CHAPTER 1

An Overview of the Attorney-Client Privilege When the Client Is a Corporation

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I. Introduction

Then Deputy Attorney General Larry D. Thompson released the “Principles of Federal Prosecution of Business Organizations”1 (the Thompson memo) on January 23, 2003, generating a maelstrom of controversy. In the memo, Thompson instructed federal prosecutors to consider various factors when determining whether to reach a favorable plea agreement with corporations under investigation. Among those factors was a corporation’s willingness to waive the attorney-client privilege and work-product doctrine protection if deemed necessary by the Justice Department. Other federal agencies followed, announcing that they too would implement similar policies. The American Bar Association and other corporate and professional groups lamented this assault on the “sanctity” of the attorney-client privilege.

Thompson’s memo was the Justice Department’s prevailing policy until late 2006. At that time, Deputy Attorney General Paul McNulty announced a policy change in a meeting of the Lawyers for Civil Justice. McNulty’s comments were followed by the release of a highly publicized memo, “Principles of Federal Prosecution of Business Organizations,” that superseded and replaced the Thompson memo.2 Subsequent deputy attorneys general, including Mark Filip, issued similar memos, emphasizing that “waiving the attorney-client and work-product protections has never been a prerequisite . . . for a corporation to be viewed as cooperative.”3 Under Filip’s leadership, the department revised its policies so that a corporation may voluntarily share information protected by the attorney-client privilege or work-product doctrine, but prosecutors may not ask for such waivers.4

Although significant, Thompson’s memo had no effect on the substantive law of privilege; at bottom, the memo articulated a federal agency’s policy regarding the circumstances under which a corporation might receive a more favorable disposition in a governmental investigation. Also, the memo was limited to attorneys representing entities being investigated for violating federal law. Far more important to the law of attorney-client privilege and work-product protection is the effect of legislation and court decisions interpreting the scope of these privileges and protections.

This chapter presents an overview of federal and state law regarding the attorney-client privilege as an evidentiary privilege and the procedures that relate to it, especially as they apply to communications by attorneys representing corporations. Frequently, attorney-client-privileged communications also are protected by the attorney work-product doctrine, which is best known as
a rule of civil procedure, and by the attorney’s ethical duty to maintain confidentiality as to information related to representation of a client.

The attorney-client privilege is generally recognized as one of the oldest evidentiary privileges in Anglo-American law. The intended purpose of the attorney-client privilege is to promote the free flow of information between attorneys and their clients by removing the fear that the details of their communications will be disclosed to outsiders. This privilege rests on the presumption that an attorney can render accurate advice only if the client fully discloses all the relevant facts. The client is encouraged, therefore, to provide complete disclosure, even as to facts that, if disclosed, could adversely affect the client’s legal position. After all, it is frequently the most harmful information that the attorney needs in order to provide the best legal advice to a client.

The attorney-client privilege can restrict or totally preclude certain communications from being discovered or admitted into evidence. For this reason, the privilege runs afoul of the general premise that every person is obligated to offer information he or she has about an issue before the courts. This general duty to disclose information is regarded as nearly sacrosanct. One important commentator on evidence, Wigmore, recognized this fact and commented as follows:

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

Nor was Professor Wigmore alone in his view that a rule that exempts some information from evidence should be narrowly construed. As one court put the matter:

[The attorney-client] privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

Many of the situations selected for inclusion in this chapter involve the assertion of attorney-client privilege by corporate in-house or general counsel, as well as by attorneys representing corporations. As will be discussed, the privilege presents special problems in the context of corporations, especially when asserted by in-house counsel. Although every American court
recognizes that in-house counsel qualify for the privilege, many courts require in-house attorneys to clear a high bar before they can successfully assert the attorney-client privilege. While this position may not be legally warranted, it is nevertheless the attitude of courts, which are typically suspicious of the role that in-house counsel play in a corporation, especially given the many nonlegal assignments that in-house lawyers perform. Further, a court’s approach in resolving a corporation’s attorney-client privilege issues must be considered in light of the courts’ liberal interpretation of discovery rules and the narrow interpretation to which the attorney-client privilege is generally subject.

II. The Attorney-Client Privilege: First Principles

The attorney-client privilege is an evidentiary rule designed to encourage (by protecting) the free flow of information between an attorney and his or her client. The privilege is traditionally and historically a product of the common law, but it has been codified in many jurisdictions across the country. In some states, the attorney-client privilege statute merely restates the common law. Other states, including Arizona and Texas, have codified the privilege in detail, specifically setting forth not only the privilege but also many of the procedural rules regarding its use. Some states have also anticipated and addressed questions on how to interpret the privilege.

The basic definition of the attorney-client privilege is fairly simple. Rule 503(b) of the Texas Rules of Evidence provides a good working definition of the privilege: “A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client....”

The assumption underlying the privilege is that our legal system is more civilized and efficient because we recognize the attorney-client privilege. Many believe that, if courts do not broadly interpret and enforce the privilege, the legal system will suffer, as clients will have to determine whether confidential disclosures to their attorney could be revealed to a party with opposing legal interests. Undoubtedly, this risk could “chill” full disclosure, causing a client to withhold important facts from the attorney. As a result, the attorney runs the risk of rendering incomplete and, perhaps, incorrect legal advice. It is believed that our adversarial legal system can encourage full disclosure only by eliminating the fear that the communication will be disclosed by the attorney and then used against the client. The attorney-client privilege helps achieve this end.

The free flow of uncensored information between an attorney and client is as important within a corporation as it is between the corporation and outside counsel. In-house counsel owe a duty to their client—the corporation. And like outside counsel, in-house counsel can perform that duty only with full knowledge of the information available to the client. It is important to understand the
rationale underlying this legal doctrine, and attorneys should always argue the potential damage to the underlying policies and objectives of the attorney-client privilege when attempting to establish this privilege, regardless of the context in which the privilege is being asserted.

A. Establishing the Privilege

The attorney-client privilege attaches early in the attorney-client relationship. For example, the Rules of Evidence in Texas and Alabama define “client” as someone who consults a lawyer “with a view to obtaining professional legal services from [him].” Once created, the privilege continues and does not end when the representation ends or the client dies.

Because the privilege belongs to the client, the claim of privilege must be made by or on behalf of the client. Thus, although the privilege belongs to the client, the lawyer may claim the privilege on behalf of the client and is presumed to have the authority to assert the attorney-client privilege in the absence of evidence to the contrary.

In the case of a corporation, it is generally held that the privilege may be asserted only by an authorized corporate representative on behalf of the corporation. Generally speaking, an attorney for the corporation is vested with presumptive authority to assert the privilege. An attorney’s authority is generally the best position to assert the privilege, whether at a deposition, when responding to written discovery, or at trial.

The attorney-client privilege, naturally, is not self-actuating, and generally a party seeking to protect privileged communication from discovery must, at some stage:

1. Affirmatively and specifically plead or assert the attorney-client privilege;
2. Produce evidence concerning the applicability of the attorney-client privilege; and
3. For written material, allow the trial court to determine whether an in camera inspection is necessary to determine if the privilege applies.

If the trial court orders an in camera inspection of the privileged communication, the party asserting the privilege should segregate and produce to the court those materials the court seeks to inspect. Failure to follow this procedure may waive any complaint of the trial court’s action regarding the privilege.

Thus, the party resisting discovery of material claimed to be privileged must specifically claim the privilege relied on and establish the justification for its imposition. In written discovery, the discovery response must identify the privilege and identify each document to which the privilege applies. General objections will most likely not suffice. Simply listing documents under the heading “Attorney-Client/Attorney Work Product” is generally insufficient to protect documents from discovery. A global claim that a list of documents is
protected by one or more privileges is also too general to prevent their discovery. Further, merely attaching something to a privileged document does not, by itself, make the attachment privileged. And while often called an absolute privilege, the attorney-client privilege is subject to exceptions.

The parameters of the attorney-client privilege in federal court were fully set forth in *United States v. United Shoe Machinery Corp.* a frequently cited case from 1950, in which the court stated:

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

It is well established that the attorney-client privilege applies to the corporate client, however, even this principle has not gone unchallenged. In fact, at least one court, subsequently reversed, has held that the attorney-client privilege could not be claimed by a corporation. Moreover, while the procedures for asserting the attorney-client privilege are rather straightforward when applied to a client who is a natural person, they are not so simple when the client is a corporation. The most obvious difference is that the corporation speaks through the many voices of its employees, agents, and representatives. There may be so many corporate employees and agents that it is unrealistic to permit every corporate employee or agent to be able to assert the attorney-client privilege in every communication. Thus, when a corporation asserts the attorney-client privilege, there are questions about (1) which natural persons’ communications are protected, (2) who within the corporation may assert the privilege, and (3) who within the corporation may waive the privilege.

Not surprisingly, there is no uniform answer to these questions, either among the states or between state and federal law. In regard to who can assert the attorney-client privilege, courts have adopted and applied two general tests (or variants of these tests): (1) the control group test and (2) the subject matter test. Determining which test applies depends on knowing a particular jurisdiction’s privilege laws, which are typically found in a state’s rules of evidence. Because the rule as applied may be affected by various factors, it is important for an attorney representing a corporation to understand both tests, notwithstanding the fact that few jurisdictions still follow the pure control group test. That said, it is not enough to know the applicable test of only a particular state because corporate litigation frequently involves parties from different states.
Also, it is likely that a corporation may be sued in a state in which it is not a resident. Therefore, attorneys should be familiar with the conflicts of law rules that govern different jurisdictions because such laws could also impact the applicable privilege test.

B. Determining the Rule of Privilege:
Control Group versus Subject Matter

Courts have taken two approaches in resolving attorney-client privilege issues in the context of corporations. The first, or “control group test,” provides that the client may be an entity and have confidential communications only if the corporate representative can act on the legal advice rendered or if the corporate representative has authority to obtain legal representation on behalf of the corporation. This test is by far the minority rule.

The control group concept originated with City of Philadelphia v. Westinghouse Electric Corp. In that case, defendant Westinghouse asserted the attorney-client privilege to prevent disclosure of an employee’s statement to Westinghouse’s general counsel. In rejecting the application of the attorney-client privilege to this communication, the court adopted the following definition of the scope of the attorney-client privilege in the corporate setting:

If the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

It is obvious that the control group test is extremely narrow in defining the group of persons who may have privileged communications. Even though low-level employees frequently possess information that may be vital to addressing a corporation’s legal issues, the control group test offers the protection of the attorney-client privilege only to communications of top management. And while the limited protection afforded by the work-product doctrine might be available for communications with counsel when litigation is anticipated, communications of a nonmanagement group employee in the absence of anticipated litigation may be unprotected. Some states, recognizing the restrictive nature of the test, have expanded the control group to include those advising top managers on legal issues.

Despite the control test’s limits, a minority of states continue to essentially follow the control group test for corporations. Change is constantly occurring,
however, as the scope of the attorney-client privilege for corporate communications is reconsidered and more states abandon the control group test for the more liberal and realistic subject matter test.

In 1993, the Texas Supreme Court, in *National Tank Co. v. Brotherton*, determined the scope of a corporation’s attorney-client privilege under Texas law. In a plurality opinion (which was effectively joined by all the other justices on this issue), Chief Justice Phillips wrote that Rule 503 of the then Texas Rules of Civil Evidence adopted the “control group test” by virtue of its definition of “representative of the client”—that is, “one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.” Thus, even if legal matters were discussed between attorneys and employees, the communications would not be considered privileged unless they were between an appropriate “control group” corporate representative and counsel. Of course, this sort of communication might be protected by the work-product doctrine if taken in anticipation of litigation. For this and other reasons, the narrow control group test was criticized and the state began to reevaluate the rule.

The control group test defined the scope of the attorney-client privilege in Texas until 1998. At that time, the Texas Rules of Evidence were amended to include the subject matter test in addition to the control group test for communications by corporate employees to attorneys. In Texas, the attorney-client privilege may now be asserted on behalf of a corporation for communications by

(A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client; or

(B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

As Texas did in amending its rule for the attorney-client privilege, the Seventh Circuit Court of Appeals, some years earlier in the leading case of *Harper & Row Publishers, Inc. v. Decker*, adopted the subject matter test. The Seventh Circuit recognized that an employee, while not a member of the control group, is sufficiently identified with the corporation so that the employee’s communication to the corporation’s attorney should be privileged when the employee makes that communication at the direction of his or her corporate supervisor. However, the court imposed the additional condition that the communication between the employee and the corporation’s legal counsel must be done in furtherance of the employee’s official duties. As the court said, the privilege is allowed “where the subject matter upon which the attorney’s advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.”

While generally accepted, the principles expressed by the court in *Harper* were viewed by some courts as being too broad. Thus, the court in *Diversified*
Industries, Inc. v. Meredith adopted what became known as the modified subject matter test. This test set forth five elements that need to be satisfied before a corporate employee's communications with counsel can be privileged:

1. The communication must be made for the purpose of securing legal advice;
2. The employee making the communication should be doing so at the direction of his corporate supervisor;
3. The employee's superior made the request for the communication in order for the corporation to secure legal advice;
4. The subject matter of the communication was within the scope of the employee’s corporate duties; and
5. The communication was not disseminated beyond those persons who, because of the corporate structure, needed to know its contents.

These principles ultimately gained acceptance by the U.S. Supreme Court. For instance, in Upjohn Co. v. United States, the U.S. Supreme Court rejected the “control group” test and held that the attorney-client privilege protected communication between corporate counsel and lower-level corporate employees. This version of the “subject matter” test is employed in federal courts in nondiversity cases. In reaching its decision, the Court followed this reasoning:

In the case of the individual client the provider of information and the person who acts on the lawyer’s advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—“officers and agents ... responsible for directing [the company's] action in response to legal advice”—who will possess the information needed by the corporation’s lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

While the Court in Upjohn limited its holding to the facts before it and expressly declined to lay down a broad rule, the Court did determine the availability of the attorney-client privilege to corporations facing litigation in federal court. The holding clearly states that confidential communications by corporate employees about matters within the scope of their employment, and made for the purpose of enabling counsel to provide legal advice to the corporation, fall within the scope of the attorney-client privilege. To be sure, the Court cautioned that because the attorney-client privilege suppresses information, it could obstruct the truth-finding process; therefore, the Court said, the privilege should be narrowly construed.
Case law suggests that this perceived need for a narrow construction arises most often when a corporation seeks to invoke the privilege to protect communications of or to in-house counsel. This is primarily due to the fact that in-house counsel may play a dual role of legal advisor and business advisor. In such instances, the courts must apply a greater level of scrutiny to the contested communications to ensure that the communication occurred for legal, not business, purposes. After all, the attorney-client privilege applies only if the communication's purpose is to gain or provide legal assistance. The varied scope of responsibility of some corporate in-house attorneys suggests that courts will continue to closely analyze a corporation's claim of privilege to determine whether the communications fall outside the realm of privilege afforded to corporations.

Since *Upjohn*, the majority of states have adopted some version of the subject matter test. The subject matter test has also been cited formally by a number of states whether via rule or case law.48 While *Upjohn* establishes that cases arising under federal law require the application of the subject matter test to corporate communications, the Federal Rules of Evidence adopt a policy consistent with the limits of federal authority in diversity cases.49

Therefore, in cases involving state laws, the applicable privilege rule will depend on the laws governing a particular jurisdiction. The incongruity of this principle has not been lost upon some commentators, who have pointed out that a single corporation might be involved in two cases—one based on diversity jurisdiction and the other based on federal law—in the same federal court before the same judge. In such a situation, the judge would be expected to apply *Upjohn*’s subject matter test in the case implicating federal law. In the diversity case, the judge would apply the privilege rule unique to the law of the particular forum state, which could easily be the control group test. This incongruity, while perhaps a little far-fetched, dictates a cautionary note, and relying upon rules for traditional conflicts offers little comfort. The *Restatement (Second) of Conflicts* favors the forum’s laws that will more likely hold that the communication is unprotected by the privilege.50 Consequently, a jurisdiction that follows the subject matter test and the *Restatement*’s view of conflicts might find itself in the awkward position of being asked to set aside its own rules regarding the attorney-client privilege and apply the control group test of another jurisdiction. This could cause a court to hold that communications typically considered privileged are no longer protected due to the imposition of a different rule. Even if this is not the result, the possibility alone suggests that a forum selection clause and choice of law clause should be a standard provision in any contract where the parties are in a position to control which standard will apply.

C. Multiple Roles of In-House Counsel

1. In-House Counsel as Executive

In addition to determining which laws courts will use to determine the scope of the attorney-client privilege, in-house counsel must also distinguish their role as legal advisor from that of business executive. In-house counsel must
make this distinction because the attorney-client privilege extends only to communications pertaining to legal matters. The privilege does not exist for business communications.

It is presumed that communications with outside counsel are for the purpose of seeking legal advice. This presumption is not given to in-house counsel because in-house counsel are perceived as being equally capable of having provided business as well as legal advice. For instance, in some corporate settings, in-house attorneys are asked only to serve as the corporation’s attorney, managing litigation or otherwise performing purely legal work. In other corporations, especially those that engage a single in-house counsel, the range of responsibilities is much broader, causing in-house lawyers to provide both business and legal services to their clients.

For instance, some corporate counsel have been described as the persons who advise the corporation on compliance with myriad regulations and business practices. Because of their legal training, these attorneys conduct internal investigations, chair committees, serve on the board of directors, and become de facto human resources managers, among other responsibilities. As such, these corporate attorneys may be expected to give advice of a business or legal nature, or a combination of both. The commingling of legal and business services creates problems for courts that are asked to define whether a particular communication is privileged. After all, the attorney-client privilege attaches only to communications between attorneys and clients made for the purpose of giving or securing legal advice. As expected, courts give increased scrutiny to corporate communications because of the broad nature of in-house counsel’s responsibilities and the type of advice frequently requested of them. Basically, the courts look to whether counsel was acting in the capacity of an attorney when receiving the communication or giving the advice. If the communication of in-house counsel is made to render business advice, even to a small degree, the protection afforded by the attorney-client privilege may not be provided to that communication.

The fact that corporate counsel is an attorney does not render all communications with employees of the corporation as privileged. Counsel must be acting in the capacity of an attorney when receiving or making a communication, and therefore must be communicating with the corporate employees, officers, or directors of the corporation for the purpose of formulating legal opinions or advice. The corporation, for this reason, cannot merely pass questionable documents through the legal department for review and thereby have them declared protected from outside scrutiny, just as it cannot provide such documents to outside counsel to protect the documents from disclosure.

Even when courts recognize that communications by corporate employees with in-house counsel are entitled to the protection of the attorney-client privilege, they seem to apply a heightened standard for determining when that privilege applies. When presented with the issue of whether the attorney-client privilege protected the communication of an in-house attorney who also served as the company’s vice president, one judge concluded that the company
“can shelter [in-house counsel’s] advice only upon a clear showing that [in-house counsel] gave it in a professional legal capacity.” In this instance, the heightened standard that the communication be made for legal and not business reasons meant that the proponent of the privilege was required to show by affidavit the precise facts that existed to support the claim of privilege.

A few precautions could assist in satisfying a court’s standards. For example, in-house counsel could develop internal procedures that indicate when the in-house counsel is acting as an attorney. This will distinguish counsel’s legal work, which is privileged, from the work they must perform when they are acting as an “executive” within the company. For instance, if oral communication between an employee and in-house counsel occurs for legal purposes, the in-house counsel should make sure the employee understands the purpose of such communication. If the communication is written, the document should expressly state that it is for a legal purpose and that there are no business aspects to the communications. The communication should also include the other elements of the privilege. The document should state that it is requested by the employee’s superior, that it is confidential, and that it is addressed to in-house counsel in the counsel’s capacity as in-house counsel.

While a lawyer’s membership in a particular state’s bar may not be a prerequisite for asserting the attorney-client privilege, such membership is worthwhile because it supports the proposition that corporate counsel is first and foremost an attorney. The importance of this precaution is best illustrated in the context of whether internal reports and investigations are privileged. Of all the documents prepared by in-house counsel, internal reports can prove to be the most difficult to protect as privileged. Indeed, as courts continue to struggle with whether particular communications were made to corporate counsel in their business or legal capacity, the federal courts have been reluctant to protect the communications of in-house counsel who prepare client tax returns, patent viability reports, or investigative reports that are solely for internal use.

The issue of corporate counsel bar membership has recently been an extremely heated topic of debate. In Gucci America, Inc. v. Guess?, Inc., a magistrate judge held that communications to Gucci’s in-house counsel were not protected under the attorney-client privilege because its in-house counsel was not an active member of the state’s bar at the time the communications were made. Nor could Gucci benefit from the privilege under the theory that it reasonably believed that in-house counsel was authorized to practice law. The court stated that a corporation must inquire into the professional licensure status of in-house counsel to ensure application of the attorney-client privilege. This decision struck a bad chord with corporations across the nation, who believed they had been burdened with the onerous task of continuously monitoring the bar status of in-house counsel.

The decision in Gucci, however, was short-lived; in 2011, the district court overruled the magistrate’s judgment. Relying on the privilege standard established by the Supreme Court in United States v. United Shoe Machinery Corp.,
the district court held that Gucci’s in-house counsel could receive the attorney-client privilege because he was “a member of the bar of a court.” The district court went further and stated that as long as the client had a reasonable belief that it was communicating with an attorney, the attorney-client privilege would be applied to in-house counsel to protect such communications. Pursuant to this decision, corporations may continue to communicate freely with in-house lawyers without having to constantly monitor each attorney’s bar membership status, so long as there is some reasonable factual basis for a belief that the lawyer is an active licensed member of a bar.

In *Simon v. G.D. Searle & Co.*, the court applied Minnesota law in a diversity action regarding the attorney-client privilege. In *Simon*, the defendant’s risk management department developed separate aggregate risk statements working from individual case loss information statements prepared by in-house counsel. The district court held that the individual case loss materials were privileged on the basis that Minnesota law protects statements made by a client to the attorney, as well as the attorney’s advice given to the client in response to the client’s inquiry. An Eighth Circuit standard was next applied to the communications. This standard provided that “[w]hen a client acts on privileged information from his attorney, the results are protected from discovery to the extent that they disclose the privileged matter, directly or inferentially.” Ultimately the privilege claimed in *Simon* was denied in regard to the documents. The court determined that the individual figures prepared by an attorney were privileged but lost their status as privileged communications when they were given to the client and combined by the client in order to create the aggregate information. The separate aggregate figures were not direct compilations of the individual figures. Rather, the individual figures were factored by variables such as inflation, and thus, were changed as to be untraceable to the privileged communication.

2. In-House Counsel as Witness

In-house counsel is most frequently exposed to the risk of being called as a witness when the attorney signs or verifies a pleading, responds to discovery, or signs an affidavit, although the risk of being called may arise in other circumstances as well. To avoid being noticed for deposition, in-house counsel should make sure that all attesting matters are performed by a corporate officer rather than in-house counsel.

Attorneys who perform corporate functions beyond representation of the corporate client invite their own depositions. Admittedly, this is unavoidable in some instances. *Johnston Development Group v. Carpenters Local Union No. 1578* involved a RICO action in which plaintiff’s in-house counsel also served as the corporation’s vice president. In that dual capacity, she was the sole person to take notes at important meetings between the parties before the litigation began, and she was the sole witness to certain prelitigation conversations of which highly disputed accounts had been given. The court was somewhat receptive to limiting the practice of deposing opposing counsel, but
it acknowledged that it was forced to allow a limited examination of the in-house counsel/vice president because she had witnessed the crucial conversations that were in controversy in the litigation.

Again, to reduce the likelihood of in-house counsel being deposed, in-house counsel should witness or attest to as few documents or purely business transactions as possible. That is, in-house counsel should not sign affidavits of discovery compliance or witness transactions if a corporate official is in a position to do so. Also, in-house counsel should not get involved with the mechanics of discovery, such as searching files, because this increases the likelihood of becoming a fact witness when the scope of that discovery compliance is at issue.

3. The Shelton Doctrine: Noticing the Opposing Counsel’s Deposition

The attorney is not permitted to testify (and may therefore refuse to answer questions) as to communications made to him or her by the client unless the client consents. However, the right to refuse to testify exists only if

- The holder of the privilege is a client (or a potential client);
- The person to whom the communication was made is a lawyer;
- The communication relates to a fact of which the attorney was informed
  - by the client;
  - not in the presence of strangers; and
  - for the purpose of receiving a legal service; and
- The privilege has been asserted and has not been waived by the client.67

Parties typically attempt to notice the deposition of opposing counsel, including in-house counsel, for several reasons. First, it can be a shortcut to information available through more traditional and legitimate methods of discovery. Second, it may create grounds for the disqualification of opposing counsel under ethical rules forbidding attorneys to serve both as advocate and witness in the same trial. Third, it may be used as an inappropriate means of harassing the opposing party.

Courts have attempted to prevent such abusive depositions. To be sure, there is no total bar to deposing in-house counsel. Some federal courts have even supported efforts to depose opposing counsel, noting that the Federal Rules of Civil Procedure permit a party to “depose any person.”68 Other courts, however, have imposed strict burdens on parties seeking to depose opposing counsel. One of the first courts to do so was the Eighth Circuit in *Shelton v. American Motors Corp.*,69 where the court granted a protective order against the taking of the deposition of an opposing party’s counsel. The court in *Shelton* determined that opposing counsel can be deposed only when a party demonstrates that (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and nonprivileged,
and (3) the information is crucial to the preparation of the case.\textsuperscript{70} As a practical matter, the law on this issue generally seems to follow \textit{Shelton}, meaning that most courts will permit the deposition of opposing counsel only upon a showing of substantial need and only after alternate discovery avenues have been exhausted or proven impractical.

When the deposition of counsel has been noticed, and not quashed, in-house counsel should rely on the \textit{Shelton} policy arguments set out below to protect privileged information:

- The deposition will inevitably hinder the attorney-client relationship and inhibit counsel’s preparation of the client’s case;
- It is unlikely that counsel has any more nonprivileged information than is available from other sources;
- Routine attempts to depose counsel will inevitably tie up the court’s time with disputes over the scope of privilege and related matters; and
- There should be no interrogation of an attorney to impeach discovery unless prior substantial evidence shows that a significant violation of the discovery obligation has occurred.

In some instances, the need to depose opposing counsel can be obviated by stipulating that certain witnesses will not be called and that certain issues will not be raised at trial. For example, in \textit{Perry v. Jeep Eagle Corp.},\textsuperscript{71} the defendants avoided the deposition of their in-house counsel by arguing that the information sought was not relevant to plaintiff’s claims. The defendants also stipulated that the study about which plaintiff sought to question the attorney would not be offered in evidence during the trial. The court recognized that, where a matter is not at issue, there is no need to pursue information about the matter by deposing in-house counsel.

Another alternative to deposing counsel is a discovery conference.\textsuperscript{72} A discovery conference allows attorneys and the court to learn why counsel intend to depose certain witnesses. The purpose is to focus the court’s attention on the opponent’s overall discovery plan instead of the mere discovery details. This permits the court to determine whether a party can obtain the necessary information without deposing an opposing counsel.

In federal court, as in many states, parties must meet and confer before a scheduling conference to “discuss any issues about preserving discoverable information”\textsuperscript{73} and “any issues about claims of privilege or of protection as trial-preparation materials.”\textsuperscript{74} The parties should attempt to resolve these issues as well as discuss a procedure for handling inadvertently produced material, placing such an agreement into an order of the court.\textsuperscript{75}

Some courts considering whether to compel counsel’s deposition have required attorneys to prove that the protection of attorney-client privilege or work-product immunity is justified. For example, in \textit{In re Shopping Carts Antitrust Litigation},\textsuperscript{76} the court stated that a party seeking to assert the attorney-client privilege must provide information from which the court could reasonably
conclude that the communication (1) concerned the seeking of legal advice; (2) was between a client and an attorney acting in his or her professional capacity; (3) was related to legal matters; and (4) was and is, at the client's instance, permanently protected. The court found that the defendants in the Shopping Carts litigation failed to meet this burden.

D. Other Types of Privilege Theory

1. The "Joint Defense"

Parties represented by separate lawyers often have legal interests in common. In some situations, these parties might need to communicate with one another through the lawyers, for example, to discuss joint strategies of defense. As long as the communications relate to a matter of common legal interest, there should not be a waiver of the attorney-client privilege or work-product immunity. This protection of shared information is known as the joint defense privilege.

While courts vary as to the elements required to support a claim of joint defense privilege, a few common requirements emerge. First, as discussed above, the parties need to have a common legal interest. Courts have different interpretations of the degree of commonality required for parties. For instance, some courts, including the Ninth Circuit, permit parties to assert the privilege based on only a common legal interest. Other courts, however, such as the Third Circuit, require a common defense strategy. For instance, the Third Circuit held that "[t]he joint defense privilege protects communications between an individual and an attorney for another when the communications are 'part of an on-going and joint effort to set up a common defense strategy.'" Several circuit and district courts have applied similar standards. Parties with adverse interests may claim joint defense privilege for communications relating to their common legal interests.

Second, the parties must be engaged in litigation; however, courts disagree over the degree to which litigation must loom over the relationship. At one extreme, Uniform Rule of Evidence 502(b) limits joint defense privilege to cases in which there is a "pending action." This provision has been interpreted as requiring the actual institution of legal proceedings, such that communications made in the course of prelitigation settlement efforts will be denied privilege. Most federal courts require the communication to involve a matter of common interest that either is currently the subject of litigation or may reasonably be expected or anticipated to become the subject of litigation.

Third, the parties do not always need to be involved in the same litigation. Fourth, even though parties might share a common interest, their communications may not be protected unless they are made in furtherance of that interest. Finally, the shared interest of joint defense participants generally must be a shared legal interest rather than merely a shared commercial interest.
If two parties plan to assert the joint defense privilege, they might want to first obtain a signed writing (letter or formal agreement) indicating their intent to share information pertaining to a common legal interest. Such an agreement might specify that

- The information transmitted contains confidential, privileged attorney-client communications;
- It is being sent only to counsel for other defendants in the pending matter;
- The disclosure is only to further common defenses;
- The information will not be furnished to any other person, either through copying of the joint defense letter or through disclosure of its contents, in whole or part;
- All signatories to the document voluntarily waive on behalf of their client any actions they may have at any time against any or all signatories; and
- All parties agree that no protective orders ban disclosure of such information.

A variation of the joint defense privilege is the “pooled information” situation.\textsuperscript{88} To assert the attorney-client privilege after “pooling information,” parties should establish that they are

- Parties in the same lawsuit;
- Parties who are about to be in the same lawsuit, making the communications in anticipation of litigation; or
- Parties with common defenses against a plaintiff.

The rule does not apply to situations where there is no common interest to be promoted by a joint consultation, or where the parties meet on a purely adversarial basis. Moreover, the privilege does not apply to matters irrelevant to the pending litigation or to communications with other parties themselves.\textsuperscript{89} The principle applies only to communications with a party’s lawyer or a lawyer’s representative.

2. Narrow Self-Critical Analysis

Another distant cousin of the attorney-client privilege is sometimes termed the “self-critical analysis” privilege. This privilege was originally created to prevent or limit disclosure of potentially damaging information uncovered as a result of an internal evaluation or analysis.\textsuperscript{90} However, the continued viability of a broad self-critical analysis privilege is increasingly doubtful, partly because of the inconsistency with which courts have recognized and applied the privilege. Circuit courts of appeal have declined to recognize a privilege for self-evaluation but have noted district court and state authorities applying analogues in specialized contexts.\textsuperscript{91}
This privilege was first explicitly recognized in *Bredice v. Doctors Hospital, Inc.* and is based upon strong public policy considerations. In *Bredice*, a medical malpractice action, the plaintiff sought production of the minutes and reports of the defendant hospital board concerning the death of a patient. The court denied the discovery requests on the grounds that “[t]here is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded.” The court also stated that “[t]he purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques . . . and that the value of these discussions [involving constructive criticism] would be destroyed if the meetings were opened to the discovery process.” This privilege for healthcare providers has been codified in some states and protects from disclosure medical committee or peer review reports of the medical staff of a healthcare facility.

Since *Bredice*, however, the privilege has not been uniformly accepted nor, for the most part, categorically denied. In cases where the self-critical analysis privilege has been applied, courts require various elements to invoke the privilege. First, the information sought must come from an internal investigation conducted to improve or evaluate the products or procedures of a party. Second, the party must have originally intended to keep the disputed information confidential. Third, there must be a significant public interest in maintaining the confidentiality of that information. Fourth, the information must be of a type whose flow would be curtailed if discovery were allowed.

The self-critical analysis privilege has been considered in nonmedical contexts, including product liability cases. In *Lloyd v. Cessna Aircraft Co.*, plaintiff's counsel sought information regarding a “top ten list” of confidential memoranda from staff meetings “designed to review, analyze, and evaluate operations for the continued self-improvement in the quality of their respective products.” Cessna objected to the request, alleging that the information sought was protected under a qualified privilege. The court, after noting that the plaintiff was not seeking actual production of the list, permitted questioning of Cessna’s witness. In reaching its holding, however, the court noted that “[w]ere the government seeking herein to obtain copies of the minutes or other reports of the actual discussions of Cessna’s ‘top ten’ meetings, this Court might be inclined to follow the principles enunciated in the afore cited [self-critical analysis] cases; under such circumstances the Court would feel obligated to apply a balancing approach before allowing the wholesale disclosure of the specific details of any such meetings.”

In *Bradley v. Melroe Co.*, the court limited the discovery of in-house investigative files of previous accidents to the factual data contained in those files. Applying a standard similar to the one required under the work-product rule, the court held that the defendant manufacturer could redact all mental impressions, opinions, evaluations, recommendations, and theories of counsel. In reaching its holding, the court noted that “in many instances, and it certainly appears to be so in this case, manufacturers study reports of accidents...
involving their products for the purpose of ascertaining if preventive measures can be taken to avoid future accidents.\textsuperscript{101} The court went on to say:

In such cases, courts have recognized a privilege of self-critical analysis precluding the discovery of impressions, opinions, and evaluations but allowing the discovery of factual data. The reasoning behind this approach is that the ultimate benefit to others from this critical analysis of the product or event far outweighs any benefits from disclosure.\textsuperscript{102}

The U.S. Supreme Court has never recognized the self-critical analysis privilege, and historically it has been very reluctant to expand common law testimonial privileges.\textsuperscript{103} In \textit{University of Pennsylvania v. EEOC}, the Court reasoned that it should not adopt a privilege “where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.”\textsuperscript{104} Further, no circuit court of appeals has recognized the privilege; numerous courts, in fact, have refused to apply it. An Eastern District of Pennsylvania court declined to apply the privilege in a case involving the production of an accident investigation report.\textsuperscript{105} While the court acknowledged the policy considerations behind the privilege, it was not persuaded that they warranted the application of the privilege, “especially in light of the liberal scope of discovery afforded litigants under Rule 26, and the view that evidentiary privileges are disfavored as inconsistent with the broad scope of discovery.”\textsuperscript{106}

\textbf{E. Losing the Attorney-Client Privilege}

Although the rules of the privilege are relatively easy to state, their implementation is multifaceted and sometimes extremely complex. It is especially important, therefore, for attorneys to understand the privilege rules because certain threshold or procedural mistakes can lead to loss or waiver of the privilege. For instance, when assertion of the attorney-client privilege is rejected, often the statements or disclosure in question was, ab initio, beyond the scope of the privilege (that is, the communication was not between an attorney, acting as attorney, and his or her client).

In addition, the privilege is potentially waived by failing to assert it when a question about a confidential communication is asked and answered. Thus, in \textit{West v. Solito},\textsuperscript{107} the court stated that neither a motion in limine nor an objection at trial would prevent the admission into evidence of privileged information that was disclosed without objection in a deposition. The court held that even though the trial court ordered that privilege objections be reserved for trial, “once the matter has been disclosed, it cannot be retracted or otherwise protected.”\textsuperscript{108} Therefore, an attorney whose client is asked for privileged information in a deposition or a trial must object and instruct the client not to answer in order to protect the privilege. If privileged documents have been produced, the attorney must attempt to regain custody of those privileged documents.\textsuperscript{109}
In the ever-growing age of technology, lawyers are faced with new challenges in protecting the attorney-client privilege. With the rise of e-mail as the primary method of communication in the workplace, the risks of inadvertent disclosure of the attorney-client privilege have also risen. Additionally, the boom in social media as an everyday means of communication has placed more pressure on attorneys to monitor and advise their clients about the perils of disclosing otherwise privileged communications.

1. Waiving the Privilege

As noted earlier, in order to preserve the attorney-client privilege, not only must the privilege be claimed, but it must also be established that the privilege has not been waived. In many instances, however, the issue for the attorney representing the corporation is not whether to waive the privilege but rather who can waive it.

It has been held that an employee whose communications have been claimed as privileged under the attorney-client privilege on behalf of the corporation may waive that privilege. Most courts, however, follow the principles of the Restatement (Third) of the Law Governing Lawyers, which provides that only an authorized agent of the corporation may waive the privilege of the corporation. Accordingly, it is the general rule that a corporation's privileged communication cannot be waived by the unauthorized disclosure by either a current or former employee. Corporate counsel should, of course, be proactive rather than reactive in this area. Rarely does privileged information disclosed by a current or former corporate employee in an unauthorized fashion have a positive consequence, regardless of whether a court subsequently declares the disclosure not to be a waiver of privilege. The attorney should, therefore, instruct employees with whom he or she communicates that the communication is confidential. In addition, in-house counsel should note the possibility of a waiver occurring at an employee's deposition. When corporate employees are being deposed, the corporate attorney should be prepared to object and instruct the employee (or former employee) not to answer a question that calls for the disclosure of privileged attorney-client communications. If necessary, the attorney should terminate the deposition, seek a protective order from the court, or contact the court for instructions on how to protect the privileged information. Failure to take these measures may be construed by the court as waiver of the privilege.

2. Waiver by Selective and Inadvertent Disclosure

One of the ways a party can waive its privilege is by voluntary disclosure. Rule 511 of the Texas Rules of Evidence is representative of the "voluntary disclosure" doctrine. According to Texas Rule of Evidence 511, a party waives the privilege if "the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged."

For example, in Axelson, Inc. v. McIlhaney, a Texas court held that a company waived the attorney-client privilege concerning information relating to
the company’s internal investigation of kickbacks to its employees. The information from the company’s investigation was at issue in a federal trial initiated by the company, and the information was revealed to federal law enforcement agencies as well as a national publication.

In another case, United States v. Ruehle, the Ninth Circuit determined that statements made by a corporation’s chief financial officer (CFO) to in-house counsel were not privileged because the CFO understood that in-house counsel would disclose the information to third-party auditors conducting an internal investigation of corporate stock-granting practices. Because the CFO repeatedly admitted that he knew his statements to in-house counsel would be conveyed to the auditors, he had no expectation of confidentiality, and therefore, the attorney-client privilege did not apply.

Some of the more frequently encountered “high-risk” areas for waiving the privilege by selective disclosure of information may occur in the following situations:

- Response to a government investigation
- Information supplied to a government agency
- Insurance renewals
- Auditor or accountant inquiry
- Public financial disclosure documents (Securities and Exchange Commission forms)
- Any disclosure to third parties not working under the attorney or at the attorney’s direction, or for nonlegal purposes

In addition to making a voluntary disclosure, parties can waive the privilege inadvertently. For instance, on some occasions, particularly in large document productions, a party will inadvertently produce privileged documents to the opposing party. In such situations, the question is whether the inadvertent production constitutes “voluntary disclosure” and therefore waives the privilege of all communications relating to the subject matter of the disclosed documents.

The Texas Supreme Court first addressed this issue in Granada Corp. v. First Court of Appeals. The court reasoned that, depending upon the facts, an inadvertent production of a privileged document could be either “voluntary” or “involuntary.” Only a voluntary production would constitute a waiver of the privilege. In Granada, the court held that the producing party carries the burden of showing specific circumstances confirming the involuntary nature of an inadvertent disclosure of a privileged document. The court identified the following factors as relevant to whether a particular inadvertent disclosure is “voluntary” and therefore results in waiver:

- whether “precautionary measures” were taken (“efforts reasonably calculated to prevent the disclosure”);
- whether there was “delay in rectifying the error”;

II. The Attorney-Client Privilege: First Principles
• the “extent of any inadvertent disclosure”; and
• the “scope of discovery.”\textsuperscript{120}

A few years after the Texas Supreme Court distinguished “voluntary” from “involuntary” disclosure in \textit{Granada}, the Texas Legislature adopted a rule simplifying the procedures for recovering inadvertently produced privileged materials. The Texas Rules of Civil Procedure now provide that

A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.\textsuperscript{121}

Until a few years ago, there was no comparable procedure under the Federal Rules of Civil Procedure. With the following observation, the Civil Rules Advisory Committee began its discussion of the need for a simplified procedure for handling inadvertent production: “Ever since the [Advisory] Committee began its intensive examination of discovery in 1996, a frequent complaint has been the expense and delay that accompany privilege review.”\textsuperscript{122}

Charged with proposing amendments to the Federal Rules of Civil Procedure, the committee further acknowledged that the federal procedures for dealing with inadvertent disclosure of privileged material lacked uniformity and insufficiently addressed discovery of electronic communications. To remedy this problem, the committee adopted procedures similar to those established in Texas.

The modern federal procedures were originally implemented under, inter alia, Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure, providing that when material “subject to a claim of privilege or of protection as trial-preparation material” is produced, the producing party may give notice to the party who received the material.\textsuperscript{123} While not required by the text of the rule, ideally the notice should be in writing unless the circumstances preclude written notice, such as when the production is at a deposition. The notice, in whatever form, should state the basis for the claim of privilege. The “[receiving] party must promptly return, sequester, or destroy the specified information and any copies it has . . . [and] must not use or disclose the information until the claim is resolved. . . .”\textsuperscript{124} If the receiving party disclosed the information before the claim of privilege, it must also take reasonable steps to retrieve the information. The receiving party need do nothing further, but it can present the information to the court for determination of whether the claim of privilege
is valid, and the producing party must preserve the information until that determination is made. It is significant to note that while the Texas and Federal Rules establish a procedure for the return of certain materials, neither address the appropriate standard courts should use in determining whether an inadvertent production constituted a waiver of privilege.

The Federal Rules of Evidence were originally amended in September 2008 to also address inadvertent disclosure issues. Under the modern Federal Rule of Evidence 502, an inadvertent disclosure does not waive the privilege if three standards are satisfied: “1) the disclosure is inadvertent; 2) the holder of the privilege . . . took reasonable steps to prevent disclosure; and 3) the holder [of the privilege] promptly took reasonable steps to rectify the [mistaken disclosure], including, (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”125 Additionally, the rule contemplates that litigants may enter privilege disclosure agreements. 126 Also, when federal courts enter privilege disclosure orders consistent with these agreements or enter a privilege disclosure order in the absence of such an agreement, Rule 502(d) provides that the order is enforceable in subsequent federal and state court proceedings.127 Further, subdivision (c) of Rule 502 addresses the effect in federal court of privilege disclosures that occur in state court.128

To be sure, Federal Rule of Evidence 502 does not make any substantive changes to the attorney-client privilege or work-product doctrine.129 Rather, the primary purpose of the rule is to reduce the costs associated with the production of documents in discovery. As a few commentators have stated, the rule “aims to reduce the time and effort lawyers spend screening documents before producing them by limiting the risk that disclosure of documents or information protected by the attorney-client privilege or work-product doctrine will result in broad waiver of that protection.”130 Rule 502 achieves this in several ways. For one, the rule limits the situations where an inadvertent disclosure constitutes waiver. Also, the rule limits the extent of a waiver, providing that when a waiver occurs, it does not automatically extend beyond the communications or information actually disclosed.131

A decision from a federal district court in Maine provides an example of how courts approach inadvertent disclosure claims in light of developments in the Federal Rules. In Ergo Licensing, LLC v. Carefusion 303, Inc.,132 the district court heard a discovery dispute involving 31 pages included in the production of a 540-page document by the plaintiff. The plaintiff and defendant disagreed as to whether a waiver of the attorney-client privilege had occurred by the inadvertent disclosure of the 31 pages. The court relied on the following three-factor test to answer this question: “1) the disclosure must be inadvertent; 2) the holder of the privilege took reasonable steps to prevent the disclosure; and 3) the holder promptly took steps to rectify the error.”133

In regard to the first prong, the court quickly decided that the plaintiff did inadvertently disclose the 31 pages. The second and third prongs were not as easy to determine. To help its analysis, the court expanded the last two elements into the following factors: (1) the reasonableness of the precautions
taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its errors. After considering these factors, the court concluded that the inadvertent disclosure did not constitute a waiver of the attorney-client privilege.

In light of the case law, the attorney responsible for a large document production should create a plan (preferably reduced to writing) for the production of documents that will minimize the chances of an inadvertent production of a privileged document. Also, an attorney who discovers that he or she has inadvertently produced a privileged document should immediately master the governing procedures and, if necessary, file any appropriate motion with the court (for example, a Motion to Compel Return of Privileged Documents Inadvertently Produced). The attorney should then become familiar with the burdens of proof expected by courts dealing with inadvertent disclosure issues (see Granada and Ergo Licensing for examples). Further, the attorney should assemble, by admissible affidavit or declaration, the evidence needed to sustain that burden, file the proof in a timely manner, and have the motion set for hearing.

Moreover, it is important to note that written client communications may also lose the protection of the attorney-client privilege if they are used at trial or in a deposition to refresh the witness's recollection. The Federal Rules of Evidence provide that “when a witness uses a writing to refresh memory . . . while testifying . . . an adverse party is entitled to have the writing produced at the hearing.” Accordingly, if the attorney uses an otherwise privileged document to refresh his or her client's memory on the witness stand, or in preparation for a deposition, waiver has occurred. Courts typically consider the work-product doctrine to be inadequate protection from disclosure when work-product documents have been used to prepare a witness for depositions. Some courts have even found that the use of work-product materials for deposition purposes is an automatic waiver of the protection, meaning that a party requesting disclosure does not have to show a substantial need or undue hardship. Also, privileged material used by a testifying expert to formulate an opinion generally must also be produced upon request by opposing counsel.

3. Protecting the Privilege in Today's Technological Age
As technology evolves and the market is flooded with new means of communication—e-mail, texting, blogs, instant messaging, Facebook, MySpace, Twitter—the potential for both clients and attorneys to waive protections for attorney-client-privileged communications increases.

Two example cases demonstrate that although e-mail has been a dominant mode of communication between attorneys and clients for the past nearly two decades, new issues concerning e-mailed communications and waiver of
attorney-client privilege continue to emerge. For instance, in an attempt to efficiently keep clients informed, some lawyers blind-copy (“bcc”) their clients when sending e-mails to opposing counsel.

A federal court confirmed that this method of communication can be very risky and can result in the loss of the attorney-client privilege. In *Charm v. Kohn*, Kohn's counsel sent an e-mail to opposing counsel and blind-copied Kohn. Kohn responded to the e-mail but inadvertently sent his response, intended only for his attorney, to opposing counsel as well. Kohn’s counsel immediately caught the error and requested opposing counsel to delete the message, which opposing counsel refused to do. When opposing counsel submitted the e-mail as an exhibit to a motion, Kohn moved to strike on the basis that the communication was protected by the attorney-client privilege. In determining whether the privilege survived Kohn's inadvertent disclosure, the court weighed several factors: whether Kohn and his counsel had taken reasonable steps to preserve the confidentiality of the communication, whether the action of “bcc-ing” the client gave rise to a foreseeable risk that he would respond as he did, and whether the delay in asking the court for relief suggested waiver of the privilege. Although the court ultimately held that the privilege was not waived, it warned the parties and others that “[r]eply all is risky. So is bcc. Further carelessness may compel a finding of waiver.” This decision instructs lawyers to “advise client to be careful” and “avoid practices that exacerbate risks.” Instead of bcc-ing clients, a better method is to forward clients any e-mails to opposing counsel, thereby eliminating the risk that a reply to the e-mail will be sent to third parties.

Another attorney-client privilege issue that has seen litigation is whether e-mails regarding action against the employer and sent between client and attorney on the client’s employer’s computer are protected by the attorney-client privilege. The 2010 case of *Holmes v. Petrovich Development Co.* held that e-mails sent by an employee to her attorney regarding possible legal action against her employer were not subject to attorney-client privilege because the employee used her work computer even though she knew that the company’s policy prohibited the use of company e-mail for personal reasons. Almost every employer that has a policy on use of company computers and e-mail has substantively similar warnings, even if they are never enforced. The holding itself may not come as a surprise to most attorneys because the law in many jurisdictions states that employees have no reasonable expectation of privacy when using their employer's electronic resources. Nonetheless, even if they are aware of the general rule, clients may not consider that an employer might be able to read e-mail sent to an attorney. While this approach is not the controlling law in all jurisdictions, it is an important reminder that attorneys must remain mindful of the risk, even if their clients are not.

Another technological trend that poses great threat to the preservation of the attorney-client privilege is the boom in social media, as both a personal and business tool. In *McMillen v. Hummingbird Speedway, Inc.*, the plaintiff was rear-ended in a stock car accident and claimed significant personal injury,
including loss of health, strength, and the ability to enjoy certain pleasures of life. The court compelled the plaintiff to provide his Facebook and MySpace information to defense counsel after defendants reviewed the public portion of plaintiff’s Facebook account and discovered comments about his vacations and attendance at the Daytona 500 race. The court reasoned that “[w]hen a user communicates through Facebook or MySpace . . . he or she understands and tacitly submits to the possibility that a third-party recipient, i.e., one or more site operators, will also be receiving his or her messages and may further disclose them if the operator deems disclosure to be appropriate. The fact is wholly incommensurate with a claim of confidentiality. Accordingly, McMillen cannot successfully maintain that the element of confidentiality protects his Facebook and MySpace accounts from discovery.”

It is especially difficult in the corporate context for lawyers to monitor and protect against a client’s unintentional disclosure of attorney-client-privileged communications via social media outlets. Managers, supervisors, or employees who disclose work-related issues in status updates, chats, or blogs run the risk of waiving the privilege, thereby forcing a company to produce documents it ordinarily would have the right to withhold in litigation. It is therefore essential that in-house counsel ensure that corporate personnel understand the implications of discussing work-related issues online. An additional concern for in-house counsel is the risk that a company will waive attorney-client privilege by posting statements on its website. Nowadays, it is often part of a company’s business strategy to post statements on its website to keep the public informed on various activities and to ensure continued public confidence in the company’s products and services. However, if the company discloses too much (or too often), it could risk waiving privilege protections.

4. Offensive Use of the Privilege

The “offensive use” doctrine applies when privileged material is used as a “sword” rather than as a “shield.” For example, if the client claims that “my former attorney didn’t tell me I had a claim until the statute of limitations had expired,” then the former attorney may be deposed on this topic to prevent “manifest unfairness.” Whether the client was aware of a fact is now relevant and relates to the heart of the claim. For this reason, if there is information that would reveal that a fact was made known to the client by the attorney, then the adversary may discover this information. The assertion of the attorney-client privilege in this setting goes well beyond the intended purposes of the attorney-client privilege, and, consequently, the privilege is unavailable to protect this type of communication. The pursuit of this type of claim is analogous to an unintentional waiver, making otherwise protected discussions and conversations discoverable.

5. The “Good Cause” Exception

The “good cause” exception is invoked when concerns of countervailing policy dictate that the attorney-client privilege or the work-product doctrine
should be ignored. In shareholder suits, for example, courts have sometimes reasoned that the corporate attorney’s true client is the shareholder and, accordingly, that communications with corporate executives cannot be privileged when the substance of the conversation is at issue. Such an analysis puts in peril many communications between in-house counsel and corporate executives because a privilege-negating shareholder suit is always possible. But at least one state bar committee has held that in the case of closely held corporations, the attorney’s duty is owed to the corporation itself, and not to the shareholders or directors. Suffice it to say, this remains a dynamic area.

Some courts attribute the “good cause” exception to the Fifth Circuit’s Garner v. Wolfinbarger decision. In Garner, the court held that when a corporation is sued by its stockholders, the availability of the corporation’s attorney-client privilege is subject to the right of the stockholders to show cause why the corporation should not be allowed to invoke the privilege. The court reasoned that although the attorney-client privilege is important in the corporate context, management owes a duty to the corporation’s stockholders, and this duty should be considered by the court in determining the applicability of the privilege. Toward that end, the court concluded, when breaches of duty occur, the privilege should not be allowed if the stockholders can demonstrate why the privilege should not be allowed.

It is important to note that in a subsequent case, the Fifth Circuit determined that the good cause exception does not apply to work-product claims. In In re International Systems & Controls Corp., the court held that the Garner rationale was premised upon a “mutuality of interest” between shareholders and management that does not exist for work-product items prepared in anticipation of litigation by the shareholders.

That said, a leading case where the “good cause” waiver was almost successfully argued by a party seeking the discovery of privileged documents is Sporck v. Peil. In Sporck, the court denied the plaintiff’s motion to compel the production of documents that the defendant acknowledged had been provided to him by his attorney in preparation for his deposition. The defendant claimed that the selection of documents was protected from disclosure by the work-product doctrine, a less restrictive rule against nondisclosure than the attorney-client privilege. Stressing that defendant’s counsel had culled the selected documents from the documents produced by defendants, the court found that the process of sifting relevant documents from the mass of produced documents was protected as attorney work product: “We believe that the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product. . . . Rule 26(b)(3) placed an obligation on the trial court to protect against unjustified disclosure of defense counsel’s selection process.” Notably, the court engaged in an analysis to determine whether there was “good cause” to compel production or whether the attorney-client privilege and work-product doctrine protection should be respected.
F. Distinguishing the Attorney Work-Product Doctrine from the Attorney-Client Privilege

1. The Attorney Work-Product Doctrine

The attorney work-product doctrine, which is largely codified in Federal Rule of Civil Procedure 26(b)(3), provides a qualified protection to materials prepared by a party’s counsel or other representative in anticipation of litigation. This doctrine is important in the American legal system because it helps to ensure that attorneys are able to “work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” As the Supreme Court explained in *Hickman v. Taylor* in 1947, without the work-product doctrine, “the effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.” The Court cautioned that absent work-product protections, an attorney’s thought process and preparation for trial would be stifled, causing “inefficiency” and “unfairness.”

The attorney-client privilege should be distinguished from the attorney work-product doctrine. Work-product immunity, which may be asserted by either the lawyer or the client, is unlike attorney-client privilege, which “belongs” to the client. Also, “the work-product doctrine is distinct from and broader than the attorney-client privilege” in that it covers all material prepared in anticipation of litigation; it is not limited to communications between attorney and client. This greater scope is, however, met by a concomitant reduction in the strength of protection offered by the doctrine, as compared to the privilege. For instance, the attorney-client privilege covers communications made by the client to the attorney or communications by the attorney to the client that incorporate or are based on a client’s communications. Once properly invoked, the attorney-client privilege is virtually inviolate. The attorney work-product doctrine, on the other hand, is a qualified protection that can be overcome by showing “substantial need” and “undue hardship.” The party claiming work-product protections has the burden of establishing that the doctrine applies. Once that protection has been demonstrated, the burden of showing “substantial need” and “undue hardship” falls on the party seeking production.

As noted earlier, an attorney’s work product is protected because it would be patently unfair and contrary to the adversarial nature of the U.S. legal system to permit discovery of materials containing an attorney’s mental impressions, conclusions, opinions, or legal theories that have been created in preparation for trial. For material to be considered prepared in anticipation of litigation, the prospect of litigation must be identifiable even if the litigation has yet to commence. Thus, a party may not simply claim that materials have been prepared in anticipation of litigation. Rather, a party asserting attorney work-product protection may also be required to actually prove this claim.

Work-product materials include a variety of information. They can include legal memoranda, impressions of witness statements, documents collected by
counsel to provide an understanding of the claims or defenses, memoranda or reports from outside consultants, statistical data compiled electronically as a result of (or to evaluate) a claim or lawsuit, and the identity of confidential consultants. Federal Rule of Civil Procedure 26(b)(3) protects not only materials prepared by lawyers, but also materials, mental impressions, or opinions of other representatives concerning the litigation, including consultants and the system specialist who may have designed a computer litigation support system.169 Not surprisingly, items otherwise considered privileged or protected under the work-product rule might lose that status by being sent to testifying experts to review.170 It is also critical to note that documents that are merely kept in the ordinary course of business will not be protected, even though they are stored in a computerized litigation support system.171

2. Limits of the Work-Product Doctrine
The attorney work-product doctrine is a qualified protection. In fact, Rule 26(b)(3) of the Federal Rules of Civil Procedure provides specific exceptions to the general prohibition against discovery of documents and tangible things “prepared in anticipation of litigation or for trial by or for another party or its representative.”172 For instance, information prepared in anticipation of litigation can be discovered if the party seeking discovery shows “substantial need” and is unable to obtain such information by other means without “undue hardship.”173 In determining whether the requisite showing has been made, courts will consider various factors, including the importance of the information sought and the availability of, and difficulty in, obtaining such information from alternative sources.174

However, even if the party requesting work-product information can show a substantial need or undue hardship, Federal Rule of Civil Procedure 26(b)(3) limits discovery of the lawyer’s mental impressions and opinions concerning the litigation.175 Courts generally classify this type of information as “opinion work product.”176 As some commentators point out, a few courts have determined that the privilege afforded to opinion work product is absolute and that a showing of necessity cannot overcome the protection.177 Other courts have held that opinion work product can be discovered, but only in rare and extraordinary circumstances.178 In Holmgren v. State Farm Mutual Auto Insurance Co.,179 the Ninth Circuit determined that discovery of opinion work product is permissible when mental impressions are at issue in the case and the need for the material is compelling.

3. Asserting the Work-Product Doctrine in Successive Litigation
As noted in the above-quoted portion of Rule 26, some items protected by work-product immunity can be discoverable if the discovering party makes a sufficient showing of substantial need and undue hardship. It is unwise to assume that this showing will be more difficult for a plaintiff relative to an already closed case. Indeed, because of the passage of time, the work-product-protected data held by corporate counsel may be the only source of pertinent information available to the plaintiff, and therefore, a court may find that the substantial need or undue hardship test is met.
The case of Shelton v. American Motors Corp. provides insight on this matter. In that case, plaintiffs filed notices to take the depositions of several individuals, including Rita Burns, a staff attorney for American Motors Corporation. Burns was the supervising in-house counsel on certain Jeep “rollover” cases. She was deposed, but she refused to answer many questions on the basis of work-product and attorney-client privilege. These questions primarily involved the existence or nonexistence of various documents regarding the model Jeep involved in the case at hand. The work-product privilege was for materials prepared “in anticipation” of previous litigation. Burns’s standard reply was as follows:

Any information I have concerning documents which might possibly be responsive to your question, I’ve acquired solely through my capacity as an attorney for American Motors in my efforts to find information which would assist me in defending the company in litigation, and therefore, I decline to respond to the question.

In its opinion, the lower court noted that the mere fact that documents or knowledge of documents came to an attorney while acting for a client was not sufficient to invoke the attorney-client privilege. In addition, the court held that the work-product doctrine from past cases did not protect discovery of the existence or nonexistence of documents. Ultimately, the district court entered a default judgment against American Motors Corporation as a sanction for Burns’s repeated refusals to answer the deposition questions.

The limited issue on appeal to the Eighth Circuit was whether a defendant’s mere acknowledgment of the existence of corporate documents was protected by the work-product or attorney-client privileges. The Eighth Circuit reversed the district court’s judgment, holding that Burns’s acknowledgment of the existence of certain documents would reveal her mental impressions, which are protected as work product. In the course of its opinion, the Eighth Circuit acknowledged that the boundaries of discovery had expanded and that the practice of taking the depositions of opposing counsel was becoming increasingly popular. The court stressed, however, that opposing counsel’s depositions should be taken only when the party seeking to take the deposition can show that “1) no other means exist to obtain the information than to depose opposing counsel . . . ; 2) the information sought is relevant and not privileged; and 3) the information is crucial to the preparation of the case.” The Shelton court concluded that the facts in the case did not present these “limited circumstances.”

III. Conclusion and Practical Tips

The attorney-client privilege is a cornerstone of the American legal system. Although deeply rooted in our nation’s history, the privilege is continually being shaped as courts interpret it and apply it to new and evolving situations.
circumstances—especially in the context of corporations. By carefully pre-
paring and adhering to the rules that define and set the parameters of the
attorney-client privilege, lawyers working for corporations can effectively use
the privilege to better serve their clients.

In sum, attorneys representing corporations should consider the following
tips when performing tasks involving the creation of confidential documents
or conversations. In general, counsel should periodically conjure up the mental
image of an adversarial proceeding in which they are attempting to establish
the attorney-client privilege against an aggressive opponent. This will inevita-
ably result in counsel paying closer attention to the formalities necessary to help
preserve the privilege. In addition to the principles articulated earlier in this
chapter, the attorney should consistently and judiciously follow the formalities
associated with the privilege. Toward that end, they should

- Follow or refer to the Upjohn factors in letters and memoranda;
- Mark all appropriate documents as “privileged” and “prepared as
  confidential communications at request of counsel”;
- Ensure that memos seeking information identify counsel by title as
  “counsel” and in legal opinions state that they are “in my opinion as
  counsel”; and
- Keep circulation and distribution of legal memos severely limited to
  “control group” personnel.

Thus, in order to maintain the attorney-client privilege, a company should
specify on reports prepared by employees that the report was prepared for
counsel regarding legal services. Also, the signature of counsel and statements
that the report is to be confidential will help enhance the likelihood that the
document is protected. In the realm of privilege and protection from waiver, it
is truly the case that an ounce of prevention is worth a pound of cure.

Notes

1. Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of
   federalevidence.com/pdf/Corp_Prosec/Thompson_Memo_1-20-03.pdf, reprinted in
   app. 1-1.
2. Memorandum from Paul McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice,
   to Heads of Dep’t Components and U.S. Att’ys (Dec. 12, 2006), http://www
   .justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf, reprinted
   in app. 1-2.
3. Memorandum from Mark Filip, Deputy Att’y Gen., U.S. Dep’t of Justice,
   in app. 1-3.
4. See also id.
6. See, e.g., Model Rules of Prof'l Conduct r. 1.6 cmt. 3.
10. Fisher v. United States, 425 U.S. 391, 403 (1976) (stating that “since the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose”).
14. Lawyers should educate themselves in the rules of unfamiliar jurisdictions in which they are handling matters. Even what many consider basic attorney-client privilege principles can differ between jurisdictions. For example, in 2011, a Pennsylvania court clarified the scope of the state’s attorney-client statute: “We hold that, in Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” Gillard v. AIG Ins. Co., 2011 LEXIS 393 (Pa. Feb. 23, 2011). Prior to this ruling, Pennsylvania common law inconsistently interpreted the attorney-client privilege statute; some courts narrowly read the statute to limit the privilege to client-to-lawyers communications only. Id.
15. Tex. R. Evid. 503(b)(1).
16. See Tex. R. Evid. 503(a)(1) (emphasis added); Ala. R. Evid. 502(a)(1) (emphasis added). See also State v. Tally, 102 Ala. 25, 15 So. 722 (1894).
17. It has been held that the privilege remains after the death of the client. Wesp v. Everson, 33 P.3d 191 (Colo. 2001); In re Busse’s Estate, 332 Ill. App. 258, 75 N.E.2d 36 (Ill. App. 1947); Eloise Bauer & Assocs. v. Elec. Realty Assocs., 621 S.W.2d 200, 204 (Tex. Civ. App.—Texarkana 1981, writ ref’d n.r.e.).
19. See, e.g., Ala. R. Evid. 502(c). See also Tex. R. Evid. 503(c) (“The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.”). This point was also made in Cole v. Gabriel, 822 S.W.2d 296 (Tex. App.—Fort Worth 1991, orig. proceeding) in a slightly different way when it was held that a lawyer had no standing to assert the attorney-client privilege in his individual capacity. See also Fisher v. United States, 425 U.S. 391 (1976); Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955 (3d Cir. 1984).
20. In re Grand Jury Proceedings, 469 F.3d 24 (1st Cir. 2006) (holding that the CEO of a corporation could not intervene in a proceeding to prevent counsel for the corporation from testifying to a conversation between the CEO and counsel in his personal capacity (absent evidence the counsel represented him in his personal capacity as well as the corporation)). In a context similar to that of the corporate world, it was held that White House lawyers could not claim that
their conversations with the First Lady were privileged from disclosure in an investigation in which the President and First Lady were being investigated because the attorneys represented the White House and not the First Lady or the President. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997). *See also In re* Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979).

21. *See, e.g.*, TEX. R. EVID. 503(c) (“The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.”).


25. A number of jurisdictions have patterned their codification of the rules of privilege after the Supreme Court draft that was ultimately not accepted by Congress in enacting the Federal Rules of Evidence but was substantially included in the 1974 Uniform Rules of Evidence. *See* Edward J. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 28 ALA. L. REV. 41 (2006). Thus, the Texas Rules of Evidence set forth the following categories of situations in which the attorney-client privilege may not be claimed:

1. Furtherance of crime or fraud. 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;
2. Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions;
3. Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;
4. Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
5. Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

TEX. R. EVID. 503(d). *See also* KY. R. EVID. 503(d); LA. CODE EVID. art. 506(C); Florida sets forth the following situations in which the privilege does not apply:

(a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.
(b) A communication is relevant to an issue between parties who claim through the same deceased client.

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(c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer–client relationship.

(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

\[\text{Fla. Stat. § 90.502(4) (2014).}\]


27. Id. at 358–59.


30. Because of ambiguities surrounding choice of law issues, if the stricter “control group” test is followed then the communication will always qualify for protection if it involves only control group personnel.

31. The “control group test” is discussed in In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1978).


35. See, e.g.,

   Alabama  ALASKA R. EVID. 503(a)(2)
   Hawaii    HAW. R. EVID. 503(a)(2)
   Maine     ME. R. EVID. 502(a)(2)
   New Hampshire N.H. R. EVID. 502(a)(2)
   Oklahoma  12 OKLA. STAT. § 2502(A)(4)(a) but see id. at (b)

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36. 851 S.W.2d 193 (Tex. 1993).
37. Id. at 197 (quoting then-prevailing Tex. R. Civ. Evid. 503(a)(2)).
40. 423 F.2d 487 (7th Cir. 1970) (per curiam), aff’d, 400 U.S. 348 (1971).
41. Id. at 491–92.
42. Id.
43. Id. at 489.
44. 572 F.2d 596 (8th Cir. 1977).
45. Id. at 609.
47. Id. at 391. See also So. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994).
48. See, e.g.,

<table>
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<th>State</th>
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<tr>
<td>Alabama</td>
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<td>D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 36 Cal. Rptr. 468 (1964)</td>
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<td>Colorado</td>
<td>Denver Post Corp. v. Univ. of Colo., 739 P.2d 874 ( Colo. App. 1987)</td>
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<td>Utah</td>
<td>UTAH R. EVID. 504(a)(4)</td>
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49. Fed. R. Evid. 501 (providing, in part, “[b]ut in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”).

50. RESTATEMENT (SECOND) OF CONFLICTS § 139. See also Atl. Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965), for the proposition that the privilege should be narrowly construed to permit liberal discovery.

51. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977).


54. This statement presupposes that corporate counsel will be an attorney admitted to the bar of a state, not necessarily the bar of the state in which the corporation is located in order to assert the privilege. See Paper Converting Mach. Co. v. FMC Corp., 215 F. Supp. 249 (E.D. Wis. 1963); Ga.-Pac. Plywood Co. v. U.S. Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956). Failure to be a member of the bar may be fatal to the claim of privilege. It has been held that communications with an unlicensed in-house counsel are not privileged. Fin. Techs. Int'l, Inc. v. Smith, 247 F. Supp. 2d 397 (S.D.N.Y. 2002). But see Hawes v. State, 88 Ala. 37, 7 So. 302 (1889).

55. In re Sealed Case, 737 F.2d at 99 (emphasis added).


61. 816 F.2d 397 (8th Cir. 1987).


63. Simon, 816 F.2d at 402 n.4.

64. Id. at 403 n.6.

65. See Tex. R. Evid. 503(d)(4).


70. Id. at 1327.
72. Rule 26(f) of the Federal Rules of Civil Procedure requires a conference to discuss such matters.
73. FED. R. CIV. P. 26(f)(1)–(2).
75. Id.
76. 95 F.R.D. 299 (S.D.N.Y. 1982).
77. Id. at 305–06 (emphasis added).
79. United States v. Austin, 416 F.3d 1016, 1021 (9th Cir. 2005) (holding that privilege can apply where parties decide on and undertake a joint defense effort or strategy).
81. In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 126 (3d Cir. 1986) (quoting Eisenberg v. Gagnon, 766 F.2d 770, 787 (3d Cir. 1985)).
82. See Snider & Ellins, supra note 78.
83. Id.
84. U.L.A. UNIF. R. EVID. 502(b)(iii): “A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client . . . (iii) by the client or a representative of the client or the client’s lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein.”
86. See, e.g., Dexia Credit Local v. Rogan, 2004 U.S. Dist. LEXIS 25635, at *13 (N.D. Ill. Dec. 20, 2004) (refusing to limit common interest rule to parties perfectly aligned on same side of single litigation; rather require demonstration of “actual cooperation toward a common legal goal with respect to the document they seek to withhold”).
87. See Snider & Ellins, supra note 78.
89. TEX. R. EVID. 503(b)(1) provides:

“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client
[and made] . . . (C) [by him or his representative or his lawyer] or a repre-
sentative of the lawyer, to a lawyer or a representative of a lawyer re-
presenting another party in a pending action and concerning a matter of
common interest therein.”

90. John F. Birmingham, Jr. & Jennifer L. Neumann, Preserving the Attorney-Client
self-critical analysis privilege has never been recognized by this Court and we
see no reason to recognize it now.”); In re Qwest Comm’ns Int’l Inc. Sec. Litig.,
450 F.3d 1179, 1198 n.8 (10th Cir. 2006) (noting “a privilege for reports required
to be made by law, which has been adopted by only a small minority of states”)
(citations omitted); In re Kaiser Alum. & Chem. Co., 214 F.3d 586, 593 (5th Cir.
2000) (“We need not decide whether a self-evaluation privilege should ever be
recognized. We decline to recognize such a privilege in the circumstances
presented, namely a case where a government agency seeks pre-accident docu-
ments.”); Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 427 (9th Cir. 1992)
(holding that “voluntary routine pre-accident safety reviews are not protected
by a privilege of self-critical analysis”); Coates v. Johnson & Johnson, 756 F.2d
524, 551–52 (7th Cir. 1985) (noting lower court decisions applying a self-critical
analysis privilege to an employer’s affirmative action plans).
92. 50 F.R.D. 249 (D.D.C. 1970). See also 4 James W. Moore, Moore’s Federal Prac-
tice ¶ 26.22(2) at 1287 (2d ed. 1969).
93. Bredice, 50 F.R.D. at 251.
94. Id. at 250.
95. In Texas, the Occupations Code protects from disclosure the evaluation of a
The Medical Committee records and proceedings of a medical organization are
also privileged (excluding business records). Tex. Health & Safet y Code
§ 161.032 (2013). See In re Univ. of Tex. Health Ctr., 33 S.W.3d 822 (Tex. 2000);
Brownwood Reg’l Hosp. v. 11th Ct. App., 927 S.W.2d 24 (Tex. 1996); Irving
Healthcare Sys. v. Brooks, 927 S.W.2d 12 (Tex. 1996); Mem’l Hosp. v. McCown,
927 S.W.2d 1 (Tex. 1996). See generally Gail N. Friend, Jennifer L. Rangel &
Madison Finch, The New Rules of Show & Tell: Identifying and Protecting the Peer
Review and Medical Committee Privileges, 49 Baylor L. Rev. 607 (1997).
96. See Brem v. DeCarlo, 162 F.R.D. 94, 101 (D. Md. 1995); Nicole Wolfe Stout, Privi-
leges and Immunities Available for Self-Critical Analysis and Reporting: Legal, Practi-
98. Id. at 520.
99. Id. at 522.
101. Id. at 2–3.
102. Id.
103. See, e.g., Univ. of Penn. v. EEOC, 493 U.S. 182, 189 (1990) (declining to recog-
nize peer review materials privilege); United States v. Gillock, 445 U.S. 360, 373
(1980) (declining to create a state legislator privilege); Branzburg v. Hayes, 408
U.S. 665, 706 (1972) (declining to recognize a privilege allowing newsmen to
avoid testifying about confidential sources and suggesting that the creation of such a privilege is best left to the legislature).

104. Univ. of Penn., 493 U.S. at 189.


106. Id. (citing Herbert v. Lando, 441 U.S. 153, 175 (1979)).

107. 563 S.W.2d 240 (Tex. 1978).

108. Id. at 245.


116. 583 F.3d 600 (9th Cir. 2009).

117. See United States v. Reyes, 239 F.R.D. 591 (N.D. Cal. 2006) (finding that voluntary disclosure to a federal investigative agency effected a waiver of the attorney-client privilege and work-product protection for the materials produced as to other litigants).

118. 844 S.W.2d 223 (Tex. 1992) (orig. proceeding).

119. Id. at 226.

120. Id. at 226–27. See Abamar Hous. & Dev. v. Lisa Daly Lady Decor, 698 So. 2d 276 (Fla. App. 1997), rev. denied, 704 So. 2d 520 (Fla. 1997).

121. Tex. R. Civ. P. 193.3(d).


124. Id.


126. See Fed. R. Evid. 502(d); Schaefer, supra note 125.

127. See Fed. R. Evid. 502(d).

128. See Fed. R. Evid. 502(c).


130. Id.

131. See id.


133. Id. at 46.

134. Id.

135. Id. at 47.


137. Id.


140. See Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 617 (S.D.N.Y. 1977) (Although the court did not order disclosure in Berkey, it stated, “To put the point succinctly, there will be hereafter powerful reasons to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties.”).


143. Id. at *5.

144. 119 Cal. Rptr. 3d 878 (2011).

145. See Stengart v. Loving Care Agency Inc., 990 A.2d 650 (N.J. 2010) (holding that communications between attorney and client sent on employer's computer were privileged because employer's policy was ambiguous and did not clearly permit employer to access otherwise protected attorney-client communications).


147. Id. at *9.


149. Allstate Ins. Co. v. Levesque, 263 F.R.D. 663, 667 (M.D. Fla. 2010); see GAB Bus. Servs., Inc. v. Syndicate, 809 F.2d 755 (11th Cir. 1987); HSH Nordbank AG N.Y. Branch v. Swerdlow, 259 F.R.D. 64, 74 (S.D.N.Y. 2009) (holding that in an order to prevent the attorney-client privilege from at once being used as a shield and a sword, the “at issue” doctrine precludes a party from disclosing only self-serving communications while barring discovery of other communications that an adversary could use to challenge the truth of the claim).


153. 430 F.2d at 1103–04.


155. 693 F.2d 1235 (5th Cir. 1982).

156. 759 F.2d 312 (3d Cir. 1985).

157. Id. at 316.


160. Id. at 511.

161. Id.


164. In re Sealed Case, 676 F.2d 793, 808 (D.C. Cir. 1982).
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166. See Hickman, 329 U.S. at 511.
167. See Toledo Edison Co. v. G.A. Techs., Inc. Torrey Pines Tech. Div., 847 F.2d 335, 339–40 (6th Cir. 1988) (stating that a party need only show anticipation of litigation, and need not establish the identities, positions, and responsibilities of the persons creating the materials with respect to the litigation expected). See also Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987) (holding that risk management and aggregate records were discoverable because they were not prepared in anticipation of any particular litigation).
174. See Hickman, 329 U.S. at 511.
177. Id.; In re Allen, 106 F.3d 582 (4th Cir. 1997) (holding that opinion work product is immune from discovery).
178. See In re Cendant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003) (holding that opinion work product receives greater protection than ordinary work product and is discoverable only upon a showing of “rare and exceptional circumstances”).
179. 976 F.2d 573, 577 (9th Cir. 1992).
180. 805 F.2d 1323 (8th Cir. 1986).
181. Id. at 1325.
182. Id. at 1326.
183. Id. at 1329.
184. Id. at 1326.
185. Id. at 1327.
186. Id. at 1327–28.