I. Introduction

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 are also protected by the attorney work-product doctrine, a rule of civil and criminal procedure, and by the attorney’s ethical duty to maintain confidentiality regarding information related to the representation of the 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 has often been explained as a rule which will promote the free flow of information between attorneys and their clients by removing the client’s 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 honestly and fully discloses all 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 to know 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,

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2. See, e.g., Model Rules of Prof’l Conduct r. 1.6 cmt. 3.
the privilege runs afoul of the general premise that every person is obligated to offer all information he or she has about an issue before the court. 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.\(^5\)

Nor was Professor Wigmore alone in his view that a rule that exempts some information from evidence should be narrowly construed.\(^6\) 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.\(^7\)

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 who are not employees of the corporation but are representing the corporation. As will be discussed, interpretation of 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 assertion of the privilege, many courts seem to require in-house attorneys to clear a higher 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 the scope

\(^5\) J.H. Wigmore, Wigmore on Evidence § 2192 (3d ed.).

\(^6\) 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”); Haines v. Liggit Group, Inc., 975 F.2d 81, 84 (3d Cir. 1992); In re Grand Jury Proceedings Under Seal, 947 F.2d 1188 (4th Cir. 1991).

\(^7\) Nat’l Labor Relations Bd. v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965).
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.8 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.9 Some states have also anticipated and addressed questions on how to interpret the privilege.10 Eschewing any definition, the Federal Rules of Evidence have left the definition of the privilege to the common law in cases in which the substantive law of the United States applies,11 or to the state in those cases in which the substantive law of the state applies.

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. . . .”12 Difficulty arises in the interpretation of this simple definition.

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

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9. See, e.g., Ariz. Rev. Stat. § 12-2234; Tex. R. Evid. 503. These statutes are based upon the American Law Institute’s Model Code of Evidence or the Uniform Rules of Evidence and provide a more comprehensive definition of the privilege.
10. 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.
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 full and honest disclosure.

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 even when 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.

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13. 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); Barton v. U.S. Dist. Court, 410 F.3d 1104 (9th Cir. 2005).

14. It has been held that the privilege remains after the death of the client. Wesp v. Everson, 33 F.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.), but this proposition is no longer without doubt. In Swidler & Berlin v. United States, 529 U.S. 399, 118 S. Ct. 2081 (1998), the issue was whether a balancing test developed by the U.S. Court of Appeals for the D.C. Circuit was the appropriate method to determine whether an attorney’s communications with a deceased client were discoverable. Under this test, issues of the significance of the statements bearing on crimes, as well as the scarcity of non-privileged evidence was to be considered, (see In re Sealed Case, 124 F.3d 230 (D.C. Cir. 1997)), a test very similar to that of discovering attorney work product. Despite the position of the American Law Institute in the Restatement (Third) of the Law Governing Lawyers, the United States Supreme Court recognized that the privilege survives the death of the client. 524 U.S. at 410-11, 118 S.Ct. at 2088.


16. 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
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. A corporation's attorney is generally in the best position and therefore is assumed to have authority 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 a written or transcribed 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 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).

17. 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).

18. See, e.g., Tex. R. Evin. 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.").


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.\(^{21}\) And while often called an absolute privilege, the attorney-client privilege is subject to exceptions.\(^{22}\)


\(^{22}\) 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.

(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.

The parameters of the attorney-client privilege in federal court were 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 to which the privilege might ordinarily apply. 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 though there is a decided trend. 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. Although the control group test is largely disfavored and in little use, determining which test applies depends on knowing a particular jurisdiction’s privilege laws, which are typically found

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24. Id. at 358–59.
in a state’s rules of evidence as the results of which test applies are dramatically different. 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 and the choice of law of 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. As noted, cases in federal court based upon diversity jurisdiction apply the law of privilege of the state whose substantive law applies.

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

Courts have taken two approaches in resolving attorney-client privilege issues as they apply to 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 (or 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.*

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27. 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.
28. The “control group test” is discussed in *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1978).
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.\(^{31}\)

Despite the control test’s limits, a minority of states continue to follow the control group test for corporations.\(^{32}\) 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*,\(^{33}\) 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.”\(^{34}\) 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, but this is a partial


\(^{32}\) See, e.g.,

- Alaska
  - Alaska R. Evid. 503(a)(2)
- Hawaii
  - Haw. R. Evid. 503(a)(2)
- Illinois
- 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)


\(^{33}\) 851 S.W.2d 193 (Tex. 1993).

\(^{34}\) Id. at 197 (quoting then-prevailing Tex. R. Civ. Evid. 503(a)(2)).
protection. For this and other reasons, the narrow control group test was criticized and the state began to reevaluate the rule.35

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, a probably redundancy. 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.36

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,37 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.38 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.”39

While generally accepted, the principles expressed by the court in Harper40 were viewed by some courts as being too broad. Thus, the court in Diversified Industries, Inc. v. Meredith41 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;

36. Tex. R. Evid. 503(a)(2).
37. 423 F.2d 487 (7th Cir. 1970) (per curiam), aff'd, 400 U.S. 348 (1971).
38. Id. at 491–92.
39. Id.
40. Id. at 489.
41. 572 F.2d 596 (8th Cir. 1977).
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.42

These principles ultimately gained acceptance by the U.S. Supreme Court. For instance, in *Upjohn Co. v. United States*,43 the U.S. Supreme Court rejected the “control group” test and held that the attorney-client privilege protected communications 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.44

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 in keeping with the position expressed by Wigmore and the broad attitude of the courts.

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

42. Id. at 609.
44. Id. at 391. See also So. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994).
in-house counsel may play a dual role of legal advisor and business advisor. Even investigations by inside counsel of facts which may lead to litigation may fall outside of a court's determination of privilege because of the multiple positions held by some inside counsel. In such instances, the courts 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. 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

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45. See, e.g.,

- Alabama: Ala. R. Evid. 502(a)(2)
- California: P. L. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 36 Cal. Rptr. 468 (1964)
- Colorado: Denver Post Corp. v. Univ. of Colo., 739 P.2d 874 (Colo. App. 1987)
- Florida: So. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994)
- Kentucky: Ky. R. Evid. 503(a)(2)
- Louisiana: La. Code Evid. art. 506(A)(2)
- Mississippi: Miss. R. Evid. 502(a)(2)
- North Dakota: N.D. R. Evid. 502(a)(2)
- Texas: Tex. R. Evid. 503(a)(2)
- Utah: Utah R. Evid. 504(a)(4)
consistent with the limits of federal authority in diversity cases and apply the rule of privilege of the state whose substantive law applies.46

Therefore, in cases involving state laws, the applicable privilege rule will depend on the laws of privilege 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.47 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 definition and scope of the attorney-client privilege, in-house counsel should also clearly distinguish their role of 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, even to an attorney, whether in house or not.

It is frequently presumed that communications with outside counsel are for the purpose of seeking legal advice.48 This presumption is not necessarily given to in-house counsel because in-house counsel are frequently 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

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46. 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.”).

47. 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.

48. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977).
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, expecting in-house lawyers to provide both business and legal services to their clients.49

Some corporate counsel advise the corporation on compliance with myriad regulations and business practices.50 Because of their legal training, these attorneys may conduct internal investigations, chair various 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 privileged.51 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 could not 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

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51. 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).
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.”52 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.53

A few precautions could assist in satisfying a court’s standards and make the judge’s determination that the communications are privileged easier. 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.54 The communication should also include the other elements of the privilege. The document should state that it is requested by the employee’s superior if it is, 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.55 Naturally, preparation of an investigative report for outside counsel may assist in asserting the privilege.

52. In re Sealed Case, 737 F.2d at 99 (emphasis added).
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. This court, at least, recognize that a corporation should be allowed to continue to communicate freely with its 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 communica-
tions 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 so 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.\(^{62}\) To avoid being noticed for deposition under these circumstances is simple, 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. \textit{Johnston Development Group v. Carpenters Local Union No. 1578}\(^{63}\) 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 \textit{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.

\(^{62}\) See e.g., Tex. R. Evid. 503(d)(4).
• 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.64

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. Fourth, it may be a legitimate attempt to obtain discovery of matters perceived as not privileged.

Courts have attempted to prevent 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.”65 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.,66 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.67 As a practical matter, the law on this issue generally seems to follow 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 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;

67. Id. at 1327.
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 *Perry v. Jeep Eagle Corp.*, 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 route to prevent deposition of counsel is a discovery conference. 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, and permits the counsel opposing the deposition to offer to the court alternatives to that deposition.

In federal court, as in many states, parties must meet and confer before a scheduling conference to “discuss any issues about preserving discoverable information” and “any issues about claims of privilege or of protection as trial-preparation materials.” 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.

Some courts considering whether to compel counsel’s deposition have required the attorneys resisting that deposition to prove that the protection of attorney-client privilege or work-product immunity is justified. For example, in *In re Shopping Carts Antitrust Litigation*, 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,

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68. 126 F.R.D. 542 (S.D. Ind. 1989).
69. Rule 26(f) of the Federal Rules of Civil Procedure requires a conference to discuss such matters.
72. Id. Recent amendments to the Federal Rules of Civil Procedure suggest this is the appropriate time to discuss clawback agreements under Rule 26(f)(3)(D), as well as the procedure for handling inadvertently produced materials subject to privilege under Rule 26(b)(5)(B). See also, Tex. R. Civ. P. 193.3(d).
73. 95 F.R.D. 299 (S.D.N.Y. 1982).
at the client’s instance, permanently protected. The court found that the parties opposing the deposition of counsel 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 that are totally in common. In some situations, these parties might need to communicate with one another through the lawyers, for example, to discuss joint strategies. As long as the communications relate to a matter of common legal interest, courts have concluded that 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 or common 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 previously, 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.

In some circumstances, parties with adverse interests may, however, claim the joint defense privilege for communications relating to their common legal interests.

Second, the parties must be engaged in or reasonably anticipate 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

74. Id. at 305–06 (emphasis added).
76. 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).
77. For an extensive discussion of the competing views, see also United States v. Weissman, No. S1 94 CR. 760 CSH, 1996 WL 737042, at *7–9 (S.D.N.Y. 1996).
78. 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)).
79. See Snider & Ellin, supra note 75.
80. Id.
81. 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 . . . (iii) by the client or a representative of the
II. The Attorney-Client Privilege: First Principles

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.82

Third, the parties do not always need to be involved in the same litigation.83 Fourth, even though parties might share a common legal interest, their communications may not be protected unless they are made in furtherance of that interest.84 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, although not always necessary, 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.85 To assert the attorney-client privilege after “pooling information,” parties should establish that they are

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83. 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”).

84. See Snider & Ellins, supra note 75.

• 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 legal interest to be promoted by a joint consultation, and naturally not 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. The principle generally applies only to communications with a party’s lawyer or a lawyer’s representative.

2. 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. 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. Federal circuit courts of appeal have declined to recognize a privilege for self-evaluation but have noted district court and state authorities have applied analogues in specialized contexts.

This privilege was first expressly recognized in *Bredice v. Doctors Hospital, Inc.* and was 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

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86. 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 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.”


88. Alaska Pen. Fund v. Pharmacia Corp., 554 F.3d 342, 351 n.12 (3d Cir. 2009) (“The self-critical analysis privilege has never been recognized by this Court and we see no reason to recognize it now.”); In re Quest Commc’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 documents.”); 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).

The court denied the discovery requests on the grounds that “there 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.”\textsuperscript{90} The court also stated that “the 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.”\textsuperscript{91} This privilege exclusively 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.\textsuperscript{92}

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.\textsuperscript{93} 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 \textit{Lloyd v. Cessna Aircraft Co.},\textsuperscript{94} 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.”\textsuperscript{95} 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 about the matter. In reaching its holding, however, the court noted that “were 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;

\begin{itemize}
  \item \textsuperscript{90} \textit{Bredice}, 50 F.R.D. at 251.
  \item \textsuperscript{91} Id. at 250.
  \item \textsuperscript{94} 74 F.R.D. 518, 518–22 (E.D. Tenn. 1977).
  \item \textsuperscript{95} Id. at 520.
\end{itemize}
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.96

In Bradley v. Melroe Co.,97 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.”98 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.99

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.100 In University of Pennsylvania v. EEOC101, 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.”102

Further, no federal circuit court of appeals has recognized the privilege; numerous courts, in fact, have refused to adopt it. An Eastern District of Pennsylvania court declined to apply the privilege in a case involving the production of an accident investigation report.103 While the court acknowledged the policy considerations behind the privilege, it was not persuaded that they warranted the application of the privilege and echoed the oft heard explanation, “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.”104

96. Id. at 522.
98. Id. at 2–3.
99. Id.
100. See, e.g., Univ. of Penn. v. EEOC, 493 U.S. 182, 189 (1990) (declining to recognize 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).
102. Univ. of Penn., 493 U.S. at 189.
104. Id. (citing Herbert v. Lando, 441 U.S. 153, 175 (1979)).
E. Losing the Attorney-Client Privilege

Although the rules of 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 *West v. Solito*, 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.” 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—an act that has been facilitated by recent changes in many codified rules of evidence or procedure, whose intent would suggest a liberalization of the rules disallowing inadvertent waiver of privileged material during testimony and a procedure to prevent waiver. The best approach is and always has been to object and instruct the witness not to answer.

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 and allowing the testimony despite objection will in most cases 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