THE ATTORNEY-CLIENT PRIVILEGE IN THE ELECTRONIC AND DIGITAL AGE

Has the ubiquitous use of electronic and digital media changed the outcome in cases dealing with the attorney-client privilege? It would seem that at least in certain instances it has.

Should it do so? Probably not.

Long before asserting and seeking to pierce the attorney-client privilege in litigation became a cottage industry which took on a veritable life of its own, a mere thirty years ago, litigation over whether the privilege was or was not applicable to preserve a particular document from discovery in litigation was a rare occurrence. That fact seems unbelievable to attorneys whose litigation careers began in the 1990s.

Despite the growth of privilege law to Talmudic proportions, applicable to and applied to every conceivable permutation of facts, the delineation of elements necessary to create the privilege and after its creation to lose it has remained the same. And those elements remain surprisingly simple, however, intricate the factual situations to which they are then applied have become.

ELEMENTS OF PRIVILEGE LAW

For the privilege to be created four elements must obtain. They are:

1. A communication;
2. Made in confidence;
3. Between a lawyer and the lawyer's client;
4. For the purpose of seeking and/or obtaining legal advice.

What could be simpler than that? If each of these four elements is present, the attorney-client privilege will attach to the written or oral communication.

LOSS OF PRIVILEGE BY WAIVER

Yet even if the privilege attaches, it can be lost. The loss of the privilege is generally known as "waiver," and the law deems that waiver can occur intentionally or unintentionally by accident or through simple carelessness.
In the Stone Age days of the privilege, courts were thoroughly unsympathetic to any loss of the privilege due to waiver, however unintentional and however understandable it might have seemed to the uninitiated. The judicial response to the inadvertent loss of the privilege was almost always: "Tough Luck, Sonny!" Or "Finders Keepers; losers weepers." The rationale was that the privilege was an exception to the principle of free and open discovery of all the facts relevant in a lawsuit. And since the privilege from mandatory disclosure in litigation was exceptionally accorded to the communication, its contents should be guarded much as one would the crown jewels. Any failure to take the requisite proper precautions against inadvertent disclosure was to the privilege holders loss.

Thus rummaging even around in the trash of either the client or lawyer was a permissible activity and any attendant loss of privilege was considered fair game. *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernia, Inc.* 91 F.R.D. 254 (N.D. Ill. 1981).

And so the shredding machine was born. Joking aside, although the shredding machine was clearly not invented to solve this problem in the law of attorney-client privilege, perhaps it has some bearing on the nearly universal use of the shredding machine when law firms discard documents after their use is over.

Did a disaffected employee steal the privileged documents? Well, why in the world were the documents have been left unguarded was the judicial reaction. *In re Grand Jury Proceedings Involving Berkley & Co.*, 466 F. Supp. 863 (D. Minn. 1979), aff'd as qualified, 629 F.2d 548 (8th Cir. 1980).

And so locked legal cabinets for the safekeeping of privileged legal documents came into use. I am not seriously suggesting there is a cause and effect. It is merely to show that greater care in preserving the privilege became the expected norm.

A glimmer of pity by the courts appeared when privileged documents had to be produced on an expedited schedule and a few privileged documents inadvertently slipped through the sieve of privilege review. *Control Data Corp. v. International Bus. Mach. Corp.*, 16 Fed. R. Serv. 2d (CBC) 1233 (D. Minn. 1972). But a mere glimmer it was and the factors which had to be present to invoke it and to forgive inadvertent disclosure
were generally that a large number of documents had been produced on an expedited schedule, leaving little time for an adequate and through privilege review. With time, some courts even took pity on a measure of "carelessness," provided adequate attempts had been made to preclude such carelessness from occurring. Courts carefully weighed the factors and decided whether the carelessness which had led to the disclosure was "excusable" In re Grand Jury Investigation, 142 F.R.D. 276 (M.D.N.C. 1992), or "inexcusable" In re Horowitz, 482 F.2d 72 (2nd Cir.), cert. denied, 414 U.S. 867, reh'g denied, 414 U.S. 1052 (1973); Carda v. E.H. Oftedal & Sons, Inc. 2005 U.S. Dist. LEXIS 26368, at *5 (D.S.D. Apr. 28, 2005).

SHIFTING RESPONSIBILITY FOR WAIVER FROM PRODUCING TO RECEIVING PARTY

And then, maybe twenty or so years ago, came the fax machine. In the early 1990's it was a cutting edge technology, making its way into law firms as a necessary component in the technologically advanced practice of the law. Who could have predicted then that so advanced a technology would become all but obsolete within twenty years thanks to the rise of a newer technology – the Internet and email.

With fax machines came the cover page, warning all actual and potential recipients that the document being transmitted was attorney-client privilege protected and advising the recipient to act as a gentleman would upon its unauthorized receipt. Namely to returning it without opening the non-existent envelop since the document was addressed for another. Heaven forefend that any gentleman or lady for that matter (although one could never be too sure of the moral rectitude in matters of honor of the latter) would open another's mail and reseal it as if it had never been opened and its contents read. The use of such cover sheets always struck me as somewhat like announcing on a crowded elevator: "This conversation is private and not intended to be overheard so close your ears." Well the analogy leaves something to be desired, but you get the drift.

Over time, lawyers, embarrassed by the consequences of their own negligence or that of their agents – secretaries and paralegals – which has resulted in the inadvertent production of privileged documents, have enacted rules shifting the ethical obligation to protect the privilege unto lawyers who become recipients of privileged documents. ABA Comm. On Ethics and Professional Responsibility, Formal P. 94-382 (1994), which states in relevant part;
"When an attorney receives, unauthorized, an adverse party's materials, once the attorney becomes aware of the privileged or confidential nature of the materials, the attorney must refrain from viewing such materials. The attorney can, however, review the materials to the extent necessary to determine the manner in which to proceed. The attorney should either notify opposing counsel, and follow such counsel's instructions regarding the disposition of the material, or should completely refrain from using the materials until a court makes a determination as to their proper disposition."

Thus lawyers have managed, by professional rule, to shift the burden from the negligent party responsible for the disclosure of the privileged communication, to the recipient thereof.

_Mirabile dictu_, some courts have been willing to give effect to this shift of ethical obligation.

With the advent of email, the problem of inadvertent disclosure has increased exponentially. Nothing is easier than to press the send button without necessarily reviewing just who is on the "reply to all" list. It happens all the time in embarrassing situations large and small. And employees are wont to use company computers for their private business, regardless of company policy. Sometimes they even communicate on company computers with their legal counsel even if they have been advised that the company reviews emails sent on its computers.

How are the courts dealing with the attorney-client privilege in the context of digital media? By and large the fact that disclosures are occurring in the context of digital media is not changing the expected outcome.

_Lenz v. Universal Music Corp._, 2010 WL4789099 (N.D. CA. 2010)—plaintiff who sent emails, posted a blog and engaged in gmail chat sessions regarding litigation strategy waived the attorney-client privilege for related information.

_Holmes v. Petrovich Development Co., LLC, _Cal.App.4th _ 119 CR3d 878 (2011 WL 117230)—employees emails sent to personal attorney on company computer regarding possible action against her employer were not protected by the privilege.

There is one case, however, where the order entered by the Northern District Court of California, Judge Jeffrey White presiding, sets usual
privilege law on its head. Nor is any rationale for the extreme relief ordered given. In the case of Terraphase Engineering, Inc., et al. v. Arcadis, counsel for the plaintiffs inadvertently sent an email containing privileged materials to his client's email address at the company of the former employer, Arcadis. Arcadis had a disclosed policy of reviewing and flagging emails. The privileged materials were thereby found and read by in-house counsel for Arcadis and their retained litigation counsel. The Court, with no explanation whatsoever, disqualified the law firm, prohibited the General Counsel and Assistant General Counsel in having any further involvement in the litigation, dismissed the counterclaim which had been filed based on facts revealed in the privileged documents, gave Arcadis time to retain new counsel and accorded plaintiffs' their fees and costs in bringing the motion to disqualify. I know of no case where more extreme relief has been accorded in an attorney-client privilege case, without judicial explanation, where one would have thought that the doctrine of waiver would have been applicable, vitiating any privilege that would otherwise have been available.

Other than these few cases where the existing law of attorney-client privilege has been applied, and misapplied, in the digital context, how has both the privilege and the word-product protection been transformed in the electronic age?

The most obvious transformation is that the creation of documents in digital form as added exponentially to the number of documents, which can be created and then stored, virtually (figuratively and literally) forever. Potentially it has made the production of documents easier, at least for the producing party. Just throw the computer tapes at the other side and let them wade through the morass to find what they want. Then argue to the court that since the receiving party wants the tapes, let that party and not your client bear the burden and the costs of sifting through computer tapes. Given the costs of sifting electronically stored data, some courts are willing to shift the cost of organizing the data to be mined on the requesting party.

The courts are increasingly looking for guidance in resolving issues involving the production of electronic documents to The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, available generally at http://www.thesedonaconference.org and more specifically at http://www.thesedonaconference.org/content/miscFiles/TSG9_05.pdf
Yet the Sedona Conference, comprised of judges, lawyers and electronic technicians, knowledgeable about electronic issues in document production, makes no recommendations as to how production should be handled. The merely state the obvious. For example: Guideline 10: "A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents." What a relief. But for that clear guideline, one fears that practitioners would be tempted to follow unreasonable procedures.

COSTS OF PRIVILEGE REVIEW IN THE ELECTRONIC AGE

The cost estimates reported in some of the cases may be vastly exaggerated, but even so they are sobering.

 Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002). Emails were requested. In motions for protection from the cost burden of such production, one defendant claimed it would cost $395,944 to hire a consultant to select, catalogue, restore and process a limited sample thereof and $ 9 and ¾ million to do so for all the emails requested. The estimates of another defendant were more modest for its production: $43,110-$84,060 for production and $247,000 to conduct a privilege review. And a third thought it would take 2 years to retrieve and catalogue its requested documents at a cost of $395,000 and an additional $120,000 to conduct a privilege review.

 Zubulake v. UBS Warburg, LLC, 216 F.R.D. 280 (S.D.N.Y.), recons denied, 220 F.R.D. 212 (S.D.N.Y. 2003). The producing party brought a motion that the costs of producing electronic documents be shifted onto the requesting party. The estimate of costs? $165,954.67 for production and $107,694.72 to conduct privilege review. Aren't you glad they tossed in those pennies instead of rounding to the nearest dollar?

This way lies the certain death of litigation for all but the hyper wealthy litigants. What is already occurring is that companies that face repeat litigation are out-sourcing document production and review to places such as India or the Philippines, countries where English speakers, who can be trained in the rudiments of U.S. privilege law, are available at cheaper rates than States side. Small wonder that large law firms, who have in some instances made document production and privilege review a profit center,
staffed by paralegals or contract attorneys, are now losing that revenue source.

The *Zubulake* court shifted the costs of producing electronic data from the party making the production onto the party seeking its production.

Other courts have been extraordinarily cavalier about the costs involved in the production of digitally stored documents or the dangers to proprietary software if what is known as metadata is also sought.

*In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 29 (S.D.N.Y. 2003). A third party accounting firm in response to a subpoena produced hard copies of its documents with a guide as to what attachments went with the work papers. The court dismissed these as "hieroglyphics." It ordered production of the documents in electronic form, since that was the way in which they were kept in the ordinary course of the third party's business. In doing so, the Court brushed aside the objection that doing so would entail disclosure of proprietary software or cost $30,000 to translate into some neutral form. Moreover, the Court refused to shift any of the costs entailed in such translation.

Surely there is a great deal more that the Sedona Conference might achieve on establishing guidelines for which party is to bear the costs of such production.

How is the privilege to be protected in light of the expense of reviewing for it in order to reserve it?

1. Ask the Court to enter a protection order that no privilege waiver will flow from production of the totality of the contents of a hard drive or tape.

Rule 502 of the Federal Rules of Evidence codifies the existing federal law of attorney-client privilege and work product doctrine concerning waivers to a federal agency or in a judicial proceeding. Judicial Protective orders are given effect while inadvertent disclosures are subject to a calculus of whether reasonable precautions were taken to preclude their occurrence.

2. Enter into a "claw-back" agreement with the opposing side. These are agreements that if privileged data is produced, the recipient will voluntarily return and cannot use the privileged material. Both sides have
every interest to enter into such agreements to spare the cost of endless wrangling about what will or will not be produced and to avoid the costs attendant upon privilege reviews. This practice was commented upon with approval by the Zubulake court, which suggested to the parties that they do so.

**THE FRCP AND DIGITAL DOCUMENTS**

Several changes in the discovery provisions of the Federal Rules of Civil Procedure address, even if they do not necessarily resolve, all the issues that arise in the production of electronic documents. Source: "A Process of Illumination: The Practical Guide to Electronic Discovery" by Mary Mack, Esq.

**FRCP Rule 16 (b)**
Allows the court to establish rules around disclosure, privilege, methods and work product prior to electronic discovery commencing.
Intent: Save court and attorney time by pre-establishing rules & process for managing discovery.
Reality: Legal must understand IT environment for all federal cases within first 120 days, more motion practice around ED very early in case; court order higher stakes than party agreement.

**FRCP Rule 26 (a)**
Adds "electronically stored information" (ESI) as own category.
Intent: Remove ambiguity around the words "document" and "data compilations."
Reality: No more wriggle room for instant messaging, Voice over IP, databases, PDA's.

**FRCP Rule 26 (b)(2)**
Sets up two-tier discovery for accessible and inaccessible data; provides procedures for cost shifting on inaccessible data.
Intent: Remove uncertainty about who pays for requests for restoring backup tapes, forensics; make sure Zubulake remains a one circuit precedent.
Reality: Will require more work and costs for defendants very early in a case to account for the backups and what data is on them; codifies Zubulake for entire US.

**FRCP Rule 26 (b)(5)**
Clarifies procedures when privileged ESI is inadvertently sent over to the requesting party (retrieval of that information).
Intent: To allow "clawback" of privileged information; allow parties to push the cost of review to the requestor.
Reality: Still huge risks involved; will not be able to capture/retrieve all sensitive data (e.g. trade secrets and other IP), embarrassing e-mails, waiver of privilege for other cases.

**FRCP Rule 26 (f)**
Requires all parties to sit down together before discovery begins to agree on some form of protocol.
Intent: Rule encourages uniformity, structure and more predictable motion practice.
Reality: Opportunity to shift preservation costs if prepared for these discussions; otherwise opportunity to get painted into a corner.

**FRCP Rule 33 (d)**
Includes ESI as part of the business records related to interrogatories.
Intent: To reduce time spent gathering and analyzing data to answer interrogatories.
Reality: Can provide transaction detail in electronic form in answer to interrogatories; may need to provide direct access or decent tools.

**FRCP Rule 34 (b)**
Establishes protocols for how documents are produced to requesting parties.
Intent: Stop arguments about the form of production, decide early to save costs.
Reality: Requesting party gets to choose form of production; most advantageous form is native files which are more difficult to review and have potentially damaging metadata or track changes.

**FRCP Rule 37**
Provides "safe harbor" when electronic evidence is lost and unrecoverable as a matter of regular business processes.
Intent: Help calm fears (and avoid sanctions) when data is lost or overwritten in the normal course of business (gut Zubulake).
Reality: Puts GC on notice to ensure litigation holds and data destruction policies are legally defensible; hard to prove without third-party validation (codifies Zubulake).

**FRCP Rule 37 (f)**
Allows for sanctions against parties unwilling to participate in the 26(f) discovery conference planning process.
Intent: Bring collaboration and agreement to the discovery process in the early stages of litigation.
Reality: Places a greater requirement on both parties to be prepared for the "meet and confer" negotiations.
FRCP Rule 45
Subpoenas to produce documents includes ESI.
Intent: Clarifies rules for subpoenas to ensure consistency.
Reality: No more arguing whether ESI is a "document."

FRCP Form 35
Standardizes discovery agreements.
Intent: Avoid downstream delays and motion practice around discovery.
Reality: Automatic reminder to include ESI where it is often overlooked.

PRESERVATION OF THE PRIVILEGE IN THE DIGITAL AGE

What precautions can and should be taken against waiver in the email context?

1. Documents that are privilege protected or work-product protected, should be placed in a separate computer file upon creation.

2. Create a separate privilege protected file, password accessible only to a limited group of employees (management employees who may deal with that particular issue).

3. If the document is to be sent over an external Internet connection, consider encryption. Technically anything short of that is accessible to the computer savvy hacker. Despite this fact, certain states, in recognition of the near universality of email communications have enacted laws that communications do not lose their privilege protection for lack of encryption. New York C.P.L.R. Sec. 4548 (McKinney 1999); Cal. Evid. Code, Sec. 917(b). Yet disagreement exists whether unencrypted email does or should remain privilege protected. See NYSBA Eth. Op. 709, WL 957924 (September 16, 1998 (citing opinions).

Despite the technological reality that transmission of a privileged communication through unencrypted email is not secure, the prevailing judicial view is that lawyers and their clients may communicate confidential information over unsecure networks through unencrypted emails without risk of waiver by virtue of such transmission. E.g., ABCNY Formal Op. 2000-1, 2000 WL 704689 (January, 2000); ABA Formal Ethics Op. 99-413 (March 10, 1999); NYSBA Eth. Op. 709, 1998 WL 957924 (September 16, 1998); see City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 59 P.3d 1212, 1218 (Nev. 2002). See generally Audrey Jordan, "Note, Does
Occasionally courts are more forgiving than they should or would need to be if they understood the technology better.

**United States v. Rigas**, 281 F. Supp. 2d 733 (S.D.N.Y. 2003). The court reviewed precautions taken and excused the fact that an entire work product protected files were made available to defendant's consultant when the hard drive was inadvertently copied. The court presumably had no idea that one can make files readable only, precluding such inadvertent copying and production to the opposing side.

In the digital world often massive inadvertent disclosure can occur with the mere tap of a finger on the wrong file or by placing the incorrect distribution list. Some courts will forgive such inadvertent production. Others will not. A lot depends, believe it or not, on the emotional temperament of the reviewing court. A simple visual review of the files being produced can avoid many an error.

**Carda v. E.H. Oftedal & Sons, Inc.**, 2005 U.S. Dist. LEXIS 26368, at *7-8 (D.S.D. Apr. 28, 2005). The court concluded that a simple review of the titles of computer kept documents produced as part of the production of the contents of a hard drive would have obviated the inadvertent production of privilege-protected documents. The court accordingly found waiver. The motion to exclude from evidence the privilege document was denied.

**F.H. Chase, Inc. v. Clark/Gilford**, 341 F. Supp. 2d 562 (D. Md., 2004). 569 out of 7,155 privileged documents when the individual hired to cull them for Internet transmission of non-privileged documents, by mistake sent the entire database instead. Here the court excused the error because the wrong file was attached. Another judge would not have been so compassionate on the privilege holder.

**THE EMPLOYER’S COMPUTERS AND EMPLOYEE PRIVACY EXPECTATIONS**

As we have set forth at the beginning of this review, a recurring issue that arises is whether individuals may use their employer's computer system for the receipt and transmission of privileged documents with any expectation of privacy and hence of privilege protection.
The United States Supreme Court has weighed in on the question of whether an employee has any reasonable expectation of privacy in the office environment, which extends to the employee's personal files. The Supreme Court has granted the existence of such an expectation of privacy, as modified, by the policies and practices of the employer. In a word, the question must necessarily therefore be answered on a case-by-case basis. There are no bright lines.


Nothing seems to be more common than personal use of an employer's computer system by employees, often regardless of employer policies against such personal use. Is communication with a personal attorney nonetheless privileged? As we saw with the *Terraphase Engineering* case supra., in some cases it is decidedly and even incomprehensibly so. Most cases, however, posit only that use of the company computer for personal privileged communications does not thereby necessarily waive the privilege. Other facts will be examined to determine whether any privilege or expectation of privacy is lost.

*In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 251 (S.D.N.Y. 2005). "Assuming a communication is otherwise privileged, the use of the company's e-mail system does not, without more, destroy the privilege."

Here are the factors which courts will consider to reach a determination of whether the privilege will obtain or be deemed waived:

1. Does the corporation maintain a policy of banning personal or otherwise objectionable use?
2. Does the company monitor the use of the employee's computer or email?
3. Was the employee informed of or was the employee otherwise aware of the company's use and monitoring policies?
4. Does the company enforce such a policy or is it there for cosmetic purposes only?
5. Do third parties have a right of access to the computer or emails?
The case results are not uniform. Certain cases hold that there is a reasonable expectation of privacy. Others, as might be expected, that there is none.

**No Reasonable Expectation of Privacy Cases**

*Muick v. Glenayre Elecs*, 280 F.3d 741, 743 (7th Cir. 2002). Where employer had announced that computers would be inspected there was no reasonable expectation of privacy.

*United States v. Simons*, 206 F.3rd 392 (4th Cir. 2000). Employer had a policy of auditing computer use and the employee did not assert that he was unaware of this policy and practice, no expectation of privacy was found.


*Kelleher V. City of Reading*, 2002 U.S. Dist. LEXIS 9408, 2002 WL 1067442, at *8 (E.D. Pa. May 29, 2002). Where the employer's "guidelines" explicitly informed employees that there was no expectation of privacy, the court found there to be none.

*Garrity v. John Hancock Mut. Life Ins. Co.*, 2002 U.S. Dist. LEXIS 8343, 2002 WL 974676, at *1-2 (D. Mass. May 7, 2002). Where the company periodically reminded employees that the company's email policy prohibited certain uses, there was no reasonable expectation of privacy even if the employee had created a password-protected file. The company had a right to inspect such files assuming a business or legal reason to do so.

*Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996). Where employer's email system was used there was no reasonable expectation of privacy.

**Reasonable Expectation of Privacy**

*Leventhal v. Knapek*, 266 F.3d 64, 74 (2d Cir. 2001). A reasonable expectation of privacy existed where employee had own desk, filing cabinets, computer and the company had not placed the employee on notice
that there was no reasonable expectation of privacy and the employer had no established practice of routinely checking computers.

*United States v. Slanina*, 283 F.3d 670, 676-77, *vacated on other grounds*, 537 U.S. 802 (2002). Expectation of privacy existed where computer was maintained in a locked office; employee installed passwords limited access; no employer policy prevented storage of personal information; employer failed to inform employees that use and Internet access would be monitored.

*Haynes V. Office of Attorney General*, 298 F. Supp. 2d 1154, 1161-62 (D. Kan. 2003). Despite a computer screen warning that there was to be no expectation of privacy and fact that employees were also advised that unauthorized access to email was prohibited, the court found one where employees were permitted to use computers for private communications, and there was no evidence that private files or emails were ever in fact monitored. Thus not only must there be a policy prohibiting use; it must also be enforced.

*Curto v. Medical World Comms., Inc.*, 2006 U.S. Dist. LEXIS 29387 (E.D.N.Y. May 15, 2006). The employer had a policy of no private use. The employee, upon termination of employment, had deleted such private files. The magistrate judge found there was no waiver of the privilege by inadvertent production where a forensic expert retrieved the erased files. A key factor in so finding is that although the employer had a no private use policy, it was not enforced.

**SEIZURE OF ENTIRE HARD DRIVES**

Increasingly, in the criminal context, entire hard drives are being seized as evidence. And we may expect to see third party subpoenas on cloud computing companies in time as well. What is to be done when a claim for privilege is raised in respect to some of the documents?

The protective order will be entered. But how is the review for privilege to be conducted? We can expect to see more *in camera* reviews, either by magistrates, special masters or even Chinese walled teams within the Prosecutor's office.

Defendants' arguments that the entire prosecution should be dismissed as a fruit of the poisoned tree are expected to go nowhere. The privilege is an evidentiary not a constitutional one.
United States v. Segal, 313 F. Supp. 2d 774 (N.D. Ill. 2004). Computerized documents allegedly containing 13,000 privileged documents were seized, including documents from the target's general counsel's office. The documents as to which privilege was claimed were identified in a privilege log. The court instructed the prosecution not to review those documents until the validity of the privilege claims could be judicially tested.
Attorney-Client Privilege and Communications Within the Firm

Mark L. Tuft
Cooper White & Cooper LLP
Mtuft@cwclaw.com

I. Introduction

Lawyers occasionally need to consult their own counsel on issues related to potential liability and ethical compliance. The need to secure legal advice has spurred many law firms to designate in-firm counsel, whose responsibilities include providing advice to the firm's lawyers on behalf of the firm and conducting internal investigations when potential claims arise or suit is threatened. One question that frequently arises in this situation is to what extent does the attorney-client privilege protect confidential communications between in-firm counsel and lawyers of the firm who seek advice regarding representation of the firm's clients. A potential conflict of interest arises in instances where a lawyer learns of a possible malpractice claim involving her or the firm's conduct and consults with in-firm counsel regarding loss prevention and the professional responsibilities of the lawyer and the firm. The law regarding application of the attorney-client privilege to in-firm communications in this context continues to evolve and is not entirely consistent.

II. The Potential for a Conflict of Interest


A lawyer who consults with in-firm counsel while representing a client of the firm has a duty to the client, while the in-firm counsel owes a corresponding duty to the firm. A conflict of interest may arise when a lawyer becomes aware of a potential claim against the firm and consults with in-firm counsel regarding the alleged act or omission. The prospect of potential adversity between the client and the law firm results in uncertainty as to the application of the attorney-client privilege to the communications with in-firm counsel.

A line of cases starting with In re Sunrise Sec. Litig., 130 F.R.D. 560 (E.D. Pa. 1989), have narrowly construed the attorney-client privilege to in-firm communications and precluded application of the privilege when such communications give rise to a conflict between the interests of the firm and the duties owed to an existing client. Thelen Reid & Priest LLP v. Marland, (Not Reported in F. Supp. 2d) 2007 WL 578989 at *7–*8 (N.D. Cal. 2007); In re Sonic Blue, (Not Reported in B.R.) 2008 WL 170562 at *10 (Bkrtcy. N.D. Cal. 2008).

While the aforementioned courts appear to inspect the communications to assess whether a conflict actually existed at the time the communications were made, or as a result of the communications, other courts seem to take the position that an asserted conflict is enough to preclude a claim of privilege. See, e.g., Asset Funding Group, LLC v. Adams & Reese, LLP, (Not Reported in F. Supp. 2d) 2008 WL 4948835 at *4 (E.D. La. 2008).
Several recent decisions signal that some courts will presume the privilege exists for in-firm communications despite a possible conflict of interest, thereby requiring the party seeking discovery of the communications to prove an exception to the privilege. Tattletale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP, 2011 WL 382627, *4 (S.D. Ohio 2011); In re Refco Sec. Litig., 2011 WL 497441 *3 (S.D.N.Y. 2011).

A. Ethics Opinions Appear to Endorse In-Firm Consultation

Ethics opinions from the ABA and the New York State Bar Association focus on the purpose and nature of the communications in determining whether communications with in-firm counsel give rise to a conflict of interest. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-453 at 3 (2008); N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 789 at ¶¶ 17–20 (Oct. 26, 2005). The ABA Model Rules permit disclosure of confidential client information to secure legal ethics advice. Model Rule 1.6(b)(4). Accordingly, a lawyer's confidentiality obligations to a client do not preclude the lawyer from securing confidential legal advice regarding the lawyer's professional obligations under the rules. Id. In most situations, disclosing information to secure legal advice is impliedly authorized for the lawyer to carry out the representation. Model Rule 1.6, cmt. 9. Rule 1.6(b)(4) permits such disclosure, even if not impliedly authorized, because of the importance of a lawyer's compliance with the ethics rules. Id. See also, Me. Prof'l Ethics Comm'n of the Bd. of Bar Overseers, Op. 171 (1999). The ABA's view is that securing legal ethics advice regarding a client’s representation does not necessarily give rise to a conflict since conforming one’s conduct to one’s professional legal obligations is an inherent part of the representation of every client. ABA Formal Op. 08-453 at 3.

The New York State Bar Association goes even further, explaining that New York's (former) Code of Professional Conduct not only encourages in-firm consultation regarding ethical obligations but, in some cases, arguably mandates such consultation occur. N.Y. Op. 789 at ¶ 8 (citing N.Y. Code of Prof'l Responsibility EC 1-8 (2007) which provides that firms should adopt measures that reasonably assure lawyers adhere to the Disciplinary Rules and that the conduct of non-lawyer employees is compatible with the ethical obligations of the firm’s lawyers). The New York opinion appears to support application of the privilege to in-firm communications, stating that to require a law firm to hire outside counsel in order to preserve the attorney-client privilege deprives the firm of its right to represent itself and would be impractical. N.Y. Op. 789 at ¶ 8.

Both the ABA and New York opinions conclude that the issue of whether a conflict arises ultimately depends on the purpose and character of the in-firm communications. The ABA opinion explains that consultations used primarily as a means of protecting the interests of the firm or its attorney pose a significant risk of materially limiting the firm’s ability to represent the client, since it may become impossible for anyone in the firm to give the client sufficiently detached advice. ABA Formal. Op. 08-453 at 3; see also, Model Rule 1.7(a)(2). The New York opinion agrees that in some cases communications with in-firm counsel may lead to circumstances that give rise to, or uncover, conflicts of interest. N.Y. Op. 789 at ¶¶ 17–20. For example, if an in-firm ethics consultation reveals that the firm made a significant error or omission in a client matter, an obligation to disclose the conclusions of the consultation would be triggered under the rules. Id.
B. Courts that Assume In-Firm Communications Implicate a Conflict

In Sunrise Securities Litigation, the U.S. District Court for the Eastern District of Pennsylvania held that while it was possible for a law firm to receive the benefit of the attorney-client privilege when seeking legal advice from its in-firm counsel, 130 F.R.D. at 595, the privilege is narrowly construed and may be disallowed when the firm's in-house communications result in a conflict between the interests of the firm and the duties owed to a current client. Id. The Sunrise court based its decision on Valente v. PepsiCo, 68 F.R.D. 361 (D. Del. 1975), which held that conflicting duties owed by a corporate in-house counsel to both the majority shareholder of the corporation and to the corporation itself prevented the majority shareholder from asserting the privilege against the corporation's minority shareholders. The Sunrise court adopted Valente’s reasoning and applied the holding in that case to communications between a lawyer and other lawyers in the same firm. Sunrise, 130 F.R.D. at 597. The court suggested that a current client conflict of interest would not exist if communications were conducted with outside counsel instead of an in-firm lawyer. Id. at 597 n.12. See also, Asset Funding Group, LLC, 2008 WL 4948835 at *4.

The approach taken in these cases has been criticized on the ground that it fails to consider the policy justifications for applying the attorney-client privilege to in-firm communications, such as encouraging prompt and full communication between an attorney and in-firm counsel so that the attorney can conform his or her conduct accordingly. Tattletale Alarm Systems, 2011 WL 382627 at *9–*10; Deutsch v. Cogan, 580 A.2d 100, 106 (Del. Ch. 1990).

C. Courts Aligned More Closely With ABA Formal Opinion 08-453

Instead of assuming a conflict of interest, some courts examine the nature and purpose of the communications to determine if a conflict actually exists. In Thelen Reid & Priest LLP v. Marland, (Not Reported in F. Supp. 2d) 2007 WL 578989 (N.D. Cal. 2007), the U.S. District Court for the Northern District of California appeared to take a similar approach to ABA Formal Op. 08-453 by assessing the reason for the in-firm consultation and the nature of the allegedly privileged communications in determining whether there was a conflict that would defeat application of the privilege. The court did not assume, like some earlier courts, that a conflict existed merely because the law firm was concurrently representing itself and its existing client. Id. at *6. Instead, the court acknowledged that having in-firm counsel on ethical obligations was beneficial and resulted in greater conformity with professional responsibilities. Id. at *7.

The court however was not willing to assume that in-firm communications could never give rise to conflicts of interest or disclosure obligations to the client. Id. at *7, *12. The court explained, for example, that the analysis is different when the attorney-client privilege is being asserted against a client as opposed to a third person whom the firm is not representing. Id. at *6. The court in Thelen Reid ordered an in camera review of the documents on the law firm's privilege log to determine if the in-firm communications were undertaken for the client's benefit or were related to protecting the interests of the firm or its lawyers. Id. at *7–*8. The court cited as an example of a communication that would lose privileged status, a communication in which there were discussions of claims the client might have against the firm.
In *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002), the same district court that decided *Sunrise* held that it was unethical for lawyers in a firm to communicate internally for the purpose of protecting the firm's interests while at the same time representing a client who had a potential malpractice claim against the firm. *Id.* at 286. The court reasoned that such communications would create a conflict of interest that vitiates the firm's right to claim the attorney-client privilege. *Id.* at 285. The court therefore undertook an *in camera* review to determine if the communications at issue were undertaken by the firm in an attempt to best position itself in light of the potential malpractice suit, thereby creating a conflict of interest. *Id.* at 286.

**D. Courts that Presume Application of the Attorney-Client Privilege**

Several recent cases suggest a different approach in which some courts presume that the attorney-client privilege applies to in-firm "loss prevention" communications, even with regard to current clients. In these cases, discovery of the communications will be allowed only if an exception to the privilege applies, such as the crime-fraud exception, or if "good cause" is shown to require an exception to application of the privilege.

In *Tattletale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP*, 2011 WL 382627 (S.D. Ohio 2011), the U.S. District Court for the Southern District of Ohio held that the attorney-client privilege presumptively covered communications between a lawyer and in-firm counsel. The plaintiffs in *Tattletale* brought a malpractice action against the firm seeking documents created during the attorney-client relationship that involved communications between in-firm counsel and other lawyers in the firm. The court found that because the communications satisfied the elements of the attorney-client privilege, they were protected unless an exception applied. *Id.* at *4. The court acknowledged the precedent set by *Sunrise* and its progeny—that a potential conflict of interest arising as a result of in-firm communications concerning an existing client precludes a claim of privilege. However, the court concluded that this was not a per se rule. *Id.* at *8.

Instead, the court adopted a balancing test first articulated in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), and later relied upon in *Deutsch v. Cogan*, 580 A.2d 100 (Del. Ch. 1990). The balancing test analyzes whether the party seeking disclosure has shown "good cause" sufficient to apply an exception to the attorney-client privilege. *Id.* at *9. The court in *TattleTale*, concluded that the *Garner* factors did not favor finding an exception to the privilege under the facts of that case because (1) the plaintiffs had other available sources for the information; (2) the communications involved past conduct as opposed to future, potentially illegal or fraudulent conduct; (3) the nature of plaintiffs' allegations were based in negligence rather than criminal or fraudulent conduct; and (4) allowing the privilege to stand would encourage prompt and full communication between the lawyer and in-firm or outside counsel regarding the matter, which ultimately benefits the client if it results in errors being quickly resolved. *Id.* at *10.

In *In re Refco Sec. Litig.*, 2011 WL 497441 (S.D.N.Y. 2011), plaintiffs were involved in multi-district litigation at the same time that they were involved in a malpractice arbitration proceeding against their previous law firm. The plaintiffs alleged in the arbitration proceeding that the law firm had aided and abetted breaches of fiduciary duties and committed malpractice
by representing conflicting interests. *Id.* at *1. In the MDL, plaintiffs sought discovery of an email that the firm argued was protected as work product. *Id.* at *1. The email consisted of preliminary thoughts of firm partners on the firm's representation of different parties in the litigation, which plaintiffs alleged in the arbitration proceeding constituted malpractice. A special master in the MDL case had characterized the document as "musings between counsel and partners at the firm as to how litigation might shape up." *Id.* at *1, *3.

The court ruled that the email was not subject to discovery on two separate grounds. First, the court agreed with the special master's conclusion that the email was not discoverable because it was not relevant to the parties' claims or defenses in the MDL. *Id.* at *3. Secondly, the court found that the email was privileged under *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 689 N.E.2d 879 (NY 1997), due to its nature as a "document [] intended for internal law office review and use." *Id.* at *3. The court in *Sage Realty Corp.* had held that while a client has "presumptive access to the attorney's entire file on the represented matter" there are narrow exceptions for documents and communications where the firm's lawyers communicate general assessments of the client, the case, or tentative preliminary impressions of the legal or factual issues presented, primarily intended to give internal direction to facilitate the representation. *In re Refco*, 2011 WL 497441 at *3.

### III. Assertion of the Attorney-Client Privilege Against Third Parties?


In *Rowe*, a law firm appealed a district court's decision upholding a grand jury subpoena compelling testimony from two associates about a firm lawyer's mishandling of client funds. *U.S. v. Rowe*, 96 F.3d 1294, 1295–96 (9th Cir. 1996). The district court found that because the associates were merely asked to undertake some fact-finding, or "leg work" regarding the circumstances of the potential mishandling of client's funds, and because they neither billed the firm nor recorded time on the matter, the associates were not engaged in providing professional legal services that would support application of the attorney-client privilege. *Id.* at 1296.

The Ninth Circuit disagreed, finding that an attorney-client relationship existed between the firm and the associates because the associates were assigned to perform services on behalf of the firm. *Id.* at 1296. The court noted that there is no distinction between outside counsel and in-firm counsel when it comes to the existence of an attorney-client relationship with the firm. *Id.* at 1296. The court, citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981), also found that because the first step in resolving a legal problem is investigating the factual circumstances with an eye to ascertaining the legally relevant facts, the associates' fact-finding activities counted as professional legal services for purposes of applying the privilege. *Id.* at 1297. The court remanded the case to determine whether an exception to the privilege, such as the crime-fraud exception, might be applicable. *Id.* at 1297–98.
More recent cases such as *Thelen Reid* have distinguished *Rowe* on the ground that the case does not apply in situations in which a former client is requesting the documents instead of a third party. See e.g., *Thelen Reid*, 2007 WL 578989 at *6; *Veruslaw Inc. v. Stoel Rives*, 127 Wash.App. 309, 334 (2005); *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 220 F. Supp. 2d at 287 (S.D.N.Y. 2002). These later cases acknowledge the public policy considerations articulated in *Rowe* but emphasize the concept set forth in *Sunrise* that the attorney-client privilege does not apply to communications between a lawyer and other members of the firm in situations that create a potential conflict of interest between the firm and an existing client.

**IV. Choice of Law Considerations**

Adding to the complexity of determining whether the privilege applies to in-firm communications are choice of law considerations. Under Federal Rule of Evidence 501, federal common law governs issues of privilege unless "state law supplies the rule of decision." If state law supplies the rule of decision "the privilege . . . shall be determined in accordance with State law." FRE 501. Given the diversity of evidence rules, and decisions on privilege among the states and between the states and federal common law, resolving issues of privilege as applied to in-firm communications continues to be an elusive task.
Attorney-led corporate investigations can place complicating strains on the attorney-client privilege. No longer is the analysis limited to a conversation between a lawyer and a client about a legal question. Instead a lawyer’s team comprised of all manner of non-lawyers is tasked with uncovering facts that may or may not be directly relevant to an often collateral legal question. What is the state of the attorney-client privilege when these third-party non-lawyers become involved and does the existence of hybrid factual legal undertakings change the fundamental nature of the attorney client communication?

Although it can be stated in other ways, there are four basis requirements for the attorney-client privilege: (1) a client; (2) a lawyer; (3) a communication in aid of giving or seeking legal advice; and (4) a reasonable and continuing expectation of confidentiality. See, e.g., RESTATEMENT (THIRD) OF THE LAW: LAW GOVERNING LAWYERS §§ 68-72 (2000). Several more traditional statements of the privilege requirements can be found in PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2.1 (2d ed. 1999).

United States attorney-client privilege law is similar, but not necessarily identical, from one state to another and from one federal court to another. See, e.g., In re Spalding Sports Worldwide, Inc., 203 F.3d 800 (Fed. Cir. 2000) (applying federal circuit privilege law rather than regional circuit privilege law to privilege claims relating to invention records).

When litigation occurs in another state, the trial court will generally apply its own privilege rules and not the rules of the jurisdiction in which the lawyer or the client reside, especially when the applicable substantive law is supplied by the state in which the trial court is located. See, e.g., KL Group v. Case, Kay & Lynch, 829 F.2d 909 (9th Cir. 1987); cf. Ford Motor Co. v. Leggat, 704 S.W.2d. 643 (Tex. Sup.Ct. 1995) (applying the “most significant relationship” test). Moreover, litigation in federal court will be governed by the federal common law of attorney-client privilege whenever federal substantive law governs the merits of the matter. See, e.g., United States v. Zolin, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) (Fed. Rule of Evid. 501).

a. Fact Investigation, Legal Advice or Both?

A rather convoluted treatment has been given to the attorney-client privilege in the context of a business-related investigation performed by lawyers. This is frequently reflected in the insurance context, when outside counsel is retained for two distinct functions—to pursue or defend legal action against wrongdoers and to provide coverage-related legal advice. Application of the attorney-client privilege to the first circumstance is clear. The second circumstance is more complex. Is the determination of coverage a business function or a legal function? Many courts have observed that claims adjusters seemingly make the same coverage inquiries made by so called coverage counsel and that the focus of those decisions appears to be the application of investigated facts to simple policy language. A lawyer hired as claims adjuster generally will not be afforded the privilege, but
where the attorney was retained to “investigate [insured’s] claim, render legal advice and make a coverage determination under the policy,” communications with counsel may be afforded full protection and the attorney-client privilege prevents discovery. Hartford Financial Services Group Inc. v. Lake County Park and Recreation, 717 N.E.2d 1232, 1236, & 1238 (Ind. 1999); see also Mission National Insurance Co. v. Lilly, 112 F.R.D. 160 (D. Minn. 1986). Determining which role and what primary function the lawyer is performing in these engagements has been the task of countless opinions across the county.

Simple right? Searching out facts or serving as an overpaid claims adjuster is not the provision of legal advice so no privilege should attached to the associated communications. On the other hand, the analysis of bad faith standards, coverage law and contract interpretation is the land of lawyers and privilege should attaches. But over-simplified approaches regarding fact-finding have been expressly rejected. See, U.S. v. Rowe, 96 F.3d 1294, 1296-1297, 35 Fed. Rev. Serv. 3d (LCP) 1502 (9th Cir. 1996)(“Although some commentators…continue to distinguish between fact-finding and lawyering, federal judges cannot…[F]act-finding which pertains to legal advice counts as ‘professional legal services.’”). But, lawyers performing non lawyer or purely business or investigative functions cannot confer the cloak of privilege simply by virtue of their license to practice law. Id. In re OM Securities Litigation, 226 F.R.D. 579 (N.D. Ohio 2005) the court recognized that a hybrid engagement of fact and law is far more common than such pure examples. The court acknowledged the fundamentally legal component of those services: “documents prepared in the context of the attorney-client relationship are protected even though the documents also reflect or include business issues. See also In re Grand Jury Proceeding, 63 F.3d 193, 196 (7th Cir. 1995) (“A client does not lose the privilege merely because his attorney served a dual role”).

Parties will, occasionally, retain lawyers to conduct evaluations and advise on both factual and legal issues regarding individual claims. The more reasoned decisions have held that in the context of an insurance claim investigation, “[t]he privilege is not waived if the attorneys perform investigative tasks provided that these investigative tasks are related to the rendition of legal services.” Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 875 (5th Cir. 1991), cited with approval in Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co., 951 F.Supp. 679, 686 (W.D.Mich.1996). Despite the logic of this approach, many courts continue to slice and dice communication, engage in lengthy in camera reviews and attempt redaction along the edge of the factual and the legal within a single correspondence.

This was the approach in California until recently. In 2,022 Ranch v. Superior Court,113 Cal.App. 4th 1377, 7 Cal.Rptr. 3d 197, an insurance bad faith action, the court engaged in this cumbersome word-for-word review. As later described in the Costco opinion noted below, “At issue were communications transmitted to the insurer from its in-house claims adjusters who also were attorneys. The insurer claimed that all communications were privileged, as involving legal advice emanating from its attorneys, whereas the petitioner asserted none were, as the attorneys were serving merely as claims adjusters. The Court of Appeal distinguished communications reporting the results of factual investigations from those reflecting the rendering of legal advice, held only the latter were privileged, and ordered the trial court to review each of the communications to determine its dominant purpose.” Costco Wholesale Corp. v. Superior Court, 47 Cal.4th 725, 1385, 1397–1398, 7 Cal.Rptr.3d 197 (2009) (internal citation omitted).
California has recently taken a firm view in favor of the attorney-client privilege despite mixed purpose or content in a lawyer’s communications with her client and hopefully cleaned the process up a bit. In Costco Wholesale Corp. v. Superior Court, 47 Cal.4th 725 (2009), the court rejected in camera review of attorney-client privileged communications that resulted in a heavily redacted production of an opinion letter. Rejecting the holding in 2,002 Ranch, the court stated that the “proper procedure would have been for the trial court first to determine the dominant purpose of the relationship between the insurance company and its in-house attorneys, i.e., was it one of attorney-client or one of claims adjuster-insurance corporation.” Id at 197.

Rather than slicing out the factual observations from their associated legal conclusions, the court focused on the purpose of the retention of counsel and ruled the entire communication privileged. There, outside counsel had written an opinion letter to a corporate client regarding the exempt status of several warehouse managers. A few years later, those managers filed a class action lawsuit for back-wages and sought production of the opinion letter. After the trial court directed a court-appointed referee to conduct an in camera review of the letter, the referee redacted the legal opinions but not the factual information. The Supreme Court overturned the order, holding that the entire letter was privileged. The court noted, “[A]s we have explained, when the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged. In sum, if, as plaintiffs contend, the factual material referred to or summarized in Hensley’s opinion letter is itself unprivileged it may be discoverable by some other means, but plaintiffs may not obtain it by compelling disclosure of the letter.”

Heading in a different direction under arguably similar facts but here in the work product setting, the court in Coito v. Superior Court, 182 Cal.App.4th 758 (2010), was asked to determine whether statements of a witness taken by an attorney are protected by the work-product doctrine. There the document at issue was notes from an interview that contained only factual recordings. In California, the work-product doctrine distinguishes between absolute work-product (mental impressions of the attorney) and qualified work product (the working papers prepared in anticipation of litigation). Code of Civil Procedure §§ 2016.010 et seq. The materials at issue in this case were qualified work product, subject to disclosure upon a sufficient showing of need.

As described by the court in Coito, “Generally speaking, work product protection extends only to ‘derivative’ material, which is material ‘created by or derived from an attorney's work on behalf of a client that reflects the attorney's evaluation or interpretation of the law or the facts involved.’ In contrast, ‘nonderivative’ material is that which is ‘only evidentiary in character.’ As such it is not protected even if a lot of attorney ‘work’ may have gone into locating and identifying [it].” Examples of derivative materials include ‘diagrams prepared for trial, audit reports, appraisals, and other expert opinions, developed as a result of the initiative of counsel in preparing for trial.’ Examples of nonderivative or evidentiary materials include the identity and location of physical evidence (id.), and the identity and location of witnesses. A guiding principle in this analysis is that “[i]nformation regarding events provable at trial, or the identity and location of physical evidence, cannot be brought within the work product privilege simply by transmitting it to the attorney.” 182 Cal.App.4th at 764 (internal citations omitted).

The court held that witness statements made to an attorney or attorney’s representative are evidentiary in nature, not derivative and as such the interview notes were subject to discovery. The witness statements were entirely factual and purely the recorded results of the attorney’s
investigative efforts that were unquestionably performed as part of the provision of legal service, but nevertheless distinguished from those services.

b. Third-Parties as Agents of the Attorney

The court in the Coito matter glossed over another interesting issue. The interview at issue in Coito was not conducted by a lawyer at all, but rather by a lawyer’s agent, an investigator hired by the lawyer to gather facts in furtherance of the representation. Relegated to a footnote, the Coito court notes that “There is no dispute in this case that the agents sent by the attorney for the state were acting as his representative. The cases have recognized that the use of an investigator to obtain information does not negate work-product protection. Rodriguez v. McDonnell Douglas Corp., supra, 87 Cal.App.3d at p. 647, 151 Cal.Rptr. 399. Although the work product doctrine protects documents produced by lawyers and parties alike, the question of third party agents applies similarly to the attorney client privilege. Accordingly, when considering the applicability of privilege or the work-product doctrine in the investigative setting, the participation of non-lawyer agents (and client agents for that matter) is an important consideration.

As a general matter of attorney-client privilege law and the work-product doctrine, the interpolation of a third-party destroys the confidentiality of the communication and therefore defeats the privilege. As a matter of federal common law, agency theory and the substantive law of nearly every US jurisdiction, however, a client is able to communicate with its attorney through the client’s personal agent. Similarly, or perhaps as the reverse engineering of the same concept, most US jurisdictions recognize that lawyers too have agents and the privilege survives their participation, so long as the relationship satisfies the requirements of agency law. State v. Shire, 850 S.W.2d 923 (Mo. Ct. App. 1993) (“The privilege is not waived by the reason of the presence of a third person if the third person is the confidential agent of either the attorney or the client.”); State v. Longo, 789 S.W.2d 812, 815 (Mo. Ct. App. 1990); State ex rel. Syntex Agri Business, Inc. v. Adolf, 700 S.W.2d 886, 88 (Mo. Ct. App. 1985).

In Hillary v. Minneapolis St. Ry. Co., 104 Minn. 432, 116 N.W. 933 (1908), the Minnesota courts long ago recognized the role of the attorney’s non lawyer extension. “An attorney at law transacts much business of a confidential nature through clerks and trusted employees, and the purpose of the statute would be rendered largely nugatory if it were made applicable to communications made solely to the attorney himself, in the presence of such clerks, etc.” Consistent with federal law, communications between clients and individuals assisting the attorney in rendering legal assistance are protected by the attorney-client privilege to the same extent as communications between the client and the attorney. Commonwealth v. Noll, 443 Pa. Super. 602, 607, 662 A.2d 1123, 1126 (Super. Ct. 1995).

Before too much confidence is placed on this concept however, careful consideration is in order with respect to jurisdictional differences and, accordingly, choice of law. In many states the existence of the corporate attorney-client privilege and the extension of that privilege to agents of the client and the lawyer have been codified into the actual rule. This is the case in North and South Dakota, Nebraska, Iowa and Kentucky. In other states the applicability of the above-described agency theory has been made unambiguously clear by case law. Those states include Illinois, Wisconsin, and Ohio. Certain Underwriters at Lloyds v. Fidelity & Casualty Co. of N.Y., 1997 WL 769467, *2 (N.D. Ill. Dec. 9, 1997); State ex rel. Dudek v. Circuit Court for
Milwaukee, 34 Wis. 2d 559, 150 N.W.2d 387, 399 (1967); Woodruff v. Concord City Discount Clothing Store, 1987 WL 6827(Ohio Ct. App. Feb 19, 1987) (employee statements to insurance representative for transmission to insurer's attorney).

There is another group of states that have clear case law regarding the applicability of agency concepts to the attorney-client privilege, but set a relatively high standard for defining agency. These states include Missouri, Michigan, Pennsylvania and West Virginia. State v. Shire, 850 S.W.2d 923 (Mo. Ct. App. 1993); Reed Dairy Farm v. Consumers Power Co., 227 Mich. App. 614, 619, 576 N.W.2d 709, 711 (1998); Commonwealth v. Noll, 443 Pa. Super. 602, 607, 662 A.2d 1123, 1126 (Super. Ct. 1995). Finally, Kansas, West Virginia, and others have ambiguous treatment of the question in case law. In Kansas, for example, there is doubt as to the applicability of the agent of attorney theory. This issue has been addressed only lightly in Alseike v. Miller, 196 Kan. 547, 559, 412 P.2d 1007, 1017 (1966), where it was held that an insurance adjuster was not the agent of the attorney when he elicited statements from the insured. “The liability insurance carrier functions in an independent role. Statements obtained by it from its insured do not come into the category of communications of a client to his lawyer, none of the essentials of the professional lawyer-client relationship being present.” 1 dc 1017.

2. Conclusion

The corporate attorney-client privilege is an important and often commented upon animal. In the context of the investigation, those issues have become even more complex. The new developments in California perhaps signal a shift to a more reasoned approach that accounts for the realities of business functioning while still affording the appropriate access to evidentiary facts necessary to the fair litigation of disputes.
Attorney-Client Privilege Issues

When Does An Individual Share the Corporate Attorney-Client Privilege?

By: Merri A. Baldwin
Chapman, Popik & White LLP
mbaldwin@chapop.com

I. Introduction

Since *Upjohn v. United States*, 449 U.S. 383 (1981) it has been clear that the corporate attorney-client privilege extends to communications between the corporation’s attorneys and individual employees within the corporation. Courts have since continued to examine the relationship between corporate employees and counsel. As the incidence of corporations waiving the privilege has increased, courts have further defined the circumstances in which an individual shares the attorney-client privilege with a corporation, such that the individual may prevent or limit the corporation’s waiver of that privilege. In two recent cases, *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) and *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010), the Ninth Circuit adopted standards set forth in other circuits, setting the bar higher for individuals seeking to prevent the corporation from waiving the privilege over communications between themselves and corporate counsel. The necessity for corporate attorneys to give clear “corporate Miranda” warnings is de-emphasized, as is the reasonable belief of the corporate employee. At the same time, *Graf* extended the corporation’s privilege to include communications with outside consultants.

II. The Basic Principles: *Upjohn* and the “Corporate Miranda” Warning

In *Upjohn*, the Supreme Court considered the issue of a corporation assertion of privilege against the government’s request seeking discovery of interviews conducted as part of an internal investigation. The Sixth Circuit held that communications between Upjohn’s counsel and the company’s employees were privileged only if the employee was part of the “control group” of employees in control of or involved in planning the company’s response to legal advice. 449 U.S. at 388.

The Supreme Court rejected the control group test as overly narrow. Instead, the Court held that the privilege extends to communications between corporate employees and corporate counsel as long as the communications are made at the direction of corporate superiors in order to secure legal advice. 449 U.S. at 390-391. However, the Court declined the opportunity to present a “draft set of rules” that would govern challenges to government subpoenas. 449 U.S. at 396.

Following *Upjohn*, new practices evolved to assist lawyers in navigating the “potential legal and ethical mine field” of corporate employee interviews. *In re Grand Jury Subpoena*, 415 F.3d 373, 340 (4th Cir. 2005). “Upjohn warnings” or “corporate
“Miranda warnings” advise the employee that the lawyer represents the corporation and does not represent the interviewee; that communications between the lawyer are protected by the corporation’s privilege; that the privilege belongs to the corporation; and that the corporation, not the employee, has the right to decide whether to waive the privilege. A detailed corporate Miranda warning serves the purpose of clarifying the identity of the lawyer’s corporate client, in compliance with Model Rule 1.13(f) (lawyer for an organization must “explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituent’s with whom the lawyer is dealing.”). See also, Model Rule 4.3 (duty to clarify lawyer’s role as counsel for the corporation when an employee is not represented by counsel and the lawyer knows or reasonably should know the employee understands the lawyer’s role.). Giving the warning, and documenting that fact, can also insulate a corporation from a claim by the employee that the privilege is shared. See, e.g., In re Grand Jury Subpoena, 415 F.3d at 340 (even “watered-down Upjohn warnings” sufficient to defeat employee’s claim of privilege).

Despite the clear utility of corporate Miranda warnings, lawyers continue to conduct interviews without making a clear record of giving those disclosures, which has led to a continued stream of cases.

III. The High Hurdles Individuals Face in Proving a Joint Privilege

In both Graf and Ruehle, the Ninth Circuit addressed the issue of when and under what circumstances individuals may share the corporate privilege, such that they may block the corporation’s waiver of the privilege.

A. Ruehle: No Expectation of Confidentiality

William Ruehle was the Chief Financial Officer of Broadcom Corporation, a publicly traded semiconductor company that came under public scrutiny (and ultimately government investigation) for suspected backdating of stock options granted to employees. 583 F.3d at 601. Anticipating a government inquiry, the company’s board retained outside counsel to conduct an internal review. The Audit Committee hired Irell & Manella, a law firm that had longstanding ties with Broadcom. Ruehle and other corporate officers met with Irell lawyers to discuss the scope of the lawyers’ review. It was agreed that the law firm would report its results to the Audit Committee. It was further agreed and understood by corporate officers and directors, including Ruehle, that the Audit Committee would turn over the information obtained through the review to the company’s outside auditors, and that the company would cooperate fully with government regulators. Id. The SEC opened an investigation of the company, counsel disclosed the substance of Ruehle’s communications to the outside auditors and then to the SEC, and Ruehle was indicted on charges of conspiracy, securities and wire fraud, and other violations of Title 15. 583 F.3d at 504-605.

Ruehle objected that his communications with Irell were privileged and should not have been disclosed. The court held a hearing to resolve the privilege issue. The trial
court concluded that the attorneys had mishandled the Equity review, and that Ruehle had a “reasonable belief” that Irell & Manella were his lawyers, based in part upon the attorneys’ failure to provide a corporate Miranda warning. 583 F.3d at 606. The court ordered the evidence suppressed, and issued a later order which also found that Ruehle had intended that his statements to counsel to be confidential. Id.

The Ninth Circuit rejected the trial court’s analysis. First, the Ninth Circuit held the trial court’s reliance on California privilege law was erroneous; the court should have applied federal common law, a stricter standard, and one that puts the burden on the individual to establish the privilege (rather than presuming the existence of the privilege). 583 F.3d at 608-609. The Ninth Circuit applied an eight-part test to determine whether Ruehle met his burden. “Typically, an eight-part test determines whether information is covered by the attorney-client privilege: ‘(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection is waived.’” 583 F.3d at 607 (quoting In re Grand Jury Investigation, 974 F.2d 1068, 1971 n.2 (9th Cir. 1992).

The Ninth Circuit focused its analysis on the issue of whether Ruehle’s statements to the lawyers were made in confidence, and found they were not. The court found that Ruehle was aware from the beginning that the information obtained by the lawyers would be passed to the Audit Committee and to the outside auditors, and that he was aware that his interview would not be held in confidence. This, the court held, destroyed the confidentiality “essential to establishing the privilege.” 583 F.3d at 612. Ruehle had argued that he expected disclosure of only the factual information that was not otherwise privileged. The Ninth Circuit found that Ruehle had not identified which particular facts he believed were made in confidence, and thus did not rule on that issue. 583 F.3d at 612. Ultimately, the court held that Ruehle had not met his burden to prove the privilege. The court also held that the allegedly unethical conduct by Irell & Manella provided no independent basis for suppression of the statements, since there was no evidence that the government was involved in any breach of ethical obligations by the attorneys. 583 F.3d at 613.

B. Graf: The Ninth Circuit Adopts the Bevill Test

James Graf was a founder of, and, nominally, a “consultant” to a corporation that represented itself as providing health care benefits coverage to more than 20,000 plan members. “In reality, the company was part of an elaborate scheme to defraud the individuals and small businesses who purchased [the company’s] health insurance plans.” 610 F.3d 1148, 1152 (9th Cir. 2010) Graf was indicted for his role in the scheme. After a month-long trial, the jury found Graf guilty, and he appealed. At the trial, the company (acting through an independent fiduciary) waived the privilege between corporate personnel and corporate counsel; three of the company’s lawyers testified against Graf after the trial court denied his objections to their testifying. 610 F.3d at 1155.
In his appeal, Graf argued (among other things) that the attorney’s testimony was privileged. One of the issues the court considered was the question of whether Graf held a joint privilege over communications with corporate counsel. The Ninth Circuit adopted the standard set forth by the Third Circuit in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986). That test has also been adopted and applied in the First, Second and Tenth Circuits. *See, e.g.*, *United States v. Norris*, 2011 U.S. App. LEXIS 5946 at 12 (3rd Cir., March 23, 2011); *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001); *United States v. International Brotherhood of Teamsters*, 199 F.3d 210 (2d Cir. 1997); *Intervenor v. United States*, 156 F.3d 1038 (10th Cir. 1998). It requires individuals seeking to assert a personal claim of attorney-client privilege with corporate counsel to demonstrate five factors.

*First*, they must show they approached counsel for the purpose of seeking legal advice. *Second*, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. *Third*, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. *Fourth*, they must prove that their conversations with counsel were confidential. And *fifth*, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

610 F.3d at 1160.

Graf claimed he believed the company’s counsel were representing him, and that no one told him otherwise. 610 F.3d at 1162. Graf was the main contact for the lawyers at the company. *Id.* There was a dispute of fact as to whether the company’s outside counsel had previously represented Graf; the Ninth Circuit assumed that it had. 610 F.3d at 1162. The lawyers admitted that they had never specifically informed Graf that he was not their client; that is, they never gave him a corporate *Miranda* warning. 610 F.3d at 1161.

However, these facts were not dispositive. Instead, the court looked to the five factors of the *Bevill* test and held that Graf could not meet those. Specifically, the court found that all matters discussed by Graf with the attorneys concerned the company; that Graf never consulted the attorneys about personal legal issues; the attorneys believed they represented only the company, and the representation agreement was signed by a corporate officer (not Graf, who was only a “consultant”); and the substance of Graf’s communications with counsel related to the firm’s representation of the company and its general affairs. 610 F.3d at 1162. The court similarly rejected Graf’s claim that in-house counsel had represented him personally. 610 F.3d at 1163.
Graf’s asserted belief that the company’s lawyers represented him personally had little factual support; the court was not pushed to a careful parsing of the Bevill test. Also important is the fact that the situation in Graf did not concern a corporate investigation, unlike Ruehle; in the context of counsel’s representation of the corporation on routine, day to day business matters, the potential for an individual to believe that counsel represented him or her individually (and thus the need for a corporate Miranda warning) is arguably less than in the context of an internal investigation conducted by an attorney. Accordingly, the full application of Bevill in the Ninth Circuit may require further definition. For example, the Tenth Circuit has clarified that the last factor is satisfied if the individual discussed his or her personal rights and liabilities with counsel, even though the general subject matter pertains to general corporate affairs. Intervenor, 156 F.3d at 1041. It is not clear whether the Ninth Circuit will similarly modify the test.

IV. When Do Independent Contractors Come Within the Definition of the Corporate “Client” for Purposes of Privilege

Does the definition of “client” in the corporate context encompass outside consultants? The Ninth Circuit in Graf held that it does, within certain limitations.

On appeal, one of Graf’s arguments focused on his role as consultant: that because he was not a director, officer or employee of the company, his conversations with corporate counsel should not have been privileged under Upjohn. In considering the issue of whether the corporation appropriately asserted that its counsel’s communications with Graf fell within the privilege, the Ninth Circuit adopted the reasoning set forth in In re Bieter Corp., 16 F.3d 929 (8th Cir. 1994), where an outside consultant is the “functional equivalent of an employee,” the corporation’s attorney-client privilege extends to communications between the consultant and the corporation’s attorneys. In that case, the Eighth Circuit held that the privilege covered communications between corporate counsel and an outside consultant who was “involved on a daily basis with the principals of Bieter and on Bieter’s behalf in the unsuccessful development that serve[d] as the basis for th[e] litigation” and was therefore “precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand Bieter’s reasons for seeking representation.” 16 F.3d at 938.

Like the consultant in Bieter, Graf was very heavily involved in the company’s affairs. He regularly communicated with insurance brokers, marketed the company’s insurance plans, managed employees and was the company’s primary contact with counsel. 610 F.3d at 1157. The court found that Graf was a “functional employee” in his activities at the company. However, the facts there had an unusual twist: the court noted that the apparent reason Graf was not an officer or director was because of cease-and-desist orders preventing him from being employed by an insurance company. 610 F.3d at 1159. These facts may somewhat limit the application of this rule, although, consistent with the courts’ willingness to make it somewhat easier for corporations to establish the privilege, the rule may soon expand beyond the facts of this case.
V. Conclusion

The Ninth Circuit has made it easier for corporations to protect waivers of the attorney-client privilege, and harder for individuals to assert a personal or joint privilege with their corporate employers. The Ninth Circuit’s approach de-emphasizes the need for and usefulness of corporate *Miranda* warnings and widens the divide between the law of certain states, particularly California, and federal common law. Given the continued pressure on corporations to waive privilege, and the variety of circumstances in which an individual may interact with corporate counsel, it is certain that courts are not yet done fleshing out the contours of this evolving standard.