

THE SCOPE AND USE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES AND ITS APPLICABILITY TO COMMUNICATIONS IN THE U.S. AND ABROAD

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ALTHOUGH the attorney-client privilege has been described as, “one of the most revered of common law privileges,”¹ recent developments have challenged the scope and use of the privilege, particularly concerning government investigations of corporate clients. In a 2005 survey by the National Association of Criminal Defense Lawyers, eighty-seven percent of lawyers surveyed reported that they had experienced recent challenges to the attorney-client privilege.² Additionally, eighty-five percent reported that the Department of Justice and Securities and Exchange Commission frequently require waiver discussions when negotiating settlements.³ Reviewing the characteristics of the privilege in the United States will aid clients and practitioners in ensuring that their communications remain as securely shielded by the attorney-client privilege as possible.

1. DEFINITIONS

What the Privilege Is

¹ In re Estate of Wood, 818 A.2d 568, 571 (Pa. Super. Ct. 2003) (citing Commonwealth v. Maguigan, 511 A.2d 1327, 1333 (Pa. 1986)).

² Stephanie A. Martz, *NACDL News: Member Survey: Attorney-Client Privilege Is Under Attack*, 29 CHAMPION 6 (July 2005). See also [http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf); [http://www.nacdl.org/public.nsf/whitecollar/wcnews024/\\$FILE/A-C_PrivSurvey.pdf](http://www.nacdl.org/public.nsf/whitecollar/wcnews024/$FILE/A-C_PrivSurvey.pdf).

³ *Id.* See also “Investigation Issues”, *infra*.

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The attorney-client privilege is the oldest confidential communications privilege known to the common law.⁴ Though each U.S. jurisdiction retains its own particular privilege test, often codified by statute, most jurisdictions require the same four elements for establishing privilege. There must be (1) a communication (2) between counsel and client (3) made confidentially (4) for the purpose of obtaining or rendering legal advice.⁵ Though most jurisdictions have extended the privilege to include a client's confidential communications with a subordinate or outside agent assisting an attorney, the communication must always be confidential and made for the purpose of obtaining or rendering legal advice.⁶ The privilege protects these communications to encourage frank discussions between a client and an attorney and to ensure that an attorney is not hindered in providing legal advice and services to a client.⁷ The attorney-client privilege rests with the client and survives an individual client's death.⁸

What the Privilege Is Not

Jurisdictions also are similar in what they do not protect under the attorney-client privilege. First, the privilege does not protect facts, including those imbedded within otherwise privileged communications.⁹ Even facts concerning the attorney-client relationship itself, such as a client's identity, whether such a relationship exists, when an attorney was retained, or the terms of the attorney's engagement, usually are not privileged.¹⁰ Additionally, the attorney-client privilege is applicable only to information sought for the purpose of obtaining legal advice and to communications involving an attorney acting as a legal advisor.¹¹ Therefore, business advice rendered by an attorney is not privileged.¹² As a practical matter, documents containing both privileged communications and facts or business advice likely are discoverable, but may be redacted before production.

The attorney-client privilege also does not protect information that counsel obtained from third parties during the course of representation.¹³ Therefore, "any communications from counsel to the client disclosing information from third parties would not be protected because the underlying communication

⁴ *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

⁵ *See, e.g.*, *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 359 (3d Cir. 2007); *John Doe Co. v. United States*, 79 Fed. Appx. 476, 477 (2d Cir. 2003); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass 1950) (stating the leading test for determining whether the attorney-client privilege applies).

⁶ *See, e.g.*, *John Doe Co.*, 79 Fed. Appx. at 477 (holding that district court did not abuse discretion in holding that communications with investigator hired by attorney were not privileged because they were not confidential).

⁷ *See Upjohn*, 449 U.S. at 389 (1981).

⁸ *See, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399, 405-10 (1998) (holding that attorney's notes from meeting with deceased are privileged).

⁹ *See Upjohn*, 449 U.S. at 395 ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: The protection of the privilege extends only to communications and not to facts.").

¹⁰ *See, e.g.*, *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 247 (2d Cir. 1986) (en banc) ("We have consistently held that, absent special circumstances, client identity and fee information are not privileged."); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977) (holding that memorandum of engagement is not privileged).

¹¹ *See Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997) ("The privilege attaches only if the attorney is acting in the role of legal advisor."); *In re Estate of Wood*, 818 A.2d 568, 571-72 (Pa. Super. Ct. 2003) (holding that information was not privileged because it did not constitute confidential communications made in the context of a legal discussion).

¹² *See In re Ford Motor Co.*, 110 F.3d 954, 966 (3d Cir. 1997), abrogated on other grounds, *Mohawk Indus. v. Carpenter*, ___ U.S. ___, 130 S. Ct. 599 (2009), (holding minutes privileged because "infused" with legal concerns); *North Pacifica, LLC v. City of Pacifica*, 274 F.Supp. 2d 1118, 1127-28 (N.D. Cal. 2003) (analyzing communications to determine their primary purpose – business or legal advice).

¹³ *MacQuown v. Dean Witter Reynolds, Inc.*, 47 Pa. D. & C.3d 21, 24-25 (Pa. Ct. Comm. Pl. 1987) (holding that information counsel obtained from third parties is not privileged).

between counsel and the third party is not protected.”¹⁴ Counsel’s notes and impressions of third party conversations may be protected, however, as attorney work product.

2. SOURCES

Because jurisdictions each have their own particular attorney-client privilege laws, choice or conflict of law issues can arise. Federal courts sitting in diversity jurisdiction apply state law concerning the attorney-client privilege.¹⁵ A court determines which state’s privilege laws apply by analyzing the forum state’s choice or conflict of law principles.¹⁶ States generally look to the state with the greatest interest or most significant relationship to the case generally, or to the privilege issue specifically.¹⁷ Among the factors analyzed are: choice of law agreements, the principal locations of the parties involved, the location of the disputed occurrence, the location of the communication, where discovery is occurring, and where any waiver is alleged to have occurred.¹⁸

If the federal court maintains federal question jurisdiction, federal common law applies to privilege disputes.¹⁹ Where both federal question claims and pendent state law claims are at issue, the federal common law of privilege applies to all claims.²⁰ In cases involving international privilege disputes, courts have ruled that comity and federal choice of law rules are included within the ambit of federal common law and, therefore, should be referenced and analyzed when deciding such disputes.²¹

Certain courts examining international privilege disputes have adopted a two-tier analysis for determining which jurisdiction’s rules should apply.²² First, if the communication simply “touches base” with the United States, such as by being authored or concerning legal matters in the United States, United States federal discovery principles prevail.²³ Second, if the communication relates solely to matters concerning

¹⁴ *Id.*

¹⁵ FED. R. EVID. 501.

¹⁶ *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 281 n.4 (8th Cir. 1984) (“Under the *Erie* doctrine, a federal court must apply the forum’s conflict of laws rules.”); *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2004 U.S. Dist. LEXIS 8596, at *6 (E.D. Pa. May 11, 2004) (“Since we are a federal court sitting in Pennsylvania, we will look to its choice of law rule.”); *Fin. Techs. Int’l, Inc. v. Smith*, 99 Civ. 9351 (GEL) (RLE), 2000 U.S. Dist. LEXIS 18220, at *6 (S.D.N.Y. Dec. 19, 2000) (“[T]he choice of law rules of the forum state are controlling”).

¹⁷ *See Urban Outfitters, Inc. v. DPIC Cos., Inc.*, 203 F.R.D. 376, 379 (N.D. Ill. 2001) (holding that privilege law of the state where discovery is occurring should apply); *Fin. Techs. Int’l, Inc.*, 2000 U.S. Dist. LEXIS 18220, at *6-7.

¹⁸ *See Urban Outfitters, Inc.*, 203 F.R.D. at 379; *Fin. Techs. Int’l, Inc.*, 2000 U.S. Dist. LEXIS 18220, at *6-7.

¹⁹ FED. R. EVID. 501.

²⁰ *See Naquin v. Unocal Corp.*, Civ. A. No. 01-3124, 2002 U.S. Dist. LEXIS 15722, at *5-6 (E.D. La. Aug. 12, 2002) (“The weight of authority among courts that have confronted this issue in the context of discovery is that the federal law of privilege governs even where the evidence sought might be relevant to pendent state law claims.”); *see also Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992) (“Courts that have confronted this issue in the context of the discoverability of evidence have uniformly held that the federal law of privilege governs even where the evidence sought might be relevant to a pendent state claim.”); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982) (applying rule to accountant-client privilege analysis because the “Senate Report accompanying Rule 501 states that it is also intended that the Federal law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case” (internal citations omitted)). *See also* FED. R. EVID. 502.

²¹ *See Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 521 (S.D.N.Y. 1992) (recognizing that courts can rely on applicable choice of law rules under the general rubric of federal common law); *see also VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8, 14-16 (D. Mass. 2000); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1169-70 (D.S.C. 1975).

²² *See Astra Aktiebolag v. Andrx Pharms., Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002); *Golden Trade, S.r.L.*, 143 F.R.D. at 520 (S.D.N.Y. 1992) (describing two-tier analysis as the “working standard”).

²³ *See In re Philip Servs. Corp. Sec. Litig.*, 98 Civ. 0835 (MBM) (DF), 2005 U.S. Dist. LEXIS 22998, at *8-9 (S.D.N.Y. Oct. 7, 2005) (holding that opinion letters “touch base” with the United States and applying federal

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foreign jurisdictions, such as by taking place and involving attorneys or proceedings there, the court analyzes which foreign jurisdiction has the predominant interest, by examining the place where the privileged relationship was entered into or the place in which the relationship was centered at the time of the communication.²⁴ At least one court, however, has found the first “touching base with the United States” part of the analysis too restrictive, and when faced with a choice of law question, immediately weighed the United States’ and the foreign jurisdiction’s interests to determine which had the “most direct and compelling interest,” taking into account the location of the parties, the substance of the communication, the center of the communicating relationship, the needs of the international system, and whether the application of foreign law would be inconsistent with federal law policies.²⁵

3. SCOPE AND LIMITS OF THE PRIVILEGE; WAIVER

Corporate Clients

A corporation is a client for purposes of the attorney-client privilege. Therefore, communications between a corporation’s employees and its attorney may be as protected as communications between an individual client and his or her attorneys.

In the leading case of *Upjohn Co. v. United States*, which concerned a federal tax issue, the United States Supreme Court held that the attorney-client privilege protected communications made by a company’s employees to the company’s counsel during the attorneys’ internal investigation of the company.²⁶ The court rejected the “control group test,” which posited that the privilege should protect only communications from senior management.²⁷ Because the corporation was communicating through its lower-level management employees in order to obtain legal advice from its counsel, such communications were privileged.²⁸ The Court found the following factors important in deciding that the communications at issue were privileged: (1) the communications were made by company employees to company lawyers, each acting in that capacity; (2) the communications concerned matters within the employees’ scope of corporate duties; (3) the employees’ communications were made to counsel at the direction of corporate superiors; (4) the communications were made to secure for the corporation legal advice from counsel and the employees understood that they were being questioned so that the corporation could obtain legal advice; (5) the communications were confidential and employees understood them to be confidential; (6) the information needed from the investigation could not be obtained from senior management; and (7) the communications were kept confidential by limiting their dissemination.²⁹

The holding in *Upjohn Co.*, however, is binding only on federal courts sitting in federal question jurisdiction applying federal common law.³⁰ While certain states have adopted a privilege test similar to that announced in *Upjohn Co.*, other states continue to analyze the issue under the “control group test” rejected in *Upjohn Co.* Still other states have yet to determine what test should govern this determination.

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privilege law); *see also* *Astra Aktiebolag*, 208 F.R.D. at 98; *Golden Trade, S.r.L.*, 143 F.R.D. at 520; *Duplan Corp.*, 397 F. Supp. at 1169-70.

²⁴ *See* *Kiobel v. Royal Dutch Petroleum Co.*, No. 02CIV7618 (KMW) (HBP), 2005 WL 1925656, at *2-3 (S.D.N.Y. Aug. 11, 2005) (examining whether England or Nigeria had more substantial contact with documents); *Astra Aktiebolag*, 208 F.R.D. at 98-99 (analyzing which foreign jurisdiction had predominant interest); *Golden Trade, S.r.L.*, 143 F.R.D. at 521-22 (examining foreign jurisdictions’ “predominant interest” in whether communications should remain privileged); *see also* *Duplan Corp.*, 397 F. Supp. at 1170-71.

²⁵ *See* *VLT Corp.*, 194 F.R.D. at 16-17 (holding that foreign jurisdictions’ privilege laws control).

²⁶ 449 U.S. 383, 390-96 (1981).

²⁷ *Id.* at 392-93.

²⁸ *Id.* at 394-96.

²⁹ *Id.* at 394-95.

³⁰ *See* FED. R. EVID. 501.

Fifteen states have adopted some variant of the broader test discussed in but not expressly adopted by the Supreme Court in *Upjohn Co.*, also called the “subject matter test,” while seven states adopted the “control group test,” and twenty-eight states had not definitively adopted any test, including Delaware, New York, Pennsylvania, and New Jersey.³¹

In fact, the Illinois Supreme Court expressly rejected the test used in *Upjohn Co.*, ruling that the control group test properly protected communications between attorneys and corporate decision makers while also “minimizing the amount of relevant material that is barred from discovery.”³² The court characterized an employee protected under the test as one “whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority. . . . However, the individuals upon whom he may rely for supplying information are not members of the control group.”³³

Particular privilege concerns can arise when a corporation merges or dissolves. Though stated as dictum, in *Commodity Futures Trading Commission v. Weintraub*, the Supreme Court of the United States noted (referring to the parties’ agreement) that, “when control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes as well.”³⁴ Therefore, “[d]isplaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.”³⁵ In deciding whether a debtor corporation’s privilege was held by the bankruptcy

³¹ The fifteen states whose highest courts or legislatures adopted tests based on or similar to the holding in *Upjohn Co.* are: Alabama (ALA. R. EVID. 502(a)(2)); Arizona (ARIZ. REV. STAT. § 12-2234); Arkansas (*Cortea v. St. Paul Fire & Marine Ins. Co.*, 821 S.W.2d 45 (Ark. 1991)); California (*D.I. Chadbourne, Inc. v. Super. Ct.*, 388 P.2d 700 (Cal. 1964) (en banc)); Colorado (*Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874 (Colo. 1987)); Florida (*S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994)); Kentucky (KY. R. EVID. 503(a)(2)); Louisiana (LA. CODE EVID. ANN. ART. 506(A)(2)); Mississippi (MISS. R. EVID. 502(a)(2)); Nevada (*Wardleigh v. Second Judicial Dist. Ct.*, 891 P.2d 1180 (Nev. 1995)); North Dakota (N.D.R. EVID. 502(a)(2)); Oregon (OR. EVID. CODE 503(1)(d)); Texas (TEX. R. CIV. EVID. 503(a)(2)); Utah (UTAH R. EVID. 504(a)(4)); Vermont (*Baisley v. Missisquoi Cemetery Ass’n*, 708 A.2d 924 (Vt. 1998)). Brian E. Hamilton, Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege, 1997 Ann. Surv. Am. L. 629, 633-640 (1999). The seven states that adopted the “control group test” are: Alaska (ALASKA R. EVID. 503(a)(2)); Hawaii (HAW. R. EVID. 503(a)(2)); Illinois (*Consol. Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982)); Maine (ME. R. EVID. 502(a)(2)); New Hampshire (N.H.R. EVID. 502(a)(2)); Oklahoma (OKLA. STAT. TIT. 12, § 2502(A)(4)); South Dakota (S.D. CODIFIED LAWS § 19-13-2(2)). Notably, lower courts in Delaware, Pennsylvania and New Jersey have positively cited the *Upjohn Co.* approach, but those states have not definitively adopted the “subject matter” test. *See Deutsch v. Cogan*, 580 A.2d 100, 106 (Del. Ch. 1990) (citing *Upjohn Co.*, in dicta, for the proposition that “the lawyer-client privilege applies even when the client is a corporation, and . . . the corporate lawyer-client privilege [may not] be limited by the application of tests like the ‘control group’ test”); *Amtrak v. Fowler*, 788 A.2d 1053, 1056 (Pa. Commw. Ct. 2001) (holding that “entities may claim the privilege for communications between their attorney and their agents or employees who are authorized to act on behalf of the entities”); *Wagi v. Silver Ridge Park W.*, 580 A.2d 1093, 1097 (N.J. Super. Ct. App. Div. 1989) (“The privilege unquestionably extends to corporations which must act through agents, including its officers and employees.”).

³² *Consol. Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982).

³³ *Id.* at 258.

³⁴ 471 U.S. 343, 349 (1985).

³⁵ *Id.*; *see also* *Venture Law Group v. Superior Ct. of Santa Clara County*, 12 Cal. Rptr. 3d 656, 662 (Cal. Ct. App. 2004) (“Former management of a merged company does not hold the merged company’s attorney-client privilege and may not waive the attorney-client privilege post-merger.”); *Maleski v. Corp. Life Ins. Co.*, 641 A.2d 1, 3 (Pa. Commw. Ct. 1994) (citing *Weintraub*).

trustee or the debtor's directors, the Court ruled that the privilege passed to the trustee because the trustee controlled the corporation's affairs.³⁶

Using this language from *Weintraub*, courts have distinguished what it means when, "control of a corporation passes to new management." Courts have held that in the case of a merger, if Corporation A acquires Corporation B's business and continues that business, Corporation A also acquires Corporation B's privilege.³⁷ However, if Corporation A merely purchases some of the assets of Corporation B, no privilege is transferred.³⁸

Few courts have addressed whether the attorney-client privilege survives corporate dissolution. Though the attorney client privilege survives an individual's death, courts have analogized the issue to a corporate merger. For example, where a liquidator assumes control of a dissolved corporation's business, the privilege passes to the liquidator.³⁹ However, where no entity exists to continue the corporation's business, such as when a liquidator merely oversees distribution of a defunct corporation's assets, the privilege does not transfer, and according to at least one court, the privilege dies with the corporation.⁴⁰

Waiver

The attorney-client privilege can be waived in several ways. Most common is when the communication at issue loses its confidential nature. If a privileged communication is shared with third parties, the privilege generally is waived.⁴¹

Most courts provide for an exception to this rule when parties establish a joint defense agreement among themselves, allowing for a "community of interest" privilege. The community of interest privilege, also known as the "joint defense" privilege protects communications between or among parties with mutual interests and their counsel. To establish the privilege, a party must demonstrate that the communication

³⁶ *Weintraub*, 471 U.S. at 353.

³⁷ *See* *Soverain Software, LLC v. The Gap, Inc.*, 340 F. Supp.2d 760, 763 (E.D. Tex. 2004) (holding that purchasing company was a successor to the business and the privilege that attended that business because it sold the transferee's product, held its patents, and serviced its customers); *Bass Pub. Ltd. Co. v. Promus Cos., Inc.*, 868 F. Supp. 615, 620 (S.D.N.Y. 1994) (holding that post-merger company could waive privilege); *Tekni-Plex, Inc. v. Meyner and Landis*, 674 N.E.2d 663, 669 (N.Y. 1996) (holding that privilege transferred because business of purchased company remained unchanged, purchaser possessed "all of the rights, privileges, liabilities and obligations" of the purchased company, in addition to its assets, and the purchaser should have "access to any relevant pre-merger legal advice rendered to [the purchased company] that it might need to defend against these liabilities or pursue any of these rights").

³⁸ *See* *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 2003 U.S. Dist. LEXIS 13816, at *6 (N.D. Ill. Aug. 7, 2003) (holding that attorney-client privilege was not a property right that could be contractually sold as an asset); *In re In-Store Adver. Sec. Litig.*, 163 F.R.D. 452, 458 (S.D.N.Y. 1995) ("[A] transfer of assets, without more, is not sufficient to effect a transfer of the privileges; control of the entity possessing the privileges must also pass for the privileges to pass.") (quoting *In re Grand Jury Subpoenas 89-3 and 89-4*, 734 F. Supp. 1207, 1211 n.3 (E.D. Va. 1990)).

³⁹ *See* *Maleski*, 641 A.2d at 4 (holding that liquidator may waive dissolved corporation's privilege because the liquidator was functioning as management of the corporation).

⁴⁰ *See* *Lewis v. United States*, No. 02-2958 B/An, 2004 U.S. Dist. LEXIS 26680, at *9 (W.D. Tenn. Dec. 7, 2004) ("client confidentiality does not extend beyond the 'death' of a corporation"); *FDIC v. McAtee*, 124 F.R.D. 662, 664 (D. Kan. 1988) ("transfer of assets to the FDIC in its corporate capacity does not transfer the attorney-client privilege"); *FDIC v. Amundson*, 682 F. Supp. 981, 987 (D. Minn. 1988) (where FDIC merely acted as receiver and liquidator of bank's assets, FDIC could not assert former attorney-client relationship with bank's attorney for purposes of disqualification).

⁴¹ *See e.g.*, *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295-304 (6th Cir. 2002) (discussing various forms of waiver).

was made in the course of, and to further, a joint litigation effort.⁴² Additionally, because the privilege is not distinct, but rather considered an extension of the attorney-client privilege, the communication still must be made confidentially and for the purpose of obtaining or rendering legal advice.⁴³ Though not all jurisdictions require one, the relevant parties should sign a written joint defense agreement establishing the scope of their shared privilege and, if appropriate, obtain court approval of the agreement.⁴⁴ Additionally, because of future disqualification concerns, parties should include a waiver of conflict of interest clause.

Parties must also be wary of inadvertent disclosures of privileged communications as courts are divided concerning whether such disclosures waive the privilege. While certain courts leniently hold that no waiver occurs in such instances, other courts hold that an inadvertent disclosure constitutes a complete waiver of the privilege.⁴⁵ Still other jurisdictions decide on a case-by-case basis, weighing the precautions taken to avoid inadvertent disclosure, the time taken to rectify the error, the scope of discovery, the extent of the disclosure, and general considerations of fairness and equity.⁴⁶

Federal Rule of Evidence 502, Attorney-Client Privilege and Work Product; Limitations on Waiver, was enacted in September of 2008 to address the issue of waiver of the attorney-client privilege and work product doctrine. Although a Federal Rule of Evidence, the Rule was enacted by federal legislation and is controlling in both federal and state proceedings.⁴⁷ Among other things, FRE 502 states that when disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to undisclosed communications or information in a federal or state proceeding only if the waiver was intentional, the disclosed and undisclosed materials concern the same subject matter, and “they ought in fairness be considered together.”⁴⁸ Likewise, FRE 502 also addresses “inadvertent disclosures”, stating that when made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if the disclosure was inadvertent, the holder of the privilege or protection “took reasonable steps” to prevent disclosure, and the holder promptly took “reasonable steps” to rectify the error.⁴⁹

FRE 502 also addresses the issue of waiver where the disclosure was in a state proceeding. When disclosure is made in a state proceeding and is not subject to a state court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure would not be a waiver had

⁴² See *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1042-43 (10th Cir. 1998) (holding that no joint defense privilege applied where there was no agreement or joint defense strategy); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94 (3d Cir. 1992) (stating test for joint defense privilege); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (holding one party’s communications with an accountant hired by another party’s attorney were privileged under joint defense privilege).

⁴³ See *Schwimmer*, 892 F.2d at 243-44.

⁴⁴ See FED. R. EVID. 502(e) (“An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.”) and 502(d) (“A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.”).

⁴⁵ See *Gray v. Bicknell*, 86 F.3d 1472, 1483-84 (8th Cir. 1996) (discussing courts’ approaches to inadvertent disclosures).

⁴⁶ See *Gray*, 86 F.3d at 1484; *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (holding privilege was not waived through inadvertent disclosure).

⁴⁷ See FED. R. EVID. 502(d, f).

⁴⁸ FED. R. EVID. 502(a).

⁴⁹ FED. R. EVID. 502(b)

it been made in a federal proceeding or is not a waiver under the law of the state where the disclosure was made.⁵⁰

Clients can also waive their privilege over communications by placing the communication at issue in litigation.⁵¹ Often this occurs when a client challenges their former attorney's representation or relies on advice of counsel as a defense, or when the case concerns insurance bad faith claims. Courts generally fall into two categories when analyzing an "at issue waiver." One group holds that if a privileged communication is relevant to the privilege-holder's claim or defense, the privilege is waived.⁵² Another group more restrictively holds that a client waives the privilege only if the client relies on the particular communication at issue to support a claim or defense.⁵³

The concept of "selective waiver" or "limited waiver", where a client attempts to waive the privilege for a specific limited purpose such as responding to a governmental investigation but maintaining it for all other purposes, has generally been rejected in the courts.⁵⁴ Most courts hold that the disclosure of communications or documents to government investigators waives, *per se*, any protections such communications or documents had. Because the investigating government authority is a potential litigation adversary, disclosure to the government is considered to be no different than disclosure to any other adversary, thus constituting waiver, and they have been unwilling to carve out any such exception for disclosures to the government. As one court stated, whether to maintain the attorney-client privilege or reveal privileged documents to a governmental entity to avoid prosecution or obtain leniency is a "tactical litigation decision" and "quintessential litigation strategy."⁵⁵ A minority of courts, however, primarily in the Second and Eighth Circuits, have adopted a case-by-case determination as to whether the privilege remains under such circumstances.⁵⁶ Those courts that do analyze waiver on a case-by-case basis analyze various factors including the existence of confidentiality agreements between the corporation, attorney, and government investigators, whether the disclosure was public, general fairness and prejudice principles, and whether the party seeking to retain the privilege is using the privilege as both a "shield and a sword" by injecting privileged material into the case, such as through an advice of

⁵⁰ FED. R. EVID. 502(c).

⁵¹ *See, e.g.*, In re EchoStar Communications Corp., 448 F.3d 1294 (Fed. Cir. 2006).

⁵² *See Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wa. 1975) (holding that privilege is waived when (1) the assertion of privilege results from affirmative conduct, such as filing suit; (2) the affirmative act places the privileged information at issue by making it relevant to the case; and (3) application of the privilege will deny the opposing party access to information vital to that party's defense.).

⁵³ *See Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3d Cir. 1995) (holding that defendant waived the attorney-client privilege concerning certain attorney-client communications because defendant raised reliance on the advice of counsel as an affirmative defense).

⁵⁴ *See, e.g.*, *Jones v. Ill. Cent. R.R. Co.*, 617 F.3d 843 (6th Cir. 2010); *In Re Quest Communications International, Inc.*, 450 F. 3d 1179 (10th Cir. 2006) (rejecting selective waiver and viewing it not as an exception to waiver but a new "government-investigation privilege"); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002). *See also Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425-27 (3d Cir. 1991) (distinguishing partial from selective waivers); *Weil v. Investment/Indicators, Research, and Management, Inc.*, 647 F.2d 18, 24-25 (9th Cir. 1981); *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671 (7th Cir. 1977).

⁵⁵ *Columbia/HCA Healthcare Corp.*, 293 F.3d at 306-07 (6th Cir. 2002).

⁵⁶ *See, e.g.*, *United States v. Doe* (In re Grand Jury Proceedings), 219 F.3d 175, 183, 186 (2d Cir. 2000) (remanding case to determine whether privilege was waived by disclosure); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (upholding protection for attorney-client communications previously disclosed to the SEC in a lawsuit by a private litigant); *In re Natural Gas Commodity Litigation*, 2005 U.S. Dist. N.Y. 11950 (S.D.N.Y. June 21, 2005).

counsel defense.⁵⁷ When examining such fairness principles, the scope of any waiver will turn on the facts of each particular case.

It should also be noted that while the Second Circuit takes the matter into account on its case-by-case analysis, most courts have found waiver and refused to afford protections even when the client's disclosure of confidential communications and documents to a governmental entity was pursuant to a confidentiality agreement with that government entity.

Finally, even if a communication is privileged and the privilege has not been waived, litigating parties might argue to the court that the administration of justice nevertheless warrants disclosure of the communication.⁵⁸ For example, the former Supreme Court Justice Sandra Day O'Connor has commented in dissent that "a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality."⁵⁹ Similarly, at least one court has held that where testimony concerning a privileged communication can only be obtained from an attorney, and disclosure of the privileged communications will not prejudice the party, justice requires disclosure of the communication.⁶⁰

4. IN-HOUSE LAWYERS

The attorney-client privilege applies equally to in-house lawyers and to outside or retained attorney in most jurisdictions.⁶¹ However, greater scrutiny is often applied to determine whether the communication and advice of the in-house lawyer is truly legal in nature, or more general business or technical advice. This becomes especially difficult and fraught with danger when the lawyer serves in several roles within the organization. Only where the advice is predominantly legal and the in-house lawyer is "acting as such"⁶² does the privilege apply. The mere presence of the in-house lawyer at the meeting will not be sufficient to protect the communications at that meeting.⁶³ See discussion above in Section 3 regarding Corporate Clients.

5. PROSPECTIVE

Protecting a corporation's privileged communications involves particular concerns. Often, corporate clients and their attorneys must decide whether to share their otherwise privileged communications concerning internal audits and investigations with government investigators. Though often pressured by the government, expressly or otherwise, to do so to assist an investigation and obtain leniency, sharing such communications risks the confidential nature of those communications, and therefore, may waive the attorney-client privilege. Without such protection, the client's communications may be discoverable to

⁵⁷ See, e.g., *Doe*, 219 F.3d at 185-190; *Diversified Indus., Inc.*, 572 F.2d at 611; *In re Natural Gas Commodity Litigation*, 2005 U.S. Dist. N.Y. 11950 (S.D.N.Y. June 21, 2005); *Maruzen Co., Ltd. v. HSBC USA, Inc.*, 2002 U.S. Dist. LEXIS 13288, 2-5 (S.D.N.Y. July 23, 2002) (holding that privilege was not waived because communications were disclosed under a confidentiality agreement with the United States Attorney's Office).

⁵⁸ See *Swindler & Berlin v. United States*, 524 U.S. 399, 412 (1998) (O'Connor, J., dissenting).

⁵⁹ See *Swindler & Berlin*, 524 U.S. at 411 (O'Connor, J., dissenting).

⁶⁰ See *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 693-94 (Pa. Super. Ct. 1976) (ordering disclosure because "when it is shown that the interests of the administration of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed.").

⁶¹ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁶² *Id.*

⁶³ *North Pacifica, LLC v. City of Pacifica*, 274 F.Supp.2d 1118, 1127 (N.D. Cal 2003); *Handguards, Inc. v. Johnson & Johnson*, 69 F.R.D. 451, 453 (N.D. Cal 1975).

any third party. Moreover, any such waiver may extend to the entire subject matter of the communication, and not merely to the particular document or communication itself.⁶⁴

Efforts by the Department of Justice to pressure corporations to waive the protections of privilege in order to gain credit for government cooperation have exacerbated concerns surrounding this issue. In a June 16, 1999 memorandum issued by then-Deputy Attorney General Eric H. Holder, Jr., federal prosecutors were expressly permitted to account for a “corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges,” when deciding whether to charge a corporation.⁶⁵ This policy was reiterated and made mandatory in a 2003 memorandum by then-Deputy Attorney General Larry Thompson⁶⁶ and a 2005 memorandum by Acting Deputy Attorney General Robert McCallum.⁶⁷

Many criticized the DOJ’s pressuring of corporations to disclose privileged information, including a bipartisan group of 10 former senior Justice Department officials, including such officials as former Attorneys General Richard Thornburgh and Griffin Bell and former Solicitor General Theodore Olsen. In September 2006, they wrote to then-Attorney General Alberto Gonzales to protest the government’s tactics in investigating corporate wrongdoing.⁶⁸ These tactics, they asserted, are “seriously eroding” attorney-client privilege and “undermin[ing], rather than enhance[ing], compliance with the law” and in fact have discouraged corporate boards and executives from consulting with their lawyers, harmed companies’ ability to conduct effective internal investigations.

In December of 2006, in response to the mounting criticism and proposed federal legislation,⁶⁹ and in what was touted as a significant shift in how the Department of Justice would seek and employ privilege waivers in corporate prosecutions, then-Deputy Attorney General Paul J. McNulty issued new guidance limiting federal prosecutors’ ability to seek waiver of attorney-client privilege protection to situations “when there is a legitimate need for the privileged information to fulfill their law enforcement obligations.”⁷⁰ Under the “McNulty Memorandum”, prosecutors could request a waiver of privilege protecting purely factual (“Category I”) information relating to the alleged underlying corporate misconduct when authorized by the US Attorney, and could consider, for charging decision purposes, the

⁶⁴ See FED. R. EVID. 502 and Committee Letter.

⁶⁵ Memorandum from The Deputy Attorney General to All Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), *available at* <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF> (“One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel.”).

⁶⁶ Memorandum from Larry D. Thompson, Deputy Attorney General to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm.

⁶⁷ Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General to Heads of Department Components, Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 21, 2005), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf.

⁶⁸ Letter from Griffin R. Bell, et al., to Hon. Alberto Gonzales, dated September 5, 2006 re Proposed Revisions to Department of Justice Policy Regarding Waiver of the Attorney-Client Privilege and Work Product Doctrine, *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/thompson_memo_letter_sept_5_2006.pdf

⁶⁹ On November 14, 2006, H.R. 3013, The Privilege Protection Act, was passed in the House of Representatives by voice vote without objection. The companion bill in the Senate, S. 186, was then expected to be taken up shortly thereafter.

⁷⁰ Memorandum from Paul J. McNulty, Deputy Attorney General to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf.

corporation's response to a request for Category I information. Privileged attorney-client communications or non-factual attorney work product ("Category II") could be sought only in "rare circumstances" where available purely factual information was inadequate. Refusal to produce Category II information could not be a factor in a charging decision, although waiver could still earn a company cooperation credit.

However, the changes made by the McNulty Memorandum did not satisfy the concerns, nor did it effectively reduce the pressures the Department of Justice could and would bring to bear, expressly or impliedly, upon companies to waive the attorney-client privilege in exchange for "cooperation credit", with the obvious corollary. In June 2008, more than thirty former U.S. Attorneys expressed continued concerns and disagreement with the McNulty Memorandum and instead their support for the Attorney-Client Privilege Protection Act of 2006,⁷¹ which was shortly thereafter reintroduced by Sen. Specter as the Attorney-Client Privilege Protection Act of 2008.

Seeing the handwriting on the wall,⁷² and responding to criticism that the Department had promoted an environment that "unfairly eroded" the protections of attorney-client privilege and work-product protection, the Department of Justice abandoned the McNulty Memorandum's framework in August 2008 when Deputy Attorney General Mark Filip issued new guidance for federal prosecutors.⁷³ Under the "Filip Memorandum," prosecutors must focus on the corporation's willingness to disclose to the government "relevant facts" concerning the alleged misconduct. "[A] corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected." Thus, in theory at least, cooperation credit is no longer given based on waiver of privilege protection, and unwillingness to waive privilege is not supposed to factor in bringing charges. In fact, prosecutors are no longer permitted to request privilege waivers.

However, the issuance of the Filip Memorandum did not and still does not quell concern about the erosion of privilege. Indeed, the current DOJ guidelines seem to turn a blind eye to the corporation's continued need to waive privilege protection in order to furnish prosecutors with the "relevant facts" necessary to gain cooperation credit.⁷⁴ Moreover, the Filip Memorandum, like those that preceded it, shows a disdain for the attorney-client privilege and work product protections, and demonstrates a view that having lawyers conduct internal investigations, as opposed to doing so without lawyers and in a manner that would not raise the privilege, is a matter of choice and suggests not only a lack of cooperation but also a desire to be secretive. The DOJ thus continues to ignore the traditional and valuable role lawyers play in such investigations. Further, other agencies, including the SEC and some

⁷¹ Letter from Rebecca A. Betts, former U.S. Attorney for the Southern District of West Virginia, et alia, to Senator Patrick Leahy, Chairman, Judiciary Committee (June 20, 2008), *available at* [http://www.nacdl.org/public.nsf/whitecollar/WCnews094/\\$FILE/USAs_Letter.pdf](http://www.nacdl.org/public.nsf/whitecollar/WCnews094/$FILE/USAs_Letter.pdf).

⁷² *See, e.g.*, Letter from Sen. Arlen Specter to Mark R. Filip, Deputy Attorney General (July 10, 2008) *available at* (http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=09EE0CFC-978B-D2CB-C6E8-511BEC8EA4EA).

⁷³ Memorandum from Mark Filip, Deputy Attorney General to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), *available at* <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf>, reprinted in UNITED STATES ATTORNEYS' MANUAL, § 9-28 *et seq.*, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

⁷⁴ *See* Press Release from Sen. Arlen Specter (Aug. 28, 2008), *available at* http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9 ("[T]here is no change in the benefit to corporations to waive the privilege by giving facts obtained by the corporate attorneys from the individuals in order to escape prosecution or to have a deferred prosecution agreement.").

state regulators, who are not subject to the Filip Memorandum, have also adopted policies encouraging corporations' cooperation with government investigations.⁷⁵ Indeed, the American Bar Association has established a task force on the Attorney-Client Privilege to address, what it perceives, are attempts to erode the privilege, and along with the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, and the United States Chamber of Commerce, has challenged the United States Sentencing Commission's proposed commentary to Section 8.C2.5(g) of the United States Sentencing Guidelines, which it believes encourages the waiver of the attorney-client privilege.⁷⁶ In the same vein, Senator Arlen Specter and other lawmakers have reintroduced the Attorney-Client Privilege Protection Act, S. 445, legislation aimed at prohibiting federal agencies from requesting attorney-client privilege and work-product protection waivers, offering rewards for such waiver, or threatening adverse consequences for refusals to waive privilege.⁷⁷

As stated above, Federal Rule of Evidence 502, Attorney-Client Privilege and Work Product; Limitations on Waiver was enacted in September of 2008. The Rule addresses the scope of a waiver of privilege in a federal proceeding or to a federal office or agency, avoiding waiver when an unintentional or inadvertent disclosure occurs, and disclosures in state proceedings.⁷⁸ In drafting this Rule, the Advisory Committee on Evidence Rules also considered including a provision allowing for "selective waiver" of privilege for a specific limited purpose of responding to a federal government regulatory, investigative or enforcement authority, but maintaining it for all other purposes. Although, as stated above, the concept has generally been rejected in the courts,⁷⁹ it was advanced and included in those proposed amendments. However, the "selective waiver" proposal was deleted during the Rule approval process.⁸⁰

Thus, Rule 502 makes no allowance for a waiver specific to responding to a governmental investigation. As stated above, the selective waiver concept has also generally been rejected in the courts.

⁷⁵ See Securities and Exchange Act of 1934 Release No. 44969, Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001), *available at* www.sec.gov/litigation/investreport/34-44969.htm; Bruce A. Green and David C. Clifton, *Feeling a Chill; Changing Government Policies Are Pressing Corporation and Attorneys to Disclose Protected Information*, A.B.A.J. at 63-64 (Dec. 2005); Elkan Abramowitz and Barry A. Bohrer, *White Collar Crime; Waiver of Corporate Attorney-Client and Work Product Protection*, N.Y.L.J., Nov. 1, 2005, at 3.

⁷⁶ See Green, *supra* note 68, at 63; Abramowitz, *supra* note 68.

⁷⁷ See Attorney-Client Privilege Protection Act, S. 445, 111th Cong. (2009); Attorney-Client Privilege Protection Act, H.R. 4326, 111th Cong. (2009).

⁷⁸ See Notes 33 – 36 and related text.

⁷⁹ See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 302-04 (6th Cir. 2002) (holding privilege was waived); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425-27 (3d Cir. 1991) (distinguishing partial from selective waivers); *Weil v. Investment/Indicators, Research, and Mgmt, Inc.*, 647 F.2d 18, 24-25 (9th Cir. 1981); *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671 (7th Cir. 1977); *United States v. Doe (In re Grand Jury Proceedings)*, 219 F.3d 175, 183, 186 (2d Cir. 2000) (remanding case to determine whether privilege was waived by disclosure); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (holding that privilege was not waived through disclosure in non-public Securities and Exchange Commission investigation); *Maruzen Co., Ltd. v. HSBC USA, Inc.*, 00 Civ. 1079 (RO), 00 Civ. 1512 (RO), 2002 U.S. Dist. LEXIS 13288, at *2-5 (S.D.N.Y. July 23, 2002) (holding that privilege was not waived because communications were disclosed under a confidentiality agreement with the United States Attorney's Office).

⁸⁰ While some had argued in favor of the selective waiver provision in order to protect against subject matter waiver and to maintain the privilege in other contexts, others argued that such a provision would simply encourage the government to pressure companies more to waive the privilege by arguing that there would be limited detriment to the company outside the government's investigation. Companies rightfully argue that they should not be compelled to waive the privileges due to the far-reaching impact beyond the particular government investigation such as in civil litigation or the ability to conduct effective investigations and counseling in the future (in addition, of course, to the fact that doing so undermines the crucial value of the attorney client privilege and work product doctrine to society and parties).