



ATTORNEY-CLIENT PRIVILEGE UPDATE:
CURRENT AND RECURRING ISSUES

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ATTORNEY-CLIENT PRIVILEGE UPDATE: CURRENT AND RECURRING ISSUES¹

This outline addresses a number of recent and recurring issues concerning the attorney-client privilege. It focuses primarily on the scope and reach of the privilege and the circumstances in which a waiver of the privilege may occur due to the involvement of, or disclosure to, certain categories of persons. The cases cited are intended to serve as illustrative examples of the relevant issues, and do not encompass or survey the law applicable to all jurisdictions.

1. Agents of the lawyer.

Employees working under the direct supervision and control of the attorney are included within the scope of the attorney-client privilege. This includes the attorney's paralegals, clerks, stenographers, summer associates, investigators, secretaries, and other attorneys. *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. g (2000). One court has suggested that the agency rule is limited to “ministerial agents of the attorney (such as clerks or stenographers) whose assistance is *essential* to the ordinary performance of legal services.” *F.T.C. v. TRW, Inc.*, 479 F. Supp. 160, 164 n.7 (D.D.C. 1979), *aff'd* 628 F.2d 207 (D.C. Cir. 1980) (emphasis added). Another court held that in order to be an agent of an attorney, the three fundamental requirements of an agency relationship must be satisfied: “First, an agent must have the power to affect the legal relations of the principal and others. Next, the agent is a fiduciary who works on behalf of the principal and primarily for his benefit. Last, the principal has the right to control the conduct of the agent.” *Henderson v. Nat'l R.R. Passenger Corp.*, 113 F.R.D. 502, 509 (N.D. Ill. 1986) (citations omitted).

In practice, however, the privilege has generally been extended beyond these narrow readings. The assistance need not be considered absolutely essential to the ordinary performance of legal services for the individual providing such assistance to fall within the scope of the privilege. *See, e.g., United States v. Koerber*, 2011 WL 2174355, at *9 (D. Utah June 2, 2011) (“At the time Mr. Koerber gave Ms. Taylor the letter, she was acting as his executive assistant. Mr. Koerber gave Ms. Taylor the letter for the purpose of proof reading it and returning it to him before he sent it to Mr. Moore for his legal review. Initially, federal courts have held [that] the passing [of] a communication to a secretary does not waive privilege.”). Nor is a finding of legal agency typically required. The standard for determining who qualifies as an agent is amorphous, and different courts have used different words – ranging from “necessary,” “needed,” “indispensable,” “required,” and “highly useful” – in establishing a threshold for the level of assistance being sought by the attorney. *See* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 3:4 (database updated December 2013); California Evidence Code § 952 (no waiver where disclosed to those third persons who are present to further the interest of the client).

In recent years, the rise in corporate employment of paralegals in legal departments has forced courts to address how the privilege should extend to the work product of fairly autonomous

¹ This update was prepared by the Attorney-Client Relations Committee of the American College of Trial Lawyers. It is current as of April 2014.

paralegals. The critical question appears to be the level of supervision that attorneys exercise over the work of paralegals. *See, e.g., Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 76 (S.D.N.Y. 2010) (finding paralegal's opinions on potential trademark opinions not protected by attorney-client privilege because it was not established "that an attorney participated in the communications"; the fact that attorney was copied on emails was insufficient to support the extension of the privilege).

2. Communications with non-employee agents or functional equivalents of clients.

A line of cases has developed for the principle that the privilege will apply to communications made between the lawyer and a third party if the third party is necessary for the attorney to render legal advice to the client, because the third party is an agent or the functional equivalent of the client. *See In re Bieter Co.*, 16 F.3d 929, 937 (8th Cir. 1994) ("[W]hen applying the attorney-client privilege to a corporation or partnership, it is inappropriate to distinguish between those on the client's payroll and those who are instead . . . employed as independent contractors."). In *In re Bieter*, the leading case in this area, an independent contractor for the client who secured tenants for a real estate development, worked with architects, consultants, and counsel, and appeared before city council and planning commissions, was deemed to be a representative of the client for purposes of applying the attorney-client privilege. *Id.* In propounding this view, the *Bieter* court said that "too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely." *Id.* at 937-38.

Thus, courts have recognized that the privilege umbrella extends to protect communications of counsel with persons performing a variety of functions on behalf of clients, if such persons, although not employed by the client, are the "functional equivalent[s]" of the client. A court's inquiry under the functional equivalence standard is very fact-specific. *Compare Export-Import Bank v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (concluding that communications with financial advisor were not protected under functional equivalence doctrine because no sufficient showing was made that consultant had primary responsibility for a key corporate job, had close and continuous relationship with company's principals on matters critical to company's litigation position, or likely possessed information possessed by no one else at the company), *with In re Adelphia Commc'ns Corp.*, 2007 WL 601452 (Bankr. S.D.N.Y. Feb. 20, 2007) (holding that outside consultant was functional employee because the consultant had substantial responsibility for client relationship, was primary contact for this relationship, was authorized to speak on behalf of company, and interacted with company's employees "just like any other employee"), *and In re Bristol-Myers Squibb Sec. Litig.*, 2003 WL 25962198 (D.N.J. June 25, 2003) (setting forth a four-part test to evaluate whether a consultant is a "functional employee"). *See also Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436, 439-40 (D. Md. 2005) (determining that financial consultant was functional equivalent of client in connection with communications to secure legal advice); *In re Currency Conversion Fee Antitrust Litig.*, 2003 WL 22389169, at *1-3 (S.D.N.Y. Oct. 21, 2003) (holding that computer service company supporting credit card issuer did not meet "functional equivalence" test because it was simply a provider of "standard trade services"); *Horton v. United States*, 204 F.R.D. 670, 673 (D. Col. 2002) (concluding, in action concerning alleged release of contaminants on property, that a contract stating that third party was plaintiff's agent for managing property and "self-serving" letter written from plaintiff to third party after litigation ensued did not establish that third party was functional equivalent of client for purpose of managing litigation); *In re Copper*

Mkt. Antitrust Litig., 200 F.R.D. 213, 217-19 (S.D.N.Y. 2001) (finding communications by inside and outside counsel with public relations firm privileged because public relations firm was functional equivalent of in-house public relations department, with authority to make decisions and statements, and to seek and receive legal advice concerning its duties); *Energy Capital Corp. v. United States*, 45 Fed. Cl. 481, 491-92 (Ct. Cl. 2000) (adopting rule recognized in *Bieter*, but declining to extend privilege to third-party consultants in absence of factual proof of agency for party claiming privilege).

Courts have also addressed situations in which the privilege has been seen as being improperly asserted by lawyers communicating in business capacities. For example, in *Genentech, Inc. v. Trustees of University of Pennsylvania*, 2011 WL 5079531 (N.D. Cal. Oct. 24, 2011), the CEO of a corporation, who was also a patent attorney, communicated with an outside consultant who could have been regarded as a “functional employee” of the company. However, the court found that the CEO’s communications were made for a business, rather than a legal, purpose. As such, these communications were not protected by the attorney-client privilege. This limitation has also been applied to perceived over-reaching of in-house counsel to prevent disclosure of what are essentially business, or non-legal, communications. See, e.g., *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 80 (S.D.N.Y. 2006) (“[I]n analyzing communications created at the direction of in-house counsel, courts must be wary that the involvement of the attorney is not being used simply to shield corporate communications from disclosure.”) (citations omitted).

3. Third parties necessary to facilitate communication/advice.

The privilege has also been extended to protect communications involving, or shared with, a third party to the attorney-client relationship when the third party’s involvement was necessary to facilitate communication between the client and the attorney and the rendering of legal advice. This extension originally applied to third parties who were literally necessary to facilitate communication between the client and an attorney, such as an interpreter. E.g., *Hawes v. State*, 7 So. 302, 313 (Ala. 1889) (“[A]n interpreter, intermediary, agent or clerk of an attorney, through whom communications between attorney and client are made, stands upon the same footing as his principal, and will not be allowed to divulge any fact coming to his knowledge as the conduit of information between them.”). The literal translation function remains part of the doctrine today. E.g., *Farahmand v. Jamshidi*, 2005 WL 331601, at *2-3 (D.D.C. Feb. 11, 2005) (holding that there was no waiver of privilege concerning client’s notes, originally in Farsi, prepared for conference with attorney, when relative attended conference in order to translate communications between lawyer and client); *United States v. Salamanca*, 244 F. Supp. 2d 1023, 1025 (D.S.D. 2003) (finding a translator to be the agent of an attorney because the translator “literally became the voice through which [the client] and his attorney could speak”).

The original rationale has now been extended to other, non-linguistic “translations” of information to assist communication or representation in a privileged environment. The leading case is *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), in which the presence of an accountant during discussions between the attorney and the client did not waive the privilege because the accountant was necessary to help the attorney understand the client’s situation and render legal advice. The court explained:

Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence

the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege . . . ; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.

Id. at 922. The *Kovel* doctrine, also sometimes called the derivative attorney-client privilege, has been applied in many different contexts. Generally, two interpretive approaches have been applied to *Kovel*'s agency theory – the narrow approach and the broad approach. See Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Party Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 746-47 (2009) (remarking that “the common thread for applying a narrow interpretation of *Kovel* is the ability to analogize the third-party consultant’s role to that of a translator” while the broad interpretation is premised on third parties “who provide services that merely *facilitate* the attorney’s ability to render legal advice”) (emphasis added). Presented below is an overview of the application of *Kovel* in several different contexts:

A. Appraisers.

An appraiser who worked closely with a bank regarding the plaintiff’s collateral and provided information important to the bank’s strategy in dealing with the plaintiff was properly included in the scope of the attorney-client privilege with regard to discussions at a meeting with the bank and the bank’s attorney. *Steele v. First Nat’l Bank*, 1992 WL 123818 at *2 (D. Kan. May 26, 1992). See also *Bernardo v. C.I.R.*, 104 T.C. 677, 685-86 (1995) (finding the work of an appraiser to be protected by attorney-client privilege when the appraiser provided estimates and a draft appraisal, at the attorney’s direction, concerning a potential charitable donation to be made by the attorney’s client).

Recently, the U.S. Court of Appeals for the Ninth Circuit held that an appraiser’s report was not protected by the attorney-client privilege. *United States v. Richey*, 632 F.3d 559 (9th Cir. 2011). In *United States v. Richey*, an appraiser prepared an appraisal report that was to be filed with the taxpayer’s tax return, as required by IRS regulations. *Id.* at 562. The report said that “this report may not include full discussion of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser’s opinion of value. Supporting documentation concerning the data, reasoning, and analyses is retained in the appraiser’s file.” *Id.* at 563. In reversing the district court’s holding that this additional data was protected by the attorney-client privilege, the Ninth Circuit noted that “any communication related to the preparation and drafting of the appraisal for submission to the IRS was not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value of the Easement.” *Id.* at 567.

B. Accountants.

A number of cases have held that the participation of accountants in attorney-client communications does not waive privilege. *Kovel*, discussed above, is undoubtedly the seminal case concerning the role of accountants. See also *Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190-91 (4th Cir. 1991) (holding that communications involving accountant were

protected); *United States v. Judson*, 322 F.2d 460, 462-63 (9th Cir. 1963) (determining that attorney-client privilege protected document prepared by accountant and communicated to attorney when accountant's role was to "facilitate an accurate and complete consultation between the client and the attorney about the former's financial picture"); *In re U.S. Healthcare, Inc. Sec. Litig.*, 1989 WL 11068, at *2-3 (E.D. Pa. Feb. 8, 1989) (concluding that accountant's presence at meeting with attorney and his client did not result in waiver of the attorney-client privilege when the accountant's expertise was necessary to render legal advice).

But when the accountant's participation is not for the purpose of facilitating legal advice, the communication is not protected. *See, e.g., Cavallaro v. United States*, 284 F.3d 236, 240, 249 (1st Cir. 2002) (finding that the *Kovel* doctrine requires that an accountant's involvement be at least "highly useful" and more than just "useful and convenient"; thus, documents in accounting firm's possession arising out of attorney-client meetings or other communications were not privileged); *Summit Ltd. v. Levy*, 111 F.R.D. 40, 41-42 (S.D.N.Y. 1986) (holding that document constituting communication with lawyer that was shared with accountant in connection with regular financial counseling, rather than the seeking of legal advice, was not privileged); *Columbia Data Products, Inc. v. Autonomy Corp. Ltd.*, 2012 wl 6212898, *15 (setting forth a three-part test for when a communication is protected). In *Commissioner of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1197-98 (Mass. 2009), the Massachusetts Supreme Judicial Court subscribed to a narrow interpretation of *Kovel* (favorably citing *Cavallaro v. United States*), finding that "[the attorney's] affidavit and the [Arthur] Andersen memoranda demonstrate that [the attorney's] purpose in consulting Andersen was to obtain advice about Massachusetts tax law, not to assist [him] with comprehending his client's information." *See also Callaway Golf Co. v. Screen Actors Guild*, 2009 WL 81387, at *2 (S.D. Cal. Jan. 12, 2009) (audit firm hired to examine contracts not protected by attorney-client privilege); *Schlicksup v. Caterpillar, Inc.*, 2011 WL 4007670, at *4 (C.D. Ill. Sept. 9, 2011) ("[E]ven if these communications were made by a lawyer, many of them would still not be protected by the attorney-client privilege. Proposals on tax-saving strategies and the creation, analysis and implementation of business ideas to bolster the bottom line are not confidential communications of legal advice.").

C. Investment bankers/financial consultants.

In *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000), the court followed *Kovel* to hold that communications in connection with the preparation of offering memoranda and other disclosure documents concerning a possible sale, involving company representatives, counsel and an investment banking firm, were privileged. Upon *in camera* review of the documents and a privilege log, the court found:

[T]he documents . . . involve, in one way or another, joint discussions among CKI [the company], Lazard [investment banking firm], and Wachtell [counsel], as to what CKI was legally required to disclose to prospective purchasers at various stages of negotiations. While Warnaco argues that Lazard's inclusion in the discussions waived the attorney-client privilege that would otherwise apply to the documents that reflect those discussions, it is clear to the Court that Lazard's roles in participating in those discussions and

helping draft these documents, to the extent such roles were more than ministerial, involved rendering expert advice as to what a reasonable business person would consider “material” in this context. “Materiality” in this regard is a mixed question of fact and law, which a responsible law firm in Wachtell’s place would not be able to adequately resolve without the benefit of an investment banker’s expert assessment of which facts were “material” from a business person’s perspective. Lazard was therefore serving, so far as these documents are concerned, an interpretive function . . . akin to the accountant in . . . [Kovel].

Id. at 209. Thus, inclusion of the investment banking firm in the privileged conversation to the extent necessary to supply investment banking expertise to assist the lawyer in advising the client (on legal, not business issues) did not destroy privilege. *Id.* See also *Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, 2006 WL 1004472, at *3-4, *6-7, *9 (S.D.N.Y. Apr. 17, 2006) (those communications involving or shared with financial advisor in the role of assisting counsel are within attorney-client privilege; others constituting business communications are not). Recently, in *In re Refco Sec. Litig. v. Sugrue*, 2011 LEXIS 113619, at *43-44 (S.D.N.Y. Sept. 30, 2011), the court was unconvinced that a third-party consultant with over 40 years of experience in the industry was necessary to the lawyer’s ability to understand a client’s materials. As such, the privilege did not extend to these materials. *Id.*

D. Public relations consultants.

Numerous cases have addressed the application of the privilege to communications including public relations consultants, and have come to different conclusions depending on the degree to which the proponent could show the importance of the advice to the legal advice to the client. *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002) (attorney-client privilege extends to communications with public relations and governmental affairs consultants to deal with issues intertwined with legal issues); *Am. Legacy Found. v. Lorillard Tobacco Co.*, 2004 WL 2521289, at *4-5 (Del. Ch. Nov. 3, 2004) (confidential communications with public relations firm may be protected by attorney-client privilege in certain circumstances; proponent of privilege failed to establish factual predicate); *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003) (confidential communications between lawyers and public relations consultants for purpose of giving or receiving advice directed to handling client’s legal problems are protected by attorney-client privilege); *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003) (proponent of privilege failed to establish that purpose of communications with public relations advisor was to facilitate legal advice or to further a role materially different than that of an ordinary public relations advisor).

E. Other.

In *United States v. Mejia*, 655 F.3d 126, 133 (2d Cir. 2011), the court held that a prisoner’s use of his sister to relay a communication to his lawyer was neither necessary nor likely useful to the prisoner’s representation because he could have directly contacted his lawyer. Accordingly, a prison recording of the conversation between the prisoner and his sister was

admissible. *See also MLC Automotive, LLC v. Town of Southern Pines*, 2007 WL 128945, at *3-4 (M.D.N.C. Jan. 11, 2007) (communications with engineer to assist counsel in providing legal advice are within attorney-client privilege).

F. Limitations/qualifications.

There are additional limitations on the application of the privilege in the context of communications involving a third party. For example, communications directly between a client and the client's consultant or expert outside the context of attorney-client communications are not protected. *See, e.g., Grand Jury Proceedings*, 947 F.2d at 1191 (communications between client and accountant prior to consultation with attorney were not privileged). Similarly, communications between an attorney and a third-party consultant (at least when that consultant is not the "functional equivalent" of the client) outside the context of assisting in communications between the lawyer and client may not be protected by the attorney-client privilege. *See, e.g., Sokol v. Wyeth, Inc.*, 2008 WL 3166662 (S.D.N.Y. Aug. 4, 2008) (finding that consultant retained prior to attorney being retained could not offer legal advice because "[l]egal advice cannot be given by one who is not an attorney and no attorney-client privilege is afforded to any advice purporting to be legal from one who is not an attorney").

In *United States v. Ackert*, which is generally regarded as the basis for a narrow interpretation of *Kovel*, the attorney-client privilege did not apply when an attorney communicated directly with an investment banker to gather information necessary to give legal advice to his client. *United States v. Ackert*, 169 F.3d 136, 139-40 (2d Cir. 1999) (communication between attorney and investment banker not shielded by the attorney-client privilege solely because communication was important to the attorney's ability to represent the client, if the investment banker was not translating information or facilitating communication); *see also Banco do Brasil, S.A. v. 275 Washington St. Corp.*, 2012 WL 1247756 (D. Mass. Apr. 12, 2012) ("In the instant case, Ms. Ou was not hired to assist counsel in rendering legal advice – she was hired to rent the Premises. In addition, while Attorney Hammer asserts that Ms. Ou provided him with information which he used in providing legal advice to the Trust, communications from a third-party 'that constitute independent information and expertise for the attorney to use in representing his or her client are not protected by the attorney-client privilege.'") (quoting *Comcast Corp.*, 901 N.E.2d at 1198).

In addition, even if the presence of the third party does not waive the privilege, there is still the general privilege requirement that the communication be sufficiently connected to the rendering of legal advice. "That clients were at a meeting with counsel in which legal advice was being requested and/or received does not mean that everything said at the meeting is privileged." *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 619 (D. Kan. 2001) (privilege does not protect discussions at committee meeting attended by counsel unless communication was between committee and counsel for the purpose of obtaining legal advice) (citation omitted). When the ultimate goal of the client is a business goal, it is not obvious that all communications on this subject to which the attorneys were privy was made for the purpose of generating legal advice. If there is a meeting between an attorney, a client, and a third party such as an investment banker, only the communications concerning legal advice are protected. *Id.* at 619; *see also Kovel*, 296 F.2d at 922 ("What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal advice from* the lawyer. If what is sought is not legal advice but only accounting

service . . . , or if the advice sought is the accountant's rather than the lawyer's, no privilege exists.”) (emphasis added) (internal citations omitted).

4. Intra-organizational communications not involving lawyer.

The conveyance of otherwise privileged communications by non-lawyers to others within the client organization who have a need for the communications does not waive the privilege. In *F.T.C. v. GlaxoSmithKline*, 294 F.3d at 147-48, the court held that privileged documents that were subject to limited intra-corporate distribution retained the privilege despite the absence of a showing by the corporation that each employee or contractor who received the documents had a specific “need to know” the information, if the documents “related generally to the employees’ corporate duties.” “The Company’s burden is to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein.” *Id.* at 147. See also *Apsley v. Boeing Co.*, 2008 U.S. Dist. Lexis 99515, at *9 (D. Kan. Dec. 9, 2008) (attorney-client privilege is not lost merely because employee conveys the legal communication to another employee); *Baptiste v. Cushman & Wakefield, Inc.*, 2004 U.S. Dist. Lexis 2579, at *5-8 (S.D.N.Y. Feb. 20, 2004) (email by non-lawyer corporate employee disseminating information and advice given by lawyer to other non-lawyer employees with responsibility for the subject matter did not lose privileged status); *Nat’l Educ. Training Grp. v. Skillsoft Corp.*, 1999 U.S. Dist. Lexis 8680, at *10 (S.D.N.Y. June 9, 1999) (noting cases that hold that intra-corporate distribution of legal advice received from counsel does not necessarily vitiate privilege, even if relayed indirectly through other corporate personnel, but holding that notes of third-party recipient who did not meet client-agency test were not privileged).

Other courts have imposed on the company a requirement to prove that the recipients had a “need to know” in addition to a responsibility for the subject matter. However, even in these cases, the courts’ focus usually remains on whether the information was restricted to a proper circle of confidentiality. See, e.g., *Wellnx Life Sciences, Inc. v. Iovate Health Sciences Research, Inc.*, 2007 U.S. Dist Lexis 39290, at *11-12 (S.D.N.Y. May 22, 2007) (evidentiary hearing required to determine whether document had been treated with sufficient intent to retain confidentiality). For example, in *Clarke v. J.P. Morgan Chase & Co.*, 2009 U.S. Dist. Lexis 30719, at *5-7 (S.D.N.Y. Apr. 10, 2009), the court held that when a communication circulated to employees did not indicate that it was to be maintained in confidence, and its confidential nature or status as confidential legal advice was not apparent from its face, there was no reasonable expectation of confidentiality on the part of the client.

The privilege has been extended to information exchanged between corporate actors in the absence of lawyers before a communication to counsel, when the purpose is to seek legal advice or assist counsel. *Carl Zeiss Vision Int’l GMBH v. Signet Armorlite, Inc.*, 2009 U.S. Dist. Lexis 111877, at *17-21 (S.D. Cal. Dec. 1, 2009) (memoranda of non-legal patent review committee protected as privileged because purpose was to obtain legal advice from counsel); *Williams v. Sprint/United Mgmt. Co.*, 238 F.R.D. 633, 638 (D. Kan. 2006) (privilege preserved on documents exchanged among human resources personnel where such documents were made to gather information to aid counsel or to secure advice; cases surveyed). The “legal advice” element has also been at issue when documents asserted as privileged have been simultaneously circulated to legal and non-legal personnel within an organization. See *Buspirone Antitrust Litig.*, 211 F.R.D. 249, 252-55 (S.D.N.Y. 2002) (simultaneous circulation of information to lawyers and key business personnel did not vitiate privilege when

circulation to business personnel was not for separate business purpose; simultaneous circulation cases reviewed).

5. Disclosures among separate entities in corporate family.

“There is overwhelming case law supporting the proposition that the existence of communications of privileged information between a parent and its subsidiary does not constitute a waiver of an applicable privilege.” *In re 15375 Mem'l Corp.*, 2007 Bankr. Lexis 610, at *6-7 (Bankr. Del. Mar. 1, 2007) (communications regarding bankruptcy shared with affiliates remained privileged). Some courts have reached this result in a summary fashion based upon the existence of a close relationship between the entities, e.g., *Brigham Young Univ. v. Pfizer, Inc.*, 2011 U.S. Dist. Lexis 76317, at *17-18 (D. Utah July 12, 2011) (although separate corporate entities, relationship between LDS Church and BYU was different than a third-party relationship in which privilege would be lost); *JA Apparel Corp. v. Abboud*, 2008 U.S. Dist. Lexis 1825, at *5-6 (S.D.N.Y. Jan. 10, 2008) (presence of employee of corporate owner of 98% of subsidiary did not, by itself, vitiate privilege), while others have relied upon the corporate affiliate’s “legal interest” in the communication at issue. E.g., *Cary Oil Co., Inc. v. MG Refining & Mktg., Inc.*, 2000 WL 1800750, at *6 (S.D.N.Y. Dec. 7, 2000) (subsidiary does not waive privilege by making disclosures to corporate parent with legal interest in communication). Still other courts have examined the question using the language of “common interest” analysis. E.g., *Mitsui Sumitomo Ins. Co. v. Sony Corp. of Am.*, 2011 U.S. Dist. Lexis 74148, at *13-15 (S.D. Fla. July 11, 2011) (privilege preserved where various corporate entities shared common legal interests with their parent companies); *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 473-74 (S.D.N.Y. 2003) (status of two companies as subsidiaries of common corporate parent not dispositive as to whether privilege preserved on inter-corporate communications where there was no representation by common counsel or proof of common legal interest). See also *Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 192 F.R.D. 263, 269 (N.D. Ill. 2000) (consultant and representative of corporate parent and subsidiary were part of “control group” for purposes of privileged communications); *Egiazaryan v. Zaimzev*, 290 F.R.D. 421 (S.D.N.Y. 2013) (holding the common-interest rule did not protect communications between former politician and his public relations firm.).

6. Responses to auditors’ requests/communications with auditors.

Generally, the attorney-client privilege is waived as to information provided to auditors, who are neither serving as the “functional equivalent[s]” of the client in handling the litigation, nor interpreting information to facilitate communications between the lawyer and client (see exceptions to waiver discussed in topics 2 and 3 above). See, e.g., *United States v. El Paso Co.*, 682 F.2d. 530, 540 (5th Cir. 1982); *In re Honeywell Int’l, Inc. Sec. Litig.*, 230 F.R.D. 293, 298 (S.D.N.Y. 2003); *First Fed. Sav. Bank of Hegewisch v. United States*, 55 Fed. Cl. 263, 268 (Ct. Cl. 2003); *Ferko v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 134 (E.D. Tex. 2003).

However, a majority of cases have held that disclosure of privileged information to auditors does not waive work product protection. See, e.g., *Lawrence Jaffe Pension Plan v. Household Int’l, Inc.*, 237 F.R.D. 176, 179-183 (N.D. Ill. 2006). In *Lawrence Jaffe*, the court held it sufficient for work product protection that audit letters were prepared “because of” litigation, and that it was not necessary that the materials be prepared to assist with litigation. *Id.* at 179-81. The court also held

that disclosure of information to the auditor as a third party did not waive work product protection; although the auditor served in a public watchdog role with certain independence, disclosure of litigation reports to the auditor did not substantially increase the opportunity for potential adversaries to obtain the information. *Id.* at 183. *See also In re JDS Uniphase Corp. Sec. Litig.*, 2006 WL 2850049, at *1-*2 (N.D. Cal. Oct. 5, 2006) (disclosure of document to corporate auditor did not constitute a waiver of work product protection); *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 445-49 (S.D.N.Y. 2004); *Laguna Beach Cnty. Water Dist. v. Superior Court*, 22 Cal. Rptr. 3d 387, 392 (Cal. App. 2004). *But see Medinol, Ltd. v. Boston Sci. Corp.*, 214 F.R.D. 113, 115-17 (S.D.N.Y. 2002) (disclosure of documents to auditors in connection with annual audit waives work product protection because of auditors' necessary independence from company and absence of any litigation-related purpose).

7. Disclosures concerning litigation to potential purchaser of client.

There is a split in the relatively undeveloped case law concerning whether disclosure of privileged information from and about the seller to the purchaser as part of pre-transaction due diligence waives privilege protection for the material disclosed. The majority of cases appear to reject the notion that such disclosure constitutes waiver, at least where the disclosure has been made under agreements that limit dissemination. *See, e.g., Tenneco Packaging Specialty and Consumer Prods., Inc. v. S.C. Johnson & Son, Inc.*, 1999 WL 754748, at *2 (N.D. Ill. Sept. 14, 1999) (disclosure of patent opinion in connection with due diligence for asset purchase agreement encompassing the patent did not waive privilege, because of common legal interest of buyer and seller, and steps taken to insure confidentiality and limited dissemination); *Rayman v. Am. Charter Fed. Sav. & Loan Ass'n*, 148 F.R.D. 647, 651-55 (D. Neb. 1993) (litigation reports shared during merger negotiations retained privileged status because of common legal interest); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 309-12 (N.D. Cal. 1987) (disclosure of patent opinion letter to prospective purchaser of business division did not waive attorney-client privilege because of common legal interest and steps taken to preserve confidentiality); *Britesmile, Inc. v. Discus Dental, Inc.*, 2004 WL 2271589 (N.D. Cal. 2004) (following *Hewlett-Packard*). *But see SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 512-13 (D. Conn. 1976) (privilege waived as to information of one party to joint venture shared with other joint venturer in negotiations concerning acquisition of interest: parties negotiating arms' length business transaction were adverse, and therefore did not have sufficiently common legal interest in subject matter of antitrust risk), *Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (holding that confidential communications can be shared without waiving privilege only if parties have "a common legal, as opposed to commercial, interest.").

8. Communications with former employees of client.

The attorney-client privilege continues to protect privileged communications between counsel and organizational employees that take place during the employment relationship, even after the employment relationship terminates. One important application of this principle is that, although there is no ethical prohibition against ex parte contacts with unrepresented former employees of an adverse party by an opposing counsel, counsel must take steps to ensure that no inquiry is made into matters protected by the continuing attorney-client privilege. *See e.g., XTL-NH, Inc. v. N.H. State Liquor Commn.*, 2013 N.H. Super. LEXIS 24, at * 12 (N.H. Super. Dec. 31, 2013) (Ex parte interviews of former employees of adverse party are not prohibited but counsel must "refrain from

asking questions that would likely reveal information protected by the attorney-client privilege.”); *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 32 A.D.3d 284, 820 N.Y.S.2d 54, 285-86 (N.Y. App. 2006) (Although “ex parte interviews of adversary’s former employees are neither unethical nor legally prohibited, some courts have acknowledged a necessary limitation on this rule, namely, that the attorney must avoid obtaining any privileged information from the adversary’s former employee....”); see generally, Restatement of the Law Governing Lawyers (Third), Section § 100, comments g & i (“Contact with a former employee or agent ordinarily is permitted” but “[a] lawyer may not seek confidential information during the course of an otherwise permissible communication.”)

With few exceptions, federal courts applying federal common law hold that post-employment communications between organizational counsel and former employees also are protected by the attorney-client privilege so long as the communications are limited to the knowledge or information the employee obtained during his or her prior employment. See, e.g. *Better Gov’t Bureau v. McGraw*, (In re Allen), 106 F.3d 582, 606 (4th Cir. 1997); *Petroleum Prod. Antitrust Litig.*, 658 F.2d 1355, 1361, n.7 (9th Cir. 1981); *Weber v. FUJIFILM Med. Sys., U.S.A.*, 2011 WL 3163507, 2011 U.S. Dist. LEXIS 82340, at * 25-26 (D. Conn. July 27, 2011); *Gioe v. AT & T Inc.*, 2010 WL 3780701, 2010 U.S. Dist. LEXIS 99066, at 4 (E.D. N.Y. Sept. 20, 2010); *Cool v. BorgWarner Diversified Transmission Prods.*, 2003 WL 23009017, 2003 U.S. Dist. LEXIS 20137, at * 6 (S.D. Ind. Oct. 29, 2003); *Surles v. Air France*, 2001 WL 815522, 2001 U.S. Dist. LEXIS at * 6 (S.D.N.Y. July 19, 2001). These cases rely on the United States Supreme Court’s statement in *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981), that in order for an attorney to effectively advise a corporate client the attorney must be able to marshal the facts from those employees directly involved in the actions or incidents giving rise to the dispute, regardless of their position in the corporation. The lower federal courts recognize that the privilege must be extended to communications with former employees as well because it is often the case that the person with the critical knowledge of the facts is no longer employed by the organization.

The majority view in state court decisions and federal court decisions applying state law in diversity cases also extends the privilege to post-employment communications between a former employee and organizational counsel. See, e.g., *In re Flonase Antitrust Litig.*, 723 F. Supp.2d 761, 764-65 (E.D. Pa. 2010); *E.I. Du Pont de Nemours & Co. v. Medtronic Vascular, Inc.*, 2012 WL 1408815, 2012 Del Super. LEXIS 129, at *19-20 (Del. Super. Ct. March 13, 2012); *Bernard v. Brookfield Props. Corp.*, 2012 WL 2502775, 2012 N.Y. Misc. LEXIS 2993, at * 12-13 (N.Y. Sup. Ct. June 15, 2012); *Salgy-Knapp v. Cirrus Design Corp.*, 2004 WL 193140, 2004 Minn. App. LEXIS 107, at * 10 (Minn. Ct. App. Feb. 3, 2004); *Notopoulos v. Hartford Hospital*, 1996 WL 151842, 1996 Conn. Super. LEXIS 644, at * 2 (Conn. Super. Ct. March 12, 1996); *Mickel v. Huntington Bank*, 192 WL 6496, 1982 Ohio App. LEXIS 11621, at * 6 (6th Dist. July 2, 1982).

A few courts, however, have been unwilling to distinguish a former employee from any other third party who might have pertinent information about a lawsuit, and have held the privilege does not apply to post-employment communications between organizational counsel or does not apply absent unique circumstances. See e.g., *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (diversity action applying Michigan law); *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 1985 WL 2917, 1985 U.S. Dist. LEXIS 15457, at 14 (N.D. Ill. Oct. 1, 1985) (applying federal common law).

The scope of the privilege, however, is narrower for former employees. Except where the former employee is independently represented by the organization's counsel, the privilege will not necessarily protect communications between counsel and the former employee that go beyond the information available to the former employee during his or her employment. *Gioe v. AT & T*, 2010 WL 3780701, 2010 U.S. Dist. LEXIS 99066, at *5 (citing *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41-42 (D. Conn. 1999)). Thus, for example, if during the course of preparing the former employee for deposition, organizational counsel gives the former employee new information previously unknown to the employee, or tells him or her what other employee deponents have testified to, those communications will not be privileged. *Peralta*, 190 F.R.D. at 41. Likewise if the counsel advises the former employee during a deposition break, the substance of their discussion may be discoverable. *Id.*; see also *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp.2d 554, 558 (E.D. Pa. 2004). These limitations may be avoided if counsel enters into a representation agreement establishing an independent attorney-client relationship with the former employee; however, some courts hold that independent representation will not preserve the privilege if the organization bears the attorney's fees for representing the former client. Compare *Pastura v Caremark*, S.D. Ohio No. 11-400, 2012 U.S. Dist. LEXIS 94084, at * 7 (July 9, 2012) (pre-deposition discussions protected due to independent representation of former employee) with *Gary Friedrich Enters., LLC v Marvel Enters.*, 2011 WL 2020586, 2011 U.S. Dist. LEXIS 54154, at * 11 (S.D. N.Y. May 20, 2011) (independent privilege does not exist for "volunteered representation" by corporate counsel where corporation assumes the cost of former employee's representation).

Even if the attorney-client privilege does not attached to post-employment, pre-deposition communications, the communications nevertheless may be shielded from discovery to the extent work-product protection applies. See *In re Terrorist Attacks on September 11, 2001*, 2008 WL 8183819, 2008 U.S. Dist. LEXIS 45751, at *16 (S.D. N.Y. May 21, 2008).

9. Disclosures to refresh witness recollections.

Federal Rule of Evidence 612 provides that an adverse party is entitled to production of a document used by a witness to refresh recollection before or while testifying, if the court in its discretion determines that the interests of justice require disclosure. A balancing test based upon this rule has also been applied in connection with privileged documents reviewed by witnesses in preparation for a deposition. *Medtronic Xomed, Inc. v. GyruS ENT LLC*, 2006 WL 786425, at *4 (M.D. Fla. Mar. 27, 2006) (party seeking production of work product reviewed by deponent failed to prove that witness's recollection had been refreshed, or that witness relied on the document in testifying). Several courts have noted a tension between Rule 612 and the work product doctrine, holding that the Rule does not obviate the need for a party seeking to override the work product doctrine to prove "substantial need" or "undue hardship." *Id.* at *5-6. See also *In re Managed Care Litig.*, 415 F. Supp. 2d 1378, 1380-81 (S.D. Fla. 2006) (explaining that courts have used different approaches to resolve tension between the need for information to ensure opportunity for effective cross-examination under Rule 612 and assertions of privilege; rejecting rule of older cases imposing automatic waiver of attorney-client privilege and holding deposition testimony at issue did not result in waiver); *Woodward v. Avondale Indus., Inc.*, 2000 WL 385513, at *2-3 (E.D. La. Apr. 14, 2000) (balancing test favored production of work product document when witness relied heavily on it in deposition testimony, it primarily included facts and did not contain opinion work product, and it had been relied upon by witness to prepare affidavit already disclosed).

10. Disclosures to testifying experts.

A major change in the treatment of information and materials provided to testifying experts occurred on December 1, 2010, when new amendments to Federal Rule of Civil Procedure 26 took effect. The overhaul of Rule 26 significantly expanded protection from discovery for communications between attorneys and their testifying experts in an effort to increase candor between counsel and experts, and to rein in the practice of hiring dual experts, which had developed in response to the expansive disclosure requirements under the previous version of Rule 26. *See generally* Arthur J. Clarke, *An Update on the New Federal Expert Discovery Rule: The Expert's Perspective*, 23 ENVTL. CLAIMS J. 214 (2011); Damon W.D. Wright, *Expert Discovery Returns to the Past*, THE FED. LAW., Jan. 2011, at 32. For example, Rule 26 now generally protects from discovery “drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.” Fed. R. Civ. P. 26(b)(4)(B).

Furthermore, the 2010 amendments effected significant changes in the disclosure requirements applicable to reporting testifying experts—experts who must submit a report of their opinions and conclusions under Rule 26(a)(2)(B). All communications between a reporting testifying expert and the attorney of the party retaining the expert are now protected from disclosure

“regardless of the form of the communications, except to the extent that the communications (i) relate to compensation for the expert’s study or testimony; (ii) identify facts or data that the party’s attorney provided and that the expert *considered* in forming the opinions to be expressed; or (iii) identify assumptions that the party’s attorney provided and that the expert *relied on* in forming the opinions to be expressed.” Fed. R. Civ. P. 26(b)(4)(C) (emphasis added).

Therefore, the rationale for broad disclosure, which courts relied upon under the previous version of Rule 26— that “because any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver [of attorney-client privilege and work product protection] to the same extent as with any other disclosure,” *In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (stating majority opinion among courts under 1993 amendments to Rule 26) – should no longer be persuasive. Instead, otherwise privileged (through the attorney-client privilege) or protected (under the work product doctrine) communications will not have to be disclosed until the other side can meet more stringent criteria for demonstrating need for the material. *See, e.g., Sara Lee Corp. v. Kraft Foods, Inc.*, 273 F.R.D. 416 (N.D. Ill. 2011). In *Sara Lee*, the court found that even assuming a marketing expert was in the reporting-testifying category, communications between that expert and defense counsel, which “arguably may have been discoverable under the pre-amendment Rule 26” no longer had to be disclosed because they did not identify facts, data, or assumptions for purposes of Rule 26(b)(4)(C), and thus received the work-product protection of Rule 26(b)(3). *Id.* at 420-21. Thus, under the new amendments, the communications were only discoverable if the requesting party could show that it “ha[d] substantial need for the materials to prepare its case and [could not], without undue hardship, obtain their substantial equivalent by other means.” *Id.* at 421 (citing Fed. R. Civ. P. 26(b)(3)(A)(ii)).

This expanded protection, however, generally does not apply to communications with testifying experts who do *not* have to provide a report under Rule 26(a)(2)(B) because they are either fact witnesses or so-called “treating physicians” who provide factual information intermixed with expert opinions. *See United States v. Sierra Pac. Indus.*, 2011 WL 2119078, at *3-6 (E.D. Cal. May 26, 2011) (carefully reviewing minutes of Civil Rules Advisory Committee meeting on 2010 amendments and concluding that “[t]he minutes . . . show that the committee did not intend that communications between a party’s counsel and non-reporting experts generally be protected”). Therefore, “the law prior to the date of the [2010] amendment determines whether [a party has] waived applicable protections” of communications with testifying, non-reporting experts. *Id.* at 7-10 (canvassing Ninth Circuit law on waiver of privileges and work product protection, finding that waiver was generally found when materials were disclosed to non-reporting testifying experts, and rejecting New Jersey authority to the contrary in *Graco v. PMC Global*, 2011 WL 666056, at *13-15 (D.N.J. Feb. 14, 2011), because it did not provide “persuasive reason for rejecting” Ninth Circuit decisions). The *Sierra Pacific* court left open the possibility that certain kinds of non-reporting testifying witnesses could be entitled to more protection than others, *id.* at 10, but resolution of this issue will have to await further case law. *But see Graco*, 2011 WL 666056, at *13-15 (generally applying same protections to both reporting and non-reporting testifying witnesses).

11. Communications by employees with counsel using employer’s email system.

Especially in employment and non-compete cases, questions have arisen about whether and to what extent email communications by an individual to her counsel using her employer’s email system, or computer files concerning attorney-client communications maintained on the employer’s system, retain privileged status.

In federal court, unless state law provides the rule of decision with respect to an element of a claim or defense, pursuant to Federal Rule of Evidence 501, federal common law on privileges controls. *See, e.g., In re Royce Homes*, 449 B.R. 709, 721-22 (Bankr. S.D. Tex. 2011) (relying on Rule 501, as interpreted by the U.S. Court of Appeals for the Fifth Circuit, to determine that because Bankruptcy Rule 2004 examinations are governed by federal bankruptcy law, not state law, federal common law governed privilege claims in that case). Under federal common law, waiver of the attorney-client privilege can be effected by “disclosure [of communications] inconsistent with an intent that communications remain confidential,” which has been interpreted to mean that employees need to have, among other things, a reasonable expectation that the communications at issue will remain private/confidential in order to preserve the privilege. *Id.* at 724,733.

Whether such a reasonable expectation exists when employees use a company email system to communicate with their attorneys is determined by most courts using the four-factor balancing test set forth in *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005) (relying on principles from privacy law in developing the four-factor test). The four factors that courts consider are: (1) whether the employer maintains a policy banning personal use; (2) whether the employer monitors the use of the computer or emails; (3) whether third parties have a right of access to the computer or emails; and (4) whether the employer notifies the employee or the employee is aware

of the use and monitoring policies. *Id.* at 257.² *In re Royce Homes*, 449 B.R. at 735-741, includes a useful summary and discussion of applicable case law since *In re Asia Global Crossing*. After adopting the *In re Asia Global Crossing* test, the *Royce* court found that an employee had waived his privilege in certain emails sent from his employer's computer system because the employer had an explicit policy that prohibited the sending of confidential information from company computers and allowed the monitoring of employee communications on company equipment. *In re Royce Homes*, 449 B.R. at 738-41. Whether monitoring actually occurred or whether the employee had actual notice of the policy was largely irrelevant because the "guidelines on monitoring were so explicit and straightforward that no employee could reasonably believe" that his or her emails would not be monitored. *Id.* See also *Holmes v. Petrovich Dev. Co.*, 191 Cal. App. 4th 1047, 1068-72 (2011) (applying provisions of California Evidence Code similar to *In re Asia Global Crossing* test but finding that communications that did not meet such test were not confidential to begin with, and thus no privilege applied).

The increased use of email and similar electronic communications in the workplace has been accompanied by an increase in the extent to which employers monitor such communications by their employees when transmitted by means of employer-owned devices or email systems. See, e.g., Am. Mgmt. Ass'n & the e-Pol'y Inst., *2005 Electronic Monitoring & Surveillance Survey*, E-POL'Y INST., <http://www.epolicyinstitute.com/survey2005Summary.pdf> (last visited March 23, 2014) (reporting that as many as 76 percent of employers monitor their employees' computer use, with 55 percent of employers retaining and reviewing employees' email messages). Increased employer monitoring of such communications in turn has given rise to the question whether the attorney-client privilege validly attaches to otherwise privileged communications by an employee by way of an employer-owned device or over a system monitored by the employer. In addressing this issue, courts have diverged. Most federal and state courts apply a fact intensive test that focuses on whether the employee had an objectively reasonable expectation of confidentiality with respect to the attorney-client communication; a minority of courts have found, however, that in such circumstances the attorney-client communication can never be privileged.

Under the majority approach, which examines the objective reasonableness of the employee's expectation of confidentiality, courts apply a four-factor balancing test first articulated in *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005). See *Goldstein v. Cleburne Acquisition Co.*, 873 F. Supp. 2d 932, 935 (N.D. Ill. 2012) (describing the four-factor test from *Asia Global* as the "most oft-quoted" test for determining whether an employee's use of a company's email system destroys the attorney-client privilege). Drawing on Fourth Amendment case law concerning expectations of privacy, the *Asia Global* test considers: (1) whether the employer maintains a policy banning personal use; (2) whether the employer actually monitors the use of the employee's computer or emails; (3) whether third parties have a right of access to the computer or emails; and (4) whether the employer notifies the employee, or the employee is aware, of the company's use and monitoring policies. *Asia Global*, 322 B.R. at 257.

The *Asia Global* court acknowledged the question "whether the employee has a reasonable

2 Some courts have added a fifth factor to the test, inquiring also into how a particular employer interpreted its computer usage policy. See, e.g., *United States v. Hatfield*, 2009 WL 3806300, at *9-10 (E.D.N.Y. Nov. 13, 2009); *Degeer v. Gillis*, 2010 WL 3732132, at *9 (N.D. Ill. Sep. 17, 2010) (referencing *United States v. Hatfield* and its five factors).

expectation of privacy must be decided on a case-by-case basis.” *Id.* at 257; *see also Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 320 (N.J. 2010) (reviewing cases that have applied the *Asia Global* factors and acknowledging “the fact-specific nature of the inquiry involved and the magnitude of different facts that can affect the outcome in a given case”); *In re Info. Mgmt. Servs. Inc. Derivative Litig.*, 81 A.3d 278, 286-87 (Del. Ch. 2013) (emphasizing case-by-case nature of *Asia Global* test and noting that “[n]o one factor is dispositive”). Numerous courts have since applied the objective reasonableness test as enunciated in *Asia Global*, or closely similar variants. The application of that test has not resulted in consistent results. The courts applying the test have often differed with respect to the factual circumstances that are dispositive. *Compare, e.g., Curto v. Med. World Commc’ns, Inc.*, 2006 WL 1318387 (E.D.N.Y. May 15, 2006) (where monitoring policy stated that “[e]mployees should not have an expectation of privacy in anything they create, store, send, or receive on the computer system,” the court found that plaintiff had a reasonable expectation of privacy and had not waived her attorney-client privilege with respect to personal files stored on a company-owned computer because the employer had never enforced its computer usage policy), *with United States v. Finazzo*, 2013 WL 619572 (E.D.N.Y. Feb. 19, 2013) (noting that where an employer has clearly and explicitly reserved the right to monitor work email, “[m]ost courts have concluded such reservation of right to review destroys any reasonable expectation of privacy, whether or not the employer routinely reviews...e-mails.”). As a result, the case law on the objective reasonableness of an employee’s expectation of confidentiality is neither consistent nor predictable. *See generally In re Royce Homes*, 449 B.R. 709, 735-41 (Bankr. S.D. Tex. 2011) (collecting cases applying *Asia Global* test); *In re Info. Mgmt. Servs. Inc. Derivative Litig.*, 81 A.3d at 287-92 (collecting cases applying *Asia Global* test).

As noted above, the objective reasonableness test has not been unanimously embraced. A minority of courts have taken a more rigid and formalistic approach when confronting this issue. Rather than focusing on the facts surrounding the employee’s expectation of confidentiality and the reasonableness of those expectations under the circumstances, these decisions have relied upon the fact that the communications necessarily lacked of actual confidentiality by reason of the fact that employers had access to them.

For example, in *Long v. Maurine American Corp.*, plaintiffs used company-issued computers to send emails to their private attorney via private, password-protected email accounts. 2006 WL 2998671, at *1 (S.D.N.Y. Oct. 19, 2006). The defendant’s employee handbook, which one of the plaintiffs had helped prepare, prohibited personal use and explicitly advised that the company retained the right to monitor any matter “‘stored in, created, received, or sent over the e-mail, voice mail, word processing, and/or internet systems provided’ by [the defendant].” *Id.* (alteration in original). The court held that the emails in question were not privileged under those circumstances because plaintiffs “knew or should have known of” the employee handbook policy and therefore knew or should have known that the communications were not confidential. *Id.* at *3 (“[P]laintiffs disregarded the admonishment voluntarily and, as a consequence, have stripped from the e-mail messages referenced above the confidential cloak with which they claim those communications were covered.”) Because the emails thus were not confidential, the court found that the attorney-client privilege could not attach. *Id.* at *3-4; *see also Scott v. Beth Israel Med. Ctr.*, 847 N.Y.S.2d 436 (Sup. Ct. 2007) (finding that employer’s ability to monitor of attorney-client communications rendered the communications non-confidential and thus non-privileged); *Holmes v. Petrovich Dev. Co.*, 119 Cal. Rptr. 3d 878 (Ct. App. 2011) (finding that emails between a former employee and her attorney sent

from her work computer were not protected by the attorney-client privilege “because they were not private” given the company’s monitoring policy, and holding that the fact that the company never actually accessed or monitored employees’ computers was “immaterial” to its analysis).

In 2011, the American Bar Association’s (“ABA”) Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion concluding that a lawyer has a duty to warn his client about the risk of sending or receiving electronic communications where there is a risk that a third party, such as an employer, may have access to such communications. ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 11-459 (2011) at 1. Because employees may not be afforded a reasonable expectation of privacy when they use an employer-owned device or system, the ABA opined that a lawyer should advise their client at the outset of the representation to avoid using a workplace device or system for sensitive or substantive communications, if not all attorney-client communications. *Id.* at 2-3; *see also* Mark M. Iba, *Warning: This Email May Be Monitored or Recorded*, 81 J. KAN. B. ASS’N, Mar. 2012, at 11 (providing an example of a state that has endorsed and adopted the ABA’s approach).

12. Communications about drafts and other matters disclosed in final form.

There seems to be disagreement over whether drafts and other matters ultimately disclosed in final form should be protected as privileged. *See generally* PAUL R. RICE ET AL., 1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 5:12 (database updated June 2012).

Many courts protect drafts as privileged *communications* between attorney and client, regardless of whether some of the substantive *information* in such drafts loses its privileged status because of eventual publication, so long as these communications fulfill other privilege requirements. *Id.*; *see, e.g., Roth v. Aon Corp.*, 254 F.R.D. 538, 541 (N.D. Ill. 2009) (“So long as the initial legal advice sought from an attorney in legally formulating the drafts is made in confidence and protected by the client as confidential information without waiver, there is no apparent reason why the drafts should cease to be privileged once the final product becomes public. Indeed, most courts have found that even when a final product is disclosed to the public, the underlying privilege attached to drafts of the final product remains intact.”); *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2001 WL 1286727, at *5 (N.D. Ill. Oct. 24, 2001) (“[E]ven assuming, *arguendo*, that the final versions of the contract terms were presented to RJR’s sales staff in 1996, it is the substance of the communication between the lawyer and the client regarding the proposed terms that is protected, not the contract terms that ultimately appeared.”). Other courts, however, have found that drafts are “considered privileged if they . . . contain information or comments *not included in the final version*” that is disseminated. *Andritz Sprout-Bauer, Inc v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997) (emphasis added).

In contrast, if the “ultimate intended use” of a document is dissemination to others, some courts might not consider the attorney-client communication to be sufficiently confidential to be privileged. *See* RICE ET AL., ATTORNEY-CLIENT PRIVILEGE at § 5.12 n. 10 (citing *United States v. Naegele*, 468 F. Supp. 2d 165, 171 (D.D.C. 2007) (“The Court concludes that draft bankruptcy filings are no more entitled to protection on the basis of privilege than are the filings actually made. By definition, they are not *confidential communications* between a client and an attorney; they and their contents are intended to be disclosed. They therefore are not protected from

disclosure by the attorney-client privilege.”)) (additional citations omitted). At least one treatise writer has argued that such privilege limitations do not make sense because clients do not relinquish confidentiality expectations in their communications with their attorney simply because they might eventually approve of or disseminate some final version of a draft to third parties. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE at § 5.12. After all, “most client communications to an attorney about matters upon which litigation is anticipated are [in some sense] preliminary statements or ‘drafts’ of information that may ultimately be disclosed in the pleadings or at trial” and should not lose protection by virtue of labeling them one way or another. *Id.* Practitioners, however, will have to adjust to the law of their respective jurisdictions.

13. Disclosures to government agencies and selective waiver.

Companies under investigation have faced considerable pressure from government agencies, such as the SEC or the Department of Justice, to cooperate in an investigation by providing privileged information in order to obtain more favorable treatment. The companies often later maintain in related civil litigation that such cooperation should not constitute waiver of the privileged information for all purposes and should be deemed only a limited or “selective” waiver applicable to the investigation itself. The majority of jurisdictions have rejected the concept of selective waiver. *See In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012); *In re Qwest Commc’ns Int’l, Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp. Building Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002). There may be fewer such situations in the future because the pressure on corporations to waive privilege has lessened. In August of 2008, the DOJ announced the withdrawal of its “McNulty Memorandum” and issued new corporate charging guidelines providing that credit for cooperation will not depend upon whether a corporation has waived privilege or work product protections (credit is supposed to depend on the disclosure of facts without regard to waiver) and prohibiting prosecutors from requesting the disclosure of non-factual attorney-client privileged communications and work product, except in cases involving the crime-fraud exception and the advice-of-counsel defense.³

In 2008, Rule 502 was added to the Federal Rules of Evidence. Although it does not change selective waiver issues, it ostensibly prevents a corporation’s voluntary waiver of certain privileged material in a government investigation from constituting a broader, subject-matter waiver of other previously undisclosed privileged materials, unless “they ought in fairness to be considered together.” Federal courts interpreting Rule 502(a) have noted that the rule did not alter the previous body of law regarding the appropriateness of subject-matter waiver in cases where a “privilege holder seeks to use disclosed material for advantage in the litigation but to invoke the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials.” *US Airline Pilots Assoc. v. Pension Benefit Guar. Corp.*, 274 F.R.D. 28, 32 (D.D.C. 2011) (quotations omitted). In addition, courts have held that a party’s reliance on the reasonable cause defense constitutes a subject-matter waiver of work product and attorney-client protected materials related to the defense. *See New Phoenix Sunrise Corp. v. Comm’r*, 408 Fed. Appx. 908, 919 (6th Cir. 2010). Although Rule 502 does not provide for selective waiver, the rule does allow the party disclosing protected materials to control the timing of any waiver through the use of a protective order pursuant to Rule 502(d). *See In re Pac. Pictures Corp.*, 679 F.3d at 1129.

3 The DOJ’s revisions do not affect other agencies’ policies encouraging waiver.

14. Inadvertent disclosure during discovery.

With the rise of electronic discovery the problem of inadvertent disclosure of privileged materials during discovery has become more acute. Most courts have taken a moderate approach to determining whether a waiver has occurred, considering five factors: (1) reasonableness of precautions taken; (2) time taken to rectify the error; (3) scope of discovery; (4) extent of disclosure; and (5) fairness. See *Williams v. Sprint/United Mgmt. Co.*, 2006 WL 1867478, at *9-10 (D. Kan. July 1, 2006); *Wallace v. Beech Aircraft Corp.*, 179 F.R.D. 313, 314 (D. Kan. 1998); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985).

New Federal Rule of Evidence 502 also addresses inadvertent disclosure. Under Rule 502(b), an inadvertent disclosure does not operate as a waiver if the privilege holder took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. The enactment of Rule 502(b) has served to at least partially abrogate prior case law which held that any disclosure of privileged documents, even if inadvertent, resulted in waiver of the privilege. See *Williams v. District of Columbia*, 806 F. Supp. 2d 44, 48 (D.D.C. 2011). The commentary to Rule 502 points out that the rule is flexible enough to accommodate the multi-factor approaches courts have used, noting that many of the factors relate to the reasonableness of the producing party's efforts to protect privileged information. The commentary further notes that Rule 502(d) contemplates enforcement of the so-called "claw-back" and "quick peek" arrangements which are designed to allow parties to agree on practical approaches to document productions without the risk of waiver. Rule 502(e) provides, however, that agreements between parties to limit the effect of waiver by disclosure can bind only the parties to the agreement unless the agreement is made part of a court order.

In addition, the American Bar Association's Model Rule of Professional Conduct 4.4(b) requires a lawyer who receives a document relating to the representation of the lawyer's client to promptly notify the sender if the lawyer knows or reasonably should know that the document was inadvertently sent. A majority of jurisdictions have adopted a version of Model Rule 4.4(b). The only states which have not adopted Rule 4.4(b) are California, Georgia, Hawaii, Massachusetts, Michigan, North Dakota, Texas, Virginia, and West Virginia.

15. Current validity of the fiduciary exception.

If the client involved is a fiduciary, such as a trustee, that client owes fiduciary duties to third parties, in particular, beneficiaries. Those duties include a duty to provide reasonable information concerning the trust to the beneficiaries. As a result, some courts, albeit a minority, have found that where the trustee-client obtains legal advice from an attorney relating to the trust, that legal advice, like all other information relating to the affairs of the trust, must be shared with the beneficiaries, whose trust generally has paid the cost of attorney's fees for obtaining the advice. The limited exception has its roots in English cases from the mid-1800s, first making its appearance in the United States in the 1970s.

The fiduciary exception to attorney-client privilege exists in some states, but has been rejected in others. In the last ten years, the exception has gotten more attention, but less support. The

exception has been rejected, by both courts and legislatures, because, *inter alia*, it: (1) creates an exception to the oldest privilege known to the common law; (2) is too uncertain in its application; and (3) ties the existence of the privilege to who is paying the lawyer involved, a factor which is generally not determinative.

Texas and California have explicitly rejected any fiduciary exception to attorney-client privilege. *Huie v. DeShazo*, 922 S.W.2d 920, (Tex. 1996); *Wells Fargo Bank v. Superior Court*, 22 Cal.4th 201 (2000). The *Wells Fargo* court found that, because the attorney-client privilege is statutory in California, there was no basis for creating exceptions to statutorily-created privileges. In light of the importance of the attorney-client privilege, the California Supreme Court opined that if the legislature had intended to restrict the privilege, it would have declared that intention unmistakably, instead of leaving it to courts to find a restriction.

When the National Conference of Commissioners on Uniform State Laws was considering the issue in the context of the Uniform Trust Code, they explained:

The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question.

* * *

There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713 (Del Ch. 1976), the court reasoned that the beneficiary, not the trustee, is the attorney's client: This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee's fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. See Louis H. Hamel, Jr., *Trustee's Privileged Counsel: A Rebuttal*, 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege*, 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee's attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591 (Cal. 2000); *Huie v. DeShazo*, 922 S.W. 2d 920 (Tex. 1996).

Uniform Trust Code § 813, comment (2005).

Even states which have recognized the fiduciary exception do not apply the exception when communications occur between a fiduciary and its counsel after the fiduciary has received an overt threat of a claim. *Fortier v. Principal Life Ins.*, 2008 WL 2323918 (E.D. N.C. Sept. 17 2008).

Some courts have recognized that, even if the fiduciary exception does exist, there must be an exception to the fiduciary exception where the trustee's and beneficiaries' interests diverge, such as in instances involving communications regarding trustee compensation. When the subject of a trustee-attorney communication relates to the fees and commissions due to the trustee from the trust, the trustee's interests "diverge sufficiently from those of the beneficiaries that the justifications for the fiduciary exception no longer outweigh the policy underlying the attorney-client privilege." *Wachtel v. Health Net*, 482 F.3d 225, 234 (3d Cir. 2006).

In *Hubbell v. Ratcliffe*, the Superior Court of Connecticut refused to adopt the fiduciary exception, holding that "[i]t is important not to weaken the privilege with various exceptions because... even the threat of disclosure would have a detrimental effect on attorneys' ability to advocate for their clients while preserving the duty of confidentiality." 2010 Conn. Super. LEXIS 2853, at *8-9, 15 (Conn. Super. Nov. 8, 2010), citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (not officially reported).

Courts of various jurisdictions have voiced similar concerns in refusing to recognize the fiduciary exception to the attorney-client privilege. *Symmons v. O'Keefe*, 644 N.E.2d 631, 640 (Mass. 1995) (holding that the attorney-client privilege protected memoranda prepared by a trustee's counsel). *Symmons* cited to SCOTT ON TRUSTS for the proposition that "where there is a conflict of interest between the trustee and the beneficiaries and the trustee procures an opinion of counsel for his own protection, the beneficiaries are not entitled to inspect the opinion." 2A, Scott, Trusts, § 173 at 465 (4th ed. 1987).

The New York Legislature amended Article 45 of its Civil Practice Law and Rules relating to attorney-client privilege, adding Section 4503(a)2, specifically dealing with the privilege in the context of a personal representative of an estate. That provision, L 2002, ch. 430 § 1, effective August 20, 2002, was added to make explicit that a beneficiary is not the client of an attorney who represents a fiduciary; the fact that the fiduciary owed duties to the beneficiary did not mean that there was a waiver of the attorney-client privilege for confidential communications made in the course of professional consultation between the attorney and the personal representative who is his client.

Even Delaware, which started all this debate, has moved away from the Exception. In 2007, the Legislature added a new section to its Decedent's Estates and Fiduciary Relations Code, 12 Del. Code § 3333, as follows:

§ 3333. Retention of Counsel by Fiduciary. Except as provided in the governing instrument, a fiduciary may retain counsel in connection with any claim that has or might be asserted against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege. However, in the event that the fiduciary is found to have breached some fiduciary duty, the Court may, in its discretion, deny such fiduciary the right to have some part or all of such fees and expenses paid from such fund and may require the fiduciary to reimburse any such fees and expenses that have previously been paid.

In *Floyd v. Floyd*, 615 S.E.2d 465 (2005), the Court of Appeals of South Carolina embraced the fiduciary exception noting that: “We find the *Riggs* rationale persuasive.” *Id.* at 482. However, on May 13, 2008, the South Carolina legislature enacted S.C. Code Ann. § 62-1-110 (2011) providing as follows:

Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

As the legislative history makes clear, the section was enacted and intended to:

(i) expressly reject the concept of a “fiduciary exception” to any attorney-client privilege; (ii) encourage full disclosure by the fiduciary to the lawyer to further the administration of justice; and (iii) foster confidence between a fiduciary and his lawyer that will lead to a trusting and open attorney-client dialogue. See *Estate of Kofsky*, 487 Pa. 473 (1979). This section also expressly rejects the holding set forth in the case of *Riggs Natl. Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976) (trustee’s invocation of the attorney-client privilege does not shield document from disclosure to trust beneficiaries) as applied by the Court in *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005).

In *Murphy v. Gorman*, 271 F.R.D. 296, 318 (D.N.M. 2010) the United States District Court for the District of New Mexico predicted that the Supreme Court of New Mexico would not recognize the fiduciary exception.

On June 13, 2011, the United States Supreme Court handed down its opinion in *United States v. Jicarilla Apache Nation*, 2011 U.S. LEXIS 4381, 131 S. Ct. 2313 (2011). In that case, the Court held that communications between the United States and its attorneys regarding the administration of a trust benefitting a Native American nation were not subject to the fiduciary exception because of the unique sovereign interests at issue and because the United States government’s disclosure requirements are governed by statute rather than by the common law. In doing so, it acknowledged:

Today, “[c]ourts differ on whether the [attorney-client] privilege is available for communications between the trustee and counsel regarding the administration of the trust.” A. Newman, G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 962, p. 68 (3d ed. 2010) (hereinafter “Bogert”). Neither party before this Court disputes

the existence of a common-law fiduciary exception, however, so in deciding this case we assume such an exception exists.

Id. at 2321 n.3. The section of the *Bogert* text referred to includes a comprehensive review of the laws of various jurisdictions with respect to the fiduciary exception, noting that most jurisdictions have upheld the privilege. *Bogert*, § 962, p. 68 at n. 11. With respect to the distinction between matters of administration and matters of liability, at oral argument, Chief Justice Roberts stated that he didn't see this distinction as a "workable" one. Transcript of Oral Argument at 30-31. Justice Kennedy referred to it as "murky." *Id.* at 32. Justice Scalia as "artificial," adding:

What I ask ... for from the attorney is advice as to how I can manage the trust so as to avoid liability. I mean, the – the two are connected. You can't separate out advice as to how to manage, how to manage the trust from advice as to how to avoid liability. In the – in the context of asking, of a trustee's asking advice, the two are the same.

Id. at 36-37.

One week later, the Florida legislature enacted House Bill 325, which in effect abrogated the fiduciary exception. In relevant part, House Bill 325 states that:

[a] communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary.

§90.5021(2) Florida Statutes. *See also, Paskoski v. Johnson*, 626 So.2d 338, 339 (Fla. App. 1993) (holding that a trustee could properly assert the attorney-client privilege with respect to communications between the trustee and the trustee's lawyer). On December 12, 2013 the Florida Supreme Court declined to follow a recommendation of the Florida Bar Code and Rules of Evidence Committee relating to Fla. Stat. § 90.5021, enacted in 2011, which explicitly eliminated any fiduciary exception. The action of the Florida Supreme Court is interesting to the extent it declines to adopt the new provision "because we question the need for the privilege to the extent that it is procedural." Although rules of evidence are obviously somewhat procedural, rules of privilege, in particular the attorney-client privilege, implicate substantive rights, i.e., the privilege.

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