The New Attorney-Client Privilege . . . How Will These Issues Play Out in Litigation?

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I. THE ATTORNEY-CLIENT PRIVILEGE

Properly applied, the attorney-client privilege should protect confidential communications, oral or written, between attorneys and their clients. The attorney-client privilege exists to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy . . . depends on the lawyer’s being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Each of the following four elements must be met to establish the privilege:

- The person or entity asserting the privilege is a “client;”
- The communication was made to a lawyer acting as a lawyer;
- The communication was made by a client to the lawyer in confidence (i.e., outside the presence of strangers) for the purpose of securing an opinion or legal services (and not to commit a crime or a tort); and
- The client has invoked and not waived the privilege.

A. Who is the client?

**The Upjohn Test.** Two tests exist to determine whether communications between a lawyer and employees of the corporate client are protected by the attorney-client privilege: the “control group” and the “subject matter” tests. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Under the control group test, the privilege extends only to persons within the organization who are in a position to control decisions made after consultation with counsel. In contrast, the subject matter test, announced by the U.S. Supreme Court in *Upjohn*, focuses on why the attorney was consulted rather than the status of the employee within the corporate structure. Most states have adopted some variation of the *Upjohn* test for the purpose of determining whether the communication is subject to the attorney-client privilege.

In *Upjohn*, the U.S. Supreme Court rejected the control group test and relied on a fact-specific balancing approach. Under the *Upjohn* standard, the attorney-client privilege applies to communications between a company employee and the attorney if: (1) the communication involves information necessary for the attorney to provide legal advice to the company; (2) the communication and information relate to matters within the employee’s scope of employment; (3) the employee making the communication was
aware that the information was being shared with the attorney in order to provide the organization with legal advice; and (4) the communication was kept confidential and not disseminated beyond employees who, considering the corporate structure, need to know its contents. That is, the company intended the communication to remain confidential.

**The Organization is the Client.** Unless expressly agreed otherwise under circumstances that meet ethical requirements, a lawyer representing an organization represents the entity, not individual managers or constituents. The entity, not the individual employees sharing information or participating in the communication, is the client. This rule applies to both in-house and outside counsel. When interviewing supervisory or management employees, counsel should specifically advise individual managers and employees that the communication is potentially subject to the attorney-client privilege under *Upjohn* and that counsel is acting on behalf of the company. In most cases, it is advisable to have the manager or employee read and sign a written “*Upjohn Statement*” at the outset of the interview. Failure to do so may create a false sense of legal representation, or jeopardize the ability to invoke the attorney-client privilege.

Properly advising company witnesses about the role of counsel is especially important if in-house (or outside) counsel are involved conducting an internal investigation. For example, in *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005), AOL Time Warner initiated a high-level investigation of its business transactions with another company. Over the ensuing months, AOL’s General Counsel and outside counsel interviewed three management-level employees. Initial interviews were conducted by the General Counsel, but outside counsel later joined in the interviews. During the third interview, the General Counsel told one manager: “We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege belongs to the company. During an interview of another manager, outside counsel told him: “We can represent [you] until such time as there appears to be conflict of interest, [but] ... the attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it.”

The former managers subsequently became the subject of a subsequent SEC inquiry and grand jury investigation. The grand jury sought all documents related to the internal review, including attorney notes of their interviews with the managers. Waiving any attorney-client privilege that may apply, the company agreed to provide the notes. In response, the three (now former) managers challenged the company’s agreement to provide the notes and sought to quash the grand jury subpoena, claiming that in-house and outside counsel individually represented each manager along with the company at the time of the interview, thus the manager’s consent to waive the privilege was also necessary. The Fourth Circuit concluded that the attorney-client privilege did not apply to protect the former managers’ communications with company counsel. The attorneys never indicated to the managers that they represented them individually, and the managers could not reasonably assume representation. The privilege did not belong to them and their consent was not necessary for any waiver.
B. Scope of the Attorney-Client Privilege.

The attorney-client privilege “does not envelope everything arising from the existence of an attorney-client relationship.” United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir. 1964). For example, the privilege does not automatically apply to attorney notes or communications from an attorney to a client, even if they are marked “confidential” or “privileged.” Only communications that seek or provide legal advice or are based on client confidences are protected. In In Re OM Group Securities Litigation, 226 F.R.D. 579 (N.D. Ohio 2005), the court held that numerous email messages between company employees and (1) outside counsel hired by the company’s internal audit committee or (2) forensic accountants hired by outside counsel, were protected by the attorney-client privilege because they contained confidential discussions made, in part, to allow outside counsel to advise the audit committee. The privilege applied even where a dual business purpose was intertwined with the legal purpose: “[t]his is true even though these communications may contain information pertaining to business advice because the legal and business concerns are inextricably intertwined.”

Copying or “cc” to Counsel on Communications. Merely copying or including a “cc” to counsel may not be enough to invoke the attorney-client privilege. The purpose of the communication must meet the elements necessary to establish the attorney-client privilege. See SmithKline Beecham Corp. v. Teva Pharmaceutical USA, Inc., 232 F.R.D. 467 (E.D. Pa. 2005) (“routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is ‘copied in’ on correspondence or memoranda.”); Zurich Amer. Ins. Co. v. Super. Ct., 155 Cal. App. 4th 1485 (Ca. Ct. App. 2007) (attorney-client privilege would not shield relevant facts from discovery simply because they were wrapped into a communication involving an attorney). But see In Re OM Group Securities Litigation, 226 F.R.D. 579, 588 (N.D. Ohio 2005) (interview notes and memoranda of interviews of company employees prepared by outside counsel hired by the company’s audit committee were protected by the attorney-client privilege because they were prepared confidentially by outside counsel in order to provide legal advice to the audit committee).

Retaining Consultants and Experts. Documents and information prepared by consultants or third-party experts during an internal investigation or audit may be covered by the attorney-client privilege if they were prepared at the request of counsel for purposes of rendering legal advice to the client and the documents are maintained confidentially.

One way to protect audit or investigation information is to have outside counsel directly hire and coordinate the work of the expert who prepares the analysis upon which counsel relies in providing legal advice to the company. See, e.g., Williams v. Sprint/United Management Co, 464 F. Supp. 2d 1100 (D. Kan. 2006) (adverse impact analysis prepared during a company reorganization and reduction-in-force was protected by the attorney-client privilege from disclosure in an age discrimination lawsuit where the statistical analysis data was gathered at the direction of counsel and the communications made for the purpose of obtaining legal advice); In re OM Group Securities Litigation, 226
F.R.D.  579 (N.D. Ohio 2005) (emails between company employees and forensic accountants hired by outside counsel, as well as interview notes and memos prepared by the forensic accountants, were protected by the attorney-client privilege because they were prepared at the request of and to assist outside counsel in providing legal advice to the company).

In contrast, information or reports prepared by consultants or experts in the ordinary course of business to assess compliance may not be protected by the attorney-client privilege. See Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992) (in class action involving allegations of company-wide sex discrimination, discussions between an attorney and company managers in a series of meetings were not protected by the attorney-client privilege where the attorney was hired as a consultant, his consultant agreement did not designate him as an attorney, and the purpose of the meetings were to train managers about the company’s affirmative action plans); Resnick v. American Dental Ass’n, 95 F.R.D. 372 (N.D. Ill. 1982) (personnel practices study performed by management consulting firm at the request of in-house counsel was not protected from discovery pursuant to the attorney-client privilege because it was for a business purpose); Volkswagen AG v. Dorling Kindersley Publishing, Inc., 2007 U.S. Dist. LEXIS 4225 (E.D. Mich. 2007) (communications between in-house lawyer for private investigation firm and a paralegal for the company were not covered by the attorney-client privilege because the communication was not for the purpose of seeking legal advice).

C. Confidentiality Must Be Strictly Maintained.

Confidentiality of the audit or investigation information must be strictly maintained in order to assert the attorney-client privilege. See In Re Qwest Communications International Inc., 450 F.3d 1179, 1185 (10th Cir. 2006) (“the courts will grant no greater protection to those who assert the privilege than their own precautions warrant”); Williams v. Sprint/United Management Co., 238 F.R.D. 633, 642 (D. Kan. 2006) (adverse impact analysis documents that were password-protected, clearly marked as being confidential, and only available only to certain HR and legal department personnel were protected by the attorney-client privilege).

The attorney-client privilege may be waived where the company or its attorney do not adequately preserve the confidentiality of the information or communications. See Hardy v. New York News Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987) (audit information voluntarily undertaken by EEO manager to determine compliance with minority hiring goals was not protected from disclosure by the attorney-client privilege where none of the documents were marked “confidential” or “privileged” or segregated, but instead were intermingled with many other personnel documents); Lexington Public Library v. Clark, 90 S.W.3d 53 (Ky. 2002) (company waived attorney-client privilege where investigation memo concerning a supervisor’s job performance was freely disclosed to the supervisor despite his being a target of the investigation and a potential adverse litigant); Fullerton v. Prudential Ins. Co., 194 F.R.D. 100 (S.D.N.Y. 2000) (attorney-client privilege was waived when employer produced otherwise privileged documents concerning its investigation of employee’s retaliation claims); Simmons v. Children’s Hosp. of Penn., 89 Fair Empl. Prac. Cas. (BNA) 417 (E.D. Pa. 2002) (attorney-client...
privilege waived where attorney intentionally sent summary of the company’s investigation into a discrimination claim without first determining whether the attorney actually represented the employee).

*Mohawk Industries Inc. v. Carpenter*, 130 S. Ct. 599 (2009) highlights the importance of preserving the attorney-client privilege at the outset. In *Mohawk*, the Supreme Court, while recognizing the application of the attorney-client privilege to internal investigations conducted at the direction of counsel, held that immediate appeal of court orders compelling disclosure of potentially privileged communications is unavailable.

The defendant in *Mohawk* attempted to assert the attorney-client privilege to shield information relating to the plaintiff’s meeting with defendant’s attorney during an investigation conducted in response to a separate lawsuit. The federal district court rejected the defendant’s claim of attorney-client privilege and, in response, the defendant sought immediate appeal under the “collateral order” doctrine. Under this doctrine, decisions that are conclusive, resolve important questions of law separate from the merits, and are effectively unreviewable on appeal from final judgment in the underlying case can be appealed immediately. The *Mohawk* opinion found that waiver of attorney-client privilege did not meet the third prong of the test because orders compelling production can be effectively reviewed when the case concluded. In support of its conclusion, the court stated that, “[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.” As a result, if a court compels the production of arguably privileged information, appellate review is unavailable until final judgment in the case.

Despite the decision in *Mohawk*, the Seventh Circuit recently issued an opinion holding that a nonparty can immediately appeal an order mandating disclosure of privileged materials because, unlike a party who has recourse once the litigation concludes, “a nonparty subject to a discovery order has no remedy at the end of the litigation.” *Sandra T.E. v. South Berwyn School District* 100, 2010 WL 1191170 *4 (7th Cir. Mar. 30, 2010).

In *Sandra T.E.*, the defendant school board hired a law firm, Sidley Austin, to conduct an internal investigation and to provide legal advice after a teacher had been arrested on charges of child molestation. The District Court ordered Sidley Austin, a nonparty, to produce the documents related to its investigation and Sidley Austin immediately appealed. The Seventh Circuit issued an expedited order in February 2009, reversing the district court and holding that the attorney-client privilege protected the documents generated during the law firm’s investigation. The opinion in *Sandra T.E.* was not issued until more than a year later, on March 30, 2010. In its March 2010 opinion, the Seventh Circuit noted that it is unclear whether its approach of allowing nonparties to immediately appeal attorney-client privilege issues survives the holding and rationale of *Mohawk*, but continued to explain that, because the court entered its original order before the *Mohawk* decision and when its circuit law permitted an immediate appeal, *Mohawk* was inapplicable to its decision. *Id.* at *4.
The Seventh Circuit, in reaching its decision that the attorney-client privilege protected the law firm’s investigation, relied heavily on the engagement letter, referring to it as the “most important piece of evidence.” The engagement letter explicitly provided that the firm was hired to “investigate the response of the school administration to allegations of sexual abuse of students” and “provide legal services in connection with the specific representation.” The court held that, because “the engagement letter spells out that the Board retained Sidley to provide legal services in connection with developing the School Board’s response to [the teacher’s] sexual abuse of his students,” the resulting investigation was protected by the attorney-client privilege. Accordingly, Sandra T.E. reaffirms the importance of carefully drafting engagement letters in order to preserve upholding the attorney-client privilege.

The Seventh Circuit’s decision in Sandra T.E., though relying on pre-Mohawk law, raises the issue of whether non-parties to litigation will be able to immediately appeal decisions adverse to a claim of attorney-client privilege and thus be an exception to the rule promulgated in Mohawk that parties cannot immediately appeal a decision adverse to maintaining the attorney-client privilege.

Regardless, because of Mohawk and the uncertainty created by it, companies should be even more careful when planning investigations to ensure all appropriate steps are taken to preserve the attorney-client privilege and, thereby, to minimize the risk that a court will compel disclosure.

D. Underlying Facts versus Opinions and Analysis.

While the privilege may protect the confidential communications, it is not a blanket to shield underlying facts or data compilations from disclosure. However, if the underlying facts or data are discoverable and not privileged, absent a waiver, any analysis of the data by counsel should be protected from discovery. See Upjohn Co. v. United States, 449 U.S. 383 (the attorney-client privilege “does not protect disclosure of the underlying facts by those who communicated with the attorney” but “[a] fact is one thing and a communication concerning that fact is an entirely different thing”); Allen v. Chicago Transit Authority, 198 F.R.D. 495 (N.D. Ill. 2001) (document contained in an internal discrimination complaint file that was authored by a company vice president and sent to a company EEO coordinator was not protected by the attorney-client privilege because it was not authored or reviewed by an attorney, and there was no evidence concerning when the file was transferred to the legal department); Clark v. Buffalo Wire Works Co., 190 F.R.D. 93 (W.D.N.Y. 1999) (although an employee’s notes were given to the company attorney during an investigation into an age discrimination claim were protected by the attorney-client privilege, any facts underlying those notes were discoverable).
E. Waiver of the Privilege.

A significant challenge in conducting internal audits and investigations is protecting against a waiver of the attorney-client privilege. Waivers of the attorney-client or work-product privileges may be intentional or accidental, express or implied. Given the volume of electronic information available in the workplace and “the informality that attends use of email and some other types of electronically stored information,” waiver of the attorney-client privilege often occurs accidentally. For example, a highly confidential email from outside or in-house counsel may be forwarded in an email chain to third-parties or non-managerial employees in a way that destroys the privilege. While inadvertent disclosure may result in a waiver of the privilege, most courts adopt a balancing test, and accidental or unintended waivers of the privilege will not allow discovery of attorney-client communications as long as the company shows that it took reasonable precautions to prevent inadvertent disclosures and acted promptly to cure any inadvertent dissemination. See IMC Chems., Inc. v. Niro, Inc., 2000 U.S. Dist. LEXIS 22850 (D. Kan. 2000) (attorney-client privilege waived where the party to whom the privilege belonged did not move quickly to recoverprivileged documents after a consultant took them when his consulting arrangement ended); Williams v. Sprint/United Management Co., 2006 U.S. Dist. LEXIS 47853 (D. Kan. 2006) (disclosure of 65 adverse impact spreadsheets to opposing counsel through electronic or “e-discovery” in litigation was inadvertent and did not waive the attorney-client privilege where thousands of documents were produced, company attorneys took reasonable steps to protect confidentiality and acted quickly to retrieve documents accidentally disclosed); In re Cardinal Health, Inc., 2007 U.S. Dist. LEXIS 36000 (S.D.N.Y. 2007) (company did not waive attorney-client and work-product privileges in later civil litigation when it disclosed confidential documents for an audit pursuant to a confidentiality agreement).

Use of Otherwise Privileged Communications. Implied waiver of the attorney-client privilege also occurs where a company attempts to use privileged communications as both a sword and a shield. If the company relies on advice of counsel as a stated defense to the challenged conduct, invoking the attorney-client privilege to prevent full disclosure of that advice will be problematic. See, e.g., Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992).

For example, if otherwise privileged investigation documents or audit information, such as an investigation report prepared by counsel, is affirmatively used to establish the company’s “good faith” defense to liability or damages or to defend against a government-led investigation, the attorney-client privilege may be waived not only as to the report, but also all underlying documents, communications and information that formed the basis of the report. See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir. 1991) (voluntary disclosure of investigation materials to government agencies investigating the company constituted waiver of the attorney-client privilege even though the parties expected that the government agencies would maintain the confidentiality of the information). But see Diversified

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1 Comment to proposed amendments to Fed. R. Civ. P. 26(f) at p. 24, regarding discovery of electronically stored information.
Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (otherwise privileged internal investigation materials that were disclosed in response to a government subpoena resulted in only a “limited waiver” and were not discoverable in subsequent civil action). See also Fullerton v. Prudential Ins. Co., 194 F.R.D. 100 (S.D.N.Y. 2000) (by producing otherwise privileged documents regarding its investigation into the employee’s retaliation claims, the company waived the attorney-client privilege as to all other communications on the same subject); Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999) (company waived attorney-client privilege in FLSA action by selectively disclosing portions of otherwise privileged information to establish its good faith defense); EEOC v. Rekrem, Inc., 2002 U.S. Dist. LEXIS 252 (S.D.N.Y. 2002) (attorney-client privilege waived where employer asserted advice of its counsel as its defense to an EEOC charge); Miteva v. Third Point Mgmt. Co., 218 F.R.D. 397 (S.D.N.Y. 2003) (employer’s testimony that termination letter that did not specify any reason for employee’s dismissal and was so worded on advice of counsel did not create a waiver of the attorney-client privilege).

Assertion of a good faith defense does not automatically waive the privilege. Simple assertion of a good faith affirmative defense, however, does not automatically put advice of counsel into play. Only where the company offers evidence of attorney advice to disprove a claim may opposing parties be given access to protected communications. The facts of a shareholder lawsuit in In re OM Group Securities Litigation, 226 F.R.D. 579 (N.D. Ohio 2005), illustrate this point: In response to potential inventory problems, the company formed an internal audit committee, hired outside counsel who, in turn, retained forensic accountants to assist in the audit. During subsequent litigation by shareholders, the company produced a hard copy of a PowerPoint presentation prepared by outside counsel (and the forensic accountants) and earlier presented to the company’s Board of Directors, along with two supporting spreadsheets prepared by the accounting consultants. The company refused, however, to produce the underlying investigation documents referred to or relied upon in the Board presentation, claiming they were covered by the attorney-client privilege. Finding that the 30-page written presentation and spreadsheets “contained significant disclosures,” including detailed conclusions, preliminary findings and substantial inventory analysis by the accounting experts, the court concluded that the attorney-client privilege was waived as to any documents supporting the statements in the Board presentation. According to the court, the disclosure of the presentation was “substantial, intentional and deliberate” making it unfair to shield documents underlying the presentation from the shareholders. Id. at 593.

Investigation Materials Segregated from Privileged Communications. Where investigation materials are segregated from privileged communications or documents containing the attorney’s advice and the plaintiff is given full access to the underlying investigatory materials, the attorney-client privilege is not waived. See, e.g., Waugh v. Pathmark Stores, Inc., 191 F.R.D. 427 (D.N.J. 2000) (attorney-client privilege not waived where in-house counsel attended meeting with the company’s decision-makers during which a manager reported her findings from an internal investigation into allegations of discrimination because counsel’s participation in the meeting and discussion of remediation efforts was as an attorney — he did not conduct the investigation or
make the decision regarding remedies); \textit{Welland v. Trainer}, 2001 U.S. Dist. LEXIS 15556 (S.D.N.Y. 2001) (in an age discrimination lawsuit, the court stated, “documents that relate to communications between the investigator and in-house and outside counsel are protected because defendant’s investigator was obtaining confidential, legal advice regarding the investigation” thus allowing the privilege to apply to such communications).

\section*{II. THE ATTORNEY WORK-PRODUCT DOCTRINE}

Documents, memorandum or tangible items prepared by company counsel or others at the direction of company counsel in anticipation of litigation or trial are usually protected from disclosure to the opposing party unless withholding the information will result in a significant hardship to the opposing party that cannot be alleviated through reasonable measures. \textit{See, e.g., Southern Bell Tel. & Tel. v. Deason}, 632 So.2d at 1385 (Fla. 1994) (internal audits containing statistical analysis, although prepared in anticipation of litigation, were “fact work product” subject to disclosure to the Public Service Commission because “it would be an unduly arduous and unrealistic task” to expect the other party to analyze “such an enormous amount of information.”). \textit{Cf. Maloney v. Sisters of Charity Hosp.}, 165 F.R.D. 26 (W.D.N.Y. 1995) (computer printouts containing statistical analysis concerning proposed workforce reduction were prepared by HR manager at the direction of counsel and in anticipation of litigation and thus were protected from disclosure in age discrimination lawsuit; plaintiff failed to show a substantial need for the fact work product because he made no effort to depose the manager before seeking the opposing party’s work product).

The attorney work product rule prevents “attorneys from benefiting from the fruit of the adversary’s labor.” \textit{Harding v. Dana Transport, Inc}, 914 F. Supp. 1084, 1097 (D.N.J. 1996). Even if a significant hardship exists and some work product information must be disclosed, an attorney’s mental impressions, conclusions and opinions remain absolutely protected from dissemination.

\subsection*{A. Materials Prepared in the Ordinary Course of Business.}

The work-product privilege is not intended to protect documents or materials prepared in the ordinary course of business. Whether audit or investigation information was prepared or obtained in anticipation of litigation and therefore within the scope of the work-product privilege or for business reasons unrelated or only tangentially related to the litigation is a fact-specific inquiry focused on the primary purpose behind the creation of the document. Employers that regularly engage in audits or investigations to assess compliance may have a harder time showing that any particular audit or investigation was completed in anticipation of litigation rather than in the ordinary course of business.

The timing of the communication or preparation of the information alone is not controlling. \textit{See, e.g., Resnick v. Am. Dental Ass’n}, 95 F.R.D. at 375 (study of personnel practices performed by outside, third-party consulting group retained by the company after
it was sued in a class action for alleged discrimination, and minutes, memorandum and documents generated by an internal ad-hoc committee or employee relations group also formed after the lawsuit was filed were not protected by the work-product privilege because they were initiated for overall business reasons and involved “personnel matters of all sorts” rather than being litigation-oriented); Volkswagen AG v. Dorling KindersleyPubl’g, Inc., 2007 U.S. Dist. LEXIS 4225 (E.D. Mich. 2007) (work product privilege did not protect trademark infringement investigation materials prepared early on in the investigation because the plaintiff did not show that “the possibility of litigation had changed from a theoretical possibility to a real possibility”); Michigan First Credit Union v. Cumis Ins. Soc’y, Inc., 2006 U.S. Dist. LEXIS 45202 (E.D. Mich. 2006) (where communication with counsel related to business not legal matters and documents were created for ordinary business purposes, the attorney-client and work product privileges did not apply). But see Southern Bell, supra, (statistical analysis performed at the request of the company’s legal department in direct response to an investigation by a public service commission was protected work product).

B. Materials Must be Prepared in Anticipation of Litigation.

For documents created by counsel or at the counsel’s direction during an internal investigation or audit to be protected work product, they must have been created in anticipation of litigation. Generally, the threat of litigation must be reasonably likely. For example, notice of a lawsuit, notice of an EEOC charge, notice of an investigation by the Department of Labor, or an OFCCP audit should suffice as an indication of actual or anticipated litigation. Because of this, any memorandum or letter initiating an internal audit or investigation should specifically state the reasons for commencing the audit or investigation and carefully describe the potential legal problems or concerns to be addressed during the investigation. Also, because the work-product doctrine cannot be used to shield facts otherwise unavailable to opponents, documents prepared during an internal audit or investigation should contain more than a bare recitation of facts if they are intended to be privileged and withheld from opposing counsel. Rather, they should be peppered with the attorney’s own words, opinions and impressions. See, e.g., Clark v. Buffalo Wire Works Co., 190 F.R.D. 93 (W.D.N.Y 1999) (although facts underlying notes taken by a non-party witness in an age discrimination lawsuit were discoverable, the notes were protected by the attorney-client privilege because they contained attorney’s mental impressions).

III. TIPS TO PRESERVE THE PRIVILEGES

While each audit or investigation should be individually tailored with advice of counsel, to preserve the attorney-client privilege the following steps may be helpful:

- Consult with counsel at the outset to identify the purpose of the audit or investigation and how the results will be used.

- Make informed decisions after consultation with counsel whether the
attorney-client privilege will apply to the investigation.

- Unambiguously invoke the privilege at the beginning of the audit or investigation if that is the agreed upon strategy. Usually, this may be accomplished by a letter from a senior company official or member of management to outside counsel seeking legal advice.

- Document the specific legal basis for the audit or investigation. Typically, this is done in the letter or memorandum invoking the privilege.

- Have outside counsel retain any consultants or experts, whose analysis or reports should be submitted directly to counsel.

- If data needs to be gathered within the company, counsel should outline in writing what should be gathered and specifically state that it is for the purpose of rendering legal advice. Counsel should instruct those gathering the information about confidentiality. The information should be collected by someone in the client group (so as to preserve the privilege) and forwarded directly to counsel.

- Confidential information and communications should be directed to counsel and higher level managers that are clearly part of the client group. Avoid sharing confidential communications with lower level employees to whom the attorney-client privilege may not apply.

- Ensure all audit reports or memorandum containing confidential communications and all copies (whether hard copy or electronic) are clearly and boldly marked, “Prepared for Counsel” or “This Document is Protected by the Attorney-Client Privilege.”

- Electronic reports or communications subject to the privilege should be stored only in password-protected files and other secure areas. The information should not be generally available on the server.

- Both in-house and outside counsel should be copied on all emails seeking legal advice or transmitting confidential communications, such as preliminary conclusions or assessments.

- Any management-level witnesses interviewed during the audit or investigation should be provided with an “Upjohn Statement” regarding the attorney-client privilege.

- Do not forward emails from either outside counsel or in-house counsel to anyone without first checking with the lawyers. Similarly, any emails on which company attorneys have been copied should not be forwarded to third-parties, including to non-secure home computers.

- Do not potentially waive the privilege by discussing the fact that an audit or
investigation is taking place, its process, or any conclusions with anyone unless counsel is present or the communication is at the express direction of counsel.

- Keep notes or communications containing attorney’s mental impressions, opinions and the like separate from investigatory materials that will be disclosed in furtherance of a claim or defense. On the other hand, if the document is not intended to be used as part of a claim or defense, intersperse attorney opinions, mental impressions and theories throughout the document in order to preserve the privilege.

IV. PITFALLS OF REPRESENTING INDIVIDUAL MANAGERS AND SUPERVISORS IN EMPLOYMENT LITIGATION

Many types of employment claims are increasingly implicating individual corporate officers, managers and supervisors as party-defendants. Although Title VII claims usually cannot add individual defendants, some federal claims such as the Family and Medical Leave Act and the Fair Labor Standards Act clearly allow individuals to be sued in addition to the corporate entity. Moreover, the Missouri Human Rights Act allows individuals to be sued for discrimination and retaliation in their individual capacities. See Hill v. Ford Motor Co., 277 S.W.3d 659 (Mo. 2009).

Considering the following questions and issues should prove helpful when faced with a situation of deciding whether and how to represent both the company and one or more of its officers, managers and/or supervisors in an employment claim:

- If the interests of employer and individual employee are adverse to each other (i.e., one or more defendants wishes to shift blame to another defendant), then the defendants named individually may have to retain their own attorneys.

- If either party wishes to deny the alleged conduct occurred and the other does not, an obvious conflict is usually created.

- Remember that individual defendants may face liability even if the Company is found not to be liable. For example, the corporate entity might be successful with its affirmative defense in a sexual harassment case because the employee victim did not timely complain of the harassment, while the alleged harassment perpetrator is still found liable for his/her actions.
• A company’s assertion that the individual defendant was “outside the scope of employment,” that the company was unaware of the alleged conduct and/or that the company took prompt remedial action may result in a representational conflict.

• Some companies decide to allow the individuals to select their own counsel and then reimburse them for those costs.

• An initial meeting with all “clients” needs to occur to ascertain the underlying facts and decide whether a conflict of interest is presented or likely to occur.

• A joint representation letter must be prepared explaining the rules for the joint representation relationship.

• Even after an initial decision that joint representation is appropriate, constantly monitor the situation to determine whether the joint clients’ interests have subsequently diverged at some point during the case.

• Remember that common interests often diverge when settlement terms are discussed.

• Ethical rules regarding attorneys’ obligations in a joint representation situation are usually strict and require following certain procedures.

• Meeting with a supervisor or manager in the presence of the corporate client’s representative may not allow for candid responses to questions by the individual defendant.

• An attorney must gain a full understanding of all facts and circumstances before undertaking the joint representation of the company and the individual(s).

• A separate engagement must be prepared for the individual client(s).

• The individual(s) must be asked if they have any discrimination or other claims of their own against the company.
• The corporate client must also be asked whether there are potential claims against the individual defendant.

• The joint representation letters must include a statement regarding these potential other claims in order to comply with due diligence, and often should be highlighted and somehow emphasized.

• The supervisor or manager defendants should deal with the attorney directly and return the signed copy of the engagement letter to the attorney, rather than dealing with another corporate representative.

• In-house lawyers should similarly obtain these letters by dealing directly with the individual defendants.

• Make sure that the individual defendants know that they must immediately contact the attorney if any individual claim against the company arises in the future.

• Maintaining the attorney-client privilege among jointly represented defendants can be difficult. In *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981), the U.S. Supreme Court explained the following factors would determine whether the attorney-client privilege can be preserved in a joint representation situation: 1) the communications were made at the direction of corporate superiors in order to secure legal advice from counsel; 2) the information was not available from upper echelon management; 3) the communications concerned matters within the scope of the employee’s duties; 4) the employee was aware that he or she was being questioned so that the corporation could obtain legal advice; and 5) the company kept the communications confidential.

• Even if the individual defendants are separately represented, consider whether a joint defense privilege can still be asserted and maintained to allow communications among the defendants to remain privileged.

• A “joint defense” letter should clearly indicate that the attorney-client and work product privileges are preserved for the communications among the defendants.
• The letter should explain that, if one of the defendants withdraws from the “joint defense” arrangement, the confidentiality must be maintained, all confidential documents must be returned, and the withdrawing defendant is prohibited from using the shared information against the other defendants.

• The separate defendants should adopt measures to protect their pooled information and protect it from disclosure to others without consent of all the defendants operating under the “joint defense” agreement.

Ex Parte Contact with Former Managers. The ABA Model Rules (and the majority of state ethical rules) currently allow ex parte contact with former supervisors, managers and company officials. Model Rule 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

While this statement does not address the issue of former representatives of an organization, Comment 7 to Rule 4.2 clearly approves of ex parte contact with former “constituents” by providing:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

(Emphasis added.) Nonetheless, Model Rule 4.3 places obligations on a lawyer when communicating with an unrepresented person:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall
make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

These obligations include making sure that the lawyer does not obtain any privileged or confidential information regarding discussions the former constituent may have had with the corporation’s attorney while the constituent was still employed by the corporation. While the rules permit the contacting of a former employee of an opposing party, “[t]he plaintiff’s attorneys must, however, inform the former employee not to divulge any communications that the former employee may have had with corporate or other counsel, and the attorney must explain that she represents an interest adverse to the corporation.” Davis v. Creditors Interchange Receivable Mgmt., LLC, 585 F. Supp. 2d 968 (N.D. Ohio 2008).

Most importantly, because of the many variations, lawyers should make sure to check their local ethical and court rules before engaging in ex parte conduct or contact with former constituents of adverse corporations.