be identical, not similar, and be legal, not solely commercial. The fact that there may be an overlap of a commercial and legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest."). See also Cheeves v. Southern Clays, Inc., 128 F.R.D. 128, 130 (M.D. Ga. 1989) ("The key factor in establishing a community of interest is that the nature of the interest be identical, not similar, and be legal, not solely commercial"); Graco Children's Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., 1995 WL 360590, *5 (N.D. Ill. 1995) (same); Roberts v. Carrier Corp., 107 F.R.D. 678, 687-88 (D. Ind. 1985) (A third party may share a common interest privilege where "it shares an identical, and not merely similar, legal interest.").

Some courts adopting the broad view of the shared interest allow parties with adverse interests to share the common interest privilege. See Eisenberg, 766 F.2d at 787-88; Cadillac Ins. Co. v. American Nat'l Bank of Schiller Park, Nos. 89 C 3267 & 91 C 1188, 1992 WL 58786 (N.D. Ill. Mar. 12, 1992) (privilege is not limited to parties who are perfectly aligned on the same side of a single litigation); Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437 (Fla. Dist. Ct. App. 1987) (matters of common interest are protected notwithstanding that in some other respect the parties are adversaries and on opposite sides of the litigation).

The common defense privilege is not limited to cases where the shared information relates to pending litigation. See United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989); United States v. AT&T, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980) (parties have strong enough common interests to share trial preparation materials where the parties in the common defense arrangement anticipate litigation against a common adversary on the same issues); United States v. United Technologies Corp., 979 F. Supp. 108, 112 (D. Conn. 1997) (common interest privilege applied to documents used to develop a tax strategy for five separate corporations to form a consortium to develop and market aerospace engines); Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187 (N.D. Ill. 1985); In re LTV Sec. Litig., 89 F.R.D. 595 (N.D. Tex. 1981). The privilege applies to any matter of common interest which causes clients to consult lawyers. For example, the common defense privilege also permits plaintiffs to share information (sometimes referred to as the joint prosecution privilege). See Sedalcek v. Morgan Whitney Trading Group, Inc., 795 F. Supp. 329 (C.D. Cal. 1992) (recognizing common interest extension applies to plaintiffs); In re Grand Jury Subpoenas 89-3 & 89-4, 902 F.2d 244, 249 (4th Cir. 1990) (common interest extension applies "whether the jointly interested persons are defendants or plaintiffs ...."). But see In re Subpoenas Duces Tecum, 738 F.2d 1367, 1372 (D.C. Cir. 1984) (no common interest existed between law firm and SEC for materials provided as part of a voluntary disclosure program). See Appendix B for an example of a common (or joint) defense agreement.

***107** When a common defense arrangement has been established, communications from one client, agent or attorney to another commonly interested client, agent or attorney are protected under the attorney-client privilege. Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) (extension allows clients facing a common litigation opponent to exchange privileged communications and work-product without waiving protection in order to prepare a defense). See also REST. 3D ß 76. But see United States v. Gotti, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) (common defense protection does not extend to conversations between the defendants themselves in the absence of any attorney). This protection allows a client's non-testifying experts or auditors to be present without waiving the privilege. See In re Grand Jury Investigation, 918 F.2d 374, 386 n.20 (3d Cir. 1990) (presence of agent or person with common interest does not abrogate privilege); United States v. Schwimmer, 738 F. Supp. 654, 657 (E.D.N.Y. 1990), aff'd, 924 F.2d 443 (2d Cir. 1991) (communications between a client and an accountant hired to further the common defense were protected). However, the sharing arrangement does not itself confer privileged status to any communication, it only permits sharing of already privileged communications without causing waiver. See In re Grand Jury Testimony of Attorney X, 621 F. Supp. 590, 592-93 (E.D.N.Y. 1985) (common defense privilege does not cover information which first lawyer obtained in non-privileged way then shared with second member); REST. 3D ß 76 cmt. d. See also:

United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989). Client was told by his attorney to cooperate with accountant hired by another attorney for a common defense. Court upheld the privilege for these communications, noting that the joint-defense doctrine and common defense doctrine are blending together.

Waller v. Financial Corp. of Am., 828 F.2d 579 (9th Cir. 1987). Communications by client to his own lawyer remain privileged when the lawyer subsequently shares the information with co-defendants for the purpose of a common defense.

In a case where parties are pooling information, confidentiality must still be maintained against those outside the common defense arrangement since disclosure to a single non-privileged member or person outside the pool can constitute waiver of the information discussed in the outsider's presence. See REST. 3D ß 76 cmt. c.

1. Waiver by Consent

The parties to a common defense agreement can waive the privilege voluntarily. However, courts are split over who possesses the actual ability to confer such consent. Some courts hold that each pool member retains the power to waive the privilege with respect to that member's own communications. See, e.g., Great Am. Surplus Lines Ins. Co. v. Ace Oil Co., 120 F.R.D. 533, 536- 38 (E.D. Cal. 1988); Western Fuels Ass'n v. Burlington N. R.R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984); 8 J. WIGMORE, EVIDENCE ß 2328 (J. McNaughton rev. 1961). Likewise, a

pool member who did not originate a communication does not have the implied authority to waive the privilege for that communication. See Interfaith Hous. Delaware, Inc. v. Town of Georgetown, No. 93-31, 1994 WL 17322 (D. Del. Jan. 12, 1994) (in a common defense arrangement, waiver by one person of information shared in the arrangement will not constitute a waiver by any other party to the communication); 8 J. WIGMORE, EVIDENCE ß 2328 ***108** (J. McNaughton rev. 1961). If several members' communications have been mixed, then all of them must consent for effective waiver unless the non- consenting members' contributions can be redacted. See 8 J. WIGMORE, EVIDENCE ß 2328 (J. McNaughton rev. 1961); REST. 3D ß 76 cmt. g.

Some courts, however, take a different view and require all clients to consent to a waiver. See In re Grand Jury Subpoenas 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990) (common defense privilege cannot be waived without the consent of all parties); John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, 913 F.2d 544, 556 (8th Cir. 1990) (same); Metro Wastewater Reclamation Dist. v. Continental Cas. Co., 142 F.R.D. 471, 478 (D. Colo. 1992) (under Colorado law, a waiver requires the consent of all parties participating in the common defense).

2. Waiver by Subsequent Litigation

Subsequent litigation also operates to selectively waive the privilege among the members of the common defense arrangement. See In re Grand Jury Subpoena Duces Tecum etc., 406 F. Supp. 381, 393-94 (S.D.N.Y. 1975); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980) (dicta); Securities Investor Protection Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 438 (Bankr. S.D.N.Y. 1997) (subsequent litigation between members of a common defense group operates to waive the common defense privilege). When litigation arises, each member can use shared information against the maker unless another arrangement has been made. Securities Investor Protection Corp., 213 B.R. at 438. However, the privilege remains effective against persons not within the common defense arrangement. Moreover, in a pooling arrangement there is no duty to share information, and thus information that is not shared as part of the common defense remains privileged even against the pool. See REST. 3D ß 76 cmt. e. Similarly, sharing with only certain members of the pool retains the privilege against those members with whom no information was shared.

3. Extent of Waiver

When waiver of the common defense information is demonstrated, the waiver normally extends only to the shared information and not to all relevant matters (i.e., a partial waiver). See REST. 3D ß 76 cmt. g. In contrast, waiver under the joint-defense privilege for co-clients normally reveals all relevant matters concerning the same subject matter. (i.e., full waiver, discussed in ß II(A)(3), supra).

***109 C. INSURANCE COMPANIES AND THE COMMON INTEREST PRIVILEGE**

1. Protection of Insurer/Insured Communications From Third Parties

Where an insured communicates with its insurer for the purpose of establishing a defense, several courts have held that an insured's communication with its insurer remains privileged, at least where the communication is made for the specific purpose of obtaining legal advice or the provision of counsel. For example, in Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1515 (D.C. Cir. 1993), the Court of Appeals for the District of Columbia held that:

An insured may communicate with its insurer for a variety of reasons, many of which have little to do with the pursuit of legal advice. Certainly, where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case, the law would exalt form over substance if it were to deny application of the attorney-client privilege.

See also American Special Risk Insurance Co. v. Greyhound Dial Corp., 1995 U.S. Dist. LEXIS 10387 (S.D.N.Y. July 24, 1995) (holding that because the disclosure of the facts required to show the insured's potential liability may be necessary to obtain that representation, such communications should be deemed in "pursuit of legal representation" and therefore privileged).

Other courts have rejected the proposition that the interests of the insured and insurer are sufficiently aligned for the privilege to be maintained. See Go Medical Industries Pty, Ltd. v. C.R. Bard, Inc., No. 3:95 MC 522, 1998 WL 1632525 (D. Conn. Aug. 14, 1998) rev'd in part on other grounds, vacated in part 250 F.3d 763 (Fed. Cir. 2000) ("An insurer's contractual obligation to pay its insured's litigation expenses does not, by itself, create a common

interest between the insurer and the insured that is sufficient to warrant application of the common interest rule of the attorney client privilege.").

Some courts have rejected the extension of a privilege to insurer/insured communications on the additional ground that such communications are made for a business, and not a legal, purpose. See Aiena v. Olsen, 194 F.R.D. 134 (S.D.N.Y. 2000) (holding that defendants failed to establish that the advocacy of their position to the insurer was intended either to obtain legal advice or to convey information regarding the claims for the use of potential future defense counsel); In re Imperial Corp. of America, 167 F.R.D. 447 (S.D. Cal. 1995) ("The letters were written for the purpose of apprizing American Casualty of the status of the case, not for seeking or imparting legal advice."); ***110**In re Pfizer Inc. Securities Litigation, No. 90 Civ. 1260, 1993 WL 561125, *8, 1993 U.S. Dist. LEXIS 18215 (S.D.N.Y. Dec. 23, 1993) ("Pfizer's communications are for the purpose of seeking insurance coverage, not legal advice, from its carriers. As such, they do not fall within the scope of the attorney-client privilege.").

2. The Insurer's Access to the Insured's Privileged Communications

In Waste Management, Inc. v. International Surplus Lines Insurance Co., 144 Ill.2d 178, 194, 579 N.E.2d 322, 328 (Ill. 1991), the Illinois Supreme Court upheld an order in a coverage dispute compelling an insured to produce its attorney's files from the underlying action. The court based its decision on the existence of a policy cooperation clause requiring the insured to turn over such documentation, and on the common interest doctrine. Similarly, in Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 654 F. Supp. 1334 (D.D.C. 1986), the court found that a coverage dispute did not obviate the common interest between the insurer and insured. There, the court held that:

[W]hile those documents may be privileged from discovery by party opponents in the underlying claims, they cannot be privileged from carriers obligated to shoulder the burden of defending against those claims.... The documents were generated in anticipation of minimizing something of common interest to both parties in this suit: exposure to liability from tort claimants.

Id. at 1365. See also Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co., 66 F.R.D. 129, 132-33 (E.D. Pa. 1975) ("It thus seems clear that, in relation to counsel retained to defend the claim, the insurance company and the policy-holder are in privity. Counsel represents both, and, at least in the situation where the policy-holder does not have separate representation, there can be no privilege on the part of the company to require the lawyer to withhold information from his other client, the policy-holder.").

Numerous courts have rejected this approach, however, citing a lack of common interest between the parties. See North River Insurance Company v. Columbia Casualty Company, No. 90 Civ. 2518, 1995 WL 5792 (S.D.N.Y. Jan. 5, 1995) ("The insurer may have the same 'desire' as the insured that the insured not be found liable for damages in an underlying action, but this does not qualify as an identical legal interest."); Owens-Corning Fiberglas Corp. v. Allstate Insurance Co., 660 N.E.2d 765 (Ohio Ct. Com. Pl. 1993) (rejecting the application of the common-interest doctrine, because, since this was an embittered dispute over whether coverage applies, the parties could not be more at odds, rendering any reference to a common interest "somewhat laughable."). Other courts have rejected the proposition that cooperation clauses could require the production of privileged materials. See Eastern Air Lines, Inc. v. United States Aviation Underwriters, Inc., 716 So.2d 340 (Fla. Dist. Ct. App. 1998) (Articulating a unique view of the effect of a cooperation clause, the court held that a cooperation clause applies only when the insured and insurer are in a fiduciary relationship. ***111** Where the fiduciary relationship exists, the court may compel production of documents as between the two parties; where it does not exist and the parties are in an adversarial position, the attorney-client privilege is not waived.); Wisconsin v. Hydrite Chemical Co., 582 N.W.2d 411 (Wis. Ct. App. 1998); Rockwell International Corp. v. Superior Court, 26 Cal. App. 4th 1255 (Cal. Ct. App. 1994) (rejecting Waste Management's rule that a cooperation clause imposes a broad duty of cooperation that requires an insured to disclose communications with defense counsel in an underlying action); Remington Arms Co. v. Liberty Mutual Insurance Co., 142 F.R.D. 408 (D. Del. 1992) (concluding that a cooperation clause did not imply a duty to produce documents otherwise protected by the attorney-client privilege -- the insurer did not seek the documents to cooperate on underlying litigation but to succeed in the coverage suit with the insured).

3. Privilege Issues Arising Between Insurers and Reinsurers

Insurers have invoked the common interest privilege to shield disclosures made to reinsurers from discovery by insureds. Several courts have found that the insurer-reinsurer relationship involves a common interest sufficient to preserve the privilege. See:

Minnesota School Boards Assoc. Ins. Trust v. Employers Ins. Co. of Wausaw, 183 F.R.D. 627 (N.D. Ill. 1999).

No waiver of privilege where insurer provided documents to reinsurer intending and expecting confidentiality and protection from common adversaries.

Great American Surplus Lines, Inc. v. Ace Oil Co., 120 F.R.D. 533 (E.D. Cal. 1988). Disclosure of documents by insurer to reinsurer did not constitute waiver of privilege because the reinsurer, which had a financial stake in the outcome of the underlying litigation, had a "need to know" the information.

Durham Industries, Inc. v. North River Ins. Co., No. 79 Civ. 1705, 1980 WL 112701 (S.D.N.Y. Nov. 21, 1980). Privileged information disclosed by insurer to reinsurer not discoverable by policyholder in coverage dispute over surety bond. The common interest privilege applies. "Here, where the reinsurers bear a percentage of liability on the bond, their interest is clearly identical to that of the defendant insurer."

Hartford Steam Boiler Inspection & Ins. Co. v. Stauffer Chemical Co., Nos. 701223, 701224, 1991 WL 230742 (Conn. Super. Ct. Nov. 4, 1991). Disclosure of privileged documents by an insurer to its reinsurer did not waive the privilege. The interests of the insurer and reinsurer were "inextricably linked by the reinsurance treaty" that imposed on obligation on the reinsurer to bear a 7.5% share of any liability imposed on the insurer.

But see:

McLean v. Continental Cas. Co., No. 95 Civ. 10415 HB HBP, 1996 WL 684209 (S.D.N.Y. Nov. 25, 1996). "[T]he relationship between insurer and reinsurer is simply not sufficient to give rise to the common interest privilege."

Allendale Mutual Ins. Co. v. Bull Data Systems, Inc., 152 F.R.D. 132 (N.D. Ill. 1993). While noting that the common interest doctrine could exist between an insurer and its reinsurers, the court held that the insurer's and reinsurer's interests were not identical in this case. "In general, different persons or companies have a common interest where they have identical legal interest in a subject matter of a communication between an attorney and a client concerning legal advice. The interest must be identical, not similar, and be legal, not solely commercial." Here, there was no consultation between the attorneys for the purpose of developing a joint defense against a litigation opponent or for the purpose of maintaining a common legal interest; the ***112** communications were normal communications between parties with a contractual obligation to keep each other informed about insurance claims.

III. RECOMMENDATIONS FOR PRESERVING THE ATTORNEY-CLIENT PRIVILEGE

The following are some suggestions to maximize the protection of the attorney-client privilege.

A. LEGAL COMMUNICATIONS

• Do not disclose the contents of privileged communications or documents beyond those who have a need to know.

• Keep all privileged communications and documents segregated from business documents.

• Clearly mark each privileged document as an "attorney-client communication" and instruct all recipients concerning the need for confidentiality.

• Avoid mixing business advice with legal advice in a privileged communication.

• When communicating via e-mail or on the internet, use an encrypted format to prevent disclosure to unintended recipients.

B. WITNESS INTERVIEWS

• In deciding whether to have employees sign interview statements or transcripts, consider the requirement under Fed. R. Civ. P. 26(b)(3) that signed statements and transcripts be produced, upon request, to the person making the statement.

• All interviews should be conducted by legal personnel. If notes are taken at all, they should be taken by legal personnel. Notes should incorporate impressions, analyses and opinions of counsel which would be protected by the work-product privilege. Where a witness to the content of the interview may be required, an investigator working for the attorney should be present. Keep a record of all persons present during oral interviews with employees.

***113** • Do not use privileged information to refresh the recollection of a witness.

C. EXPERTS

• If non-legal experts are necessary, the attorney, and not the corporation, should hire them. Express authority to hire non-legal experts should be given in a directive to in-house counsel or in the retention letter to outside counsel.

It may be desirable to use experts who are not regularly retained in a business capacity by the corporation.

• The attorney should send a letter of retention to each non-legal expert, setting forth the nature of the expert's obligation and the necessity of expert information in rendering legal advice. The letter of retention also should state the confidential nature of all communications and information.

• Do not provide an expert with privileged information.

D. CORPORATE EMPLOYEES

• Where corporate employees will be interviewed, an appropriate high- ranking corporate executive should send a letter to the employees emphasizing the importance of the investigation, the need for full cooperation from all employees, and the confidential nature of the investigation. The letter also should state that the purpose of the investigation is to provide legal advice to the corporation.

• If an investigation will include the questioning of middle or lower level employees, the attorney should memorialize the fact that the information sought is not available from higher level employees and the reasons why it is not available.

• The attorney should restrict communications with lower level employees to matters within the scope of their employment.

• The attorney or corporation should inform employees who are interviewed or questioned that the attorney does not represent them individually.

***114 E. DISCLOSURE TO GOVERNMENT AGENCIES**

• Where disclosure of privileged communications to a government agency is required or advisable, attempt to obtain a specific written commitment from the agency to maintain the confidentiality of all communications in perpetuity.

• Be aware of statutes and regulations regarding agency disclosure. Take advantage of statutory or regulatory schemes that decrease the risk of further disclosure.

• If possible, maintain custody and control of any privileged documents disclosed to government agencies by allowing the agencies access to the documents without relinquishing possession.

IV. THE WORK-PRODUCT DOCTRINE

The work-product doctrine, established in Hickman v. Taylor, 329 U.S. 495 (1947), can also be a valuable means of protecting confidential documents. In Hickman, the Supreme Court held that an attempt by a party to obtain written statements, private memoranda, and personal recollections prepared by an adverse party's attorney in the course of his legal duties, without showing necessity or justification, "falls outside the arena of discovery." Id. at 510. Work-product protection developed to provide the attorney with a "zone of privacy" in which to prepare a case. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980); Gonzalez v. McGue, No. 99 Civ. 3455 DCC, 2000 WL 1092994 *1 (S.D.N.Y. Aug. 3, 2000); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 142-43 (D. Del. 1982). In certain cases, an attorney may even be able to assert the work product privilege against his own client, at least where the materials are intended solely for the benefit of the attorney's own firm. See Lippe v. Bairnco Corp., No. 96 Civ. 7600 DC, 1998 WL 901741, *1 (S.D.N.Y. Dec. 28, 1998). See also Rockwell Int'l Corp. v. United States Department of Justice, 235 F.3d 598, 605-06 (D.C. Cir. 2001); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980). The Supreme Court indicated that this protection was not absolute, at least with respect to written statements and documents containing relevant and non-privileged facts, and that discovery might be permitted if the party seeking access established adequate reasons. Hickman, 329 U.S. at 511- 12. For a witness's oral statements to the attorney, whether memorialized or not, the Court held that no showing "under the circumstances of this case" would justify an order for production. Id. at 512. However, the Court did not foreclose the possibility that this type of material may be discoverable in "a rare situation." Id. at 513.

Federal Rule of Civil Procedure 26(b)(3) substantially codified the doctrine of Hickman v. Taylor, 329 U.S. 495 (1947), for tangible materials. The application of the rule depends on a number of factors, including the nature of the information, the nature of the ***115** proceedings, the identity of the parties, and the need for the information by the party seeking discovery. FRCP 26(b)(3) gives protection to:

(1) Documents or tangible things;

(2) Prepared by or for a party (i.e., by or for a party or a party's representative);

(3) In anticipation of litigation or for trial.

These requirements are discussed more fully in ß ß IV(A)-(C), infra. For criminal cases, the equivalent of FRCP 26(b)(3) is contained in Fed. R. Crim. P. 16. That rule imposes an absolute prohibition on the discovery of reports, witness statements or other internal memoranda made by an attorney or his agents in connection with the investigation, prosecution or defense of a case. See United Kingdom v. United States, 238 F.3d 1312, 1321 (11th Cir. 2001). However, the U.S. Supreme Court limited the application of Rule 16 to pretrial proceedings, and thus the common law doctrine of Hickman would apply in a criminal trial. See United States v. Nobles, 422 U.S. 225 (1975). In addition, in some cases, the Jencks Act, 18 U.S.C. ß 3500, has been held to protect the work-product of government prosecutors. See United States v. North Am. Reporting, Inc., 761 F.2d 735, 738-40 (D.C. Cir. 1985); United States v. Lindell, 881 F.2d 1313, 1325-26 (5th Cir. 1989).

It must be remembered that the work-product doctrine provides only qualified protection to documents. Even if an item meets the three criteria for work- product protection, it may still be discovered if the moving party can demonstrate:

(A) substantial need of the materials, and

(B) that a substantial equivalent cannot be obtained without undue hardship.

FRCP 26(b)(3). However, some courts have held that opinion work-product is not discoverable even with a showing of need or hardship. See Protection of Opinion Work-Product ß IV(D)(2), infra.

A. DEFINING WORK-PRODUCT

1. Underlying Facts Not Protected

The facts underlying a case cannot be shielded from discovery by invoking work-product protection. Instead, the work-product doctrine protects the attorney's interpretation of those facts. See Note, The Work-Product Doctrine, 68 CORNELL L. REV. 760, 842-43 (1983). Thus, while the work-product doctrine will generally protect a document prepared by an attorney, it does not protect the underlying facts that are contained in the document. Hickman, 329 U.S. at 511-13; Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995); ***116** 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2023, at 194 (2d ed. 1994). When facts and attorney impressions are mixed, a party may still discover the factual portions after the impressions are redacted. Further, where the facts and impressions are intertwined, the court may examine the document in camera to determine if it should be disclosed. See:

Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984). Where the same document contains both facts and legal theories of attorney, adversary party can discover the facts. If facts and impressions are intertwined the document can be redacted.

In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982). Work-product doctrine protects the documents themselves but not the underlying facts.

In re Murphy, 560 F.2d 326, 336 n.20 (8th Cir. 1977). Under FRCP 26(b)(3), "any relevant facts contained in non-discoverable opinion work product are discoverable upon a proper showing."

Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir. 1981). Technical information in a document is discoverable while legal advice in the same document would be immune.

In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91 (S.D.N.Y. 1993). Shareholders sued alleging that corporate officers had caused corporation to misrepresent its exposure in pending asbestos litigation. Court concluded that the disputed documents contained mere statistics and facts and thus were not really in anticipation of litigation. Court noted that need and hardship existed even if work-product doctrine applied.

Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 518 (N.D. Ill. 1990). Underlying facts are not protected even if the facts are based on information provided by counsel.

United States v. Willis, 565 F. Supp. 1186, 1219 (S.D. Iowa 1983). Work- product doctrine does not bar discovery of facts that a party may have learned from documents that are themselves not discoverable.

Mercy v. County of Suffolk, 93 F.R.D. 520, 522 (E.D.N.Y. 1982). Holding that facts are not protected by the work-product privilege.

2. Ordinary Work-Product

While underlying facts are not protected, the attorney's "version" of the facts or her perception of those facts constitutes ordinary work-product. In Hickman v. Taylor, the Supreme Court recognized that an attorney's interpretation of the facts could be reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways ...." 329 U.S. 495, 511 (1947). To summarily describe this attorney-produced material, the Supreme Court adopted the term "work-product," a phrase

originally coined by the Third Circuit in the same case. Id.

In practice, ordinary work-product is usually defined in the negative: it is all attorney-originated materials that are not opinion work-product (and therefore do not contain the mental impressions, conclusions, or opinions of the attorney). See Opinion Work-Product ß IV(A)(4), infra. See also In re Doe, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981) (ordinary work-product consists of those documents prepared by an attorney that do not contain mental impressions, conclusions or opinions of the attorney).

***117** FRCP 26(b)(3) provides that work-product is composed of "documents and tangible things," while the Hickman definition would also encompass unrecorded and intangible forms of information. (See Protection of Tangible vs. Intangible Things ß IV(D)(3), infra.) The most common instances of ordinary work-product include witness statements, factual eyewitness information, investigative reports, photographs, diagrams, sketches, and memoranda or recordings (stenographic, mechanical or electronic) prepared in anticipation of litigation. See, e.g., 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2024 (2d ed. 1994) (photographs are work-product). See also:

Ford v. CSX Transportation, Inc., 162 F.R.D. 108, 110 (E.D.N.C. 1995). Surveillance films are treated as work-product.

People by Vacco v. Mid Hudson Medical Group, P.C., 877 F. Supp. 143 (S.D.N.Y. 1995). Printed transcripts of attorney's TTY conversations with deaf potential witness are work-product.

In re Grand Jury Subpoena Dated Nov. 9, 1979, 484 F. Supp. 1099, 1102 n.2 (S.D.N.Y. 1980). Tape recordings made by an attorney can constitute work- product.

Galambus v. Consolidated Freightways Corp., 64 F.R.D. 468, 473 (N.D. Ind. 1974). Recognizing that sketches and diagrams can constitute work- product (and implying that photographs would be similarly treated).

Under FRCP 26(b)(3) , ordinary work-product is discoverable upon a showing of "substantial need" and "undue hardship." (See Extent of Ordinary Work- Product Protection ß IV(D)(1), infra).

3. Legal Theories Not Protected

Just as facts are the kernel of ordinary work-product, legal theories are the core around which opinion work-product is built. See Note, The Work-Product Doctrine, 68 CORNELL L. REV. 760, 842-43 (1983). Like facts, legal theories are freely discoverable and do not constitute work-product. See Fed. R. Civ. P. 33(b) (allowing discovery of legal theories through interrogatories); Fed. R. Civ. P. 36(a) (permitting discovery of legal theories through a request for admission). Instead, it is the lawyer's interpretation, strategy, and perceptions of the legal theories that constitute opinion work-product. Thus, legal theories entwined with the attorney's strategies, impressions, or his application of the facts would constitute protected opinion work-product.

4. Opinion Work-Product

Opinion work-product is defined as material prepared by an attorney which contains "mental impressions, conclusions, opinions, or legal theories of an attorney ...." FRCP 26(b)(3). The use of the term "legal theories" in FRCP 26(b)(3) is somewhat misleading since pure legal theories are not protected (see Legal Theories ß IV(A)(3), supra). Instead, it is the attorney's interpretation of these theories and the application of the facts to the theories that is protected. The opinion work-product doctrine protects not only the attorney's mental ***118** impressions, but also the mental processes of persons assisting in trial preparation such as paralegals, investigators, consultants, or law office personnel. See FRCP 26(b)(3) advisory committee's note (mentioning protection of mental impressions and subjective evaluations of investigators and claim-agents); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 402 (E.D. Va. 1975) (impressions and opinions of person hired by an attorney are part of the attorney's work- product).

Opinion work-product includes memoranda which contain analysis of law or fact, evaluations of trial strategy, perceived strengths and weaknesses in a case, intended lines of proof, cross-examination plans, and the inferences drawn by the lawyer. See Upjohn Co. v. United States, 449 U.S. 383, 339-402 (1981). See also:

In re Sealed Case, 676 F.2d 793, 811 (D.C. Cir. 1982). Transcript of a cassette tape dictated by an attorney can be opinion work-product.

In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980). Opinion work-product includes an attorney's legal strategy.

Chamberlain Mfg. Corp. v. Maremont Corp., No. 90 C 7127, 1993 WL 11885 (N.D. Ill. Jan. 19, 1993). Interview

memoranda containing the thoughts or mental impressions of attorney and which are not verbatim transcripts of the interview are protected.

But see:

Redvanly v. NYNEX Corp., 152 F.R.D. 460, 466 (S.D.N.Y. 1993). In-house counsel's notes of meeting in which an executive was fired were not opinion work-product since the notes were not mental impressions but merely a "running transcript of the meeting in abbreviated form."

In addition, the compilation, ordering or indexing of facts is also considered opinion work-product (see Selection of Documents as Opinion Work-Product ß IV(A)(5), infra).

Opinion work-product receives heightened protection and is discoverable, if at all, only upon a showing of extraordinary need. (see Extent of Opinion Work- Product Protection ß IV(D)(2), infra).

When ordinary work-product and opinions are mixed, the court may order the opinions or mental impressions redacted, thus rendering the remaining portion ordinary work-product. See In re Martin Marietta Corp., 856 F.2d 619, 626 (4th Cir. 1988); Washington Bancorporation v. Said, 145 F.R.D. 274 (D.D.C. 1992). Where the ordinary work-product and opinions are intertwined, the court may examine the document in camera to determine if it should be disclosed. See Washington Bancorporation v. Said, 145 F.R.D. 274 (D.D.C. 1992).

5. Selection of Documents as Opinion Work-Product

Most courts have recognized that an attorney's compilation of particular documents reflects her mental processes. Thus such compilations or distillations will qualify ***119** as opinion work-product, even if they are composed of non-work-product materials. See REST. 3D ß 87 cmt. f. See also:

Gould Inc. v. Mitsui Mining & Smelting Co., 825 F.2d 676, 680 (2d Cir. 1987). Compilation of materials constitutes opinion work-product. Sporck may not apply to protect compilations by counsel when the files from which the documents were selected are not available to the opposing party.

Shelton v. American Motors Corp., 805 F.2d 1323, 1329 (8th Cir. 1986). Compilation of materials constitutes work-product since it reflects attorney's legal strategy and opinions.

Sporck v. Peil, 759 F.2d 312, 315-317 (3d Cir. 1985). Selection process can create opinion work-product even though the documents themselves do not qualify for work-product protection.

American National Red Cross v. Travelers Indemnity Co. of Rhode Island, 896 F. Supp. 8 (D.D.C. 1995). A 30(b)(6) witness was not required to testify regarding all of the facts supporting an affirmative defense where his testimony would be based on counsel's selection and compilation of documents and transcripts produced during discovery. The compiled materials were work- product and disclosure would invade counsel's defense plan.

Stone Container Corp. v. Arkwright Mut. Ins. Co., No. 93 C 6626, 1995 WL 88902 (N.D. Ill. Feb. 28, 1995). Attorney compilation of materials to be shown to client constitutes opinion work product.

United States v. District Council of New York City and Vicinity of the United Bhd. of Carpenters and Joiners, No. 90 Civ. 5722, 1992 WL 208284 (S.D.N.Y. Aug. 18, 1992). Recognizing that a "selection and compilation theory" discloses attorney thought-processes and thus constitutes opinion work-product.

United States v. Horn, 811 F. Supp. 739 (D.N.H. 1992), rev'd in part on other grounds, 29 F.3d 754 (1st Cir. 1994). In response to a document request, defendant inspected documents and specified certain documents to be copied. Defendant did not know that an employee also made a copy of each requested document for the prosecution. Court concluded that the document selection revealed the strategy and mental impressions of defense counsel, and therefore deserved work-product protection. In this case, the precautions taken by defense counsel were not unreasonable and did not show an indifference to confidentiality.

Barrett Indus. Trucks, Inc., v. Old Republic Ins. Co., 129 F.R.D. 515 (N.D. Ill. 1990). Work-product doctrine prevents defendant from asking plaintiff's consultant what questions his attorney had asked him, or the topic to which the majority of his attorney's questions were directed. Court noted that a party can ask about any facts conveyed to the consultant and the origin of those facts.

Santiago v. Miles, 121 F.R.D. 636, 638-40 (W.D.N.Y. 1988). Computer printouts that reflect the compilation and selection of documents by counsel constitute opinion work-product.

Berkey Photo Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977). Noting that if documents were merely arranged in broad categories or if a nonparty had indexed his own documents then the compilation would not reveal any attorney thoughts and would not be protected. Attorney must index the materials so as to highlight their importance to the case.

Compare:

In re Grand Jury Subpoenas, 959 F.2d 1158 (2d Cir. 1992). Government sought phone records which law firm had

gathered in earlier representation of client. Court recognized that the selection of documents can constitute work-product. However, court concluded that the requested documents would be sufficiently voluminous to minimize disclosure of the documents which the attorney thought were important. Moreover, many of the records were no longer obtainable from other sources. Court therefore ordered disclosure.

***120** In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1015-17 (1st Cir. 1988). In a complex litigation case, selection and compilation of 70,000 documents out of millions of documents did not constitute opinion work-product but did constitute ordinary work-product.

In re Air Crash Disaster Near Warsaw, Poland on May 9, 1987, No. MDL 787, 1996 WL 684434 (E.D.N.Y. Nov. 19, 1996). Selection and compilation of documents constitutes opinion work product only if there is a "real rather than speculative concern that the thought processes of counsel in relation to pending or anticipated litigation would be exposed."

Audiotext Communications Network, Inc. v. U.S. Telecom, Inc., 164 F.R.D. 250, 252 (D. Kan. 1996). Collecting and organizing discoverable documents in a notebook does not make the notebook protected work-product.

In re Conner Bonds Litig., No. 88-1-H, 1989 WL 67334 (E.D.N.C. Feb. 7, 1989). The organization of documents provided by a client does not create work-product where the documents were not prepared by counsel in anticipation of litigation and thus were not otherwise protected by the work-product doctrine.

Note, The Attorney-Work-product Doctrine: Approaching Absolute Immunity? -- Shelton v. American Motors Corp., 61 ST. JOHN'S L. REV. 658-70 (1987). Note argues that protecting material compiled for trial may lead to trial by surprise.

B. WORK-PRODUCT MUST BE PREPARED BY OR FOR A LAWYER

The purpose behind the work-product doctrine is to protect the adversary relationship and to give a lawyer a "zone of freedom" in which to plan trial strategy without fearing disclosure to an opponent. United States v. Nobles, 422 U.S. 225, 238 (1975). Thus, the work-product doctrine primarily protects the attorney, not the client. To qualify for protection, a document must be prepared by an attorney or created for an attorney's use. See United States v. Smith, 135 F.3d 963, 970 (5th Cir. 1998) (declining to extend work product doctrine to protect non-confidential work product of members of the press). See also Moore v. Tri-City Hosp. Auth., 118 F.R.D. 646, 650 (N.D. Ga. 1988) (entries made by plaintiff into his diary that discussed persons who could serve as witnesses in his lawsuit and attorneys who could assist him in prosecuting his claim were protected work-product even though they were made a month and a half before the plaintiff retained counsel). This would include material prepared "by or for [a] party's representative" as long as the agent is assisting in preparing for litigation. FRCP 26(b)(3) advisory committee's note ("the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers...."); Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439, 445 (S.D.N.Y. 1990); In re Conticommodity Services, Inc. Sec. Litig., 123 F.R.D. 574 (N.D. Ill. 1988) (work-product doctrine does not prevent discovery of tax refund claim form prepared by an accountant, but documents prepared by the accountant as an agent for the lawyer would be protected); Sterling Drug Inc. v. Harris, 488 F. Supp. 1019, 1027 (S.D.N.Y. 1980). But see In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992) (work- product doctrine does not protect information about analyses prepared by employees at direction of corporate counsel).

As noted, work-product protection under FRCP 26(b)(3) applies to materials prepared "by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) ...." Taking this ***121** language literally, FRCP 26(b)(3) would not provide protection for the work-product of non- parties to the litigation. Several courts have reached this conclusion. See In re California Public Utilities Comm'n, 892 F.2d 778 (9th Cir. 1989) (a nonparty to a suit cannot assert work-product protection); Prucha v. M & N Modern Hydraulic Press Co., 76 F.R.D. 207, 209 (W.D. Wis. 1977) (FRCP 26(b)(3) does not permit nonparties to assert work-product protection even though nonparty had strong common interest with a party in the suit). But see 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2024 (2d ed. 1994) (criticizing this interpretation and suggesting a court could issue a protective order to provide protection anyway). Some courts that have addressed this issue have held that the work-product protection developed in Hickman encompasses nonparty work-product. See United States v. AT&T, 642 F.2d 1285 (D.C. Cir. 1980) (permitting a third party to intervene to assert work-product protection for documents it had prepared).

The operation of the work-product doctrine does not differ when applied to in-house rather than outside counsel. See Shelton v. American Motors Corp., 805 F.2d 1323, 1328 (8th Cir. 1986).

C. WORK-PRODUCT MUST BE PREPARED IN ANTICIPATION OF LITIGATION

It is important to note that the attorney-client privilege protects communications between a client and a lawyer relating to all kinds of legal services, while the work-product doctrine protects only litigation related materials. See, Research Inst. for Med. & Chemistry, Inc. v. Wisconsin Alumni Research Found., 114 F.R.D. 672 (W.D. Wis. 1987) (work-product doctrine inapplicable to patent application process which involves ex parte non- adversarial proceedings); REST. 3D ß 87 cmt. h. However, the definition of "litigation" is quite broad and includes criminal and civil trials as well as other adversarial proceedings (such as administrative hearings, arbitration, and grand jury proceedings). See Jumper v. Yellow Corp., 176 F.R.D. 282 (N.D. Ill. 1997) (documents prepared in anticipation of arbitration were protected by the work-product privilege).

The determination of whether a document has been prepared in anticipation of litigation often depends upon two factors: (1) the imminence of the anticipated litigation, and (2) whether there were mixed purposes in preparing the document.

1. Required Imminence of Litigation

To acquire work-product protection, a document must be prepared in response to a threat of impending litigation. FRCP 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947). Courts perform a case-by-case analysis to determine if the anticipated litigation has the requisite level of imminency. A general fear of ever-present litigation in the future will not meet the anticipation requirement. Instead, there must be some particularized suspicion that litigation is likely. See:

***122** In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998). In order for work-product protection to apply, an attorney must have "had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." Documents prepared prior to the materialization of specific claim were protected because they were prepared "in anticipation of possible litigation."

Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252 (3d Cir. 1993). After employee contacted OSHA with health problems, counsel for Bally's ordered expert to conduct a test on the emissions of a dishwasher. Later, Bally's claimed work-product protection for this report. Court agreed that the report had been in anticipation of litigation despite the fact that OSHA had mentioned closing the file if the emissions were corrected. Court declared that OSHA had not been unequivocal that it was possible to avoid the litigation.

Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1119 (7th Cir. 1983). There must be more than a remote prospect of future litigation for work-product protection to apply. Work-product immunity requires at least some articulable claim likely to lead to litigation and a document which was prepared because this litigation was fairly foreseeable.

Miller v. Pancucci, 141 F.R.D. 292 (C.D. Cal. 1992). Police department documents prepared in the ordinary course of an internal affairs investigation in response to citizen complaint are not in anticipation of specific litigation and therefore not protected work-product.

Heyman v. Beatrice Co., No. 89 C 7381, 1992 WL 97232 (N.D. Ill. May 1, 1992). "[T]he prospect of litigation must be identifiable because of specific claims that have already arisen." A mere contingency of litigation will not give rise to work-product protection. Thus, documents that were prepared to analyze or preclude future litigation not regarding existing claims were not protected work-product.

James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 143 (D. Del. 1982). Party not required to know who will sue it or the theory of recovery, but the prospect of litigation must be "sufficiently strong."

National Eng'g & Contracting Co. v. C. & P. Eng'g & Mfg. Co., No. 49A05- 9607-CV-303, 1997 WL 55464 (Ind. Ct. App. Feb. 12, 1997). Photographs taken in ordinary course of business were discoverable, but photographs taken in anticipation of litigation were protected work-product.

Procter & Gamble Co. v. Swilley, 462 So. 2d 1188, 1193 (Fla. Dist. Ct. App. 1985). Mere likelihood of litigation is not enough.

However, some courts have held that litigation related to a future event may be sufficiently "anticipated" to satisfy the requirements of the work product doctrine. See United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995) (memorandum containing opinion work product relating to potential tax litigation arising out of a proposed merger may be protected; "[T]here is no rule that bars application of work product protection to documents created prior to the event giving rise to litigation"). In In re Sealed Case, 146 F.3d 881, 887 (D.C. Cir. 1998), the Circuit Court for the District of Columbia held that documents prepared prior to the transaction that formed the basis for the claim were protected work product. The court reasoned that the work-product privilege "turns not on the presence or

absence of a specific claim, but rather on whether, under 'all of the relevant circumstances,' the lawyer prepared the materials in anticipation of litigation." Id. at 884-885. Under this standard, the court found that an attorney must have "had a subjective belief that the litigation was a real possibility, and that belief must have been objectively reasonable" in order for work-product protection to apply. Id. at 884.

***123 2. Preparation of Documents Must be Motivated by Litigation**

The work-product doctrine only protects documents that are prepared with litigation as the primary concern. 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2024 (2d ed. 1994) (the test is whether the document was "prepared or obtained because of the prospect of litigation"). Materials that are "assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation" are not protected. FRCP 26(b)(3) advisory committee's note on 1970 Amendment. See also National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992); In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91, 103 (S.D.N.Y. 1993) (documents in the nature of facts and statistics, updates of claim status, costs and exposure were created for purpose other than preparation of litigation). But see United States v. Adlman, 134 F.3d 1194, 1204 (2d Cir. 1998) (documents prepared to inform a business decision were protected if the documents would not have been prepared but for anticipated litigation arising out of the business decision); 4 J. Moore et al., Moore's Federal Practice ∂ 26.64[3] (2d ed. 1983) (arguing that blind denial of protection to all materials prepared in the ordinary course of business is a misinterpretation). Pre-existing documents not prepared in anticipation of litigation may not be immunized merely by transmitting them to an attorney in response to the prospect of litigation. See Brown v. Hart, Schaffner & Marx, 96 F.R.D. 64, 68 (N.D. Ill. 1982). However, counsel's selection and compilation of pre-existing documents may constitute opinion work-product. See Selection of Documents as Opinion Work- Product ß IV(A)(5), supra.

Courts have applied three different standards in determining whether the preparation of a document was sufficiently motivated by litigation to be considered work-product. Courts have considered whether preparation for litigation was: (1) the primary motivating factor, (2) one motivating factor, or (3) the sole motivating factor for the creation of the document. Each test is discussed separately in ß ß IV(C)(2)(a)-(c), infra. Under any of these tests, the court makes a factual determination of the preparer's motivations in preparing the document as evidenced by the nature of the materials and the expected role of the lawyer in the ensuing litigation.

a. Primary Motivating Factor Test

The majority of courts have concluded that preparation for litigation must be the primary motivating factor underlying the creation of a document in order to invoke work-product protection. See McMahon v. Eastern S.S. Lines, Inc., 129 F.R.D. 197, 199 (S.D. Fla. 1989). See also:

United States v. Bornstein, 977 F.2d 112 (4th Cir. 1992). IRS issued a subpoena to defendant, a tax preparer and attorney, for the documents used to prepare a tax return. Court remanded for a determination of whether the materials were prepared primarily for defendant in his capacity as an accountant/tax preparer or as an attorney.

Simon v. G.D. Searle & Co., 816 F.2d 397, 401-02 (8th Cir. 1987). Defendant had compiled risk management documents giving an attorney's estimates of anticipated legal expenses, settlement values, etc. Court ***124** concluded that these documents served a variety of business planning purposes and that the risk management department was not involved in giving legal advice or strategy in any individual case. Thus, court held that the work-product doctrine did not apply.

United States v. Gulf Oil Corp., 760 F.2d 292, 296-97 (Temp. Emer. Ct. App. 1985). Document does not get work-product protection unless the primary motivating purpose behind its creation was to assist in impending litigation.

Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1119 (7th Cir. 1983). Work-product immunity requires that the document have been primarily prepared because of the prospect of litigation.

United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981). The test is whether the primary motivating factor behind the creation of the document was to prepare for pending or impending litigation.

In re Subpoena Duces Tecum served on Wilkie Farr & Gallagher, No. M8-85, 1997 WL 118369 (S.D.N.Y. Mar. 14, 1997). Law firm was compelled to produce audit committee documents generated in connection with internal investigation. Court ruled that "[t]he investigation was necessary to maintain the integrity of the financial reports of a publicly-held corporation and the documents were prepared primarily for business purposes. Where primary motivation for the creation of work product is other than litigation, the work product doctrine does not apply."

Allendale Mutual Ins. Co. v. Bull Data Sys., Inc., 145 F.R.D. 84, 87 (N.D. Ill. 1992). "[I]n order to establish work product protection for a document, a discovery opponent must show that the primary motivating purpose behind the creation of a document ... [was] to aid in possible future litigation."

Gottlieb v. Wiles, 143 F.R.D. 241 (D. Colo. 1992). Document qualifies for work-product protection if it was created with the primary motivating purpose of preparing for litigation.

Henderson v. Zurn Indus., 131 F.R.D. 560, 570 (S.D. Ind. 1990). Adopting a primary motivating purpose test.

In re Atlantic Fin. Management Sec. Litig., 121 F.R.D. 141, 144 (D. Mass. 1988). Adopting the primary motivating purpose test of Gulf Oil Corp.

Hardy v. New York News, Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987). Adopting the primary motivating purpose test of Gulf Oil Corp.

In assessing whether preparation for litigation was the primary motivating factor, some courts have found that the timing of the preparation of the document is a factor to be considered. See, e.g., Playtex, Inc. v. Columbia Cas. Co., No. C.A. 88C-MR-233-1-CV, 1989 WL 5197 (Del. Super. Ct. Jan. 5, 1989) (timing is a factor to consider). Many of these cases involve the issue of whether insurance investigations following an accident are for business purposes or in anticipation of litigation and therefore privileged. Compare:

Janicker v. George Washington Univ., 94 F.R.D. 648 (D.D.C. 1982). Document prepared immediately after a disaster was prepared for business purposes rather than for litigation that might result from the disaster.

APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 21 (D. Md. 1980). Routine investigations into indemnity claims are not carried out in anticipation of litigation but instead as part of normal business practices of an insurance company.

With:

***125** Carver v. Allstate Ins. Co., 94 F.R.D. 131, 133-34 (S.D. Ga. 1982). Information gathered by the fire loss investigator of an insurance company was protected work-product since the activity had shifted from mere claim evaluation to a strong anticipation of litigation.

b. One Motivating Factor Test

Several courts have held that preparation for litigation need merely be one motivating factor behind the creation of the document in order to invoke work- product protection. See:

United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998). Documents prepared to inform a business decision regarding a proposed merger were protected. The test is whether "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."

Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160, 164 (D. Minn. 1986). If preparation for litigation was any part of the motivation for producing a report then the report is work-product.

Waste Management, Inc. v. Florida Power & Light Co., 571 So. 2d 507, 510 (Fla. Dist. Ct. App. 1990). Preparation of litigation need be just one of the purposes behind litigation, and it is not required to be the entire purpose.

Procter & Gamble Co. v. Swilley, 462 So. 2d 1188, 1193 (Fla. Dist. Ct. App. 1985). Dual purpose of (1) helping employee morale/combating negative publicity and (2) preparing for litigation could sustain work-product protection.

c. Sole Motivating Factor Test

Some courts have adopted a standard that requires a work-product document to have been prepared exclusively in anticipation of litigation. Documents prepared for mixed purposes will not meet this standard. See:

In re Painted Aluminum Prods. Antitrust Litig., No. Civ. A. 95-CV-6557, 1996 WL 397472 (E.D. Pa. July 9, 1996). Where expert likely would have been retained by corporation even without litigation, the expert's findings and work product were valid targets for discovery.

Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 660-62 nn.2-3 (S.D. Ind. 1991). Document prepared for simultaneous legal and non-legal review is not protected.

Leonen v. Johns-Manville, 135 F.R.D. 94, 99 (D.N.J. 1990). If document would not have been prepared but for the need for legal services, work- product protection is available.

Kelly v. City of San Jose, 114 F.R.D. 653, 659 (N.D. Cal. 1987). Work- product immunity applies only to material generated for use in litigation and which would not have been generated but for the imminence of the litigation.

But see:

United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998). Limiting work-product immunity to documents prepared primarily and exclusively to assist in litigation is at odds with the text and the policies of Rule 26(b)(3).

***126 3. Application to Legal Investigations**

Although there is some contrary authority, most courts have held that documents prepared during internal legal investigations satisfy the anticipation of litigation requirement. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 399 (1981) (government conceded work-product doctrine applied to documents prepared in the course of a legal audit). Compare:

Granite Partners, L.P. v. Bear, Stearns & Co., Inc., 184 F.R.D. 49, 55 (S.D.N.Y. 1999). Documents obtained and created during the course of an investigation that was conducted by a bankruptcy trustee to assess the validity of creditors' claims was protected work-product. However, the protection was waived when party placed the work-product at issue in the litigation.

Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869 (5th Cir. 1991). Insurer's attorneys conducted investigations into the cause of a fire. Court held that communications relating to this investigation were privileged.

In re Grand Jury Subpoena Dated Dec. 19, 1978, 599 F.2d 504, 511 & n.5 (2d Cir. 1979). Interview notes, memoranda, questionnaires, and summaries compiled by outside counsel pursuant to a legal audit of possible illegal foreign payments were prepared in anticipation of litigation.

In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979). Interview memoranda and questionnaires compiled as a result of an internal legal audit by outside counsel regarding possible illegal payments were prepared in anticipation of litigation.

In re LTV Sec. Litig., 89 F.R.D. 595, 612 (N.D. Tex. 1981). Outside counsel's response to SEC subpoena was held to have been prepared in anticipation of litigation.

With:

Mount Vernon Fire Ins. Co. v. Try 3 Bldg. Servs., Inc., No. 96 Civ. 5590, 1998 WL 729735 at *8 (S.D.N.Y. Oct. 16, 1998). Investigative reports prepared by insurer were not protected because the "existing objective evidence" established that the insurer did not anticipate litigation at the time the reports were produced.

Litton Sys., Inc. v. AT&T, No. 76 Civ. 2512, 1979 WL 1612 (S.D.N.Y. Mar. 30, 1979). Court held that interview memoranda compiled under the direction of in-house counsel regarding suspected bribes and unfounded "finder's fees" in the corporation's sales department were not prepared in anticipation of litigation. Court noted that the only anticipated litigation would be criminal prosecutions of the employees involved.

Ramada Inns, Inc. v. Drinkhall, 490 A.2d 593, 596 (Del. Super. Ct. 1985). Materials assembled during a routine investigation by counsel are not protected.

4. Using Previously Prepared Documents in Subsequent Litigation

When documents have been prepared in anticipation of litigation, but not in anticipation of the litigation in which work-product protection is asserted, many courts have held that the documents should be treated as work-product. See, e.g., Eagle-Picher Indus. Inc. v. United States, 11 Cl. Ct. 452, 457 (1987). Thus, the initial preparation of the document must have been in anticipation of the initial litigation, but whether the subsequent litigation was anticipated is irrelevant. See REST. 3D ß 136 cmt. 1. Compare:

***127** In re Grand Jury Proceedings, 43 F.3d 966 (5th Cir. 1994). Documents prepared for an earlier litigation remained protected for purposes of a subsequent grand jury investigation.

In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980). Documents prepared for an earlier grand jury investigation were protected in a second grand jury investigation of the same matter.

Jumper v. Yellow Corp., 176 F.R.D. 282, 286 (N.D. Ill. 1997). Work- product protection applied to documents prepared in preparation of a grievance proceeding directly related to the subsequent arbitration proceeding in which production of the documents was requested.

Liberty Envtl. Sys., Inc. v. County of Westchester, No. 94 Civ. 7431, 1997 WL 471053 at *7 (S.D.N.Y. Aug. 18, 1997). "The fact that a document was prepared in anticipation of one litigation does not preclude the application of the work-product rule in another litigation." Documents prepared in anticipation of a prior environmental law enforcement proceeding remained protected in a subsequent suit arising out of one party's effort to comply with a consent decree that the parties entered into at the conclusion of the prior proceeding.

High Plains Corp. v. Summit Resource Management, Inc., No. 96-1105, 1997 WL 109659 (D. Kan. Feb. 12, 1997). "The work product rule protects materials prepared for any litigation or trial so long as they were prepared by or for a party to the subsequent litigation."

In re International Sys. & Controls Corp. Sec. Litig., 91 F.R.D. 552, 557 (S.D. Tex. 1981), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982). Work-product protection prevents disclosure of materials prepared for SEC proceedings in a subsequent unrelated shareholder suit.

In re LTV Sec. Litig., 89 F.R.D. 595, 612 (N.D. Tex. 1981). Anticipation of suit by federal agency protects material in later unrelated shareholder suit.

With:

Horizon Fed. Sav. Bank v. Selden Fox & Assoc., No. 85 C 9506, 1988 WL 77068, (N.D. Ill. July 20, 1988). In an unsupported assertion, the court stated that FRCP 26 is concerned with the discovery of materials created for use in the litigation at issue.

Research Inst. for Med. & Chemistry, Inc. v. Wisconsin Alumni Research Found., 114 F.R.D. 672 (W.D. Wis. 1987). Work-product immunity only applies in the litigation for which the materials were prepared.

Some courts have permitted protection in subsequent litigation but only if the subsequent case is related to the case for which the work-product was created. The Restatement and a majority of courts reject this relatedness requirement. See REST. 3D ß 87 cmt. j; Compare:

FTC v. Grolier, Inc., 462 U.S. 19 (1983). In dictum, the Supreme Court noted that the literal language of FRCP 26(b)(3) protects materials prepared in any litigation.

In re Murphy, 560 F.2d 326 (8th Cir. 1977). Subsequent litigation not required to be related in order to maintain work-product protection.

Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439, 445 (S.D.N.Y. 1990). The fact that work-product materials were prepared in another case is immaterial.

Byrne v. Board of Educ., 741 F. Supp. 167, 171 (E.D. Wis. 1990). Work- product protection extends to documents prepared in anticipation of any litigation, not just the pending litigation.

Eagle-Picher Indus. Inc. v. United States, 11 Cl. Ct. 452, 457 (1987). Work-product immunity applies to documents prepared in anticipation of unrelated terminated litigation.

***128** With:

In re Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979). Documents protected by work-product immunity in subsequent litigation that is closely related to the first.

Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 586-87 (N.D.N.Y. 1989). Court adopted a relatedness test to maintain work-product protection.

Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977). Documents prepared for one case are protected in a subsequent case if the second case is closely related to the first case.

And:

Levingston v. Allis-Chalmers Corp., 109 F.R.D. 546 (S.D. Miss. 1985). Finding no work-product privilege where the litigations are not at all related.

D. EXTENT OF WORK-PRODUCT PROTECTION

Unlike the absolute protection afforded by the attorney-client privilege, the work-product doctrine affords only a qualified protection. Federal Rule of Civil Procedure 26(b)(3) provides that the court can order disclosure of work-product if the party requesting it has (1) substantial need of the materials and (2) cannot obtain the substantial equivalent without undue hardship. The rule further provides, however, that the court "shall protect against disclosure" of the mental impressions and opinions of the attorney or other representative. Id.

Hickman, FRCP 26(b)(3) , and the cases addressing the extent of work- product protection all recognize a distinction between materials which do not reveal any of the attorney's mental processes ("ordinary work-product"), and materials which reveal the opinions, conclusions, and mental impressions of the attorney ("opinion work-product"). Hickman v. Taylor, 329 U.S. 495, 511-13 (1947); Upjohn Co. v. United States, 449 U.S. 383, 399-402 (1981); In re Grand Jury Subpoena Dated Dec. 19, 1978, 599 F.2d 504, 512-13 (2d Cir. 1979). Not surprisingly, ordinary work-product receives less protection under the work-product doctrine.

1. Protection of Ordinary Work-Product

Ordinary work-product which does not reveal the mental impressions of the attorney is discoverable upon a showing of "substantial need" and "undue hardship." FRCP 26(b)(3); Hodges, Grant & Kaufmann v. United States Gov't, Dept. of Treasury, IRS, 768 F.2d 719, 721 (5th Cir. 1985); Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86, 88-89 (W.D. Okla. 1980); REST. 3D ß 88.

To prove need and hardship the party seeking production must show why the desired materials are relevant and that prejudice will result from the non- disclosure of those materials. See Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir. 1981); National Union Fire Ins. Co. v. AARPO, Inc., No. 97 Civ. 1438, 1998 WL 823611 (S.D.N.Y. Nov. 25, 1998) (court refused to order disclosure of work product because party seeking disclosure failed to ***129**

show that his ability to prepare for trial would be adversely affected by non-disclosure); Condon v. Petacque, 90 F.R.D. 53, 54-55 (N.D. Ill. 1981) (noting that the burden of showing substantial need is lessened the farther the material is from the attorney's mental processes and impressions); REST. 3D ß 88 cmt. b. Courts have considered a variety of factors in determining need and hardship:

(a) the importance of the materials to the preparation of the case. See Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 43 (D. Md. 1974).

(b) the difficulty in obtaining substantial equivalents to the desired materials. In re Grand Jury Subpoena Dated Nov. 9, 1979, 484 F. Supp. 1099, 1104-05 (S.D.N.Y. 1980) (attorney's tape recording of relevant conversations discoverable since no alternative means of discovering equivalent information). Additional expense or inconvenience created by duplicative discovery or investigation does not ordinarily constitute undue hardship. See, e.g., Carver v. Allstate Ins. Co., 94 F.R.D. 131, 136 (S.D. Ga. 1982). However, it is possible for a party to show undue hardship if the expenditure of cost and effort is substantially disproportionate to the amount at stake in the litigation and to the value of the desired information to the inquiring party. See In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1241 (5th Cir. 1982) (cost of discovery is a factor to consider for undue hardship); REST. 3D ß 88 cmt. b.

(c) the uses to which the desired materials will be put.

(d) the availability of alternative means of obtaining the desired information if discovery is denied. See In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982); National Union Fire Ins. Co. v. AARPO, Inc., No. 97 Civ. 1438, 1998 WL 823611 (S.D.N.Y. Nov. 25, 1998) (transcripts of witness interviews conducted by opposing counsel that were protected work product should not be disclosed because party seeking disclosure had the opportunity to depose same witnesses); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 43 (D. Md. 1974).

(e) the extent to which the asserted need is substantiated. See In re Grand Jury Subpoena Dated Nov. 9, 1979, 484 F. Supp. 1099, 1103 (S.D.N.Y. 1980).

Fed. R. Civ. P. 26(b)(3) advisory committee's notes.

Undue hardship most often is proven when materials are unavailable elsewhere. Unavailability can be of several types:

(1) when a witness is unavailable (similar to the Federal Rule of Evidence 804(a) standard). See, e.g., In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (hardship shown due to deceased employee); ***130**A.F.L. Falck, S.P.A. v. E.A. Karay Co., 131 F.R.D. 46, 49-50 (S.D.N.Y. 1990) (hardship shown because witness in Greece); 4 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE ∂ 26.64[3] (2d ed. 1983).

(2) when the materials concern statements made contemporaneously with an event and a witness cannot provide a similar account at later time. See McDougall v. Dunn, 468 F.2d 468, 474-76 (4th Cir. 1972); Stout v. Norfolk & W. Ry. Co., 90 F.R.D. 160, 161-62 (S.D. Ohio 1981).

(3) when the passage of time has dulled the witness's memory. See Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974) (allowing use of notes from interviews with employees unable to recall events); Xerox Corp. v. IBM Corp., 79 F.R.D. 7 (S.D.N.Y. 1977) (same). But see In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982) (unsubstantiated assertions of faulty memory insufficient).

(4) when materials are exclusively in the opposing party's possession. See Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir. 1981); Metro Wastewater Reclamation Dist. v. Continental Cas. Co., 142 F.R.D. 471, 478 (D. Colo. 1992) (information within the exclusive control of the opposing party can show hardship); Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974).

(5) when the person possessing the materials has refused to respond to discovery or deposition requests.

See generally 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2025 (2d ed. 1994); Rest. 3d ß 88 cmt. b.

Courts are split as to when a witness's unavailability justifies disclosure of ordinary work-product. See:

In re International Sys. and Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982). Witness' present lack of recollection is sufficient to establish substantial need.

Zoller v. Conoco, Inc., 137 F.R.D. 9 (W.D. La. 1991). Work-product doctrine does not protect photographs taken as part of a defendant's investigation of an accident when the scene had subsequently changed and no other substantial equivalent was available.

Panter v. Marshall Field & Co., 80 F.R.D. 718, 725 (N.D. Ill. 1978). Death of witness was sufficient to allow production of work-product.

DiMichel v. South Buffalo Ry. Co., 604 N.E.2d 63 (N.Y. App. Div. 1992). Surveillance films are treated as work-product. Neither substantial need nor undue hardship are automatically proven from the unique nature of films

themselves.

***131 2. Protection of Opinion Work-Product**

Unlike ordinary work-product, opinion work-product is discoverable, if at all, only upon a showing of extraordinary need. See Upjohn Co. v. United States, 449 U.S. 383, 401-2 (1981) ("As Rule 26 and Hickman make clear, such work-product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship" instead a "far stronger showing of necessity and unavailability" must be made).

In Upjohn, the Supreme Court stopped short of ruling that opinion work- product is always protected. Upjohn Co. v. United States, 449 U.S. 383, 399- 402 (1981). Nevertheless, some courts have adopted the view that opinion work- product is absolutely privileged, and not discoverable under any circumstances. See 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2026 (2d ed. 1994); Rest. 3d ß 138. See also:

National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980 (4th Cir. 1992). Court held that if work-product contains opinions or theories, then discovery is prohibited. However, if only part of the document contains opinion work-product, then court can order production of a redacted copy.

Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984). Court concluded that the provisions of FRCP 26(b)(3) outweighed the expert disclosure provisions of FRCP 26(b)(4), thus it gave absolute protection to core opinion work-product provided to expert witnesses. Where opinion work-product is intertwined with facts, the document can be redacted to allow production.

Shipes v. BIC Corp., 154 F.R.D. 301, 305 (M.D. Ga. 1994). "It is questionable whether any showing justifies disclosure of an attorney's mental impressions."

APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 14 (D. Md. 1980). Opinion work-product is given absolute protection.

However, even under this reasoning, if an item contains both ordinary and opinion work-product, then the court can order redaction of the opinion work- product before the document is produced. National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980 (4th Cir. 1992).

Other courts, however, find that opinion work-product is only given a qualified privilege. In such cases, many courts note that the language of FRCP 26(b)(3) merely orders that opinion work-product "shall be protected." These courts conclude that this language only requires a greater showing than ordinary substantial need and undue hardship. Often the courts refer to a standard of "extraordinary need or special circumstances" that must be met to justify disclosure of opinion work-product. See Upjohn, 449 U.S. at 399-402. These courts, however, do not establish what situations constitute the rare circumstance that removes work-product protection. As a practical matter, opinion work-product is an almost absolute protection. See:

Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573 (9th Cir. 1992). Opinion work-product protected even though not absolutely privileged. Instead, court must consider the facts on a case-by-case basis.

***132** Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985). Opinion work- product accorded "almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies on its own wit in preparing their respective cases." Under the facts of the case, court found that the opinion work-product was protected.

In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982). Opinion work-product entitled to "almost absolute protection." Under the facts of the case, court found that the opinion work- product was protected.

In re Sealed Case, 676 F.2d 793, 809-10 (D.C. Cir. 1982). Opinion work- product can be discovered only upon "extraordinary justification." Under the facts of the case, court found that the opinion work-product was protected.

In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935-36 (6th Cir. 1980). Opinion work-product may be disclosed in rare and extraordinary circumstances. Under the facts of the case, court found that the opinion work-product was protected.

Andrews v. St. Paul Re Insurance Co. Ltd., No. 00-CV-0283K(J), 2000 WL 1760638 (N.D. Okla. Nov. 29, 2000) . Noting the distinction between opinion and ordinary work-product, and imposing a "heavier burden" for showing a need for opinion work-product.

AIA Holdings, S.A. v. Lehman Brothers, Inc., No. 97 Civ. 4978 (LMN) (HBP), 2000 WL 1639417, * 2 (S.D.N.Y. 2000). Where defendants deposed co- defendant in Lebanese prison, and at plaintiffs' deposition three years later co-defendant was unable to recall the events in question, unavailability of discovery of the forgotten facts

was not sufficient to compel disclosure of opinion work product consisting of defendant-attorneys notes from the earlier deposition. Though declining to adopt the "essential element" test endorsed by Moore's, the court held that a higher showing must be made beyond the "broad standard of relevance applicable in discovery."

United States v. Jacques Dessange, Inc., No. 5299 CR 1182, 2000 U.S. Dist. LEXIS 3734 (S.D.N.Y. Mar. 27, 2000). Criminal defense counsel's opinion work-product, here counsel's notes of client's interviews with government, will be given heightened protection because the work-product doctrine is particularly vital in assuring the proper functioning of the criminal justice system. Although co-defendant had an interest in the contents of the notes, that interest did not justify disclosure.

Harris v. United States, No. 97 Civ. 1904, 1998 WL 26187 at *3 (S.D.N.Y. Jan. 26, 1998). Production of opinion work-product was warranted in habeas corpus proceeding, where petitioner sought the production of opinion work-product generated in connection with his prosecution to support a collateral attack on his convictions.

United States v. Board of Educ., 610 F. Supp. 695, 701 (N.D. Ill. 1985). In dictum, court noted that mental impressions and conclusions of an attorney would be discoverable only in rare and extraordinary circumstances. Under the facts of the case, court found that the opinion work-product was protected.

Eagle-Picher Indus., Inc. v. United States, 11 Cl. Ct. 452, 457 (1987). Discovery of opinion work-product "is allowed sparingly." Under the facts of the case, court found that the opinion work-product was protected.

3. Tangible vs. Intangible Things

The Hickman Court was clearly concerned not only with documents and tangible things, but also with unwritten materials. As a result, the court held that attempts to secure "personal recollections" prepared by counsel without any necessity or justification were prohibited. Hickman v. Taylor, 329 U.S. 495, 510 (1947). However, as drafted, FRCP 26(b)(3) ***133** applies only to "documents and tangible things." Taking Rule 26(b)(3) literally it would not apply to information in an unwritten form. 4 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE ∂ 26.64 (2d ed. 1983). Thus, courts must look back to Hickman for guidance when dealing with work-product protection of intangible things (such as attorney recollections or other unrecorded information). See Id. (noting that because of its wording FRCP 26(b)(3) leaves the area of unrecorded work-product unchanged and subject to Hickman); In re D.H. Overmyer Telecasting Co., 470 F. Supp. 1250, 1255 n.6 (S.D.N.Y. 1979) (content of communications between co-counsel held protected by Hickman although Rule 26(b)(3) was inapplicable).

Despite being grounded on different precedents, the protections afforded tangible and intangible materials are essentially the same in most cases. There are, however, two areas that deserve special discussion: non-lawyer work-product, and oral opinion work-product.

Non-Lawyer Work-Product: The protections of FRCP 26(b)(3) apply to non- lawyer work-product prepared for an attorney since the rule explicitly includes material prepared by an attorney. (For a more complete discussion see ß IV(B), infra.) However, on its face, Hickman applies only to work-product prepared by attorneys and not to materials originating with non-attorneys. 329 U.S. at 509-10. Some old case law recognizes this distinction and would deny Hickman protection to non-lawyer work-product. See Groover, Christie & Merritt v. Lobianco, 336 F.2d 969, 973-74 (D.C. Cir. 1964) (documents not prepared under supervision of attorney not work-product); Burke v. United States, 32 F.R.D. 213 (E.D.N.Y. 1963) (material not work- product since not product of legal skill). But see Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949) (Hickman applies to all witness statements irrespective of whether attorney or party actually obtained the statement); 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2024 (2d ed. 1994) (protection should not depend on who obtained the statement).

Oral Opinion Work-Product: Some commentators have noted that unrecorded work- product is really oral opinion work-product. See Note, The Work-Product Doctrine, 68 CORNELL L. REV. 760, 842-43 (1983). Such oral materials or recollections necessarily include the mental impressions of the attorney. Id. at 839. When an attorney is asked about her recollection of an interview, the attorney will only recount those items which she analyzed and deemed significant enough to remember. Thus, when recounted, the underlying information takes on aspects of opinion work-product as it is strained through the attorney's mental processes, perceptions, and evaluations. Id. As a result, unrecorded information may more easily qualify as opinion work-product and therefore gain extra protection. (See Opinion Work-Product ß IV(A)(4) and ß IV(D)(2), supra.) Apparently recognizing this fact, a few courts have included material within the category of opinion work-product. See In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980) (defining work-product as "the tangible and intangible material which reflects an attorney's efforts at investigating and preparing a case, including one's pattern on investigation, assembling of information, determination of relevant facts, preparation of legal theories, planning

of strategy, and recording of mental impressions").

***134 E. ASSERTING WORK-PRODUCT PROTECTION**

Work-product protection may be raised by the attorney even when the client is unable or unwilling to do so. See In re Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 62 (7th Cir. 1980) (as modified); In re Grand Jury Proceedings, 604 F.2d 798, 801-02 (3d Cir. 1979). Nevertheless, the work-product doctrine does not prevent a client from discovering the materials amassed by her attorney during the course of her own representation. Spivey v. Zant, 683 F.2d 881, 885 (5th Cir. 1982).

When work-product protection is invoked, the invoking party has the burden of proving all the required elements: that (1) the document (2) was prepared by or for attorney and (3) in anticipation of litigation. See United States v. 22.80 Acres of Land, 107 F.R.D. 20, 21 (N.D. Cal. 1985); Lemelson v. Bendix Corp., 104 F.R.D. 13, 16 (D. Del. 1984); Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 41 (S.D.N.Y. 1984); Coastal Corp. v. Duncan, 86 F.R.D. 514, 522 (D. Del. 1980) (party invoking work-product protection has burden of showing materials prepared in anticipation of litigation). When these elements are established, the burden shifts to the opposing side to show: (a) that substantial need and undue hardship exists, (b) that an exception to work-product can be proven, or (c) that waiver has been demonstrated. Hodges, Grant & Kaufmann v. United States Gov't, Dep't. of Treasury, IRS, 768 F.2d 719, 721 (5th Cir. 1985); Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86, 88-89 (W.D. Okla. 1980); REST. 3D ß 90. See also:
National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980 (4th Cir. 1992). In resolving work-product challenges, courts should examine the materials themselves rather than relying on descriptions provided by party from whom discovery is sought.

F. WAIVER OF WORK-PRODUCT PROTECTION

1. Consent, Disclaimer & Defective Assertion

A client or attorney can relinquish the protection of the work-product doctrine in several ways. The easiest way to abandon the protection is through consent, which acts as a waiver of the doctrine and leaves the underlying communications unprotected. See generally In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981); REST. 3D ß 91 cmt. b.

Occasionally, an attorney voluntarily abandons work-product protection and then subsequently attempts to reassert it. In such cases, the client will be estopped from invoking work-product protection if an adversary has detrimentally relied on the disclosure or if the interests of justice and fairness otherwise require waiver. See In re Subpoenas Duces Tecum, 738 F.2d 1367, 1375 (D.C. Cir. 1984) (addressing generally the issues of fairness in disclosure).

Waiver can also occur when the client fails to effectively assert the work- product doctrine. A client's failure to object properly in response to a discovery request may waive the ***135** protection of the doctrine. See Asserting the Work-Product Doctrine ß IV(E), supra; REST. 3D ß 91(3).

2. Disclosure To Adversaries

Unlike the attorney-client privilege, selective disclosure of work-product to some but not to others is permitted. See 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2024 (2d ed. 1994). (For a discussion of selective v. partial waiver see Terminology of Waiver ß I(G)(1), supra.) Since the work- product doctrine protects trial preparation materials, only disclosures that show an indifference to protecting strategy will result in waiver. See Chubb Integrated Sys., Ltd. v. National Bank of Wash., 103 F.R.D. 52, 63 (D. D.C. 1984); In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982) ("[B]ecause [the work-product doctrine] looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work-product privilege is not automatically waived by any disclosure to a third party."). Varel v. Banc One Capital Partners, Inc., No. CA3:93-CV-1614-R, 1997 WL 86457 (N.D. Tex. Feb. 25, 1997) ("In light of the distinctive purpose underlying the work-product doctrine, a general subject-matter waiver of work- product immunity is warranted only when the facts relevant to a narrow issue are in dispute and have been disclosed in such a way that it would be unfair to deny the other party access to other facts relevant to the same subject matter."). Such indifference is most often demonstrated when a lawyer discloses material knowing that it is likely to be seen by an adversary. In re Subpoenas Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984) (work-product protection lost when materials provided to adversary); Shulton, Inc. v. Optel Corp., No. 85-2925, 1987 WL 19491 (D.N.J. Nov. 4, 1987); 4 J. Moore et al., Moore's Federal Practice ∂ 26.64[4] (2d ed.

1991); 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2024 at 210 (2d ed. 1994) (disclosure to third persons does not waive work-product protection unless "it has substantially increased the opportunities for potential adversaries to obtain the information."). Thus, waiver will occur when a party discloses material in circumstances in which there is significant likelihood that an adversary or potential adversary will obtain it. Mere disclosure to a witness does not necessarily waive protection since this activity is consistent with the work-product doctrine by allowing the attorney to prepare for litigation. See, e.g., In re Grand Jury Subpoenas Dated Dec. 18, 1981, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982); In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982) (selective disclosure is not inimical to the theory underlying the work-product doctrine). See also:

In re Martin Marietta Corp., 856 F.2d 619, 626 (4th Cir. 1988). Actual disclosure of pure mental impressions or opinion work-product to adversaries can constitute waiver.

United States v. Horn, 811 F. Supp. 739 (D.N.H. 1992), rev'd in part on other grounds, 29 F.3d 754 (1st Cir. 1994). In response to a document request, defendant inspected documents and specified certain documents to be copied. Defendant did not know that an employee also made a copy of each requested document for the prosecution. Court found that disclosure to third persons only destroys work-product protection when the disclosure is not consistent with the adversary system. In this case, defendant could have been more careful, but it was not unreasonable to assume that the employee was making copies only for defendant.

***136** Hatco Corp. v. W.R. Grace & Co., No. 89-1031, 1991 WL 83126 (D.N.J. May 10, 1991). Client distributed legal memoranda prepared by six law firms to several insurance companies that were not clients of the law firms. Court found that this waived the attorney-client privilege for the memoranda. However, work-product protection existed as long as the memoranda were not disclosed to an adversary.

Prudential Ins. Co. v. Turner & Newall, PLC, 137 F.R.D. 178 (D. Mass. 1991). Plaintiff waived work-product protection for documents in a third party's possession when plaintiff reviewed its files and determined they contained privileged documents but did not take steps to insure against the third party's disclosure of the documents.

In re Air Crash Disaster at Sioux City, 133 F.R.D. 515, 521 (N.D. Ill. 1990). Disclosure by defense counsel to 500 employees with no expectation of confidentiality resulted in waiver of work-product protection.

Bank of the West v. Valley Nat'l Bank, 132 F.R.D. 250, 262 (N.D. Cal. 1990). In determining waiver, the issue is whether disclosure has increased the likelihood that a current or potential adversary will gain access to protected documents.

Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 590 (N.D.N.Y. 1989). Disclosure results in waiver only if it is inconsistent with maintaining secrecy from adversaries or substantially increases the opportunity for an adversary to obtain the protected information.

3. Partial Waiver: Extent of Waiver

Generally, disclosure of work-product will result only in the waiver of work- product protection for the particular materials disclosed and not for all related materials involving the same subject matter. See Bramlette v. Hyundai Motor Co., No. 91 C 3635, 1993 WL 338980 (N.D. Ill. Sept. 1, 1993) (disclosure of 5 reports from internal investigation did not waive work-product protection for 7 related reports that were kept confidential); In Re Air Crash Disaster at Sioux City, 133 F.R.D. 515, 527 (N.D. Ill. 1990) (drafts behind report that was disclosed are still protected under work-product doctrine); United States v. Willis, 565 F. Supp. 1186, 1220 n.64 (S.D. Iowa 1983); 8 C. Wright & A. Miller, Federal Practice & Procedure ß 2024 (2d ed. 1994) (suggesting that disclosure to an adversary does not waive protection for underlying notes and memoranda on the same subject matter); Rest. 3d ß 91 cmt. c. However, when a party waives work-product protection for only a portion of a protected document the court may require the rest of that document to be revealed in the interest of fairness.

Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1089 (D. N.J. 1996). Client retained attorney to conduct internal investigation regarding allegations of sexual discrimination, and then used attorney's findings to defend against the charges before State Civil Rights Commission. Court held that such disclosure waived the work-product privilege for all materials underlying attorney's report.

Republic of Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 389 (D.N.J. 1990). Waiver of protection does not necessarily waive work- product protection for related materials.

In re Air Crash Disaster at Sioux City, 133 F.R.D. 515, 527 (N.D. Ill. 1990). Prior drafts of documents do not lose their work-product protection merely because the final document is made public.

Nye v. Sage Prods., Inc., 98 F.R.D. 452, 453-54 (N.D. Ill. 1982). Waiver relating to final document does not waive work-product protection for related opinion work-product materials.

***137** But see:

In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988). Client conducted internal investigation into alleged fraudulent accounting procedures, and disclosed the results to government to avoid indictment. Court concluded that

waiver extended to non-disclosed materials and even to undisclosed details underlying the published data. Court noted that there was only a partial waiver for opinion work-product.

In re Grand Jury Subpoena Duces Tecum Dated Mar. 24, 1983, 566 F. Supp. 883, 885 (S.D.N.Y. 1983). Partial disclosure constituted a full waiver of all materials on the same subject matter.

4. Selective Waiver: Reporting To Government Agencies

When litigants voluntarily disclose documents or communications to federal agencies, those materials may lose work-product protection and be subject to discovery by other parties, including private litigants. See Disclosure to Government Agencies and the Attorney-Client Privilege ß I(G)(6), supra. Corporations have argued that such voluntary disclosures to government agencies are solely for the benefit of the public agency's review, and not for purposes of private civil litigation. As a result, these companies have argued that limited disclosures should only constitute a selective waiver. See Terminology of Waiver ß I(G)(1), supra). See also Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991). Under the selective waiver concept, a party can disclose a document to the government but retain work-product protection against other litigants. Not all courts have been receptive to this concept. See In re Subpoenas Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984) (rejecting idea of "limited" (selective) waiver); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). (same); Maryville Academy v. Loeb Rhoades & Co., 559 F. Supp. 7, 9 (N.D. Ill. 1982) (same). Compare:

In re Steinhardt Partners L.P., 9 F.3d 230 (2d Cir. 1993). Voluntary submission to the SEC waived work-product protection in a later civil class action suit. Second Circuit concluded that the submission constituted a voluntary disclosure to an adversary and effected waiver. Court rejected the selective waiver concept since cooperation with the SEC was not likely to be affected in future cases. Court declined to lay down a per se rule of waiver in all cases but instead held that analysis should be done on a case-by-case basis.

Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991). Government was investigating corporation. Court held that disclosure of work-product during this investigation fully waived any attorney-client or work-product protection, even with respect to third parties in civil litigation. Court reasoned that protection is not required to encourage these types of disclosures to a government agency since the corporation will turn over the exculpating documents willingly, privileged or not, in order to obtain lenient treatment. Court thus refused to apply selective waiver to reports disclosed to the government.

United States ex rel. Burns v. Family Practice Assoc. of San Diego, 162 F.R.D. 624, 626 (S.D. Cal. 1995). Disclosure of work-product to Department of Justice, which was investigating qui tam relator's allegations of Medicare fraud, waived work-product protection as to the qui tam relator himself. Disclosure of work-product to the Department of Justice an adversary, waived the protection as to all other adversaries.

In re Subpoenas Duces Tecum, 738 F.2d 1367, 1372 (D.C. Cir. 1984). Voluntary disclosure to SEC under a voluntary disclosure program waived protection for materials sought by Justice Department in a later investigation.

***138** In re Sealed Case, 676 F.2d 793, 817-25 (D.C. Cir. 1982). Work- product protection did not apply to documents which related to documents previously supplied to the SEC.

In re Digital Microwave Corp. Sec. Litig., No. C 90-20241, 1993 WL 330600 (N.D. Cal. June 28, 1993) . Letter from corporate counsel to SEC during informal inquiry was not protected since work-product protection was waived by disclosure to government. In addition, there was no explicit statement by the SEC that they would grant the corporation's request to keep the letter confidential.

In re Leslie Fay Cos. Sec. Litig., 152 F.R.D. 42 (S.D.N.Y. 1993). Relying on Steinhardt, the court found that the work-product doctrine did not protect an audit committee's report submitted to the SEC.

With:

Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). Documents were produced in private litigation subject to a confidentiality agreement and then to the SEC under a separate confidentiality agreement. When the materials were later sought in another suit, court held that the materials were still subject to the protection of the work-product doctrine.

United States v. AT&T, 642 F.2d 1285 (D.C. Cir. 1980). Government sued AT&T for antitrust violations. MCI had turned documents over to the government under stipulation that they be used only in the litigation against AT&T. MCI then filed its own antitrust action against AT&T and sought to assert work-product protection (as a nonparty) in the government's case to prevent AT&T from obtaining the materials that MCI had previously turned over. D.C. Circuit held that MCI had not waived the protection by disclosing the materials to the government. Court recognized the government and MCI had a common interest against a common adversary and therefore no waiver had occurred from the sharing.

The purpose behind a litigant's disclosure of work-product documents to government agencies may determine

whether such disclosure waived work-product protection. For example, in Information Resources, Inc. v. Dun & Bradstreet, Corp., 999 F. Supp. 591, 593 (S.D.N.Y. 1998), the Southern District of New York held that if a party discloses information to a government agency in an attempt to incite government action against a rival, work-product protection may be waived.

5. Inadvertent Disclosure

Inadvertent disclosure of work-product is analyzed in much the same manner as inadvertent disclosure under the attorney-client privilege. See Inadvertent Disclosure ß I(G)(7), supra. Most courts apply a case by case analysis to determine the reasonableness of the precautions taken to protect against disclosure and the actions taken to recover the disclosed communication. In addition, inadvertent disclosure of work-product often results in only a partial waiver, leaving materials on the same subject matter protected. See:

Gundacker v. Unisys Corp., 151 F.3d 842, 844-45 (8th Cir. 1998). Inadvertent production of document detailing internal corporate investigation by counsel did not constitute waiver.

S.E.C. v. Cassano, 189 F.R.D. 83 (S.D.N.Y. 1999). Finding waiver of work-product privilege where the SEC produced one privileged document out of fifty to fifty-two boxes of reviewed documents. Not only did the existence of the single document show careless review, but the SEC's failure to review the document, after defense counsel specifically requested that it alone be copied outside of the agreed to procedure for copying such documents, demonstrated waiver.

***139** Zapata v. IBP, Inc., 175 F.R.D. 574, 576-77 (D. Kan. 1997). Applying five factor test in determining that inadvertent release of defendant's expert's report, which contained attorney's handwritten notes, did not waive privilege.

Lois Sportswear, USA, Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 104- 05 (S.D.N.Y. 1985). Inadvertent production of 22 pages out of 16,000 did not result in waiver when precautions had been taken and error was quickly rectified.

Western Fuels Ass'n v. Burlington N. R.R. Co., 102 F.R.D. 201, 204-05 (D. Wyo. 1984). Inadvertent disclosure during expedited discovery process does not waive work-product protection.

But see:

Norton v. Caremark, Inc., 20 F.3d 330 (8th Cir. 1994). Party who mistakenly marked work-product document as a proposed trial exhibit and produced it to opposing counsel waived work-product protection.

Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir. 1990). Voluntary disclosure of work-product to an adversary constitutes waiver even though disclosure may have been inadvertent.

Data General Corp. v. Grumman Sys. Support Corp., 139 F.R.D. 556 (D. Mass. 1991). Inadvertent production of work-product constituted waiver.

6. "At Issue" Defenses: Advice of Counsel

The work-product doctrine may be deemed waived when the protected material is itself an issue in the litigation. See Hager v. Bluefield Reg'l Med. Ctr., 170 F.R.D. 70 (D.D.C. 1997); Charlotte Motor Speedway, Inc. v. International Ins. Co., 125 F.R.D. 127 (M.D.N.C. 1989); 4 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE ∂ 26.64[3-2] (2d ed. 1986). This usually occurs when the client alleges reliance on the advice of counsel or otherwise puts the attorney's advice into issue. Similarly, defenses that the attorney's assistance was ineffective, negligent or wrongful would also waive work-product protection. See REST. 3D ß 92(1)(b). In these cases, the scope of the waiver extends only to the item disclosed, not to all related items. See Partial Waiver ß IV(F)(3), supra. See also REST. 3D ß 92 cmt. f.

A client who claims to have acted pursuant to the advice of a lawyer cannot use the work-product doctrine to immunize that advice from scrutiny. Such a defense places the advice "at issue" and removes the protection of work-product even with respect to opinion work-product. See REST. 3D ß 92(1)(a). See also:

Conkling v. Turner, 883 F.2d 431 (5th Cir. 1989). Plaintiff claimed that he did not know of the falsity of some information until his attorney notified him. Court found that plaintiff's attorney was subject to deposition since work-product had been placed in issue by plaintiff.

Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 184 F.R.D. 49, 55 (S.D.N.Y. 1999). Work product protection waived with respect to documents generated and obtained during a corporate investigation because corporation's bankruptcy trustee placed the contents of the documents "at issue" by using the documents to impeach witnesses during depositions and by placing extensive excerpts from the documents into a published report. The published report served as a factual basis for many of the claims.

***140** Charlotte Motor Speedway, Inc. v. International Ins. Co., 125 F.R.D. 127, 129-31 (M.D.N.C. 1989). Where

activities of counsel are directly in issue, discovery is allowed through an exception to work-product immunity (even for opinion work-product).

Coleco Indus., Inc. v. Universal City Studios, Inc., 110 F.R.D. 688, 690 (S.D.N.Y. 1986). Court noted that "a consistent line of cases has developed an exception to the work-product privilege where the party raises an issue which depends upon an evaluation of the legal theories, opinions and conclusions of counsel." Thus, court held that corporation'sreliance on advice of counsel as a defense waived the work-product privilege.

Donovan v. Fitzsimmons, 90 F.R.D. 583, 588 (N.D. Ill. 1981). In breach of fiduciary duty case, documents that would be presumptively entitled to work-product protection were found to be discoverable.

But see:

Thorn EMI North Am., Inc. v. Micron Tech., Inc., 837 F. Supp. 616 (D. Del. 1993). Opinion work-product protection is not waived by relying on advice of counsel to defend a claim of willful patent infringement. Unless communicated to the client, such materials are not probative of intent and not discoverable.

7. Testimonial Use

At times, work-product may constitute direct and substantial evidence of a material issue in a case before a tribunal. The testimonial use of work-product will usually render it unprotected and permit the discovery of undisclosed portions of materials relating to the same subject matter. See REST. 3D ß 92(2). See also:

United States v. Nobles, 422 U.S. 225, 236-40 (1975). Defense counsel's use of the testimony of an investigator waived work-product protection with respect to matters covered in the investigator's testimony.

Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980). Court ruled State waived work-product protection where State's witness referred to protected documents to bolster his credibility.

United States v. Salsedo, 607 F.2d 318, 320-21 (9th Cir. 1979). Defense forfeited work-product immunity for materials that were used to cross-examine a witness.

But see:

Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222-23 (4th Cir. 1976). Work-product waiver does not occur if the testimonial use involves only a partial or inadvertent disclosure.

In re E.I. DuPont de Nemours and Co. -- (R) Litigation, 918 F. Supp. 1524 (M.D. Ga. 1995), rev'd on other grounds, 99 F.3d 363, 368 (11th Cir. 1996). An expert's testimonial reliance on summary data waives any privilege that might protect the more detailed underlying data.

Coleco Indus., Inc. v. Universal City Studios, Inc., 110 F.R.D. 688 (S.D.N.Y. 1986). Where privileged documents were selectively disclosed in order to secure a partial new trial in a separate action, fairness dictated an implied waiver of all work-product relevant to the same issue in the instant action.

***141 8. Use of Documents by Witnesses and Experts**

a. Refreshing Recollection of Fact Witnesses

Work-product protection may be waived by using protected documents for the purpose of refreshing the recollection of a witness. The decisions in this area are balanced between the conflicting protection afforded by the work-product doctrine and the requirement of Federal Rule of Evidence (FRE) 612 to reveal items which a witness has used to refresh his recollection. FRE 612 requires a party to reveal any writing "if a witness uses a writing to refresh memory for the purposes of testifying ...." FRE 612 covers documents used to refresh a witness' memory for both in-court and deposition testimony. See Lawson v. United States, No. 97 Civ. 9239, 1998 WL 312239 (S.D.N.Y. 1998). But see Omaha Public Power Dist. v. Foster Wheeler Corp., 109 F.R.D. 615 (D. Neb. 1986) (questioning whether FRE 612 applies to materials used to prepare a witness for deposition testimony).

Under FRE 612 , if the witness uses the communication to refresh or aid his testimony while he is actually testifying before a tribunal, then the privilege is waived and the court must order disclosure. Fed. R. Evid. 612(1). See also Chavis v. North Carolina, 637 F.2d 213, 223-24 (4th Cir. 1980) (witness referred to work-product material and used it to bolster his credibility at trial. As a result, court ordered the material produced); S & A Painting Co., Inc. v. O.W.B. Corp., 103 F.R.D. 407, 409-10 (W.D. Pa. 1984) (work-product protection was waived when witness examined and referred to a portion of attorney's handwritten notes during his deposition). However, if the witness used the communication to refresh his recollection prior to testifying, then the court has discretion to order disclosure in the interests of justice. Fed. R. Evid. 612(2). Before exercising its discretion, the court should determine whether the protected document was used for the primary purpose of preparing to testify and not for another reason. See Rest. 3d ß 92 cmt. e. Most courts require a showing that the protected documents used to prepare a witness actually impacted the witness' testimony. See Sporck v. Peil, 759 F.2d 312, 317-318 (3d Cir. 1985); Laborers Local 17 Health Benefit Fund v. Philip Morris, Inc., No. 97 Civ. 4550, 1998 WL 414933 at *5

(S.D.N.Y. July 23, 1998) (even though witness admitted that document helped him remember "to some degree" events about which he testified, there was no showing that the privileged portion of the document assisted his memory, therefore, the court concluded, disclosure was not warranted under FRE 612 because the party seeking disclosure did not show that the privileged information impacted his testimony). But see Audiotext Communications Network, Inc. v. US Telecom, Inc., 164 F.R.D. 250, 254 (D. Kan. 1996) (although a party seeking work-product must show that the documents "actually influenced the witness' testimony ... [a]ctual refreshment of recollection is immaterial").

Courts have taken a number of different approaches to determining whether work-product should be disclosed in the interests of justice pursuant to FRE 612(2). For example, in Sporck v. Peil, 759 F.2d 312, 318 (3d Cir. 1985) the Third Circuit held that FRE 612 does not infringe on the protection afforded work-product if courts properly require the party seeking production to establish that the witness actually relied upon a particular ***142** document and that the document impacted the witness's testimony in order to obtain disclosure. See also Omaha Public Power Dist. v. Foster Wheeler Corp., 109 F.R.D. 615, 616-17 (D. Neb. 1986) (following approach taken in Sporck).

Other courts have found that the deliberate use of protected documents to prepare a witness is sufficient in and of itself to satisfy the interests of justice standard. See James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144-146 (D. Del. 1982). Finally, some courts balance the interest of protecting work-product with the interest of permitting an adverse party to obtain information necessary to conduct an effective cross-examination. See Lawson v. United States, No. 97 Civ. 9239 (AJP) (JSM), 1998 WL 312239 at *1 (S.D.N.Y. July 12, 1998). Compare:

In re Atlantic Fin. Mgmt. Sec. Litig., 121 F.R.D. 141, 143-44 (D. Mass. 1988). Work-product protection was waived for the extracts of deposition transcripts reviewed by deponent to refresh his recollection.

James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144-46 (D. Del. 1982). Court ordered production of a binder of documents compiled by counsel and used to refresh the recollection of deposition witnesses, even though it recognized that the binder constituted opinion work-product.

With:

Lawson v. United States, No. 97 Civ. 9239, 1998 WL 312239 at *1 (S.D.N.Y. June 12, 1998). Court ordered the production of work-product because the application of a three-factored balancing test indicated that the disclosure of the material would be in the interests of justice.

In re Joint Eastern and Southern Dist. Asbestos Litig., 119 F.R.D. 4, 5- 6 (S.D.N.Y. 1988). Found that an analysis of the facts of each case was necessary in order to determine whether the disclosure of work-product would be in the interests of justice. The court identified three factors that should be considered in making the determination: 1) "whether the attorney using the work product attempted 'to exceed the limit of preparation on one hand and concealment on the other"'; 2) "whether the work product is 'factual' work product or 'opinion' work product"; and 3) "whether the request [for production] constitutes a fishing expedition."

Bloch v. Smithkline Beckman Corp., No. Civ. A. 82-510, 1987 WL 9279 (E.D. Pa. Apr. 9, 1987). Use of protected documents to refresh a witness's recollection does not automatically waive work-product protection, but such uses will be evaluated on a case by case basis to ensure that a party does not make "unfair use" of the work-product doctrine.

While a number of courts have removed protection for ordinary work-product, many courts have attempted to protect opinion work-product that is shown to a fact witness. See 3 J. Weinstein & M. Berger, Weinstein's Evidence ∂ 612 [04] (1982) (court should require showing of need before compelling disclosure of protected documents). See also:

Shelton v. American Motors Corp., 805 F.2d 1323, 1329 (8th Cir. 1986). In-house attorney would not be compelled to testify about even the existence of a document contained in a trial notebook that the attorney used to prepare to testify because the selection and compilation of the documents would reveal her mental impressions and opinion work-product.

Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 683 (D. Kan. 1986). In denying motion to compel discovery of files reviewed by deponent prior to his deposition, court held that the purpose of FRE 612 is to allow an adverse party to have access to writings which "have an impact on the testimony of the witness." However, ***143** "[p]roper application of Rule 612 should never implicate an attorney's selection, in preparation for a witness' deposition, of a group of documents he believes critical to a case."

But see:

Sporck v. Peil, 759 F.2d 312, 317-18 (3d Cir. 1985). In dictum, court interpreted FRE 612 to require the disclosure of documents which a deponent has used to refresh his memory only where opposing counsel lays a

proper foundation. In such cases, counsel must first elicit specific testimony from deponent and then ask deponent which, if any, documents "informed that testimony." Deponent will be compelled to disclose only the documents which he actually used to refresh his memory, not all opinion work- product which counsel showed him in preparation for his testimony.

Omaha Public Power Dist. v. Foster Wheeler Corp., 109 F.R.D. 615, 616- 17 (D. Neb. 1986). The court doubted that FRE 612 is applicable to deposition testimony, but applied the Sporck standard which requires party to first elicit testimony from deponent and then ask the witness to identify which documents, if any, informed that testimony.

b. Use of Documents by Experts

Courts have struggled to define the extent and type of waiver that results from the disclosure of work-product to expert witnesses. Due to the importance placed on discovering items shown to testifying experts, hardship and need are usually fairly easy to prove when the challenge involves ordinary work-product. Thus, in most cases, ordinary work-product will probably be disclosed under regular application of FRCP 26(b)(3). However, because of the extra protection afforded opinion work-product, the courts disagree over the showing which must be made to discover opinion work-product that is shown to experts. This tension is particularly acute in the area of experts, because of the conflicting rationales of FRCP 26(b)(3) to protect opinion work-product, and FRCP 26(b)(4) to allow discovery of materials on which expert testimony is based. See Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984); Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991).

The 1993 Amendments to FRCP 26(a)(2)(B) have added to the confusion regarding the treatment of opinion work-product used to prepare expert witnesses. Rule 26(a)(2)(B) requires parties to identify expert witnesses and to produce a "written report prepared and signed by the witness." The report must include a description of the information that the expert considered while preparing to testify. Fed. R. Civ. P. 26(a)(2)(B). Further, the advisory committee note to the 1993 Amendments to Rule 26(a)(2)(B) provides that "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions ... are privileged or otherwise protected from disclosure."

Some courts have concluded that the amendments to Rule 26(a)(2)(B) were intended to require the disclosure of all documents reviewed by an expert witness while preparing to testify, including opinion work product. See Musselman v. Phillips, 176 F.R.D. 194, 197 (D. Md. 1997); Karn v. Ingersoll Rand, 168 F.R.D. 633, 635 (N.D. Ind. 1996); Furniture World, Inc. v. D.A.V. Thrift Stores, 168 F.R.D. 61, 62 (D.N.M. 1996).

***144** Other courts have found that the amendments to Rule 26(a)(2)(B) were not intended to impose a bright-line rule requiring disclosure of all materials reviewed by experts while preparing to testify. See Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 642 (E.D.N.Y. 1997) (holding that the disclosure requirements of Rule 26(a)(2)(B) "extend[s] only to factual materials, and not to core attorney work-product considered by an expert"); Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 294-95 (W.D. Mich. 1995) (holding that opinion work-product shown to an expert was protected despite the 1993 amendments); All West Pet Supply Co. v. Hill's Pet Prods., 152 F.R.D. 634, 639 n.9 (D. Kan. 1993) (interpreting Rule 26(a)(2)(B) as requiring only the disclosure of facts and not entire documents considered by experts).

Courts have taken basically four different approaches in this area:

(1) Work-product that is shown to experts is unprotected.
(2) Work-product shown to experts is discoverable under a balancing approach.
(3) Particular work-product documents that an expert relies upon are discoverable.
(4) Opinion work-product is absolutely protected even if shown to experts.

Notwithstanding these differences, the courts agree that the factual basis of an expert's testimony is always discoverable, even in jurisdictions that provide absolute protection for opinion work-product. See Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984). Similarly, if a document contains both opinions and facts, it can be discovered after in camera inspection and redaction to leave only the factual information. Id.

As a result of the uncertainty in this area, there is always a chance that counsel will be required to produce documents that are shown to an expert witness. Therefore, an attorney should not reveal to experts any documents containing important theories or thought processes. See 3 J. Weinstein & M. Berger, Weinstein's Evidence ∂ 612[04] (1991).

(1) Approach #1: Work-Product Shown to Experts Is Not Protected

Courts adopting this approach have held that basically anything a lawyer gives to an expert is discoverable. See Karn v. Ingersoll Rand, 168 F.R.D. 633, 639 (N.D. Ind. 1996); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982). See also:

Musselman v. Phillips, 176 F.R.D. 194, 199 (D. Md. 1997). "[W]hen an attorney communicates otherwise protected work-product to an expert witness retained for the purposes of providing opinion testimony at trial -- whether factual in nature or containing the attorney's opinions or impressions -- that information is discoverable if it is considered by an expert."

***145** Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 387 (N.D. Cal. 1991). Court set forth an "open balancing analysis" in which the court should:

(1) identify the interests that the work-product doctrine is intended to promote,

(2) make a judgment about how much these interests would be either:

(a) harmed by finding these kinds of communications discoverable, or

(b) advanced by a ruling they are not discoverable,

(3) identify the relevant interests that are promoted by rules of civil procedure and evidence concerning experts (FRCP 26(b)(4) and FRE 702, 703 and 705), and then

(4) make a judgment about how much these interests would either be:

(a) harmed by finding these kinds of communications discoverable, or

(b) advanced by a ruling they are not discoverable.

Court concluded that the work-product rationale is not damaged if lawyers know in advance that anything they send to an expert will be discoverable. Court felt that this "sunshine factor" would make documents shown to experts more objective and improve the truth-finding process. Thus, "absent an extraordinary showing of unfairness" all oral and written communications between counsel and a testifying expert would be discoverable if they are related to the subject of the expert's testimony.

But see:

Rail Intermodal Specialists, Inc. v. General Elec. Capital Corp., 154 F.R.D. 218 (N.D. Iowa 1994). Court adopted the Intermedics open balancing analysis and concluded that the interests behind work-product doctrine outweighed the interest in discovery of the documents.

(2) Approach #2: Work-Product Shown to Experts Is Discoverable Under a Balancing Approach

Some courts balance several factors to determine whether production of work- product materials is required in the interests of justice. Courts examine factors such as:

1) the likelihood of coaching,

2) the nature of the work-product sought,

3) the value of the information for impeachment, and

4) the extent that the request is merely a fishing expedition.

See Lawson v. United States, No. 97 Civ. 9239 (AJP) (JSM), 1998 WL 312239 (S.D.N.Y. June 12, 1998) (adopting the "balanced standard" and ordering production of transcripts of interviews of government experts conducted by the government's attorney where the experts reviewed the transcripts prior to their depositions); Parry v. Highlight Indus., Inc., 125 F.R.D. 449 (W.D. Mich. 1989); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 108 F.R.D. 283, 286 (M.D.N.C. 1985); Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977). See also REST. 3D ß 92 cmt. e.

***146 (3) Approach #3: Particular Documents That an Expert Relies** Upon Are Discoverable

Under this test, courts will allow discovery of the opinion work-product documents that were utilized by the expert in the development of the expert's opinion. This approach protects documents that were not utilized by the expert while still allowing discovery of materials that form the basis of the expert's opinion. See In re Shell Refinery, Nos. 88-1935 & 88-2719, 1992 WL 58795 (E.D. La. Mar. 17, 1992); William Penn Life Assur. Co. v. Brown Transfer & Storage Co., 141 F.R.D. 142 (W.D. Mo. 1990). Compare:

Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985). Opposing counsel must establish reliance on a particular document for a given piece of testimony before discovery will be compelled.

Elco Indus., Inc. v. Hogg, No. 86 C 6947, 1988 WL 20055 (N.D. Ill. Feb. 29, 1988). Work-product materials given to expert are discoverable if they may influence and shape the expert's testimony. However, the attorney's mental impressions remain protected.

Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983). Opinion work-product is not protected where expert utilizes

counsel's opinion work-product to formulate opinion.

With:

Martin v. Valley Nat'l Bank of Ariz., No. 89 Civ. 8361, 1992 WL 203840 (S.D.N.Y., Aug 12, 1992). Plaintiff's expert had independently prepared a report and was not requested to testify about the matters in the report. Court held that a party cannot limit an expert's analysis to the parts that the party thinks are useful. Similarly, the party cannot shield testimony on the assertion that they do not choose to offer testimony on certain findings. Court therefore found that the entire report was discoverable.

(4) Approach #4: Opinion Work-Product Is Absolutely Protected Even if Shown to Experts

Some courts refuse to make an exception for opinion work-product materials shown to experts. These courts find that opinion work-product remains undiscoverable even when used by an expert to formulate his testimony. See United States v. 215.7 Acres of Land, 719 F. Supp. 273 (D. Del. 1989); Hamel v. General Motors Corp., 128 F.R.D. 281 (D. Kan. 1989); Protection from Discovery of Attorney's Opinion Work-Product Under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 A.L.R. FED. 779 (1987). See also:

Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 642 (E.D.N.Y. 1997). Core work-product protection is not vitiated by an expert's use of the work- product while preparing to testify. Federal Rule of Civil Procedure 26(a)(2)(B) requires the disclosure of only "factual materials" and not core attorney work-product considered by an expert.

Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984). Absolute protection is given to core opinion work-product provided to expert witnesses. Court concluded that the work-product protections of FRCP 26(b)(3) outweigh the FRCP 26(b)(4) expert discovery provisions.

Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 294 (W.D. Mich. 1995). "[N]othing in ...[FRCP 26(b)(3) or FRCP 26(b)(4)] or the committee notes,...suggests core attorney work-product was discoverable ***147** under [FRCP 26(b)(4)]." Court concluded that core opinion work- product provided to expert witness was protected.

Maynard v. Whirlpool Corp., 160 F.R.D. 85, 87-88 (S.D. W. Va. 1995). Opinion work-product revealed to testifying expert does not defeat the nearly absolute protection afforded the opinions of counsel.

All West Pet Supply Co. v. Hill's Pet Prods., 152 F.R.D. 634, 639 (D. Kan. 1993). The protection afforded work-product materials, including opinion work-product materials, is not avoided "simply because the attorney's work-product ... was transmitted to his client's expert witness and considered in the course of preparing an expert opinion for purposes of testifying at trial." FRCP 26(a)(2)(B) only requires the disclosure of the facts that an expert considered and not "the documents that transmitted the data or information." Id. at 639 n.9.

Bramlette v. Hyundai Motor Co., No. 91 C 3635, 1993 WL 338980 (N.D. Ill. Sept. 1, 1993). The showing of opinion work-product to an expert witness does not waive protection; instead, the solution is to redact the document omitting the opinion work-product.

Elco Indus., Inc. v. Hogg, No. 86 C 6947, 1988 WL 20055 (N.D. Ill. Feb. 29, 1988). Work-product materials given to an expert are discoverable if they may influence and shape expert's testimony. However, attorney's mental impressions remain protected and should be redacted.

North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 108 F.R.D. 283, 285-86 (M.D.N.C. 1985). There is no waiver under FRE 612 for opinion work-product that is supplied to refresh an expert's recollection.

c. Discovery of Experts Shifting Between Consulting and Testifying Status

(1) Consulting Experts Who Become Testifying Experts

While discovery into the thoughts held by testifying experts may be quite broad, discovery into facts known and opinions held by consulting experts not expected to testify may only occur "upon a showing of exceptional circumstances." See Fed. R. Civ. P. 26(b)(4)(B). Because different rules govern discovery of testifying and non-testifying experts, the same expert may be subject to different discovery regimes, depending on his role. Where an expert is retained solely as a consulting expert, counsel may share privileged materials with the expert, as counsel's privileged agent, without loss of the work-product privilege. Later use of the same expert as a testifying expert may waive this privilege, however.

In The Herrick Co., Inc. v. Vetta Sports, Inc., No. 94 CIV. 0905 (RPP), 1998 WL 637468 (S.D.N.Y. Sept. 17, 1998), Skadden, Arps, Slate, Meager, & Flom ("Skadden") retained an attorney as an outside ethics expert and consultant for several years. Skadden subsequently designated the consultant as a testifying expert, and the plaintiff in the action moved to compel production of all documents pertaining to the expert's previous advice to Skadden. The court ordered Skadden to produce all such materials related to the same general subject mater as his expert

report, holding Skadden to have waived its attorney-client and work product privileges.

***148** Similarly, several courts have held that designation of a party's prosecuting attorney as an expert witness in a patent dispute waives the party's privilege with respect to communications with the prosecuting attorney. See Multiform Dessicants, Inc. v. Stanhope Products Co., Inc., 930 F. Supp. 45, 49 (W.D.N.Y. 1996) (finding that plaintiff voluntarily waived the privilege with respect to "all communications pertaining to the patent prosecution" by calling the prosecuting attorney as a witness); Vaughan Furniture Co., Inc. v. Featureline Mfg., Inc., 156 F.R.D. 123, 128 (M.D.N.C. 1994) (same). Waiver of the privilege as it extends to consulting witnesses is not unique to attorney witnesses. See B.C.F. Oil Refining, Inc. v. Consol. Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997) (holding documents produced by defendant's testifying expert while a consulting expert were discoverable to the extent they were not clearly established to be unrelated to expert's testimony).

(2) Waiver of the Privilege as to a Withdrawn but Previously Designated Testifying Expert

Courts are split as to whether parties waive the privilege as to experts who are designated as testifying but are withdrawn prior to the completion of discovery. Several courts have indicated that once designated, an expert cannot be protected from subsequent discovery by withdrawing the expert's designation as a trial witness. See House v. Combined Ins. Co. of America, 168 F.R.D. 236, 248 (N.D. Iowa 1996); Furniture World v. D.A.V. Thrift Stores, Inc., 168 F.R.D. 61, 62 (D.N.M. 1996). See also Ferguson v. Michael Foods, Inc., 189 F.R.D. 408, 409 (D. Minn. 1999) (finding a waiver and allowing the adverse party to call a previously designated expert as an adverse witness); House v. Combined Ins. Co. of America, 168 F.R.D. 236 (same).

Some courts rejecting this approach have looked to the Committee Notes to Rule 26(b)(4)(A), which indicate that "[d]iscovery is limited to trial witnesses...", concluding that because withdrawn witnesses are no longer trial witnesses, discovery is no longer justified. Further, because the purpose of Rule 26(b)(4)(A) is to help the opposing party prepare for cross- examination, once a witness is withdrawn, the underlying purpose for discovery is negated. See Dayton-Phoenix Group, Inc. v. General Motors Corp., 1997 WL 1764760, *1 (S.D. Ohio 1997); Ross v. Burlington Northern R.R. Co., 136 F.R.D. 638, 638-39 (N.D. Ill. 1991) (finding protection of Fed. R. Civ. P. 26(b)(4)(B) not waived by prior designation as testifying expert). See also Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984) (requiring a special showing to obtain testimony of a previously designated testifying witness redesignated as a consultant).

G. EXCEPTIONS TO WORK-PRODUCT PROTECTION

1. The Crime-Fraud Exception

a. Ordinary Work-Product

Like the attorney-client privilege, the work-product doctrine does not protect materials that were made when a client has consulted a lawyer for the purpose of furthering an ***149** illegal or fraudulent act. In re Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986); In re Grand Jury Subpoenas Duces Tecum, 773 F.2d 204, 206 (8th Cir. 1985). In most respects, the work- product crime-fraud exception operates the same as the exception applied for the attorney-client privilege. (For a more detailed discussion see Crime-Fraud Exception ß I(H)(1), supra.) See:

In re Grand Jury Proceedings, 102 F.3d 748, 752 (4th Cir. 1996). Crime- fraud exception applies to vitiate work-product privilege.

In re Grand Jury Proceedings, 867 F.2d 539 (9th Cir. 1989). Court applied the crime-fraud exception to ordinary work-product.

In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038 (2d Cir. 1984). Advice sought to further a crime or fraudulent scheme renders any work-product unprotected.

In re Sealed Case, 676 F.2d 793, 811-13 (D.C. Cir. 1982). Crime-fraud exception applied to work-product privilege.

In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982). Crime-fraud exception applies to work-product.

In re Doe, 662 F.2d 1073, 1078 (4th Cir. 1981). Attorney cannot invoke work-product immunity to cover his own crime or fraud.

In re Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir. 1980). Upon a prima facie showing of fraud, neither client nor attorney may assert work-product protection for ordinary work-product. A guilty client cannot assert the work-product protection of her innocent attorney.

The crime-fraud exception waives protection for materials concerning on-going or continuing crimes or frauds. See REST. 3D ß 93. However, the exception does not encompass communications concerning crimes or frauds that occurred in the past. See United States v. Zolin, 491 U.S. 554, 562-63 (1989); REST. 3D ß 93 cmt. b. In addition, the exception can only be invoked for materials created in furtherance of the crime or fraud. See:

In re Antitrust Grand Jury, 805 F.2d 155, 162-64 (6th Cir. 1986). When the on-going crime or fraud involves opinion work-product, there must be a showing that the otherwise protected materials were made in furtherance of the crime or fraud to remove work-product protection.

United States v. Davis, 131 F.R.D. 391, 407 (S.D.N.Y.), recons. granted, 131 F.R.D. 427 (S.D.N.Y. 1990). Party seeking to invoke crime- fraud exception must show that the desired communications were made in furtherance of the alleged fraud.

A party seeking the production of work-product documents based upon the crime-fraud exception has the burden to make out a prima facie case.

(1) The party must show by independent evidence that there is a reasonable basis for a good faith belief that the material involves obtaining assistance with a crime or fraud. Evidence gained from in camera inspection is not taken into account.

***150** (2) If the first showing is made, it is within the trial judge's discretion to conduct an in camera examination of the entire communication. The judge is never required to conduct an in camera inspection.
See Zolin, 491 U.S. at 572. See also REST. 3D ß 93 cmt. d.

In addition, the person seeking to establish the crime-fraud exception must show that a reasonable relationship exists between the material sought and the crime or fraud. See Hercules Inc., v. Exxon Corp., 434 F. Supp. 136, 155 (D. Del. 1977) (even assuming a prima facie case, if there is no connection between the documents and the fraud, then the documents remain protected work-product); REST. 3D ß 93 cmt. d. Courts differ on the degree to which the work-product must be related to the crime or fraud. See:

In re John Doe Corp, 675 F.2d 482, 492 (2d Cir. 1982). Materials must be related to the crime or fraud.

In re Grand Jury Proceedings, 604 F.2d 798, 803 n.6 (3d Cir. 1979). Materials must have some relationship to the crime or fraud.

In re September 1975 Grand Jury Term, 532 F.2d 734, 738 (10th Cir. 1976). Materials must have a potential relationship to the crime or fraud.

b. Opinion Work-Product

In general, the crime-fraud exception also applies to opinion work-product in the same manner as ordinary work-product. However, there are two major differences.

Prima Facie Showing: First, some courts have imposed a higher burden on the prima facie showing when the material involves opinion work-product. The courts require more than a reasonable basis for a good-faith belief that the material was involved with a crime or fraud. See:

In re John Doe Corp., 675 F.2d 482, 492 (2d Cir. 1982). Use of work- product in aid of criminal scheme may be a "rare occasion" in which opinion work-product is not immune.

Attorney's Knowledge Relevant: Second, unlike the attorney-client privilege, the attorney's knowledge of the crime or fraud can be relevant in determining the scope of the work-product protection. Some courts have held that if the attorney is ignorant of the crime or fraud, then work-product protection is waived only with respect to ordinary information furnished to the attorney and not to opinion work-product. In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986); In re Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir. 1980) (client lost work-product protection but attorney's impressions should remain protected since the lawyer's privacy is not justifiably invaded because she represented a fraudulent client); In re National Mortgage Equity Corp. Mortgage Pool Certificates Litig., 116 F.R.D. 297 (C.D. Cal. 1987) (if attorney is unaware of crime or fraud then fact work-product is not protected but opinion work-product remains protected); In re International Sys. & Controls Corp. Sec. Litig., 91 F.R.D. 552, 559-60 (S.D. Tex. 1981), vacated on other grounds, ***151**693 F.2d 1235, 1242 (5th Cir. 1982) (where there is no allegation of attorney fraud, no intrusion will be allowed upon opinion work-product.) However, other cases and the Restatement have taken a different approach which waives opinion work-product even though the attorney did not know of the fraud. In re Doe, 662 F.2d 1073, 1079 (4th Cir. 1981); In re Grand Jury Proceedings, 102 F.3d 748, 751 (4th Cir. 1996); In re John Doe Corp., 675 F.2d 482, 491-92 (2d Cir. 1982); In re Sealed Case, 676 F.2d 793, 812 n.75 (D.C. Cir. 1982) (a guilty client would not have standing to assert the work-product claim of

his innocent attorney); REST. 3D ß 93 cmt. c.

c. Cases where Lawyer is Involved with Fraud but Client is Ignorant

In cases where it is the attorney who is involved with the crime or fraud and the client is innocent, then the client can assert work-product protection for the materials despite the lawyer's complicity. See Moody v. IRS, 654 F.2d 795, 801 (D.C. Cir. 1981); In re Grand Jury Proceedings, 604 F.2d 798, 801- 02 (3d Cir. 1979). But see In re Impounded Case (Law Firm), 879 F.2d 1211, 1214 (3d Cir. 1989) (crime-fraud exception applies in case where the lawyer rather than client is the object of criminal investigation, but this exception is limited to materials pertinent to the charge against the lawyer).

2. Exception for Attorney Misconduct

Several commentators have proposed an exception to the work-product doctrine for materials created through attorney misconduct. See, e.g., G. Michael Halfenger, The Attorney Misconduct Exception to the Work-product Doctrine, 58 U. CHI. L. REV. 1079 (1991). This exception would remove protection when:

(1) an attorney violates the law or an accepted norm of professional conduct and the resulting materials are tainted with information gathered through this misconduct; or

(2) an attorney violates the law or an accepted norm of professional conduct and

(a) revelation of the resulting materials would correct the asymmetry caused by misconduct,

(b) no other action would be an effective remedy, and

(c) disclosure will not adversely affect other parties.

***152** Id. at 1091. Such an exception would extend the crime-fraud exception to include ethics violations in addition to crimes. Several courts have recognized this extension of the crime-fraud exception. See:

Parrott v. Wilson, 707 F.2d 1262 (11th Cir. 1983). Attorney secretly tape recorded meeting between plaintiff's attorney and defense witness. Court concluded that this recording was work-product but found that a clandestine recording constitutes an ethical violation and such a violation abrogates the protection of the work-product doctrine.

Haigh v. Matsushita Elec. Corp., 676 F. Supp. 1332, 1358-59 (E.D. Va. 1987). Client clandestinely recorded witnesses' conversation without his consent. Court found that attorney's acquiescence in the recording amounted to active participation and was therefore an ethical violation. As a result, the work-product doctrine was vitiated for the recording.

But see:

Moody v. IRS, 654 F.2d 795, 801 (D.C. Cir. 1981). In broad dicta, court stated that attorney misconduct does not necessarily implicate the crime- fraud exception to breach work-product protection.

3. Fiduciary Exception: The Garner Doctrine

As noted in ß I(H)(3), supra, an exception to the attorney-client privilege has developed for actions involving an organization and the parties to whom it owes fiduciary duties. This exception had its roots in Garner v. Wolfinbarger, 430 F.2d 1093, 1102-03 (5th Cir. 1970). Garner was based on the rationale that a fiduciary relationship between the corporation and its shareholders creates a commonality of interest which precludes the corporation from asserting the attorney-client privilege against its shareholders. Courts have recognized that the policy rationale underlying the Garner exception does not readily mesh with the work-product goal of protecting the adversary system. In In re International Systems & Controls Corp. Securities Litigation, 693 F.2d 1235 (5th Cir. 1982), the Fifth Circuit held that the Garner principle does not apply to the work-product doctrine and refused to order the production of several binders of work-product. In holding that Garner does not apply to work-product materials, the court stated that the mutuality of interest rationale of Garner does not apply once there is sufficient anticipation of litigation to bring the documents within the work- product doctrine.

Most courts are in accord with this reasoning and have not applied the Garner exception to work-product. See, e.g., Nellis v. Air Line Pilots Ass'n, 144 F.R.D. 68 (E.D. Va. 1992) (in dictum); Helt v. Metropolitan Dist. Comm'n, 113 F.R.D. 7 (D. Conn. 1986). However, at least one court has applied Garner to the work-product doctrine. See Donovan v. Fitzsimmons, 90 F.R.D. 583, 588 (N.D. Ill. 1981) (Garner rationale must be addressed in the work-product context "lest the work-product immunity swallow up the Garner exception in its entirety").

In practice, the fact that many courts do not recognize a Garner exception to the work-product doctrine may make little difference because it would be easier to show hardship or burden under FRCP 26(b)(3). The Garner court identified a series of factors to show "good ***153** cause" to invoke the Garner exception. These included the "necessity of the shareholders" and the "availability from other sources." 430 F.2d at 1104. It can be argued that

these criteria of necessity and availability are the same as the "substantial need" and "undue hardship" requirements of FRCP 26(b)(3). Under this reasoning, the Garner standard imposes a higher burden since it subsumes the two FRCP 26(b)(3) criteria and requires other criteria in addition. As a result, for ordinary work-product the fact that the Garner exception does not apply will have little practical effect. However, in the case of opinion work-product, the lack of a fiduciary exception will have the effect of protecting the mental impressions of corporate counsel from later discovery.

H. COMMON INTEREST EXTENSIONS OF WORK-PRODUCT PROTECTION

As noted earlier in ß IV(F)(2), the rationale of the work-product doctrine is not necessarily compromised by the sharing of protected communications. In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982). Under the work-product doctrine, the concern is to protect trial preparation from adversaries, not from those with similar interests. Thus, courts have recognized a broad common interest extension for work-product immunity which allows attorneys to pool work-product with clients and other lawyers with the same interest in a matter. See Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) (common interest allows clients facing a common litigation opponent to exchange privileged communications and work-product without waiving protection in order to prepare a common defense); In re Doe, 662 F.2d 1073 (4th Cir. 1981); Gottlieb v. Wiles, 143 F.R.D. 241 (D. Colo. 1992); Weil Ceramics & Glass, Inc. v. Work, 110 F.R.D. 500, 502 (E.D.N.Y. 1986). See also REST. 3D ß 91 cmt. b. Upon disclosure, a court will examine whether the originator and recipient of the protected information have common interests against a common adversary which would make disclosure to adversaries unlikely. The existence of a potential common interest, for example as between co-defendants in a criminal proceeding, does not compel the disclosure of privileged work-product, however. See United States v. Jacques Dessange, Inc., 52 99 CR. 1182, 2000 U.S. Dist. Lexis 3734, *8-11 (S.D.N.Y. Mar. 27, 2000) (co-defendant's desire to review all possible material of use to his defense did not justify compelled disclosure of defendant's attorney's notes). See Appendix B for a sample joint/common defense agreement. Compare:

In re Grand Jury Subpoenas 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990). Parties with a common-defense or strategy may share work-product materials prepared in the course of an ongoing common enterprise and intended to further the enterprise.

United States v. AT&T, 642 F.2d 1285 (D.C. Cir. 1980). The government sued AT&T for antitrust violations. MCI had turned documents over to the government under a stipulation that they be used only in the litigation against AT&T. MCI then filed its own antitrust action against AT&T and sought to assert work-product protection (as a nonparty) in the government's case to prevent AT&T from obtaining the materials that MCI had previously turned over. The D.C. Circuit held that MCI had not waived the protection by disclosing the materials to the government. The court recognized the government and MCI had a common interest against a common adversary and therefore no waiver had occurred from the sharing.

***154** Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187, 191 (N.D. Ill. 1985). Attorneys facing a common litigation opponent may exchange privileged communications and attorney work-product in order to prepare a common defense without waiving either privilege.

Triax Co. v. United States, 11 Cl. Ct. 130, 133 (1986). Disclosure of privileged documents to the General Accounting Office by the Air Force did not constitute waiver, because the GAO was not an adversary in litigation and disclosure was not "inconsistent with the adversarial process."

With:

Chubb Integrated Sys., Ltd. v. National Bank of Wash., 103 F.R.D. 52, 67 (D.D.C. 1984). Voluntary disclosure of work-product to adversary in separate litigation waives the privilege with respect to adversaries in lawsuits concerning the same subject matter.

V. RECOMMENDATIONS FOR PRESERVING THE CONFIDENTIALITY OF WORK-PRODUCT

In addition to the steps recommended to maximize the corporation's protection under the attorney-client privilege set forth above at ß III, supra, some further precautions will maximize the protection afforded by the work-product doctrine.

A. LEGAL COMMUNICATIONS

• Segregate work-product materials and maintain their confidentiality. Disclosure of protected documents may

result in waiver.

B. WITNESS STATEMENTS

• Counsel should conduct all interviews. Counsel's interview notes or interview memoranda should state that the documents contain counsel's "impressions and conclusions" concerning the interview. Do not include lengthy verbatim entries.

• Do not use work-product materials to refresh the recollection of a witness.

C. EXPERTS

• Do not use work-product materials to provide an expert with a basis for an opinion.

***155 D. LEGAL INVESTIGATIONS**

• Stress that any legal investigation is being conducted in anticipation of litigation. If in-house counsel will conduct the legal investigation, she should receive a specific directive from the board of directors indicating that the investigation has been undertaken in anticipation of litigation. If outside counsel will conduct the investigation, the company should send a retention letter reciting these matters.

VI. SELF-CRITICAL ANALYSIS PRIVILEGE

Corporations and businesses often conduct internal investigations for a variety of different reasons, and the results of these investigations can be damaging, inculpatory or embarrassing. Investigating parties have therefore attempted to shield these reports from discovery by outside parties and civil litigants. See Note, The Privilege of Self-Critical Analysis, 96 HARV. L. REV. 1083, 1086 (1983). See also Self-Evaluative Privilege and Corporate Compliance Audits, 68 S. Cal. L. Rev. 621 (1995). The broadest protections are afforded by the attorney-client privilege and work-product doctrine discussed throughout this outline. However, in order to provide additional protection, some courts have recognized a specific limited privilege to protect institutional self-analysis from outside discovery. Usually referred to as the "self-critical analysis" privilege, the privilege was first recognized by the federal courts in the context of medical peer reviews in 1970. See Bredice v. Doctors Hospital, Inc., 150 F.R.D. 249 (D.D.C. 1970), aff'd without opin., 479 F.2d 920 (D.C. Cir. 1973). Over the years, the federal courts, principally district courts, have created a confusing body of case law relating to the privilege. The privilege is defined differently in different jurisdictions, but in most cases the courts have found that the privilege did not apply to the facts before them. Some jurisdictions have cases with conflicting outcomes that are barely reconcilable. Broad application of the privilege was called into question in University of Pennsylvania v. EEOC, 493 U.S. 182 (1990). In that case, without specifically addressing the self- critical analysis privilege, but admonishing against the application of broad new privileges, the United States Supreme Court held that a university's internal peer review materials relating to tenure decisions were not privileged. However, the federal courts subsequently have gone on to discuss the privilege and to apply it in rare cases.

The purpose of the self-critical analysis privilege at its most general is to encourage organizations to conduct self-critical reviews regarding matters of importance to the public without being chilled by the possibility that the self-criticism will be discovered and used against the organization in some later proceeding. Recognizing that the privilege could create an enormous exception to the general rules of discovery, the courts have applied severe restrictions on the privilege.

***156** A common statement of the self-critical analysis privilege is that it applies when:

(1) the information results from a critical self-analysis undertaken by the party seeking protection;

(2) the public must have a strong interest in preserving the free flow of information sought;

(3) the information is of the type whose flow would be curtailed if discovery were allowed; and

(4) the document must have been created with the expectation that it would be kept confidential and must have remained so.

See Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423 (9th Cir. 1992). See also, In re Salomon, Inc. Securities Litigation, Nos. 91 Civ. 5442 and 5471, 1992 WL 350762 (S.D.N.Y. Nov. 13, 1992) (applying first three factors but finding them unsatisfied by the facts of the case). This articulation of the privilege applies particularly to tort cases. Tice v. American Airlines, Inc., 192 F.R.D. 270, 272-73 (N.D. Ill. 2000). In tort actions, the rationale for

the self-critical analysis privilege is to promote public safety through voluntary and honest self-analysis. Morgan v. Union Pacific RR Co., 182 F.R.D. 261, 265-66 (N.D. Ill. 1998).

Characterizing it as "perhaps the most cogent statement of a possible test" emerging from a line of cases decided in the Southern District of New York, one court put forth the following test:

The party resisting discovery must make a detailed and convincing showing of the harm to be anticipated from the disclosure at issue in the particular case.... Where a party establishes that disclosure of requested information could cause injury to it or otherwise thwart desirable social policies, the discovering party will be required to demonstrate its need for the information, and the harm it would suffer from the denial of such information would outweigh the injury that disclosure would cause the other party or the interest cited by it.

In re Nieri, Civil Action No. M12-329, 2000 U.S. Dist. LEXIS 540 at *11 (S.D.N.Y. January 20, 2000), quoting Trezza v. The Hartford, Inc., No. 98 Civ. 2205, 1999 U.S. Dist. LEXIS 10925 at *2 (S.D.N.Y. July 20, 1999).

Some have found that the self-investigative privilege is only qualified and can be overcome upon a showing of need. See In re Air Crash Near Cali, Columbia, 959 F. Supp. 1529, 1535-36 (S.D. Fla. 1997) (self-critical analysis privilege is qualifiedand may be ***157** overcome by a showing of substantial need); Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994) (self-critical analysis privilege is a qualified privilege which can be overcome on a showing of extraordinary circumstance or special need).

Several courts require the compilation of the material to be mandated by the government (such as an EEOC report). See Clark v. Pennsylvania Power and Light Co., Civ. Action No. 98-3017, 1999 U.S. Dist. LEXIS 5118 (E.D. Pa. April 14, 1999) (subjective portions of affirmative action plans prepared by employer pursuant to OFCCP regulations protected from production to employee by self- critical analysis privilege); Culinary Foods, Inc. v. Raychem Corp., 151 F.R.D. 297, 304 (N.D. Ill.), order clarified, 153 F.R.D. 614 (N.D. Ill. 1993) (self-investigative privilege can protect materials prepared for mandatory government reports); Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 434 (E.D. Pa. 1978); Vanek v. NutraSweet Co., No. 92 C 0115, 1992 WL 133162 (N.D. Ill. June 11, 1992) (finding material not privileged). See also Tice v. American Airline, Inc., 192 F.R.D. 270, 272 (N.D. Ill. 2000) (requirement of government mandate applies in context of employment discrimination case, but not in a tort case); Morgan v. Union Pacific RR Co., 182 F.R.D. 261, 265 (N.D. Ill. 1998). But see Lawson v. Fisher-Price, Inc., 191 F.R.D. 381 (D. Vt. 1999) (privilege not applicable where information mandated to be disclosed to government agency); In re Air Crash Near Cali, Columbia, 959 F. Supp. 1529 (S.D. Fla. 1997) (declining to apply self-critical analysis privilege to voluntary pilot self-reporting documents, but applying a completely new common law privilege to protect the documents).

Most courts have held that only the subjective portions of self-critical reports are protected; the underlying objective data is not protected. See, e.g., Clark v. Pennsylvania Power and Light Co, Inc., Civ. Action No. 98- 3017, 1999 U.S. Dist. LEXIS 5118 (E.D. Pa. April 14, 1999); Shipes v. BIC Corp., 154 F.R.D. 301, 308 (M.D. Ga. 1994); Culinary Foods, Inc. v. Raychem Corp., 151 F.R.D. 297, 304 (N.D. Ill.), order clarified, 153 F.R.D. 614 (N.D. Ill. 1993) (self investigative privilege protects only subjective, evaluative materials and not objective data or reports); John v. Trane Co., 831 F. Supp. 855 (S.D. Fla. 1993) (employer was required to produce affirmative action plan but self-evaluative privilege protected portions containing subjective evaluations of management); In re Crazy Eddie Sec. Litig., 792 F. Supp. 197 (E.D.N.Y. 1992) (finding privilege to exist); Witten v. A.H. Smith & Co., 100 F.R.D. 446, 449 (D. Md. 1984); aff'g, 785 F.2d 306 (4th Cir. 1986) (finding privilege inapplicable to the facts); Resnick v. American Dental Ass'n, 95 F.R.D. 372, 374 (N.D. Ill. 1982) (privilege protects subjective and evaluative material prepared for mandatory government reports); Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 434 (E.D. Pa. 1978).

Some courts have restricted the privilege to post-accident analyses and have held that the privilege is inapplicable to pre-accident internal safety analyses. See Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 427 (9th Cir. 1992) (refusing to apply the privilege to pre-accident safety reviews). But see Myers v. Uniroyal Chem. Co., Inc., Civ. Action No. 91- 6716, 1992 U.S. Dist. LEXIS 6472 (E.D. Pa. May 5, 1992) (self-critical analysis would not apply to post-accident investigation because manufacturer would have sufficient incentive without the privilege to investigate to prevent future accidents). Other courts have ***158** held that the privilege does not apply to government demands for documents. See, e.g., In re Kaiser Aluminum and Chemical Co., 214 F.3d 586, 593 (5th Cir. 2000) (privilege does not apply where a government agency seeks pre-accident documents).

A typical analysis under the four-pronged Dowling standard, supra, turns on the third element and whether the information would be subject to a chilling effect. Courts often determine that the information in a report would continue to be collected even if discoverable because other incentives would be sufficient to overcome any chilling effect. In In re Salomon, Inc. Securities Litigation, Nos. 91 Civ. 5442 & 5471, 1992 WL 350762 (S.D.N.Y. Nov. 13, 1992), for example, Salomon Bros. was sued for misrepresentation of facts and concealment of treasury violations in a securities auction. Salomon had conducted internal audits of its controls and procedures for trading, and had commissioned an audit by Coopers & Lybrand. When a suit was brought, Salomon claimed a self-critical privilege for these audits. The court recognized the public's interest, but concluded that management control studies and internal audits would not be curtailed because economic efficiencies, accuracy in financial reporting, and improvement of business standards are integral to the success of a business. Thus, the court found that no self-investigative privilege applied. Id. See also Cruz v. Coach Stores, Inc., No. 96 Civ. 8099, 2000 U.S. Dist. LEXIS 12371 at *13 (S.D.N.Y. August 25, 2000) ("A company has an obvious economic interest in engaging in self-evaluations of employee misconduct: it hardly needs the additional protection of a shield of privilege to investigate its own employees' alleged derelictions."); Myers v. Uniroyal Chem. Co., Inc., Civ. Action No. 91-6716, 1992 U.S. Dist. LEXIS 6472 (E.D. Pa. 1992) (manufacturer's interest in preventing future accidents sufficient incentive for post-accident investigation).

The self-investigative privilege has been most frequently employed to protect hospital internal review procedures and employer affirmative action reports.

Hospital Review Committee notes protected: see Granger v. National R.R. Passenger Corp., 116 F.R.D. 507, 509 (E.D. Pa. 1987); Gillman v. United States, 53 F.R.D. 316, 318 (S.D.N.Y. 1971).

Affirmative action filings protected: see Cobb v. Rockefeller Univ., No. 90 Civ. 6516, 1991 WL 222125 (S.D.N.Y. Oct. 24, 1991); Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985) (affirmative action filings protected in dicta); Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 506, 507 (D. Or. 1982); Roberts v. National Detroit Corp., 87 F.R.D. 30, 32 (E.D. Mich. 1980). But see Witten v. A.H. Smith & Co., 100 F.R.D. 446, 449-54 (D. Md. 1984) aff'g, 785 F.2d 306 (4th Cir. 1986) (rejecting privilege for affirmative action documents).

Increasingly, the self-investigative privilege has also been invoked to protect the internal investigations of corporations. See In re LTV Sec. Litig., 89 F.R.D. 595, 618-622 (N.D. Tex. 1981) (finding that privilege existed); FTC v. TRW, Inc., 628 F.2d 207 (D.C. Cir. 1980) (rejecting use of privilege to impair FTC). Compare:

***159** Joiner v. Hercules, Inc., 169 F.R.D. 695, 699 (S.D. Ga. 1996). Self-critical analysis privilege protected documents created by company to evaluate its compliance with environmental laws and regulations.

Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994). Self-critical analysis privilege protected retrospective analyses of past conduct, practices, and occurrences, and the resulting environmental consequences. The privilege applies only to reports prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution.

Shipes v. BIC Corp., 154 F.R.D. 301 (M.D. Ga. 1994). Applying Georgia law, the court held that the self-critical analysis privilege protected self- evaluation disclosures sent to the Consumer Products Safety Commission, but only to the extent that they reflected critical analysis of BIC products, testing, or procedures.

In re Crazy Eddie Sec. Litig., 792 F. Supp. 197 (E.D.N.Y. 1992). Court recognized that a self-investigative privilege serves the public interest by encouraging self-improvement through uninhibited self-analysis and evaluation. However, court also noted that the privilege is not absolute and applies only to the evaluation itself, and not to the underlying facts on which the evaluation is based.

Granger v. National R.R. Passenger Corp., 116 F.R.D. 507, 509 (E.D. Pa. 1987). Railroad claimed privilege for internal investigation documents. Court found that a self-investigative privilege applied to prevent a chilling of company's efforts at self analysis and evaluation. Court concluded that the privilege served to protect the public by leading to safer practices.

With:

Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423 (9th Cir. 1992). Court addressed the self-investigative privilege without specifically adopting it since it concluded that even if a self-critical privilege exists it would not apply to routine safety reviews. It reasoned that these routine reviews would not be curtailed by discovery since other incentives for conducting such interviews (i.e., avoiding liability) continue to exist. In addition, court found that safety reviews are not always performed with an expectation of confidentiality. The court also found that fairness did not require protection since the company was not legally required to conduct these reviews.

U.S. ex rel. Sanders v. Allison Engine Co., 196 F.R.D. 310 (S.D. Ohio 2000) Self-critical analysis privilege would not protect from discovery by qui tam relator internal audits conducted to assess quality control deficiencies and

potential improvements in the fabrication of base and enclosure assemblies for generator sets that were installed in United States Arleigh Burke class destroyers. First, with apparent uniformity, courts have refused to apply the privilege where the documents in question have been sought by a government agency. There is a "strong public interest in allowing governmental investigations to proceed efficiently and expeditiously." Second, the court was skeptical that disclosure would chill future quality control audits. Third, the documents were not created with the expectation that they would remain confidential because the company was required to make the reports available to the prime contractor.

Mason v. Stock, 869 F. Supp. 828 (D. Kan. 1994). City could not invoke self-critical analysis privilege to block discovery of police internal affairs investigation because it would interfere with the constitutional rights of citizens and discovery was not likely to chill police cooperation with internal investigations.

In re Grand Jury Proceedings, No. K-94-2153, 1994 WL 465509 (D. Md. Aug. 23, 1994). Company was served a grand jury subpoena for the results of an internal audit conducted by a private consultant. Court held that the privilege of self-critical analysis did not apply in the criminal context.

Steinle v. Boeing Co., No. 90-1377-C, 1992 WL 53752 (D. Kan. Feb. 4, 1992). Employee complained to company's internal EEOC office which conducted an investigation and concluded that there was no misclassification. In a subsequent lawsuit, the employee requested documents from the investigation, and the court found there was no privilege. It reasoned that self evaluation of individual grievances will not be affected by disclosure since such an investigation is consistent with the business interests of management.

***160** Vanek v. NutraSweet, Co., No. 92 C 0115, 1992 WL 133162 (N.D. Ill. June 11, 1992). Employee sued under Title VII when she was laid off while on maternity leave. Before the lawsuit, company had formed a task force to set goals for diversity. In addition, an outside consultant had performed an audit and made recommendations to key personnel in human resources. Court held that no self-evaluative privilege applied since these activities were voluntary.

Some courts have expressed skepticism and have refused to recognize a self- critical privilege for internal corporate investigations. See Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 635 (M.D. Pa. 1997) (only a few courts have held documents created in the course of an environmental investigation or remedial action protected by the self-critical analysis privilege; there is no authority to suggest that either Virginia or Pennsylvania would adopt the privilege); Spencer Sav. Bank v. Excell Mortgage Corp., 960 F. Supp. 835 (D.N.J. 1997) (recognizing split of authority and rejecting self-critical analysis privilege); Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 182 (S.D. Iowa 1993) (rejecting privilege in employment discrimination context); U.S. v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990) (rejecting privilege in environmental context); Siskonen v. Stanadyne, Inc., 124 F.R.D. 610 (W.D. Mich. 1989). See also Abbott v. Harris Publications, 97 Civ. 7648, 1999 U.S. Dist. LEXIS 11410, 1999 WL 549002 (S.D.N.Y. July 28, 1999) ("In light of the Supreme Court opinion in University of Pennsylvania, it is clear that to the extent a self-critical analysis privilege has any continued validity, the party seeking to invoke it bears a heavy burden of establishing that public policy strongly favors the type of review at issue and that disclosure in the course of discovery will have a substantial chilling effect on the willingness of parties to engage in such reviews.").

One commentator has noted that development of a self-investigative privilege has taken place almost entirely at the district court level. See Note, Making Sense of Rules of Privilege Under the Structural (Il)logic of the Federal Rules of Evidence, 105 HARV. L. REV. 1339, n.74 (1992). This lack of appellate guidance has created unpredictability and difficulty in determining which courts will acknowledge such a privilege. For example, within one year, one federal court in the Southern District of New York refused to find a self- investigative privilege under facts similar to those in which another federal court in the Eastern District of New York recognized such a privilege. See In re Salomon Inc. Sec. Litig., Nos. 91 Civ. 5442 & 5471, 1992 WL 350762 (S.D.N.Y. Nov. 13, 1992); In re Crazy Eddie Sec. Litig., 792 F. Supp. 197 (E.D.N.Y. 1992).

State law relating to privileges is often governed by statute, and many states have statutes adopting forms of a self-evaluative privilege in a very limited context. For example, most states afford some confidentiality to medical peer reviews of patient care. A number of states have adopted statutes that create privilege for environmental audits, generally covering reports or audits that constitute voluntary evaluations designed to identify or prevent non-compliance with environmental laws. State courts have generally declined to recognize a more general self-evaluative privilege. See, e.g., Cloud v. Superior Court (Litton Indus., Inc.), 50 Cal. App. 4th 1552, 58 Cal. Rptr. 2d 365 (Cal. Ct. App. 1996) (privilege does not exist under California law); Combined Communications Corp. v. Public Service Co., 865 P.2d 893, 898 (Colo. Ct. App. 1993); Southern Bell Telephone & Telegraph Co. v. Beard, 597 So.

2d 873, 876 n.4 (Fla. Ct. App. 1992); ***161**Scroggins v. Uniden Corp. of America, 506 N.E.2d 83, 86 (Ind. Ct. App. 1987); Jolly v. Superior Court, 112 Ariz. 186, 540 P.2d 658, 662-63 (Ariz. 1975) (refusing to apply privilege to materials relating to internal investigation of possible violation of company safety standards).

VII. PRESERVING THE ATTORNEY-CLIENT PRIVILEGE AND THE CONFIDENTIALITY OF WORK- PRODUCT DURING DEPOSITION PREPARATION AND TESTIMONY

Although the practitioner needs to be aware of the principles of the attorney-client privilege and work-product doctrine throughout the course of litigation, it is no more important than in the preparation for and defending of depositions. During the course of a deposition, usually with only a few seconds notice, an attorney must decide whether to instruct a witness not to answer a question on the grounds of privilege and articulate the basis for the privilege. Just as important, an attorney must have prepared the witness with privilege issues in mind -- to avoid waiver and to ensure that a witness is prepared to lay the proper foundation for an asserted privilege.

A. INSTRUCTIONS NOT TO ANSWER

As a general matter, it is improper during a deposition to instruct a witness not to answer a question unless the basis is that the answer would reveal privileged information. See, e.g., Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993) (holding that it is only proper to instruct a witness not to answer if the answer is protected by the privilege and further prohibiting conferences between the attorney and client except to discuss whether to assert the privilege); Hisaw v. Unisys Corp., 134 F.R.D. 151, 152 (W.D. La. 1991); Gould Investors, L.P. v. General Ins. Co. of Trieste & Venice, 133 F.R.D. 103, 104 (S.D.N.Y. 1990).

This rule, although previously contained in Federal Rule of Civil Procedure 30(c), is now unmistakably expressed in new Rule 30(d)(1) which was added as part of the 1993 amendments, and further modified by the 2000 amendments:

> Any objection during a deposition must be stated concisely and in a non- argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).

An instruction not to answer a question on grounds of privilege should be accompanied by sufficient information to ensure that the court will be able to determine whether the asserted privilege is well-founded. See, e.g., In re One Bancorp Sec. Litig., 134 F.R.D. 4, 8 (D. Me. 1991) ("counsel shall state on the record a fact-specific basis for any claim of privilege sufficient to permit the Court to determine the validity of the claim."). Although it is probably not necessary to specify the type of protection asserted (i.e., attorney-client privilege ***162** or work-product doctrine), the better practice is to identify one or both of the protections to ensure that the protection is not waived on review by the trial court. Compare Delco Wire & Cable, Inc. v. Weinberger, 109 F.R.D. 680, 691 (E.D. Pa. 1986) (failure to specify work-product doctrine during deposition does not waive the protection absent equitable reasons requiring waiver); with Gerrits v. Brannen Banks of Fla., Inc., 138 F.R.D. 574, 576 n.2 (D. Colo. 1991) (failure to identify work- product doctrine in response to motion to compel waives the protection).

Although it is common practice in many jurisdictions to require the party taking the deposition to move to compel deposition answers, some courts require the objecting party, immediately following the deposition, to move the court for a protective order regarding the matters to which the attorney has objected and about which she has instructed the witness not to testify. See, e.g., Hisaw v. Unisys Corp., 134 F.R.D. 151, 152 (W.D. La. 1991) ("it is the duty of the attorney instructing the witness not to answer to immediately seek a protective order."); Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, 120 F.R.D. 504, 508 (W.D. La. 1988) (same); American Hangar, Inc. v. Basic Line, Inc., 105 F.R.D. 173, 175 (D. Mass. 1985) (same); International Union of Elec., Radio and Mach. Workers v. Westinghouse Elec. Corp., 91 F.R.D. 277, 280 n.4 (D.D.C. 1981) (same).

An attorney should be careful not to instruct a witness not to answer questions calling for background information which is itself not privileged. For example, a witness may identify who participated in an allegedly privileged conversation, where and when the conversation took place, and the general context of the conversation without revealing the substance of the communication. See, e.g., Potts v. Allis-Chalmers Corp., 118 F.R.D. 597 (N.D. Ind.

1987) (fact that attorney advised client on a particular occasion is not privileged). These are the types of information that would be included on a privilege log for documents and is the sort of information that the court requires to determine whether the objection is well-founded. However, an attorney may instruct his client not to answer questions that relate to the witness's preparation for the deposition, such as "were you instructed not to speculate in this deposition by anyone" or "were you instructed not to provide any information unless you knew it for a fact?" Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51, 54 (E.D. Pa. 1995).

With respect to attorney-client conversations or written communications, a witness should provide the general contextual information about the communication. With respect to work-product, a witness should identify information regarding the foundation for the doctrine, that is, the person who prepared the work-product and, if not an attorney, the attorney who authorized the creation of the work-product. It is also well-settled that a witness must testify about the facts contained in work-product, even if the document itself is protected from discovery by the work-product doctrine. See Underlying Facts Not Protected ß IV(A)(1), supra. ***163** However, a witness should be instructed not to answer questions that would elicit his attorney's mental impressions, conclusions, opinions, or legal theories about the litigation. See:

Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 518 (N.D. Ill. 1990). The work-product doctrine does not protect discovery of the underlying facts of a particular dispute, even if the deponent's answer to a question is based upon information provided by counsel.

Hydramar, Inc. v. General Dynamics Corp., 119 F.R.D. 367, 372 (E.D. Pa. 1988). The work-product doctrine "does in a very limited way operate to circumscribe the scope of depositions upon oral examination." A deponent may not be asked questions that would reveal his attorney's mental impressions, conclusions, opinions, or legal theories concerning the litigation. However, application of the work-product doctrine to oral depositions must be limited, otherwise litigants would use the doctrine unfairly to restrict "the open discovery process envisioned by the Federal Rules of Civil Procedure." Therefore, the work-product doctrine furnishes no shield against discovery of the facts that the adverse party's attorney has learned, or the persons from whom he has learned such facts, or the existence or non-existence of documents.

See also:

Protective Nat'l Ins. Co. v. Commonwealth Ins. Co., 137 F.R.D. 267, 279- 80 (D. Neb. 1989) (same); Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, 120 F.R.D. 504, 509 (W.D. La. 1988) (same).

B. SPECIAL CIRCUMSTANCES -- RULE 30(B)(6) DEPOSITIONS AND DEPOSITIONS OF COUNSEL

Depositions taken pursuant to Federal Rule of Civil Procedure 30(b)(6) present unique problems regarding privilege issues. Rule 30(b)(6) provides in pertinent part:

A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.... The persons so designated shall testify as to matters known or reasonably available to the organization....

(Emphasis added.) The Notes of the Advisory Committee on Rules regarding the 1970 Amendment to Rule 30 indicate that the purpose of Rule 30(b)(6), among other things, is to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it."

Several courts have held that Rule 30(b)(6) witnesses are required to testify regarding facts which they learned from conversations with counsel and from the review of work-product, even if the witness has no first-hand knowledge regarding the information. Otherwise, the only alternative may to be depose a party's attorney to learn the basis of a party's ***164** allegations or defenses. However, the courts attempt to protect legitimately privileged information by prohibiting questions the answers to which would elicit the mental impressions of counsel.

Protective Nat'l Ins. Co. v. Commonwealth Ins. Co., 137 F.R.D. 267, 278- 82 (D. Neb. 1989). A party has the right to discover the factual basis of allegations and defenses. Therefore, in response to a Rule 30(b)(6) notice, a corporation must make a good faith effort to designate persons having knowledge of the matters sought and to prepare those persons so that they can answer fully, completely, and unevasively. This may require that a designated deponent testify regarding facts which the witness has learned from counsel or from the review of work-product. However, care must be taken to protect against the indirect disclosure of counsel's advice, counsel's view as to the

significance or lack thereof of particular facts, or any other matter that reveals counsel's mental impressions concerning the case.

Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, 120 F.R.D. 504, 509 (W.D. La. 1988). A witness designated pursuant to Rule 30(b)(6) must testify about his knowledge of the facts which underlie the basis for the lawsuit, even though his knowledge is based solely upon conversations with counsel. However, the witness may not be asked questions which would tend to elicit specific questions posed to the witness by corporate counsel, the generalized inquiry pursued by corporate counsel, the facts to which corporate counsel appeared to attach significance, or any other matter that would reveal corporate counsel's mental impressions regarding the case.

Some courts have suggested that, where a corporate party objects to an entire category of requested testimony, the proper procedure is to seek a protective order prior to the deposition rather than instruct the witness not to answer at the deposition. See generally Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, 120 F.R.D. 504, 508 (W.D. La. 1988) (corporate party could have sought a protective order or moved to quash Rule 30(b)(6) deposition).

A second type of deposition presents unique difficulties for the practitioner -- defending the deposition of a party's counsel. See Steven W. Simmons, Note, Deposing Opposing Counsel Under the Federal Rules: Time for a Unified Approach, 38 WAYNE L. REV. 1959 (1992). Several courts have commented that there appears to be a trend in favor of deposing opposing counsel. These courts have almost universally condemned the trend as injecting unnecessary animosity into litigation and increasing the risk that an attorney will become a witness at trial. As a result, the courts increasingly are requiring that the parties use contention interrogatories instead of deposing counsel.

In N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83 (M.D.N.C. 1987) , the court imposed substantial restrictions on the ability of one party to depose opposing counsel. The court in N.F.A. Corp.barred defendant from deposing plaintiff's patent counsel. Defendant apparently noticed the deposition in retaliation for plaintiff's deposing defendant's attorney, upon whose advice defendant relied. The court began by explaining that, although protective orders totally prohibiting a deposition rarely should be granted absent extraordinary circumstances, a request to depose a party's attorney constitutes a circumstance justifying departure from the normal rule. The court stated "experience teaches that countenancing unbridled depositions of attorneys constitutes an invitation to delay, disruption of the case, harassment, and perhaps disqualification of the attorney." 117 F.R.D. at 85.

***165** In response to the potential evil of free access to opposing counsel, the court held that "the mere request to depose a party's attorney constitutes good cause for obtaining a [Rule 26(c) protective order] unless the party seeking the deposition can show both the propriety and need for the deposition." Id. (citations omitted). In seeking to depose a party's attorney, the movant must demonstrate that the deposition "is the only practical means available" of obtaining the desired information. 117 F.R.D. at 86. In addition, the movant must show that the information sought will not invade the attorney-client privilege or the attorney's work-product. Id.; see also Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986) (depositions of opposing counsel should be limited to cases where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case); Thiessen v. General Electric Capital Corp., 2001 WL 1150399 (10 Cir. Sept. 28, 2001) (applying Shelton analysis, court upheld district court's refusal to allow deposition of party's in-house counsel because the information sought was available through other means); M & R Amusements Corp. v. Blair, 142 F.R.D. 304, 305-6 (N.D. Ill. 1992) (imposing similar restrictions); Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 593-94 (N.D.N.Y. 1989) (there is a trend toward permitting the deposition of counsel only upon a showing of substantial need and only after alternate discovery avenues have been exhausted or proven impractical); Kerr v. Able Sanitary and Environmental Services, Inc., 684 A.2d 961 (N.J. Super. Ct. App. Div. 1996) (due to the disruptive nature of attorney depositions, a party seeking to depose opposing counsel must demonstrate that the propriety and need for the deposition outweigh the possible disruptive effects that the deposition would have on underlying litigation.) See also In re Dow Corning Corp., 261 F.3d 280 (2d Cir. 2001) (in denying mandamus and remanding for further proceedings, the court found that the district court, which had ordered production of unredacted minutes of Dow's board of directors, "may well have erred" when it directed Dow's general counsel to submit to questioning about his communications with the board of directors).

Designating an attorney as Rule 30(b)(6) witness is rife with danger. Although courts generally hold that the mere designation of an attorney pursuant to Rule 30(b)(6), without more, does not waive any privilege, the witness may

waive privileges by straying into privileged areas. See Avery Dennison Corp. v. UCB Films PLC, No. 95 C 6351, 1998 WL 703647 at *6 (N.D. Ill. Sept. 30, 1998); Motley v. Marathon Oil Co., 71 F.3d 1547, 1552 (10th Cir. 1995) (the fact that Marathon designated a lawyer as its Rule 30(b)(6) witness "is a wholly insufficient ground to hold that [it] waived its attorney- client privilege"); Colonial Gas Co. v. Aetna Casualty & Surety Co., 139 F.R.D. 269, 273 (D. Mass. 1991) (court refuses to find "an automatic and general waiver" by virtue of designating an attorney pursuant to Rule 30(b)(6). In Avery, the court held that a party's attorney had voluntarily waived the attorney-client privilege by straying into testimony regarding the reasons for withdrawing a reissue application for a patent. 1998 WL 703647 at *4. The court, however, narrowly limited the scope of the waiver. Id.

***166 C. PROTECTING THE ATTORNEY-CLIENT PRIVILEGE**

In order to assert the attorney-client privilege at a deposition, a party must be careful not to waive the privilege during deposition preparation or during the course of prior discovery. See generally Waiving The Attorney-Client Privilege ß I(G), supra. Where the privilege has been waived previously, the witness must testify about otherwise privileged matters. See, e.g., Thomas v. F.F. Financial, Inc., 128 F.R.D. 192, 193 (S.D.N.Y. 1989) (attorney may not assert attorney-client privilege when client had previously waived the privilege during her deposition).

In many cases it may be necessary to prepare an outside corporate attorney or in-house attorney to testify regarding their communications with the corporate client. As discussed supra, communications with an attorney are privileged only if the attorney is acting in her official capacity as a lawyer. See Communications Must Be Made For The Purpose Of Securing Legal Advice ß I(D). When an attorney has acted primarily as a business person, the communications are not privileged. Therefore, deposition preparation should include discussing the nature of the attorney's work and whether she used her legal skills and training at relevant times. Otherwise, the deponent may be caught off guard and inadvertently fail to provide an otherwise available basis for privilege.

Preparing a client's former employees to testify may also present potential pitfalls. In Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999), an employment discrimination case, the court considered the scope of the attorney-client privilege and work-product doctrine with regard to communications between a corporate attorney and an unrepresented former employee during preparation for a deposition. The corporation's attorney met with the former employee to prepare for the deposition and engaged in a "two-way discussion" of the case during which the former employee spoke about the underlying facts of the case and counsel explained the corporation's legal position. 190 F.R.D. at 39. During a conversation during a break in the deposition, counsel may have provided guidance on how the former employee might handle a particular line of questioning. Id. At the deposition, counsel instructed the former employee not to answer questions about counsel's discussions with her. Id.

The court observed that, although the Supreme Court left open the question, lower federal courts generally have applied the attorney-client privilege to communications with former employees. 190 F.R.D. at 39-40. The court in Peralta rejected the "wholesale application of the Upjohn principles to former employees as if they were no different than current employees" because it was not justified by the underlying reasoning of Upjohn. 190 F.R.D. at 40. The court concluded that any privileged information obtained by the witness during her employment, including any information conveyed by counsel during that period, remains privileged upon termination of employment. 190 F.R.D. at 41. Further, to the extent that the nature and purpose of counsel's communications with the witness were to learn facts that the witness became aware of during her employment, those communications would be privileged whenever they occurred. Id. However, to the extent that conversations went beyond ***167** the witness's knowledge of events developed during her employment, such communications would not be protected by the attorney-client privilege. Id. For example, if counsel informed the witness of facts developed during litigation, such as testimony of other witnesses, of which the former employee would not have had prior or independent knowledge, such communications would not be privileged. Id. The court also held, however, that the work-product protection would cover conclusions or opinions that counsel communicated to the witness, because disclosure of work-product to non-adverse third parties does not waive the protection. 190 F.R.D. at 42. See also The City of New York v. Coastal Oil New York, Inc., No. 96 Civ. 8667, 2000 U.S. Dist. LEXIS 1010 (S.D.N.Y. Feb. 7, 2000) (attorney-client privilege does not apply to communications between in-house corporate counsel and a corporate subsidiary's former employee during deposition preparation where in- house counsel was not conducting an investigation and the former employee did not regard in-house counsel as his attorneys; because the Second Circuit had not ruled in the area, the court limited questioning to in-house counsel's activities which aided the witness in preparing to be deposed, and prohibited questioning into conversations which were not related to the witness's upcoming testimony or testimony

of other potential witnesses in the case).

D. MAINTAINING WORK-PRODUCT PROTECTION

In the context of a deposition, the principal hazard regarding work-product is waiving work-product protections by showing work-product to a witness during deposition preparation or allowing the deponent to review work-product during the deposition. As discussed in detail supra, the work-product protection may be waived by using protected documents for the purpose of refreshing the recollection of a witness. See Waiver of Work-Product Protection ß IV(F)(8). However, the waiver may be limited solely to the portions of material that were actually used to refresh recollection. See, e.g., S & A Painting Co. v. O.W.B. Corp., 103 F.R.D. 407 (W.D. Pa. 1984) (where deponent referred to only portions of 24 pages of notes during deposition, disclosure required of only those portions, not the entire set of notes). See also Laxalt v. McClatchy, 116 F.R.D. 438, 451 (D. Nev. 1987) (where court ordered deponent to review attorney work-product to refresh her recollection for deposition, the work- product protection would not be waived pursuant to Federal Rule of Evidence 612).

It is important that the practitioner be aware of possible waiver before preparing a witness to testify. There may be cases in which the risk of waiver of some work-product is outweighed by the benefit of refreshing the witness's recollection. There are, however, certain precautions that can be employed to avoid waiver in most cases:

• Do not show a witness notebooks or other compilations of documents that have been assembled by counsel. Using only the specific non-work-product documents contained in the compilations which are relevant to the witness's testimony will serve the purpose of preparation, but will not waive the protection of the attorney's organization and related thought processes.

***168** • Use the non-work-product underlying a compilation or analysis instead of the resulting work-product whenever possible.

• Instruct the witness not to bring notes or other documents to the deposition, unless the documents are otherwise called for by a document request or court order.

VIII. INTERNAL INVESTIGATIONS

It is common for corporations to conduct internal investigations regarding matters that come to the attention of management. Investigations may involve seemingly mundane matters, such as rumors about employee inefficiency or petty wrongdoing, or obviously serious matters, such as alleged criminal misconduct. Corporations may delegate the task of conducting such investigations to outside counsel, to in-house counsel, or to non-legal personnel. Often, the materials assembled and created during an investigation are sought by government subpoena or civil document request.

Whether communications and documents relating to an investigation will be discoverable will depend on the same issues that are discussed above relating to the attorney-client privilege and work-product doctrine. Essentially, the court will want to know: (1) whether the investigation was conducted primarily or solely for the purpose of rendering legal advice or, instead, was conducted largely for business reasons; (2) whether the investigation was conducted by counsel or by non-legal personnel; and (3) whether the investigation was conducted in anticipation of imminent litigation or, instead, as a routine matter in response to the ever-present concern with the possibility of litigation. The less routine and more "special" the internal investigation, the more likely it is that a court will protect materials relating to the investigation.

A. THE COURTS' ANALYSIS OF ASSERTIONS OF PRIVILEGE OVER INVESTIGATIVE MATERIALS

Corporations may protect the products of internal investigations through both the attorney-client privilege and the work-product doctrine. Each presents its own benefits and its own challenges. The attorney-client privilege provides the best protection, but is also the more difficult to establish. As discussed supra, once established, the attorney-client privilege is almost absolute. Barring waiver or the crime-fraud exception, a communication deemed privileged is simply off-limits in discovery. However, establishing the privilege is difficult in the context of an internal investigation. There must be communications with counsel that are intended to secure or communicate legal advice

and which are intended to be and remain privileged. As discussed below, each of these elements presents difficulties in internal investigations. In addition, it is far easier to waive the attorney-client privilege than the work-product protection.

***169** The products of internal investigations are more often protected by the work-product doctrine. The protection provided is far less absolute than the attorney-client privilege, but it is easier to establish that investigative materials are work-product, and waiver is more difficult to prove. Ordinary work-product, such as verbatim or near verbatim witness statements of company employees, are discoverable upon a showing of substantial need and undue hardship by an opposing party. As discussed infra, many courts do not require very substantial need or very much hardship to allow a party to discover ordinary work-product, particularly when the work-product is primarily a recitation of facts. Opinion work-product, as discussed supra, does enjoy far more protection, "absolute" protection in some jurisdictions.

In order to maximize the chance that internal investigative materials will not be discovered in litigation, it is important that a company attempt to place the materials under both umbrellas.

B. THE ATTORNEY-CLIENT PRIVILEGE

The decision in Admiral Ins. Co. v. United States District Court, 881 F.2d 1486 (9th Cir. 1989), presents an example of a corporation successfully conducting an internal investigation and prevailing in its assertion of attorney-client privilege over interviews conducted with corporate employees. In anticipation of litigation regarding certain real estate transactions, Admiral hired outside counsel. Shortly thereafter, a securities fraud action was filed against it. Admiral's senior management directed outside counsel to interview the two Admiral officers who were the most knowledgeable about the transactions. A stenographer transcribed the interviews. At the beginning of interviews, counsel advised the employees that Admiral had retained counsel to investigate the circumstances of the transactions to render legal advice to Admiral regarding its potential interests and liabilities arising from the transactions; that counsel was Admiral's and not the employees' personally; that Admiral intended to claim for itself the attorney-client privilege and work-product protection with respect to the interview; that the officers were being interviewed because they were the Admiral employees who knew the most about the transactions; and that the employees should treat the interviews as confidential communications. Both employees resigned shortly after their interviews were completed. 881 F.2d at 1489.

During discovery, plaintiffs in the securities fraud action scheduled the employees' depositions. Both employees informed plaintiffs that they would invoke the fifth amendment privilege against self-incrimination if they were deposed. In response, plaintiffs sought production of the witness statements; Admiral moved to quash plaintiffs' subpoena. Plaintiffs opposed the motion on the grounds that their inability to obtain the information from another source rendered the statements discoverable. The district court denied the motion to quash, holding that, because the employees intended to refuse to answer deposition questions, the statements must be produced. Id.

A panel of the Ninth Circuit reversed and issued a writ of mandamus to the district court. Id. at 1492-93. Applying Upjohn, the court held that the communications ***170** between counsel and the corporate employees were privileged because: (1) counsel was retained in anticipation of litigation concerning the real estate transactions; (2) the officers were the management- level employees most knowledgeable about the transactions; (3) they were instructed by Admiral to give statements; (4) the information furnished related directly to the officers' roles in the transactions and was, therefore, within the scope of their corporate duties; and (5) the employees were aware that the purpose of the interviews was to enable counsel to provide legal advice. "These circumstances fall squarely within Upjohn." Id. at 1493. The court directly rejected an "unavailability" exception to the attorney-client privilege. Id. at 1494. See also Shew v. Freedom of Info. Comm'n, 714 A.2d 664 (Conn. 1998) (employee interviews conducted by outside counsel privileged where attorney acting as an attorney and interviews relate to the legal advice sought by the client).

The Admiral case demonstrates the importance of having internal investigation interviews conducted by counsel. As discussed infra, although the interviews may have qualified as work-product, there is a good chance that the court would have found both substantial need and undue hardship based on the witnesses' refusal to submit to discovery and would have compelled production of the interview transcripts.

The decision in General Elec. Capital Corp. v. DirectTV, Inc., No. 3:97 CV 1901, 1998 U.S. Dist. LEXIS 18940

(D. Conn. Aug. 19, 1998), is a good example of an internal investigation where the attorney-client privilege was not established because it did not appear to the court that investigative materials had been created for the primary purpose of obtaining legal advice. GECC attempted to withhold from production on the grounds of attorney-client privilege and work-product protection early drafts and the final version of an internal audit relating to GECC's Retail Financial Services ("RFS"). Id. at *11-12. The first sentence of the report stated: "This audit is being conducted pursuant to requests from RFS Legal and the attendant outside firm of Williams and Connolly." Id. One stated purpose was to "review the operational procedures with respect to contractual relationships between GECC, [DTV] and various third parties...." Id. at *12.

The court held that the documents fell outside the attorney-client privilege because they did not appear to have been created for the primary purpose of obtaining legal advice. Id. at *12. (The court, however, found that the work-product doctrine protected the documents from production. 1998 U.S. Dist. LEXIS 18940, at *15.) Half of the documents were addressed to multiple addresses, only a limited number of whom were attorneys; the other half were addressed solely to GECC business personnel. Id. The "overwhelming portion" of the documents contained background information regarding the operation of the program and only a limited portion was a "candid assessment of GECC's potential exposure in a dispute with DTV." Id. The court held that very little of the documents was protected by the attorney-client privilege, because they did not appear to have been drafted for the purpose of obtaining legal advice. Id. The court quoted United States v. IBM Corp., 66 F.R.D. 206, 212 (S.D.N.Y. 1974):

> One of the essential elements of the attorney-client privilege is that the attorney be acting as attorney, that the communications ***171** be made for the purpose of securing legal services.... In the process of giving legal advice, an attorney may incorporate ... "relevant nonlegal considerations" without losing the privilege of non-disclosure. However, this does not mean that the privilege attaches to incidental legal advice given by an attorney acting outside the scope of this role as attorney.... when he acts as an advisor, the attorney must give predominantly legal advice to retain his client's privilege of nondisclosure, not solely, or even largely, business advice. Thus, while a document in appropriate circumstances may be privileged only in part.... In the case where a lawyer responds to a request not made primarily for the purpose of securing legal advice, no privilege attaches to any part of the document.

GECC, 1998 U.S. Dist. LEXIS 18940, at *6.

The GECC case demonstrates the importance of: (1) having counsel conduct investigations directly; (2) limiting the focus of the investigation to providing legal advice; (3) limiting the distribution of investigative materials to those with a need to know; and (4) weaving impressions, opinions and strategies into memoranda so that it is clear that the purpose of the investigation is to obtain legal advice.

Unlike the work-product protection, which most courts allow even if a substantial portion of the document relates to business matters, the attorney- client privilege does not exist unless the predominant intention of the party is to obtain legal advice. See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977) (report prepared by outside counsel based on interviews with corporate employees not protected by attorney-client privilege because counsel "was employed solely for the purpose of making an investigation of facts and to make business recommendations with respect to the future conduct of Diversified;" the work done by counsel could just as easily have been performed by non-lawyers.). Cf. Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co., 951 F. Supp. 679, 685-86 (W.D. Mich. 1996) (investigation report commissioned by board of directors and conducted by outside counsel in response to shareholder demand held privileged despite mixture of legal and business considerations, because the report contained a legal analysis of the securities fraud claims and discussed legal theories; "legal and business considerations may frequently be inextricably intertwined.... The mere fact that business considerations are weighed in the rendering of legal advice does not vitiate the attorney-client privilege.").

1. Only Communications Protected

Although the attorney-client privilege will protect a communication with counsel, it will not protect the facts communicated. "Facts gathered by counsel in the course of investigating a claim or preparing for trial are not privileged and must be divulged if requested in the course of proper discovery." ***172**Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 632 (M.D. Pa. 1997). Opposing counsel is entitled to obtain through discovery the names of witnesses, facts underlying the cause of action, technical data, the results of studies, investigations and testing to be used at trial, and other factual information. Id. Including such facts in documents prepared by, or circulated to, counsel does not make the facts privileged. Id. The court in Andritz stated in dicta: "To the extent that purely factual material can be extracted from privileged documents without divulging privileged communications, such information is obtainable." Id. at 633. As a result, although a witness may properly be instructed not to testify

regarding what he told the company's attorney, he will be required to testify about factual information that he knows. See, e.g., Upjohn, 449 U.S. at 395- 96. See also Abel v. Merrill Lynch, No. 91 CV 6261, 1993 WL 33348 (S.D.N.Y. Feb. 4, 1993) (in employment disparate impact case, demographic analysis prepared for in-house counsel not privileged, because the underlying facts to the analysis are not privileged and the corporation chose to destroy the underlying data; the communication with counsel was the only remaining form in which the factual data was available).

2. Privilege May Extend to Consultants

The attorney-client privilege may protect not only communications between the attorney and client, but also between the attorney and consultants hired by the attorney to enable the attorney to render legal advice. Olson v. Accessory Controls and Equip. Corp., 735 A.2d 881 (Conn. App. Ct. 1999). In Olson, Accessory Controls received an order from the state requiring it to submit a report regarding how it intended to respond to a hazardous waste site. Accessory Controls hired outside counsel to provide it with legal advice regarding how to proceed with the order. Counsel in turn hired an environmental consulting company and its subcontractor to conduct an investigation and to provide Accessory Controls and counsel with information. 735 A.2d at 883. In counsel's retention letter to the consulting company, counsel made it clear that all communications between the consultant and counsel or Accessory Controls were to be treated as confidential and for the sole purpose of enabling counsel to give Accessory Controls legal advice. Id. at 890-91. The court concluded that the attorney-client privilege was broad enough to cover the communications with the consultant under these circumstances. Id. at 889.

The court in United States Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156 (E.D.N.Y. 1994) , came out with exactly the opposite result, in somewhat different circumstances. In Phelps, defendant Phelps hired outside environmental consultants to formulate a remediation plan and to oversee remedial work. 852 F. Supp. at 161. The court held that the consultants' communications with Phelps' in-house counsel were not privileged because the consultants had not been hired for the purpose of analyzing the client's data and putting it in a form which would enable counsel to provide legal advice. Instead, the consultants had undertaken their own "factual and scientific" study -- information that did not come through client confidences. Id. at 161-62. The court stated: "[U]nderlying factual data can never be protected by the attorney-client privilege and neither can the resulting opinions and recommendations. There are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the ***173** privilege since the information collected will generally be factual, obtained from sources other than the client." Id. at 162.

The Olson and Phelps cases demonstrate the importance of setting forth in an engagement letter the foundation for asserting the attorney-client privilege: the work is intended to enable counsel to render legal advice, and the consultant should treat all communications as confidential.

C. WORK-PRODUCT DOCTRINE

The work-product doctrine will generally apply with respect to an internal investigation that is undertaken in anticipation of litigation, whether it is conducted by counsel or by other agents of the corporation. See, e.g., Peterson v. Wallace Computer Servs., Inc., 984 F. Supp. 225 (D. Vt. 1997) (investigation undertaken by director of human resources constituted work- product prepared in anticipation of litigation); Covington v. Calvin, No. CL96-30, 1996 WL 1065647 (Va. Cir. Ct. Nov. 25, 1996) (accident reconstruction prepared by insurer's agent may be work-product because agent of insurer is a party's "representative" as defined by Virginia's corollary to FRCP 26(b)(3)). The work-product doctrine also protects materials prepared by consultants hired by counsel to undertake investigation in anticipation of litigation. Bituminous Cas. Corp. v. Tonka Corp., 140 F.R.D. 381, 389 (D. Minn. 1992). See also Pacamor Bearings, Inc. v. Minebea Co., Ltd., 918 F. Supp. 491, 513 (D.N.H. 1996) ("When a party or party's attorney has an agent do work for it in anticipation of litigation, one way to ensure that such work will be protected under the work-product doctrine is to provide '[c]larity of purpose in the engagement letter."').

However, the involvement of counsel is useful for several reasons. First, use of counsel is a contemporaneous indication that the corporation was contemplating the initiation of specific litigation. Second, counsel is more likely to prepare written materials that will be considered opinion work- product and, therefore, enjoy a high level of protection.

The primary limitation in invoking the work-product doctrine with respect to internal investigative materials is that

ordinary work-product may be discovered upon a showing of substantial need and undue hardship. To prove need and hardship the party seeking production must show why the desired materials are relevant and that prejudice will result from the non-disclosure of those materials. See, e.g., Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir. 1981); Condon v. Petacque, 90 F.R.D. 53, 54-55 (N.D. Ill. 1981) (noting that the burden of showing substantial need is lessened the farther the material is from the attorney's mental processes and impressions). Courts have considered a variety of factors in determining need and hardship. See discussion, supra, at ß IV(D)(1). Undue hardship most often is proven when materials are unavailable elsewhere. Id. Like the attorney-client privilege, the work-product doctrine does not protect the discovery of facts contained in work-product. "Rule 26(b)(3)'s work-product protection 'furnishes no shield against discovery,' by interrogatory and deposition, of facts that an adverse party's representative has amassed and accumulated in document prepared for litigation." ***174**Carver v. Allstate Ins. Co., 94 F.R.D. 131, 136 (S.D. Ga. 1982). Many courts have held that, where the factual information that is contained in work-product may be obtained by the opposing party's deposing the witnesses who provided the factual information contained in the work- product, there is a showing of neither substantial need nor undue hardship. Id.

1. Witness Statements

A critical component of most internal investigations is interviewing employees about their knowledge of relevant events. Memoranda generated by interviews conducted in anticipation of litigation are generally deemed to be work-product. These memoranda can take the form of (1) verbatim statements, e.g., stenographically produced and signed; (2) near verbatim statements, e.g., handwritten notes that attempt to track the actual statements made by the witness; or (3) summaries of witness statements that do not attempt to recite any statements verbatim. Such summaries are often drafted by counsel and weave in the mental impressions of counsel as well as the substance of the witness's statements. Categories one and two constitute ordinary work-product. Category three, to the extent that it includes opinions and impressions of counsel, constitutes opinion work-product. As discussed infra, courts commonly find that an opposing party demonstrates substantial need and undue hardship with respect to witness statements. It is therefore preferable that all witness interview memoranda be in the form of opinion work-product, which is almost absolutely protected from discovery.

Many federal and state courts have compelled the production of witness statements, despite finding them to be work-product. These courts find that parties demonstrate substantial need and undue hardship when witness statements are contemporaneous with relevant events, witness memories have dimmed, and/or where the party is effectively unable to obtain the information by other means.

In National Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co., Inc., 967 F.2d 980 (4th Cir. 1992), a panel of the Fourth Circuit considered the discoverability of employee witness statements taken by non-legal personnel during an internal investigation immediately after a fire. The court did not consider the attorney-client privilege, because counsel did not interview the employees and was not involved in the investigation. In remanding the case for further proceedings, the court instructed the trial court to consider the following issues, assuming that the statements were determined by the trial court to be ordinary work-product:

When evaluating a party's need for statements taken immediately after an accident, we have observed: Statements of either the parties or witnesses taken immediately after the accident and involving a material issue in an action arising out of that accident, constitute "unique catalysts in the search for truth" in the judicial process; and where the parties seeking their discovery was disabled from making his own investigation at the ***175** time, there is sufficient showing under the amended Rule to warrant discovery.

967 F.2d at 985 (citing with approval McDougall v. Dunn, 468 F.2d 474 (4th Cir. 1972)).

In In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982), the court held that notes taken by an attorney of a witness interview during an internal investigation were discoverable because the government demonstrated substantial need. In John Doe, a company conducted an internal "business ethics review" through its legal department, apparently in response to allegations of criminal wrongdoing. Among other things, in-house counsel conducted interviews of high- level employees and took notes of those meetings. After determining that the attorney-client privilege was inapplicable due to the crime-fraud exception, the court turned its attention to the work-product doctrine. The court found that notes relating to one high-level employee were work-product but, based on an in camera inspection, found that the notes did not reflect the mental processes of counsel. The court ruled that the notes had to be produced because, among other things, the notes may have been the only available evidence of what Doe Corp. knew and when it knew it. 675 F.2d at 492. The employee's memory was hazy and other potential witnesses had invoked the fifth amendment against self-incrimination. Id. at 492-93. See also In re Grand Jury Subpoenas, 734 F.

Supp. 1207 (E.D. Va. 1990) (citing John Doe, the court held that employee witness interview materials created by in-house counsel were discoverable, even though the interviews took place four years after the alleged wrongdoing because: (1) the interviews would "constitute the most accurate and the principal, if not sole, source of evidence of movant's state of knowledge; (2) time had faded memories; and (3) several witnesses had taken the fifth amendment. The court indicated it would conduct an in camera inspection and would "order appropriate redactions to protect against any unwarranted or unnecessary disclosure of attorneys' mental processes.").

Numerous state courts have come to the same conclusion. See, e.g., Roselund v. Stop & Shop Cos., No. 539474, 1998 WL 253887 (Conn. Super. Ct. May 7, 1998) (plaintiff demonstrated substantial need for recorded statement of employee who was present during plaintiff's fall in store, because several years later the plaintiff would not be able to obtain the equivalent of a contemporaneous statement through other means); Brugh v. Norfolk and Western Ry. Co., Nos. 1240, 1260, 1979 Va. Cir. LEXIS 38 (Va. Cir. Ct. Feb. 15, 1979) (witness statements taken by company's claims department immediately after incident discoverable at least in part because the company prohibited employees from making statements to plaintiff's attorney and deposition discovery would be expensive and time consuming); Powers v. Troy, 184 N.W.2d 340 (Mich. Ct. App. 1970) (witness statement taken four days after incident, but six years before trial, discoverable).

Other courts have found that parties have not demonstrated substantial need under similar circumstances. Hedgepeth v. Jesudian, Nos. LM-754, LM-755, 1989 WL 646207 (Va. Cir. Ct. Mar. 8, 1989) (notes of witness interviews taken by non-legal personnel shortly after incident not discoverable: "The court concedes that the quality of the information available to the plaintiff now is probably not of the same quality as that obtained by the hospital, but there ***176** is no reason to assume or believe that it is, and will not be, the substantial equivalent. The rule does not allow breach of the protection just because the material you can obtain is not as good as that protected. It must be shown to be of substantially inferior quality."); Smith v. National R.R. Passenger Corp., No. LS 1343-3, 1991 WL 834705(Va. Cir. Ct. Jan. 2, 1991) (investigation reports made within a few days of incident not discoverable where party given the names of all persons having knowledge of the injury); Warmack v. Mini-Skools Ltd., 297 S.E.2d 365 (Ga. Ct. App. 1982) (where party took extensive interrogatory and deposition discovery, no substantial need for contemporaneous witness statements, despite fact that memories were probably fresher at time statements made); Fireman's Fund Ins. Co. v. McAlpine, 391 A.2d 84 (R.I. 1978) (witness statements taken two weeks to a number of months after incident not "contemporaneous" to incident and not discoverable).

The lesson to be taken from these cases is that, to the extent possible, counsel should take statements from witnesses and should create memoranda that weave in mental impressions and opinions as much as possible. Unless there is some compelling reason to do so, the company should not take verbatim statements or have statements signed by the employee witnesses.

2. Employment Discrimination Cases: "At Issue" Waiver

One category of internal investigation presents particular problems: investigations into allegations of sexual harassment and racial discrimination in the workplace. In these cases, a company often alleges in its answer to a complaint that it has conducted a thorough investigation and found no wrongdoing and/or that the company has taken appropriate remedial action to ensure no future wrongdoing. In these cases, the company is putting the merits of the internal investigation at issue in the litigation and courts often hold that the work-product protection has been waived.

The district court decision in Peterson v. Wallace Computer Services, Inc., 984 F. Supp. 821 (D. Vt. 1997), illustrates the particular difficulty companies have in maintaining the work-product privilege in the context of employment discrimination claims. In Peterson, Barry White, Wallace's Director of Human Resources, undertook an investigation of Peterson's allegations of sexual harassment after Peterson informed him that she intended to file a claim. 984 F. Supp. at 823. Wallace consulted both in-house and outside counsel during the course of the investigation. Id. Wallace prepared three memoranda regarding his conversations with counsel and his interviews with several employees. Id. Wallace raised as a defense against Peterson's claim that the company had conducted an adequate investigation of Peterson's allegations. Id. In response to Peterson's discovery requests, Wallace asserted the attorney-client privilege and work-product immunity over the memoranda, but it did not object to depositions of White and other Wallace employees. Id.

The Magistrate Judge found that both privileges applied to the investigation memoranda and that Wallace had not

waived those privileges. 984 F. Supp. at 824. The district court agreed that the privileges applied, but set aside the Magistrate Judge's opinion because ***177** the court found that the privileges had been waived by Wallace by putting the investigation "at issue" in the litigation. Id. at 826-27.

In order to establish her hostile work environment claim, Peterson had to show that Wallace "provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." 984 F. Supp. at 825. Wallace must have taken "immediate and corrective action" in response to Peterson's allegations in order to avoid liability. Id. The court held that, in order to enable the finder of fact to evaluate Wallace's investigation with respect to timeliness, thoroughness and employer bias, Peterson had to be able to present evidence on these aspects of Wallace's investigation. Id. at 826. Peterson's ability to do so would have been "impaired severely" if the investigation notes and memoranda were not disclosed to her. Id.

The court held that both the attorney-client privilege and work-product protection had been waived by Wallace's interjecting the investigation into the case, and ordered that the investigative materials be disclosed. 984 F. Supp. at 827. However, the court instructed the Magistrate Judge to conduct an in camera review of the materials to protect against the disclosure of opinion work-product. Id. See also Harding v. Dana Transp., Inc., 914 F. Supp. 1084 (D.N.J. 1996) (in case of first impression regarding discoverability of investigative materials obtained by counsel in sexual discrimination case founded on allegations of hostile work environment, the court held that the employer waived both the attorney-client privilege and work-product protection as to all of outside counsel's investigative materials by raising the fact of the employer's investigation as a defense to plaintiff's allegations).

Two cases decided by California appellate courts indicate that very little of an internal investigation into employment discrimination claims can be protected from discovery when the company raises the investigation as a defense. In Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal. App. 4th 110 (1997), the court held that prelitigation investigative materials prepared by outside counsel were discoverable because Wellpoint had waived its privileges by putting the investigation at issue in litigation. Prior to plaintiff's filing of an employment discrimination action, Wellpoint hired outside counsel to conduct an investigation into charges plaintiff had brought to Wellpoint's attention. 59 Cal. App. 4th at 117. Wellpoint's counsel then sent a letter to plaintiff asserting that each charge that he had filed "had been fully investigated and taken seriously." Id. The parties assumed that Wellpoint would ultimately raise the adequacy of the investigation as a defense to plaintiff's complaint.

The court held that both the attorney-client privilege and work-product doctrine applied to the investigative materials. 59 Cal. App. 4th at 114. However, the court held that Wellpoint would waive those protections if it chose to defend the action based on the adequacy of the investigation. The court explained the unique situation that is presented by employment discrimination cases:

> The adequacy or thoroughness of a defendant's investigation of plaintiff's claim is simply irrelevant in the typical civil action. In an employment discrimination lawsuit based on a hostile work ***178** environment, on the other hand, the adequacy of the employer's investigation of the employee's initial complaints could be a critical issue if the employer chooses to defend by establishing that it took reasonable corrective or remedial action.

Id. at 126. A party cannot use the investigation as both sword and shield by "fusing the roles" of internal investigator and attorney:

> By asking [the attorney] to serve multiple duties, the defendants have fused the roles of internal investigator and legal advisor. Consequently, [the employer] cannot now argue that its own process is shielded from discovery. Consistent with the doctrine of fairness, the plaintiffs must be permitted to probe the substance of [the employer's] alleged investigation to determine its sufficiency.

Id. at 127 (quoting Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1096 (D.N.J. 1996)). The employer's injection into the lawsuit of an issue concerning the adequacy of the investigation undertaken by an attorney must result in waiver of the attorney-client privilege and work-product doctrine. 59 Cal. App. 4th at 128.

A later California appellate court decision limited the scope of Wellpoint somewhat, but made it clear that the vast majority of investigative materials must be produced when they are put at issue by a defendant in an employment discrimination case. Kaiser Found. Hosps. v. Superior Court, 66 Cal. App. 4th 1217 (Cal. Ct. App. 1998). In Kaiser, the employer, Kaiser, prior to the initiation of litigation, directed its human resources consultant, Diaz, to conduct an investigation into the employee's allegations. 66 Cal. App. 4th at 1219. Diaz periodically consulted with members of Kaiser's legal department to obtain advice about the process and progress of the investigation. Id. After filing suit, plaintiff sought discovery of Kaiser's "complete investigation files." Id. at 1220. In response to plaintiff's document

request, Kaiser agreed to produce the majority of Diaz's work, including several investigation reports and investigation notes that did not refer or relate to communications with counsel. Id. at 1221. Kaiser withheld on grounds of attorney-client privilege and work-product protection 38 documents, less than 10% of the investigative materials. Id.

The court in Kaiser held that, where a defendant has produced its files and disclosed the substance of its internal investigation conducted by nonlawyer employees, and only seeks to protect "specified discrete communications" which those employees had with their attorneys, disclosure of such communications is not essential for a thorough examination of the adequacy of the investigation or a fair adjudication of the action. 66 Cal. App. 4th at 1227. The court distinguished Wellpoint, because there the court was confronted with an assertion of complete privilege over all materials prepared by counsel who undertook the investigation for the employer. Id. at 1226.

***179** There are at least two lessons to be derived from Wellpoint and Kaiser. First, where a company intends to put its internal investigation at issue in litigation, it should expect to produce at least the majority of the investigative materials. See also, Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co., 951 F. Supp. 679 (W.D. Mich. 1996) (court upheld privilege asserted over internal investigation in securities class action, but warned that the privilege would be waived if the investigation report were to be used as a defense in a separate stockholder derivative action then pending before the court). Second, employment discrimination investigations should be carefully structured to comply with local jurisdiction privilege rulings. In California, for example, the company would have to weigh the advantages and disadvantages of attorney-led investigations (e.g., care in drafting, but risk of complete loss of privilege) versus the merits of non-attorney investigations (e.g., potentially less care in the conduct of the investigation and less careful draftsmanship, but a chance of preserving the privilege over some limited communications and materials).

D. RECOMMENDATIONS FOR PROTECTING INTERNAL INVESTIGATION MATERIALS

The following are some suggestions to maximize the protection of internal investigation materials.

- **Counsel Should Request Formal Authorization.**

Prior to commencement of an investigation, General Counsel or other corporate counsel should request from the Board of Directors or other high level management formal authorization to conduct an investigation. Counsel's written request should establish that communications generated in the course of the investigation will be privileged. The request should state that the purpose of the investigation is to render legal advice to the corporation and, to achieve that purpose, confidential communications between the attorney and client are necessary. In addition, the request should detail the forms of litigation, such as civil and criminal proceedings and subpoena compliance, that corporate counsel anticipates.

- **Corporate Management Should Formally Authorize.**

For the most significant and sensitive investigations, the Board of Directors should officially direct the General Counsel to initiate an investigation, authorize the General Counsel to take the steps necessary to conduct the investigation, e.g., hire outside counsel and consultants, and clearly state that the purpose of the investigation is to obtain sufficient information to enable counsel to render legal advice to the Board. The Board should articulate that the investigation is being commissioned in anticipation of litigation, identifying the specific forms of litigation anticipated to the extent possible. For less sensitive or ***180** smaller matters, high level management may provide formal authorization.

- **General Counsel Should Instruct Counsel Who Will Be Conducting** Investigation.

General Counsel should retain outside counsel or instruct in-house counsel to conduct the investigation for the purpose of obtaining information necessary to render legal advice to the company. General Counsel should authorize counsel to interview personnel who have necessary information to enable the rendering of legal advice. The retention letter to outside counsel and the instruction to in-house counsel should state that the investigation is being conducted in anticipation of litigation, identifying the specific forms of litigation anticipated to the extent possible.

- **Non-Legal Personnel Should be Used Sparingly.**

If possible, management personnel should not conduct a legal investigation. If non-legal personnel must be used, counsel should direct their work. Where non-legal personnel are used, instruct them to address work-product directly to counsel and not to copy it for any other non-lawyer.

- **In-House Counsel Should Document Providing Legal Advice.**

When in-house counsel who is working on an investigation has business as well as legal responsibilities, work prepared as part of an internal investigation should reflect that it was prepared within the scope of counsel's legal

duties.

• Maintain a Separate Investigation File.

A separate file should be maintained for the investigation. Only those involved in the investigation should have access to the file.

• Management Should Direct Employee Cooperation.

Management should formally direct the cooperation of employees who will be contacted in the course of the investigation.

• Witness Statements Should Be Made Opinion Work-Product.

Notes and other memoranda of witness interviews should incorporate and weave throughout the impressions, analyses and opinions of counsel. Counsel should avoid recording lengthy verbatim statements.

• Summary Reports Should Reference Privileges.

Any report that summarizes the results of an internal investigation should reference the initial request for authorization to conduct the ***181** investigation. Rather than merely summarizing the investigation, the report should include legal advice, recommendations, and analyses.

IX. SPECIAL PROBLEM AREAS

A. CHOICE OF LAW: IDENTIFYING THE APPLICABLE LAW

Because each jurisdiction may apply different rules regarding privilege, it is important to identify which law will most likely be applied to discovery disputes arising from each deposition in a case. Where depositions of third parties will be taken in several different jurisdictions, several different rules of law may be applied to the same case.

Rule 501 of the Federal Rules of Evidence provides in pertinent part:

[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Thus, in cases based solely on diversity, privilege claims will be based on state attorney-client privilege law. See Connolly Data Sys., Inc. v. Victor Tech., Inc., 114 F.R.D. 89, 91 (S.D. Cal. 1987). The scope of the work-product protection, however, will be determined under federal procedural law. (Fed. R. Civ. P. 26(b)(3).)

In determining which state's law will be applied, federal district courts sitting in diversity cases apply the conflict of laws rules prevailing in the state in which they are situated. Connolly, 114 F.R.D. at 91. Where a third party witness's deposition is being taken, federal courts have applied the privilege law of the forum where the deposition takes place. Id. at 92 (citing Wright v. Jeep Corp., 547 F. Supp. 871, 875 (E.D. Mich. 1982)).

When jurisdiction is based on a federal question, privilege claims are governed by federal rather than state law. See Gray v. Bicknell, 86 F.3d 1472 (8th Cir. 1996); Lizotte v. New York City Health and Hosps. Corp., No. 85 Civ. 7548, 1989 WL 260217 (S.D.N.Y. Nov. 28, 1989). Federal privilege law will apply in federal questions cases even if the challenged testimony is relevant to a pendent state law count. See Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992) (Georgia psychiatrist-patient privilege not applicable since federal law does not recognize such a privilege); von Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987); Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981); ***182** Audritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 632 (M.D. Pa. 1997). In federal question cases, work-product is also determined under federal procedural law (Fed. R. Civ. P. 26(b)(3)).

B. SHAREHOLDER LITIGATION

Shareholder litigation can create special problems when shareholders seek privileged or work-product documents from the corporation. Many courts have recognized an exception to the attorney-client privilege rule which allow the

shareholders of the corporation to get access to materials prepared by corporate counsel. For a more detailed discussion see Fiduciary Exception to the Attorney-Client Privilege ß I(H)(3), supra. On the other hand, courts have not generally found a similar exception for work-product protection. They recognize that the mutuality of interest is destroyed between shareholders and the corporation when litigation arises. For a more detailed discussion see Fiduciary Exception to the Work-product Doctrine ß IV(G)(3), supra.

C. ETHICAL CONSIDERATIONS

1. Dual Representation

One issue which often arises in the organizational context is whether a corporation's counsel should represent corporate employees, and if not, the extent to which corporate counsel should inform employees about their individual legal rights. When a corporation believes it is in its best interest to waive the attorney-client privilege for employee communications, such communications are subject to discovery unless the employee may assert an individual attorney-client privilege. United States v. International Brotherhood of Teamsters, 119 F.3d 210, 216-17 (2d Cir. 1997); In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 124-25 (3d Cir. 1986); United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). An employee may do so only if the communication satisfies each element of the privilege. See Individual Representation of Employees ß I(B)(1)(b)(2), supra. If counsel represents only the corporation and has informed the employee of that fact, no individual privilege arises to protect the employee. See, e.g., United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985).

Under certain circumstances, a corporation may choose to have its counsel also represent its employees. For example, where corporate officers, directors, or employees are the targets of a grand jury investigation a corporation may wish to offer joint representation in order to retain control over the case and enable counsel to plot joint strategy. Joint representation may provide counsel with increased information and facilitate interviewing grand jury witnesses.

Multiple representation may, however, lead to disqualification of counsel on motion of the government in a criminal case, or an adverse party in a civil case, and could result in disqualifying the lawyer and the lawyer's firm from participating in the litigation. See Smith v. City of New York, 611 F. Supp. 1080, 1091 (S.D.N.Y. 1985) (Canon 5 is satisfied by the ***183** clients' informed consent); United States v. Occidental Chem. Corp., 606 F. Supp. 1470 (W.D.N.Y. 1985) (corporate counsel may also represent former employees where there is no actual conflict of interest); Doe v. A Corp., 709 F.2d 1043 (5th Cir. 1983) (attorney disqualified from representing class in action against former client where he would have had opportunity to use confidential information against former client); In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355, 1361 (9th Cir. 1981) (Cannon 9 is sufficient ground for disqualification in itself, but appellate court will affirm a disqualification order "only where the impropriety is clear and is one that would be recognized as such by all reasonable persons"); United States v. Linton, 502 F. Supp. 871, 877 (D. Nev. 1980) (consent to and waiver of objections to conflict of interest not sufficient if confidential information involved: "the ethical requirement to utilize on behalf of one client confidential information obtained from another client could conceivably result in counsel's disqualification to represent both clients"). But see Vegetable Kingdom, Inc. v. Katzen, 653 F. Supp. 917 (N.D.N.Y. 1987) (noting that motions for disqualification are increasingly filed merely to harass opposing counsel, the court denied the motion and imposed sanctions on movant).

Even if counsel is not disqualified, counsel may have difficulty adequately representing an individual's interests which may conflict with those of the corporation, or those of other individuals represented by corporate counsel. For example, it may be in an individual's best interest to accept an offer of immunity from the government, but such an offer may undermine the corporation's case. In certain circumstances, the rules of professional Responsibility may prohibit the representation of more than one client in this situation. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105, EC 5-14, 5-15, 9-1, 9-2; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b); United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973). In criminal cases, moreover, this joint representation by counsel may also increase the possibility that counsel will be subpoenaed by the grand jury, which may lead to disqualification.

Even if a corporation decides that its attorneys will not represent its directors, officers, and employees, there are a number of ethical questions unanswered. In conducting interviews with employees what should an attorney tell the

employees or directors about their individual rights? Should an attorney merely inform interviewees that she represents the company and does not represent them, or should the attorney explain that the corporation has the right to waive the privilege and that disclosure may expose the employee to criminal or civil liability? Should an attorney suggest that an interviewee consult separate counsel before speaking to him or her? Corporate counsel's task obviously becomes more difficult in such a case, because such admonitions may chill employees' willingness to provide complete information, and the corporation's best interests may be thwarted.

2. Former Employees

Ethics rules will also affect the ability of lawyers to contact former employees of an adversary corporation. Courts have reached conflicting results under the ethical canons. See Brian J. Redding, The Perils of Litigation Practice, 18 LITIG. No. 4 at 10 (Summer 1992) ***184** (summarizing opinions on communicating with former employees). Some courts have found that ethical rules prohibit interviews with the former client of an adversary. See American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc., No. CV-LV 82-26, 1986 WL 57464 (D. Nev. Mar. 11, 1986) (ex parte contact with former employee involved with legal activities was improper). Other courts allow a lawyer to communicate with these former employees without the consent of opposing counsel. See Goff v. Wheaton Indus., No. Civ. 92-1571, 1992 WL 404766 (N.D.N.Y Oct. 27, 1992); Nalian Truck Lines, Inc. v. Nakano Warehouse & Transp. Corp., No. B061732, 1992 WL 111308 (Cal. Ct. App. May 27, 1992); ABA Comm'n on Ethics & Professional Responsibility, Formal Op. 91-359 (Mar. 22, 1991) (contacts with former employees are not prohibited if the employee is unrepresented).

Still other courts restrict interviews if the former employee was significantly involved in the events of the case. See Lang v. Superior Court, 826 P.2d 1228 (Ariz. Ct. App. 1992) (former employee interviews permitted unless the acts or omissions of the former employee give rise to the underlying litigation, or the former employee has an ongoing relationship with the former employer in connection with the litigation); Chancellor v. Boeing, Co., 678 F. Supp. 250 (D. Kan. 1988) (ex parte interviews with former employees are not permitted without the corporation's consent if the former employee's acts or admissions can be imputed to the corporation).

In any case, even if the court allows the interview to take place, the attorney is prohibited from discussing any privileged communications of which the former employee is aware. See Dubois v. Gradco Sys., Inc., 136 F.R.D. 341 (D. Conn. 1991); In re Home Shopping Network, Inc. Sec. Litig., No. 87- 248-CIV-T-13A, 1989 WL 201085 (M.D. Fla. June 22, 1989) (counsel can question about non-privileged matters but must advise former employees (1) that the attorney-client privilege belongs to the company and cannot be waived by the employees and (2) that the employees are prohibited from discussing matters where the privilege belongs to the company); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36 (D. Mass. 1987) (cannot try to get strategy or opinions of other lawyer from interviews with employees or former employees).

*187 APPENDIX A - INDEX OF SELECTED TOPICS

This index provides references to points in the text which relate to the key words listed below.

*189 APPENDIX B - JOINT/COMMON DEFENSE AGREEMENT

The Parties have concluded that they have interests in common relating to the proceeding and wish to cooperate in the pursuit of their common interest. The Parties have determined it to be in their individual and common interests for them to share information relating to common interests and common issues, including certain privileged communications, work-product, and discovery planning with each other in order to facilitate representation and anticipated defense in the matter.

The Parties recognize that the exchange of information will further their common interest and wish to avoid waiving any applicable privileges. The Parties also desire to retain certain industry and other consultants (hereinafter "Consultants") and to share the use, benefit, and expense of said Consultants, while preserving to the maximum extent allowed by law all privileges available to them.

Accordingly, it is the Parties' intention and understanding that:

1. Communications between and among the Parties and the results of such communications and of joint interviews of prospective witnesses in connection with the proceeding are confidential and are protected from disclosure to any third party by the attorney-client privilege, the work-product doctrine, and by other applicable rules or rules of law.

2. All documents, including but not limited to memoranda of law, debriefing memoranda, factual summaries, transcript digests, and other written materials which would otherwise be protected from disclosure to third parties and which are exchanged among any of the Parties in connection with the proceeding will remain confidential and protected from disclosure to any third party by the attorney-client privilege, the work-product doctrine, and by any other applicable rules or rules of law.

3. Nothing in this Agreement shall be construed to require any of the Parties to disclose any privileged or work-product documents or information which any of the Parties, in their sole discretion, shall determine not to disclose.

4. Any disclosure or exchange of information by the Parties in connection with the proceeding has been and shall be accomplished pursuant to the doctrine referred to as the "common interest" or "joint-defense doctrine" as recognized by numerous authorities and to the maximum extent recognized by law. Any counsel who receives information as a result of this Agreement may disclose the same to his client and to those individuals assisting counsel in the preparation and defense of this case. However, none of the information obtained by any of the undersigned counsel as a result of this Agreement shall be disclosed to anyone by his client and those individuals assisting him in the preparation or defense of this case without the consent of the Party who first ***190** furnished the privileged information. In addition, no client who receives information as a result of this Agreement may disclose the information to anyone but his counsel and those individuals assisting his counsel in the preparation and defense of his case, without the consent of the Party who first furnished the privileged information. In the event that a motion is filed in any court or forum seeking to compel disclosure by any of the Parties of information obtained as the result of this Agreement, the Party shall notify the other Parties hereto in time sufficient to permit them to intervene or otherwise protect their interest.

5. All tangible materials exchanged pursuant to this Agreement (including all copies thereof), including but not limited to all documents and any other tangible thing on or in which information is recorded, shall be deemed to be "on loan" while they are in the hands of any person other than the producing Party. All originals of such materials shall be returned upon request at any time to the Party who furnished them, and all copies thereof shall be destroyed at that time. Original materials also shall be returned promptly to the Party who furnished them and all copies thereof shall be destroyed in the event either of the undersigned counsel or each of their clients determine that the Parties no longer share a common interest in the litigation or if, for any reason, the joint-defense effort or this Agreement is terminated. The obligations imposed by this Agreement shall remain in effect with respect to all privileged or work-product information obtained by a withdrawing Party prior to such withdrawal. At the conclusion of the litigation, all original tangible materials exchanged pursuant to this Agreement shall be returned to the Party who furnished them, and all copies thereof shall be destroyed.

6. Nothing contained in this Agreement shall obligate any Party to consult or agree with any other Party on any specific decision or strategy. Likewise, nothing in this Agreement obligates any Party to exchange or share any information that such Party concludes should not be disclosed.

7. Information exchanged under this Agreement shall be used only in connection with asserting common claims and defenses against plaintiffs in the subject litigation and conducting such other activities that are necessary and proper to carry out the purposes of this Agreement.

8. Each Party agrees that he or it will not use and hereby waives any right to use any and all information which has been provided to him or it pursuant to this Agreement in any forum or manner in any way adverse to the interests of the other Parties.

9. Any Party may withdraw from the joint-defense group and this Agreement by providing written notice of that intention to the remaining Parties. As to any tangible materials already obtained under this Agreement, any Party which withdraws from this Agreement shall, not more than ten days after providing notice, ***191** return the originals of all tangible materials to the Party who furnished them and destroy all copies thereof, and turn over the originals of all tangible work-product of any Consultant to counsel for the remaining clients and destroy all copies thereof. A Party's withdrawal from the joint-defense group and this Agreement shall not affect the duty of confidentiality which that Party has undertaken by virtue of having entered into this Agreement and such Party shall remain obligated to preserve the privileges and confidentiality of all information exchanged pursuant to this Agreement.

10. In the event any client settles with the plaintiffs and/or is dismissed from the subject litigation, said dismissed client shall be deemed to withdraw from the joint-defense group and from this Agreement and shall, not more than ten days thereafter, comply with the terms of paragraph 9. A client's settlement and/or dismissal from the subject litigation shall not affect the duty of confidentiality which that client has undertaken by virtue of having entered into

this Agreement and such client shall remain obligated to preserve the privileges and confidentiality of all information exchanged pursuant to this Agreement.

11. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective representatives, successors and assigns.

12. This Agreement contains the entire understanding of the Parties relating to its subject matter, and all prior or contemporaneous agreements, understandings, representations, and statements, whether oral or written, are merged herein.

13. No breach of any provision of this Agreement can be waived unless in writing. Waiver of any one breach shall not be deemed to be a waiver of any other breach of the same or any other provision hereof.

14. All notices and demands under this Agreement shall be sent by registered or certified mail, postage prepaid, to the applicable counsel at the addresses set forth below. Notices shall be deemed given and demands made when received by addressee.

15. If any provision of this Agreement is deemed invalid or unenforceable, the balance of this Agreement shall remain in full force and effect.

16. This Agreement may be executed in counterparts and will become effective and binding upon the Parties at such time as all of the signatories hereto have signed a counterpart hereof. All counterparts so executed shall constitute one Agreement binding on all Parties.

17. This Agreement may be modified only by a writing executed by the Parties.

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[FN1]. The American Law Institute adopted and published The Restatement (Third) of the Law Governing Lawyers at its annual meeting in 1998. The finalized Restatement was preceded by eight Tentative Drafts (1988-1994; 1997) and two Proposed Final Drafts (1996 and 1998). Though the order of the Restatement's chapters was not altered after Proposed Final Draft No. 1 of 1996, the Official Text, as cited in this outline, reduced the chapter numbers to consecutive order. Thus, many articles as well as earlier drafts of this outline, in citing to the Annual Meeting Draft Section Numbers, refer to chapter numbers that do not correlate to the Official Text as adopted by the Institute. For more information, see the Parallel Tables of Restatement Third Section Numbers and Annual Meeting Draft Section Numbers, REST. 3d at 499-502.

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