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Privilege Precautions when Investigating Construction Catastrophes

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INTRODUCTION

The attorney-client privilege and the work product doctrine allow litigants to withhold certain information that would otherwise be subject to discovery and/or revelation at trial.

This paper addresses common privilege-related and work-product-related issues that arise in investigations into engineering and construction-related failures and other types of catastrophic accidents. The paper focuses on federal law in the United States, but also discusses the law of North Carolina and some other states.

Before addressing these issues, this paper reviews the basics of the attorney-client privilege and the work product doctrine.

THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the "oldest of the privileges for confidential communications known to common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The purpose of the attorney-client privilege is to encourage clients to communicate with attorneys freely, enabling attorneys to provide informed and thorough legal advice without clients fearing the communications will be disclosed. Id.

The Fourth Circuit has held that the attorney-client privilege protects communications from disclosure if:

1. The asserted holder of the privilege is or sought to become a client;

2. The person to whom the communication was made:

    (a) is a member of the bar of a court, or his subordinate; and

    (b) is acting as a lawyer in connection with this communication.

3. The communication relates to a fact of which the attorney was informed:

    (a) by his client;

    (b) without the presence of strangers;

    (c) for the purpose of securing primarily either:

        (i) an opinion on law; or

        (ii) legal services; or

(iii) assistance in some legal proceeding;

(d) and not for the purpose of committing a crime or tort; and

4. The privilege has been:

(a) claimed; and

(b) not waived by the client.

In re Allen, 106 F.3d 582, 600 (4th Cir. 1997) (citing United States v. Tedder, 801 F.2d 1437, 1442 (4th Cir. 1986) (formatting changed)).

Attorney-client privilege is a substantive legal issue that is governed by applicable state law in a diversity action in federal court. Hawkins v. Stables, 148 F.3d 379, 382 (4th Cir. 1998).

THE WORK PRODUCT DOCTRINE

The work product doctrine protects materials created with an eye toward litigation and particularly the "mental impressions" of attorneys analyzing and preparing a case. United States v. Nobles, 422 U.S. 225, 238 (1975).

Rule 26(b)(3) of the Federal Rules of Civil Procedure defines the elements of work product protection:

1. That the material consists of "documents and tangible things;"

2. Which were "prepared in anticipation of litigation or for trial;" and

3. "[B]y or for another party or by or for that other party's representative."

8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024, at 336 (2nd ed. 1994).

Once the threshold requirements for work product protection are met, the level of protection accorded to material depends on whether it is "opinion" work product versus "fact" or "ordinary" work product. In re Allen, 106 F.3d at 607.

Opinion work product contains an attorney's mental impressions, conclusions, opinions, or legal theories concerning the litigation and is accorded near absolute immunity from discovery whether it was "actually prepared by the attorney or another representative of the party." In re Allen, 106 F.3d at 607; accord Drummond Co. v. Conrad & Sherer, LLP, 885 F.3d 1324, 1335 (11th Cir. 2018) (quoting Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir. 1994)).

Fact work product, which includes everything else eligible for protection as work product, is discoverable "upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship." In re Allen, 106 F.3d at 607.

LAWYER'S ETHICAL DUTY TO PROTECT CLIENT INFORMATION

Beyond the opportunities and strategies presented by the attorney-client privilege and the work product doctrine, lawyers have an ethical obligation to protect client information. The exact contours of that ethical obligation differ under various states' rules of professional conduct.

For example, Rule 1.6(a) of the Revised Rules of Professional Conduct of the North Carolina State Bar states that:

> A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [which allows disclosures to prevent commission of a crime, to prevent reasonably certain death or bodily harm, to defend against allegations of malpractice, or to comply with a court order].

While the North Carolina rule shows a broad concern with any information acquired during the professional relationship with a client, other states approach the issue more narrowly. For example, Rule 1.6 of the Virginia Rules of Professional Conduct implicates "information protected by the attorney-client privilege" or "other information . . . that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client," and forbids attorney disclosure absent the client's consent, implied authorization, or special circumstances.

Importantly, the lawyer's ethical obligation under either approach is broader than the attorney-client privilege and the work product doctrine.

PRIVILEGE PRECAUTIONS WHEN INVESTIGATING CONSTRUCTION CATASTROPHES

Something goes wrong – perhaps there is a collapse of a structure during construction, another type of engineering failure, or an industrial accident – and a corporate client seeks legal advice. Litigation appears inevitable. Before counsel can assess the client's possible legal exposure, counsel has to know what happened. Interviews with employees can provide valuable insight, but may also reveal sensitive information that the client would not want disclosed. Counsel may want to consult with an outside expert to identify the cause of the failure or

accident (or the client may have already retained and consulted with such a person before contacting counsel). The client may have already initiated a root cause analysis as part of its routine procedure when failures occur. Both counsel and the client need to be cognizant of the following precautions regarding the attorney-client privilege and the work product doctrine.

Precaution No. 1: Communicating with corporate employees is not the same thing as communicating with a corporation itself.

(Related precautions include clearly identifying the lawyer's client and clarifying, in interviews, who is and is not the client.)

Lawyers cannot assume that the attorney-client privilege covers their communications with all corporate employees. Some employees might not qualify as client agents for purposes of the privilege. If so, communications with these employees would not be privileged, and disclosure of other privileged communications (such as lawyers' analytical memos) to these employees could waive the privilege.

In federal practice, the attorney-client privilege is protected if the employee qualifies under the Upjohn test. Upjohn Co., 449 U.S. at 394. Under this test, attorney-client privilege applies to communications (1) made by corporate employees, (2) to counsel, (3) at the direction of corporate superiors, (4) when those communications involve matters within the scope of employees' corporate duties, and (5) when the employees were aware that they were being questioned so that the corporation could obtain legal advice. Id. The Fourth Circuit has held that the Upjohn test applies equally to former employees. In re Allen, 106 F.3d at 606.

Who can assert or waive the corporate attorney-client privilege varies by jurisdiction. The majority rule is that it can be asserted or waived by the corporation, not by an individual employee or manager. In re Grand Jury Subpoenas, 902 F.2d 244, 248 (4th Cir. 1990). However, a small minority of states have adopted the so-called "Joint Client" theory, which treats the corporation and its directors as joint clients when legal advice is given to the corporation through one of its directors; the corporation then cannot assert privilege against a director to prevent access to legal advice received during the director's tenure. See Inter-Fluve v. Montana Eighteenth Judicial District Court, 112 P.3d 258 (Mont. 2005); Omega Consulting Group, Inc. v. Templeton, 805 So.2d 1058 (Fla. Dist. Ct. App. 2002); Moore Business Forms, Inc. v. Cordant Holdings Corp., No. 13911, 1996 WL 307444 (Del. Ch. June 4, 1996).

An attorney must be attentive to the possibility that an employee will try to claim privilege against the employer. Communicating too loosely with the wrong corporate employee risks disqualification of the offending law firm and ethical sanctions. See Sutherland v. Jagdmann, No. 3:05CV042-JRS, 2005 WL 5654314, at *1 (E.D. Va. Oct. 31, 2005) (seeking disqualification of defense counsel for corporation based on the purported existence of an attorney-client relationship with the plaintiff, a former employee of the corporation). Loose communication could also allow an employee to assert the attorney-client privilege despite the corporation's desire to waive the privilege. See, e.g., In re Grand Jury Investigation, No. 83-30557, 575 F. Supp. 777, 778 (N.D. Ga. 1983).

To prevent these bad outcomes, lawyers need to make clear to employees that the corporation, not the individual employees, is the client whose interests the lawyer must protect. Based on ethics rules, as well as the requirements of the Upjohn test, commentators have developed a standard warning—sometimes called a "corporate Miranda warning"—to give to corporate employees before any interviews. One verbal formula for such a warning follows:

> I am a lawyer for Corporation A. I represent only Corporation A, and I do not represent you. If you want an attorney, you must hire your own [or the corporation will hire one for you].
>
> Your communications with me are protected by the attorney-client privilege.
>
> The attorney-client privilege belongs solely to Corporation A. Accordingly, Corporation A may elect to waive that privilege and reveal your communications with me to third parties, including the government, at its sole discretion.

Ass'n of Corporate Counsel, Sample "Corporate Miranda" Warning (Sept. 2005), available at http://media01.commpartners.com/acc_webcast_docs/Corporate_Miranda_Warnings.pdf (last visited November 30, 2019).

Although this warning might make an employee hesitate to reveal information, the alternative is a possible finding that the employee reasonably believed that the lawyer was her lawyer. In such a case, a court would likely hold that an attorney-client relationship had formed. As a result, the corporate counsel could be compelled to withdraw from continuing to represent the corporation.

In In re Grand Jury Subpoena: Under Seal, the Fourth Circuit faced employees' claims that they believed that the corporate counsel was representing them. The court held that "the putative client must show that his subjective belief that an attorney-client relationship existed was reasonable under the circumstances." 415 F.3d 333, 339 (4th Cir. 2005). Because a "corporate Miranda warning" (though a less definitive version than the one above) had been given to the employees, the court found that the employees' perception of representation was not reasonable. Id. at 339-40. Thus, no attorney-client relationship was formed.

Precaution No. 2: Communications with client agents and lawyer agents are sometimes, but not always, protected.

During the course of an investigation into an incident, a corporation or its counsel may talk with experts within the corporation or may retain experts outside the corporation. Once again, the client may want to keep any information relayed to or by these consultants confidential, as well as any related legal advice.

Although revealing privileged information to parties outside the immediate attorney-client relationship often waives the attorney-client privilege and can waive work product

immunity, this outcome does not apply when clients and lawyers reveal this information to certain types of agents. In general, the privilege-extending doctrines for agents of clients are narrower than those for agents of lawyers.

A. Agents of Clients

One type of (often overlooked) client agent is a corporate employee. Because attorney-client privilege requires communications to be made in confidence and for the purpose of obtaining or giving legal advice, these communications should only be shared with corporate employees with a "need to know." Corporate employees with a "need to know" might include employees tasked with implementing legal advice or conveying certain information necessary for the rendering of legal advice. See Upjohn Co., 449 U.S. at 390 (holding that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice"). Revealing otherwise privileged communications to employees without a "need to know" could waive attorney-client privilege.

Many courts require that, for the privilege to survive, any disclosure to a client agent is "necessary for the transmission of information between the clients and lawyers." 1 Thomas E. Spahn, The Attorney-Client Privilege and The Work Product Doctrine: A Practitioner's Guide 160 (3d ed. 2013). On this theory, administrative assistants, interpreters, and translators are generally allowed to be involved in privileged communications without undermining the privilege. Id.

Other types of client agents present a more difficult case. Courts have been less willing to allow a client's independent accountants, financial advisors, or consultants to be involved in privileged communications, but there are decisions that protect communications with these types of agents as well.

In Neighborhood Development Collaborative v. Murphy, the court held that communications between a client's financial consultant and the client's lawyers were protected by the attorney-client privilege. 233 F.R.D. 436, 441 (D. Md. 2005). The court held that the consultant was the functional equivalent of the client's employee because the consultant protected the client's confidences and acted in accordance with the client's interests. Id. at 440. By acting in that capacity, the consultant played an important role in "facilitating communication" with the client's counsel. Id. at 441. For these reasons, and because the client "had every reason to believe those communications would remain confidential," the court held that the consultant's communications with counsel were protected by the attorney-client privilege. Id. at 440.

Other courts have applied this same reasoning to consultants who have been hired to work with real property. See, e.g., In re Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994); MLC Automotive, LLC v. Town of Southern Pines, No. 1:05cv1078, 2007 WL 128945, at *4 (M.D.N.C. Jan. 11, 2007).

In MLC, the client hired a civil engineer "to investigate and address regulatory requirements applicable to the property from a planning and design perspective" and to act as a client representative in meetings with municipal officials. Id. at *2. As part of his work for the client, the engineer "communicated directly with [the client's] attorneys regarding the property." Id.

The MLC court denied the defendant's motion to compel production of the engineer's communications with counsel. The court noted that the engineer played "an integral part in supplying to [the client's] attorneys information necessary for processing the various applications and permits." Id. at *4. The engineer's communications with counsel fell within the rule that the attorney-client privilege applies "where the communications are meant to facilitate or assist in the rendition of legal services, or to provide the consultants [with] legal advice and strategies formulated by counsel so that the consultant can carry out related tasks on behalf of the client." Id.

A 2012 article summarizes the above principles as follows: Communications with (or revealed to) third parties will receive protection if the third parties are the functional equivalent of a company employee. See Bryan A. Zemil, Attorney-Client Privilege Protections for Non-Employees: Criteria for the Functional Equivalent Test, Litig. News, Fall 2012, at 4, 4. The article cites decisions that extend this analysis to construction consultants, independent credit counseling consultants, invention consultants, insurance consultants, and public-relations consultants. Id.

In sum, most courts protect communications with agents of clients that support a client's request for and receipt of legal advice. These rules may be applied narrowly, however, so the privilege is more likely to survive if counsel analyzes the case law and makes any needed adjustments before the communications happen. When trying to protect communications that did take place, a generic statement that information has not been shared with anyone other than individuals that needed to know the information likely is not sufficient to establish that attorney-client privilege has not been waived. See, e.g., Brown v. Am. Partners Fed. Credit Union, 183 N.C. App. 529, 536, 645 S.E.2d 117, 122 (2007). A corporation should always identify any persons privy to a privileged communication, their corporate responsibilities, and their relationships to the issues communicated.

B. Agents of Lawyers

In contrast to agents of clients, a lawyer's own agents are generally considered to be within the attorney-client relationship, so that shared communications remain privileged. The privilege, for example, extends to a client's communications with a lawyer's staff.

Non-lawyer consultants present a harder case for extending the privilege, but courts have generally accepted the extension. An important decision in this area is United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). The Kovel court considered whether a client's communications with an accountant employed by a law firm were privileged from discovery in a grand jury investigation. After the accountant refused to testify about those communications before the

grand jury, the district court held him in contempt. On appeal, the Second Circuit vacated the judgment of contempt, holding that the client's communications with the accountant could, depending on their purpose, be protected by the attorney-client privilege.

The court explained its conclusion as follows:

> [I]f the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought to fall within the privilege.

Id. at 922.

Some states take a narrower approach to the doctrine originally advanced in Kovel. The Supreme Court of Virginia, for example, has stated, "The privilege attaches to communications of the client made to the attorney's agents . . . when such agent's services are indispensable to the attorney's effective representation of the client." Commonwealth v. Edwards, 235 Va. 499, 508–09, 370 S.E.2d 296, 301 (1988) (emphasis added). Thus, Virginia courts will not apply attorney-client privilege to communications with an attorney's agent absent evidence that the agent's role was indispensable. See, e.g., Via v. Com., 42 Va. App. 164, 189, 590 S.E.2d 583, 595 (2004).

A case from the Southern District of New York takes a similarly narrow view of when client agents/consultants should be afforded privilege protection. Scott v. Chipotle Mexican Grill, Inc., No. 12-CV-08333 (ALC) (SN), 2015 U.S. Dist. LEXIS 40176 (S.D.N.Y. Mar. 27, 2015). In that case, Chipotle sought advice from outside counsel about wage and hour issues, and outside counsel retained a human services consultant to prepare a report about Chipotle's employees' classifications.

The court explained that privilege protection would only attach if counsel "engaged [the consultant] as its agent for a specific type of information that it could not otherwise obtain," before noting that "it strains credulity to imagine that an attorney evaluating wage and hours laws would not be able to speak with employees or interpret those laws on his own." Id. at *28-29. Ultimately, the report was denied privilege protection because it did not "provide any specialized knowledge that [counsel] could not have acquired or understood on their own or directly through [their] clients." Id.

Thus, lawyers should not assume that privilege protection always applies when they retain a consultant to gather facts. For privilege to attach, the activities of consultants must always relate to obtaining legal advice, and courts may require that a consultant provide services that neither counsel nor its client could undertake.

Still, where expert consultations are a true necessity, such as in cases involving complex technical matters, privilege likely will be extended to a lawyer's agent. An expert in this area,

Tom Spahn, suggests taking the following steps to clarify that a consultant is a lawyer's agent as opposed to a client's agent:

- selecting an agent who is not already assisting the client;
- explicitly explaining in the agent's retainer agreement what role the agent will play in helping the lawyer provide legal advice to the client;
- directing the agent to communicate only with the lawyer or only in the lawyer's presence; and
- incorporating the agent's work into the legal advice that the lawyer transmits to the client, rather than simply forwarding the agent's advice to the client.

1 Spahn, supra, at 203.

Precaution No. 3: The common interest/joint defense doctrine does not apply universally.

When there is a collapse of a structure during construction or another type of engineering failure, people with bodily injuries – or corporations with business losses – often look to multiple corporations responsible for different aspects of the work leading to the accident. One should not assume that one can freely share otherwise privileged information with such co-plaintiffs or co-defendants because of the common interest doctrine. The doctrine has a number of elements that take careful effort to establish.

The common interest doctrine "permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims." Hunton & Williams v. DOJ, 590 F.3d 272, 277 (4th Cir. 2010). The doctrine is not a free-standing privilege but is simply an exception to the waiver of the attorney-client privilege or work product doctrine. In re Grand Jury Subpoenas, 902 F.2d at 249; see also, e.g., Mainstreet Collection, Inc. v. Kirkland's, Inc., 270 F.R.D. 238, 243 (E.D.N.C. 2010); Raymond v. N.C. Police Benevolent Ass'n, 365 N.C. 94, 101, 721 S.E.2d 923, 928 (2011).

For the common interest doctrine to apply, "the proponent must establish that the parties had 'some common interest about a legal matter.'" In re Grand Jury Subpoena: Under Seal, 415 F.3d at 341 (quoting Sheet Metal Workers Int'l Ass'n v. Sweeney, 29 F.3d 120, 124 (4th Cir. 1994)); accord United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996) (rejecting the application of the common interest doctrine where a party participates in developing defenses merely to preserve its reputation since "the preservation of one's reputation is not a legal matter").

The common interest doctrine applies regardless of whether litigation is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the

litigation is civil or criminal. In re Grand Jury Subpoenas, 902 F.2d at 249. However, courts have carefully scrutinized claims of contemplated litigation. One court explained that "contemplated litigation means a palpable threat of litigation," which "would seem to be at least as stringent as the anticipation of litigation standard used for work product." United States v. Duke Energy Corp., 214 F.R.D. 383, 388-89 (M.D.N.C. 2003).

Courts have also concluded that, for the common interest doctrine to apply, the proponent also must be able to show an actual agreement between the parties "to share information as a result of a common legal interest relating to ongoing or contemplated litigation." Id. While a common interest agreement can be inferred where two parties are clearly collaborating in advance of litigation, courts have also declared "mere indicia of joint strategy" insufficient to show formation of a common interest agreement. Bethune-Hill v. Virginia State Bd. of Elections, 114 F. Supp. 3d 323 (E.D. Va. 2015) (citing Hunton & Williams, 590 F.3d at 284).

Therefore, it is a good idea to have an easily identified communication to confirm the parties' understanding of their common interest before the parties share privileged information. Opinions vary on whether a common interest agreement should be in writing. Here are the key considerations pro and con:

- A writing makes it far easier to show the existence, date, and terms of the agreement.

- In addition, a writing makes it less likely that lawyers will have to testify (by affidavit or otherwise) to prove the existence and terms of the agreement.

- On the other hand, if parties are going to have a written common interest agreement, they should assume that their litigation opponents are going to seek to discover the agreement — ostensibly, to show the bias of witnesses whose companies have declared a common interest. Parties should draft common interest agreements with careful thought about how the agreements will look in open court and in briefs filed by the other side. When parties draft any common interest agreement, they should also decide their general plan for how to respond to a demand for production of the agreement.

Notably, a written common interest agreement may not be effective if other requirements of the common interest doctrine are not met. See SCR-Tech LLC v. Evonik Energy Servs. LLC, No. 08 CVS 16632, 2013 WL 4134602, at *8 (N.C. Bus. Ct. Aug. 13, 2013) (holding that communications between two corporations, made pursuant to a "Cooperation Agreement" and intended solely to facilitate one corporation's legal claims, were not privileged because the non-party corporation had only a business interest in the ongoing litigation, not the shared legal interest necessary to support a common interest privilege); see also Friday Investments, LLC v. Bally Total Fitness of the Mid-Atl., Inc., 788 S.E.2d 170, 178 (N.C. Ct. App. 2016), aff'd as modified, 370 N.C. 235, 805 S.E.2d 664 (2017) (finding entities shared a common business interest as opposed to a common legal interest necessary to support a tripartite attorney-client relationship where the relationship was not formed for purposes of indemnification or coordination in anticipated litigation).

When there is a close corporate affiliation, including that shared by a parent and subsidiary, courts may either forego common interest analysis or take a more lenient approach in applying the doctrine. See, e.g., SCR-Tech, 2013 WL 4134602, at *2-4. One court has suggested that if there is sufficient unity between corporations – e.g., one is wholly owned by the other or both are wholly owned by a third party – they may properly be considered a joint client and no showing of joint strategy or shared legal interest is necessary. Id. at *4 (citing Teleglobe USA, Inc. v. BCE Inc., 493 F.3d 345, 370-72 (3rd Cir. 2007)). However, it is not clear how many courts will adopt this logic.

The common interest/joint client doctrine is primarily thought of as a shield against discovery by a third party, but it may also impact discovery between the parties in a later action.

Courts have explored this issue primarily in the context of insurance litigation, and decisions allowing discovery of otherwise privileged communications in subsequent litigation often emphasize the unique "tripartite" relationship that arises when an insurer retains defense counsel for the insured. See, e.g., Nationwide Mut. Fire Ins. Co. v. Bourlon, 172 N.C. App. 595, 605, 617 S.E.2d 40, 47 (2005) aff'd, 360 N.C. 356, 625 S.E.2d 779 (2006) ("The common interest or joint client doctrine applies . . . . Therefore, where, as here, an insurance company retains counsel for the benefit of its insured, those communications related to the representation and directed to the retained attorney by the insured are not privileged as between the insurer and the insured."); Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1 (1st Cir. 2012) (finding a common interest between insurer and insured where insurer appointed defense counsel for the insured and therefore allowing discovery of insured's communications with defense counsel).

However, the Illinois Supreme Court applied the common interest doctrine and ordered discovery of attorney-insured communications in an underlying action "where the attorney, though neither retained by nor in direct communication with the insurer, act[ed] for the mutual benefit of both the insured and the insurer." Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322, 328 (Ill. 1991). The court's logic could apply to common interest agreement participants outside of the insurance context, as the court emphasized, "It is the commonality of interests which creates the exception, not the conduct of the litigation." Id. at 329. However, this decision has been widely criticized. See, e.g., RML Corp. v. Assurance Co. of Am., 60 Va. Cir. 269 (2002) (rejecting the rule in Waste Management and citing cases critical of the decision).

Many courts have not explicitly addressed how the common interest doctrine applies to discovery between the parties in subsequent litigation, but one Virginia court has remarked that "the common-interest doctrine is intended to enable a common defense rather than to open the files of co-defendants that choose to retain separate counsel." RML Corp., 60 Va. Cir. at 269 (finding the common interest doctrine did not apply and denying discovery of insured's communications with independent counsel, reasoning independent counsel was hired because the parties had adverse interests).

However, Virginia courts are likely to find that privilege fails to attach where commonly interested parties are jointly represented. See Patel v. Allison, 54 Va. Cir. 155 (2000) ("Where

an attorney is consulted by two parties in a matter of common interest for their mutual benefit, nothing said by the parties or the attorney is deemed confidential in litigation between those parties or their personal representatives since their common interest forbids concealment of statements made by one from the other."); Bd. of Directors of Port Royal Condo. Unit Owners' Ass'n v. Crossland Sav. F.S.B., 19 Va. Cir. 8 (1989) (finding a "joint client exception to the attorney-client privilege applies" but only "to those matters of common interest and concern," explaining that "the mere fact that an attorney has represented two or more clients jointly does not give either client carte blanche to all files involving the other client or clients").

Thus, whether a court is careful in distinguishing between analysis under the joint client doctrine and analysis under the common interest doctrine may be especially important in this context. See SCR–Tech, 2013 WL 4134602, at *2-4 (distinguishing between the joint client doctrine, which focuses on client identity and the relationship between two entities, and the common interest doctrine, which focuses on the common legal interests between two entities regardless of their relationship).

It is not uncommon for parties sharing a common interest in a legal matter to also have adverse interests in regard to other legal matters. For example, two corporations may have a common interest in the defense of a wrongful death claim, but their interests remain adverse as to contractual claims arising from the same events. Parties should keep any privileged communications and work product related to matters of common interest separate from those dealing with issues on which the parties are adverse, keeping in mind that privilege may not attach to materials relating to matters of common interest and concern in a subsequent action between the parties. Either way, parties must be aware that accidentally sharing communications on issues where the parties are adverse waives privilege.

Precaution No. 4: A lawyer cannot have privileged communications with a testifying expert.

A. Federal Practice

Rule 26(a)(2) of the Federal Rules of Civil Procedure states requirements for expert-related discovery, including the requirement that the party who designates a testifying expert provide a written report with, among other things, "the data or other information considered by the witness in forming [his or her opinions]."

Because of this requirement, lawyers who disclose documents that contain attorney work product or privileged communications to a testifying expert risk a waiver of the protections that govern those documents – and, for privileged communications, a possible subject-matter waiver.

Lawyers who work with testifying experts should address, from the first contact, the expert's practices with draft reports, correspondence, e-mails, and the like. Under current law, even with the protections provided in the 2010 amendments to Rule 26 of the Federal Rules of Civil Procedure, no lawyer should assume that testifying experts can create or receive these written materials and avoid producing them.

Rule 26 extends work product immunity to most draft reports and attorney-expert communications, subject to (as with other work product) an override based on a showing of substantial need. The subsections of Rule 26(b)(4) provide:

> (B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
>
> (C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), 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)(B)-(C).

B. State Practice

State rules of civil procedure concerning expert discovery are generally less comprehensive than the federal rule. For example, North Carolina and many other states do not require written reports from testifying experts. N.C. R. Civ. P. 26(b)(4). (If reports are prepared, counsel should be aware that the state's rules do not protect discovery of drafts as the federal version does.) Instead, parties may serve written interrogatories on the party who proposes expert testimony, requiring the latter

> to identify each person whom [it] expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

N.C. R. Civ. P. 26(b)(4)(a)(1). If a party wants additional expert-related discovery, that party may move for a court order to allow that additional discovery, subject to possible shifting of fees and expenses. N.C. R. Civ. P. 26(b)(4)(a)(2).

Unlike the North Carolina Rules of Civil Procedure, the North Carolina Business Court Rules expressly recognize the role of expert depositions in expert-related discovery. Specifically, Rule 10.8 states that "The parties must attempt to agree on procedures that will govern expert discovery including any limits on the number of experts and/or the number of expert depositions . . . Unless the parties agree otherwise, each expert witness may be deposed by a party adverse to the party designating the expert. The expert witness is only subject to a single deposition at which all adverse parties may appear."

In Azalea Garden Board & Care, Inc. v. Vanhoy, the North Carolina Business Court acknowledged that, to the extent that a party must disclose, under Rule 26(b)(4)(a)(1), "a summary of the grounds for each opinion," that disclosure can waive the attorney-client privilege. No. 06 CVS 0948, 2009 WL 795287 (N.C. Bus. Ct. Mar. 26, 2009).

A similar result had been reached in Hospira Inc. v. AlphaGary Corp., No. 05 CVS 6371, slip op. (N.C. Bus. Ct. Mar. 20, 2007). The court rejected across-the-board discovery of everything that counsel had communicated to a testifying expert. See id. at 3-4. At the same time, the court held that it is "fair to allow Hospira to elicit, via deposition, all information relied on by AlphaGary's expert to form his opinions, regardless of its form or source." Id. at 3 (emphasis added).

Thus, if you are giving an expert information that might serve as a basis for her opinion, you need to make sure that this information does not include privileged information. And if you are designating an expert that has already been privy to privileged communications that might be relevant to the subject matter of her testimony, you should be aware of the possibility that these too will be discoverable.

Because state laws often do not require an expert to prepare a report, disputes over experts' reliance on privileged communications are likely to play out during expert depositions. In the faster-moving environment of a deposition, inadvertent communications of privileged material can have even more damaging consequences.

Precaution No. 5: There is risk in designating your client as a possible expert witness.

Often where the corporate client's product or design allegedly caused an accident, the best expert could be an employee of the corporate client. In Azalea Garden Board & Care, Inc. v. Vanhoy, the North Carolina Business Court addressed the danger of listing a client as an expert witness. No. 06 CVS 0948, 2009 WL 795287 (N.C. Bus. Ct. Mar. 26, 2009).

In response to an interrogatory, the plaintiff's counsel in Azalea Garden listed his client as a "possible" expert witness. Defendant's counsel then served additional discovery requests that addressed the proposed expert testimony, pursuant to Rule 26(b)(4) of the North Carolina

Rules of Civil Procedure. Plaintiff's counsel responded to those requests by asserting the attorney-client privilege. Defendant's counsel replied that there could be "no attorney-client privilege associated with communications related to a witness's service as an expert." Id. at *2.

The defendant then filed a motion to compel, which the court granted. In granting the motion, the court noted that the attorney-client privilege did not cover communications related to expert testimony.

The plaintiff's counsel then tried to withdraw the designation of his client as a possible expert witness. The defendant's counsel moved for sanctions. The court granted sanctions in the form of attorney fees.

The court concluded that "[i]t is clear that designating a client as an expert can result in at least a limited waiver of the attorney-client privilege." Id. at *8. The court held that because Rule 26(b)(4) allows interrogatories on the "grounds for each opinion" of an expert, an opposing party may discover, as one of these grounds, information that an expert has obtained from counsel. Id. (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1)). As a result, the plaintiff's privilege objections were neither "reasonable [n]or consistent with the rules or existing law." Id.

Precaution No. 6: Disclosures of privileged information and of work product are not treated the same.

If information otherwise protected by the attorney client privilege or the work product doctrine is disclosed (for example, to the consulting expert) and a court finds waiver, then both counsel and clients should be aware of the possible extent of any waiver.

A. Voluntary Disclosure Can Lead to Subject-Matter Waiver

By voluntarily disclosing formerly privileged communications, parties can waive the attorney-client privilege not only for the specific communications disclosed, but also for other communications that involve the same subject matter. See United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982); F.C. Cycles Int'l, Inc. v. FILA Sport, 184 F.R.D. 64, 72-73 (D. Md. 1998).

B. Subject-Matter Waiver Does Not Apply to Work Product

In Continental Casualty Co. v. Under Armour, Inc., the court stated that "the Fourth Circuit has recognized that when work product protection has been waived, it is limited to the information actually disclosed, not subject matter waiver." 537 F. Supp. 2d 761, 773 (D. Md. 2008).

C. Attorney-Client Privilege Waiver Does Not Equal Work Product Waiver

In Continental Casualty, the court also noted that "[t]he conclusion that the attorney-client privilege has been waived . . . does not concomitantly compel the conclusion that they also have lost work product immunity." Id. at 769. The waiver of attorney-client privilege for a

communication "does not automatically waive whatever work-product immunity that communication might also enjoy, as the two are independent and grounded on different policies." Id.

D. Inadvertent Disclosure Might Not Result in Waiver in Federal Court

Rule 502 of the Federal Rules of Evidence, enacted in 2008, has reduced the likelihood that certain disclosures of privileged communications will cause a subject-matter waiver under federal law.

As the Advisory Committee note explains, the rule has two primary objectives:

1. To clarify the law on the circumstances under which a disclosure of a privileged communication results in a waiver, as well as the extent of any resulting waiver; and

2. To reduce litigation costs, especially the escalating costs of privilege reviews in cases that involve substantial amounts of electronically stored information, by:

   (a) putting strict limits on subject-matter waivers;

   (b) reducing the risks associated with inadvertent disclosures; and

   (c) empowering the federal courts to bind non-parties (and state courts) by entering orders that universally restrict or eliminate arguments for privilege waivers.

Rule 502 has four key provisions:

1. Subject-Matter Waiver Limited. Rule 502(a) states that a subject-matter waiver can occur only under narrow circumstances.

   - Under the rule, when a disclosure that waives the privilege or the work product immunity is made in a federal proceeding (or to a federal agency), the waiver extends beyond the disclosure only if:

     (a) the waiver is intentional;

     (b) the disclosed and undisclosed communications or information concern the same subject matter; and

     (c) they ought in fairness to be considered together.

Fed. R. Evid. 502(a).

- The Advisory Committee note on Rule 502(a) explains:

  "[S]ubject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver."

- Rule 502(a) thus creates a presumption against subject-matter waiver. Except under narrow circumstances, any waiver will be limited to the communication disclosed.

2. Waiver by Inadvertent Disclosure Limited. Rule 502(b) states that an inadvertent disclosure may not cause any waiver (even for the communication disclosed) under certain circumstances.

   No waiver occurs if:

   - The disclosure is 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, including (if applicable) following Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure.

   Rule 502(b) resolves conflicting case law on the effects of an inadvertent disclosure. In Hopson v. City of Baltimore, 232 F.R.D. 228, 235-36 (D. Md. 2005), the court outlined the courts' earlier "three distinct positions" on the consequences of inadvertent disclosures:

   (a) Strict accountability, under which any disclosure, even inadvertent, resulted in waiver;

   (b) A lenient approach that barred a waiver unless the waiver proponent showed either intentional and knowing privilege relinquishment or grossly negligent inadvertent disclosure; and

   (c) A balancing test that called for a case-by-case determination on whether the disclosure was excusable.

   Rule 502(b) adopts a middle ground. Under that rule, a disclosure causes no waiver if the privilege holder took reasonable steps to prevent disclosure and takes prompt, reasonable steps to rectify the error.

3. Protective/Confidentiality Orders Binding on Non-Parties in Federal & State Proceedings. Rule 502(d) allows the federal courts to enter protective orders that provide that "the privilege or protection is not waived by [a] disclosure" in a pending case and that such a disclosure "is also not a waiver in any other Federal or State proceeding."

   The rule undertakes to change results under state privilege law by making those results subject to federal courts' orders.

4. Protective/Confidentiality Agreements Binding Only on Parties. Subsection (e) states that a protective agreement that limits the effect of disclosure binds only the parties to the agreement, unless the agreement is incorporated into a court order.

In addition, the Rule has three other provisions. First, Rule 502(f) declares that Rule 502 applies "even if State law provides the rule of decision," and "applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in circumstances set out [elsewhere] in the rule." Fed. R. Evid. 502(f). Second, Rule 502 (g) clarifies that Rule 502 does not redefine the substance of the attorney-client privilege and the work product doctrine. See Fed R. Evid. 502(g). Third, Rule 502(c) states that when a disclosure first happens in a state proceeding, the consequences of that disclosure are governed either by Rule 502 or by the law of the state where the disclosure occurred — whichever rule is most protective against waiver. See Fed. R. Evid. 502(c).

The rule, however, does not supplant all state and federal law on waivers of privilege and work product. Specifically, the rule does not affect waivers that do not flow from disclosures, such as waivers that result from malpractice allegations or from asserting an "advice of counsel" defense.

Although Rule 502 allows agreements and court orders that lower the stakes of privilege reviews, Rule 502 does not lessen a lawyer's ethical duty to safeguard client information. The comment to Rule 1.6(a) of the North Carolina Revised Rules of Professional Conduct provides: "A lawyer must act competently to safeguard information acquired during the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Most states have similar provisions in their ethical rules.

E. Waivers Are More Likely in Some State Courts

Under North Carolina state law, the North Carolina Rules of Civil Procedure expressly allow parties who have inadvertently produced protected documents to "claw back" those documents:

> If information subject to a claim of privilege or protection as trial-preparation material is inadvertently produced in response to a discovery request, the party that produced the material may assert the claim by notifying any party that received the information of the claim and basis for it. After being notified, a party (i) must

> promptly return, sequester, or destroy the specified information and any copies it has, (ii) must not use or disclose the information until the claim is resolved, (iii) must take reasonable steps to retrieve the information if the party disclosed it before being notified, and (iv) may promptly present the information to the court under seal for determination of the claim. The producing party must preserve the information until the claim is resolved.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(7)(b) (effective in lawsuits filed after October 1, 2011).

However, North Carolina does not yet have a rule that limits the waiver consequences of any inadvertent disclosures of protected documents or information.

The risk of such a waiver – and the contrast between North Carolina law and Federal Rule 502 – becomes clear from an opinion of the North Carolina Business Court. See Blythe v. Bell, No. 11 CVS 933, 2012 WL 3061862 (N.C. Bus. Ct. July 26, 2012). (My colleagues at Ellis & Winters participated in Blythe as additional counsel. I have restricted my comments here to points stated in the Business Court's opinion.)

In Blythe, the defendants' lawyers hired a relatively inexperienced computer consultant to retrieve e-mails in response to document requests. The lawyers then produced all of these e-mails to the other side, on hard drives, without manually reviewing the e-mails for privilege or even keeping copies of the production. They instructed the consultant to omit e-mails that included the computer domain of the law firm, but these e-mails, too, were apparently produced. Id. at *3.

When the likely production of privileged documents came to light, defendants' counsel asked that plaintiffs' counsel return the production. Plaintiffs' counsel refused. They argued that the production was an abusive "document dump," and thus an intentional waiver of the privilege. Id. at *7.

In the end, the Business Court found a waiver of the privilege and refused to order the return of the e-mails. The court stated:

> The record, including . . . the conscious choice to make the production without any advance review, might support a finding of an intentional waiver, although Defendants also contend that the effort to segregate communications with counsel, even if unsuccessful, demonstrate that any production of privileged communications was inadvertent. The court need not resolve these contested positions because it believes there has been a privilege waiver whether the production was intentional or inadvertent.

Id. at *8 (emphasis added).

In an effort to distinguish the extensive federal case law on privilege waiver, defendants expressly tried to draw distinctions between the expectations in small-town North Carolina state court practice and the expectations in federal practice. These arguments did not succeed:

> Counsel also suggests that the court should approach the waiver issue with caution and recognizing that the general state court trial practice may not yet be as experienced in the particular problems attendant to electronic discovery as to justify a strict application of the waiver principles now developed in the federal courts. The court has exercised that caution, but that caution does not lead to protecting against a waiver on the facts of this case.
>
> The court also acknowledges that electronic discovery and the associated need to review for privilege can include extraordinary expense, such that a litigant may make a considered choice to relax efforts to avoid that expense. While such choices may be informed and reasonable ones, those choices must at the same time absorb the risk of a privilege waiver. Protections to guard against privilege cannot be deferred by first addressing the risk of waiver only after a production has been made.

Id. at *10.

Since Blythe, the North Carolina Business Court has indicated that counsel can, by joint agreement, limit the waiver consequences of inadvertent production of attorney-client privilege or work product protected materials. Morris v. Scenera Research, LLC, No. 09 CVS 19678, 2011 WL 3808544, at *10 (N.C. Bus. Ct. Aug. 26, 2011) (interpreting Joint 26(f) Report as providing that inadvertent production of privileged materials will not constitute a waiver and giving effect to the agreement). Regardless, counsel should be wary of producing materials without advance review since a court might find such conduct amounts to an intentional waiver of privilege in some courts.

F. General Objections to Discovery Can Waive Privilege Protections

Another way that a party can waive the attorney-client privilege and the work product immunity is by asserting objections to discovery in insufficient detail. See Kinetic Concepts, Inc. v. Convatec, Inc., 268 F.R.D. 226, 241, 247 (M.D.N.C. 2010) (stating "magistrate judges in at least five district courts in the Fourth Circuit have declared boilerplate objections to discovery requests, including for documents, invalid" and holding that the party who had used such boilerplate objections waived any legitimate objections that it might have had to the discovery); K2 Asia Ventures v. Trota, 215 N.C. App. 443, 447, 717 S.E.2d 1, 4-5 (2011) (holding, for the first time in a North Carolina appellate decision, that a general objection to written discovery is insufficient to preserve discovery immunities), disc. rev. denied, 365 N.C. 369, 719 S.E.2d 37 (2011); accord Burlington Northern & Santa Fe Ry. Co. v. United States Dist. Court, 408 F.3d 1142, 1149 (9th Cir. 2005) ("We hold that boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a

privilege."); Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-42 (10th Cir. 1984) (holding a blanket, non-specific attorney-client and work product privilege objection insufficient and thus finding a waiver of the privilege); Loudoun County Asphalt, L.L.C. v. Wise Guys Contr., L.L.C., 79 Va. Cir. 605, (2009) (condemning the use of general objections unless every general objection clearly applies to every discovery request and emphasizing that assertions of confidentiality, privilege, or work product require production of a privilege log describing the documents not produced).

A privilege proponent should explicitly state what documents are protected, offer a specific explanation as to why each document is protected, and should be prepared to submit the allegedly privileged documents for review in camera. See Fulmore v. Howell, 189 N.C. App. 93, 101, 657 S.E.2d 437, 443 (2008) (affirming discovery of documents where the privilege proponent generally argued that they were protected by either attorney-client privilege or work product doctrine and never submitted the documents to either the trial or appellate court).

Precaution No. 7: Root-cause analysis reports may not be protected from disclosure.

Often where the corporate client's product or design allegedly caused an accident, the government regulations or the corporation's own policies and procedures may mandate a root-cause analysis.

As a threshold matter, where such an analysis is done and the corporation discloses the report for any purpose, courts generally find that the reports do not retain any protection. See, e.g., Doe v. Hamilton Cty. Bd. of Educ., Case No. 1:16-cv-373, 2018 WL 542971, at *4 (E.D. Tenn. Jan. 24, 2018) (concluding that the defendant waived the attorney-client privilege, tangible work product immunity, and opinion work product immunity by publicly releasing the report of an internal investigation and thereafter stating that it intended to rely on the investigation and report to defend lawsuits against it); Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334, 346-47, 349 (Nev. 2017) (affirming the trial court's decision that Wynn Resorts waived its attorney-client privilege by disclosing the report of an internal investigation conducted by the Freeh Group, but issuing a writ of prohibition directing the trial court to determine the applicability of the work product doctrine).

Where not disclosed, courts do not apply a blanket rule of work product immunity to documents that result from companies' internal investigations, such as these root-cause analyses. Instead, they apply a number of context-dependent factors. By keeping these factors in mind when conducting root-cause analyses, corporations can increase the chances that the resulting reports will enjoy immunity from discovery.

As mentioned, the nationwide trend is to reject blanket protection for internal investigations. See, e.g., United States v. Lockheed Martin Corp., 995 F. Supp. 1460, 1464 (M.D. Fla. 1998) ("Courts have, with few exceptions, declined to recognize any privilege for internal organizational self examinations."). Instead, courts focus on anticipation of litigation when they decide whether documents deserve protection.

Lockheed Martin applies general principles to a root-cause analysis. Lockheed was aware of issues with its accounting for work on a government project. It performed a major internal audit of the project, culminating in a report that included a root-cause analysis. Id. at 1463-64. The Department of Defense's Inspector General subpoenaed documents related to Lockheed's work on the project. Id. at 1462. When Lockheed objected to producing these documents, including the report, the government moved to compel. Id.

The District Court for the Middle District of Florida held that an employee's notes on historical file documents, audit work papers, and employee interviews were not protected because they were not communications to a lawyer or part of a lawyer's own work product. Id. at 1465. In contrast, an employee's report was protected by the attorney-client privilege, because it was a communication to a lawyer, intended to enable the lawyer to give legal advice. Id.

The court also applied the work product doctrine to the report. The court held that by the time the report was drafted, Lockheed contemplated litigation against the government. Id.

For reports of internal investigations, the challenging element of the work product immunity is "in anticipation of litigation." See 2 Spahn, supra, at 1113. Courts apply tests that range "from 'imminent' litigation to 'some possibility' of litigation." Id. at 1114. This element requires a company to show that the prospect of litigation, instead of other pressures, motivated the company to prepare the documents in question. The "work product doctrine generally does not protect documents generated during investigations mandated by an external requirement, such as government regulation, or an internal requirement, such as corporate policy." Id.

Because of this "motivation" factor, a company might hesitate to adopt blanket policies that require internal investigations under certain circumstances. An adversary might point to such a policy to show that the policy, not the prospect of litigation, led the company to prepare the documents in question. Id. at 1115; see Alta Refrigeration, Inc. v. AmeriCold Logistics, LLC, 688 S.E.2d 658, 667 (Ga. Ct. App. 2009) (holding that the work product doctrine did not protect the investigation of an ammonia release—an investigation that was required by the company's safety manual and by OSHA regulations).

Courts, however, do not treat the existence of such a policy as a disqualifying factor in every case. For example, in Fojtasek v. NCL (Bahamas) Ltd., 262 F.R.D. 650, 655 (S.D. Fla. 2009), the court applied the work product doctrine because a policy of Norwegian Cruise Lines, "as determined by NCL's legal counsel, required that the tour operator [involved in an accident] prepare and submit a report to NCL in anticipation of litigation." Id. at 655; accord Eisenberg v. Carnival Corp., No. 07-22058-CIV, 2008 WL 2946029, at *2 (S.D. Fla. July 7, 2008).

An important decision that also deals with root-cause analyses specifically is Transocean Deepwater, Inc. v. Ingersoll-Rand Co., No. 08-4448, 2010 WL 5374744 (E.D. La. Dec. 21, 2010). In that case, an employee was injured while using a winch. Id. at *1. After settling the employee's claims, the employer subsequently sought indemnity and contribution from the distributor of the winch. Id. The distributor moved to compel the production of the employer's root-cause analysis. Id. It argued that the employer prepared this analysis in the ordinary course of business.

The employer, in contrast, argued that the report was work product because it was prepared in anticipation of litigation, during an investigation in which outside counsel participated. Id. The employer emphasized that outside counsel reviewed the report and made handwritten revisions. Id. The employer also noted that, given the severity of the accident, litigation was inevitable. Id. at *2.

The court accepted all of these arguments and held that the work product doctrine protected the report. Id. at *3. The court wrote, "While the Court recognizes that the work-product doctrine does not protect all Root Cause Analysis Reports as many are created in the ordinary course of business, the Court's review of the law here and the Report itself reveals that the work-product doctrine protects this Report." Id. (emphasis deleted). The court agreed that "[t]he severity of the injury—the amputation of three toes through a steel boot—rendered litigation imminent. Moreover, the participation of counsel in the investigation, the drafting of the Report and the revisions to the draft by counsel [buttress] this Court's conclusion that the Report is non-discoverable." Id.

Summarizing the cases that apply the work product doctrine to internal investigations, one commentator has written: "the corporation must begin the investigation because it anticipates litigation, rather than anticipate litigation as a result of what the investigation finds." 2 Spahn, supra, at 1117.

When courts have favored work product immunity in these settings, they have noted factors like these:

- The investigation at issue is qualitatively different from other investigations.
- Counsel played a role in initiating the investigation and participated in the investigation thereafter.
- The investigation, and the participation of counsel, were not standard company practices.
- Documents that start the investigation mention litigation and risk, rather than emphasizing business issues and downplaying risk.
- The language of the documents shows that litigation is anticipated.
- The final reports mention litigation. Indeed, an omission of this discussion can be fatal to the immunity. See, e.g., Allied Irish Banks, p.l.c. v. Bank of Am., N.A., 240 F.R.D. 96, 108 (S.D.N.Y. 2007) ("[N]owhere in the Report are AIB's litigation concerns adverted to explicitly or implicitly.").
- The company does not use the investigation for business purposes alone.

See 2 Spahn, supra, at 1118-26.

In addition, some courts have recognized a self-critical analysis privilege that may protect internal investigations and root cause analyses. See Scott v. City of Peoria, 280 F.R.D. 419, 424 (C.D. Ill. 2011) (concluding that federal common law has come to recognize the self-critical analysis privilege); Hickman v. Whirlpool Corp., 186 F.R.D. 362, 363 (N.D. Ohio 1999) (predicting that "the Circuit would adopt the 'self-critical analysis' privilege when faced squarely with the issue"); Robbins v. Provena Saint Joseph Med. Ctr., No. 03 C 1371, 2004 WL 502327, at *2 (N.D. Ill. Mar. 11, 2004) (holding that information requested was protected by the self-critical analysis privilege); Anderson v. Marion County Sheriff's Dept., 220 F.R.D. 555, 566 (S.D. Ind. 2004) (shielding self-critical internal investigations in a police department); Kan. Gas & Elec. v. Eye, 789 P.2d 1161, 1166-67 (Kan. 1990) (recognizing self-critical analysis privilege). This privilege is based on the idea that organizations should be able to undertake candid, critical self-assessments in order to improve their own procedures, yet might be hesitant to do so if it could be used against them in litigation. See Morgan v. Union Pac. R.R. Co., 182 F.R.D. 261, 265 (N.D. Ill. 1998) ("The justification for the privilege in tort cases is to promote public safety through voluntary and honest self-analysis.").

Courts that apply the privilege typically do so after balancing the public interest in protecting candid corporate self-assessments against the private interest of the litigant in obtaining all relevant documents through discovery. See Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 182 (S.D. Iowa 1993). Therefore, courts are most likely to use the privilege to encourage activities that will protect human life or public health. See Deel v. Bank of America, N.A., 227 F.R.D. 456, 458 (W.D. Va. 2005).

However, no clear legal standard has emerged from decisions analyzing the privilege. See Scott, 280 F.R.D. at 424 (explaining that the appropriate legal standard will depend on the factual context); Morgan, 182 F.R.D. at 264 (citing cases presenting different criteria for application of the privilege).

Even more problematically for a proponent of the self-critical analysis privilege, the majority of courts considering the issue have rejected the privilege. See, e.g., Ala. Elec. Pension Fund v. Pharmacia Corp., 554 F.3d 342, 351 n.12 (3d Cir. 2009) ("The self-critical analysis privilege has never been recognized by this Court and we see no reason to recognize it now."); Burden–Meeks v. Welch, 319 F.3d 897, 899 (7th Cir. 2003) (referring to the self-critical analysis privilege as "a privilege never recognized in this circuit"); Union Pacific R.R. Co. v. Mower, 219 F.3d 1069, 1076 n. 7 (9th Cir. 2000) ("This court has not recognized this novel privilege."); In re Digitek Prod. Liab. Litig., No. MDL 1968, 2010 WL 519860, at *4 (S.D. W. Va. Feb. 10, 2010) (finding no Fourth Circuit court had applied the privilege and declining to acknowledge it); Williams v. City of Philadelphia, No. 08–1979, 2014 WL 5697204, at *3 (E.D. Pa. Nov. 4, 2014) (rejecting the contention that there is a "developing trend" in federal courts of recognizing the privilege); Granberry v. Jet Blue Airways, 228 F.R.D. 647, 650 (N.D. Cal. 2005) (noting that no circuit court of appeals had explicitly recognized the self-critical analysis privilege).

The Illinois Supreme Court refused to recognize a common law self-critical analysis privilege, reasoning that recognition of a new privilege is a "matter more appropriately a subject for legislative action." Harris v. One Hope United, Inc., 28 N.E.3d 804, 805 (Ill. 2015); accord

Uniformed Fire Officers Ass'n v. City of New York, 955 N.Y.S.2d 5 (App. Div. 2012); In re Fisher & Paykel Appliances, Inc., 420 S.W.3d 842 (Tex. App. 2014).

In sum, the self-critical analysis privilege may be asserted as an alternative argument against disclosure of sensitive documents relating to internal investigations, but it should not be relied upon to provide protection. The best possibility for protecting such documents likely remains assertion of the work product doctrine.

Precaution No. 8: A witness may have to testify to facts that the witness knows only from a lawyer.

If litigation does ensue following the collapse of a structure during construction, another type of engineering failure, or an industrial accident, then depositions will follow. Some attorneys and clients have the mistaken impression that a witness is always protected by the attorney-client privilege or work product doctrine from testifying about facts that the witness learned from the corporation's lawyer.

Courts that analyze privilege issues distinguish between communications and facts. The attorney-client privilege does not bar discovery of facts merely because a client stated them to his lawyer. E.g., Upjohn Co., 449 U.S. at 395-96. At the same time, the attorney-client communications about those facts remain privileged. Id. at 396.

As the Supreme Court summarized, "The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge . . . ." Id.

Applying this rule, several courts have held that a client cannot resist discovery of any facts that a client knows, even if the client knows those facts only from an attorney-client communication. In short, "when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) (quoting Brinton v. Dep't of State, 636 F.2d 600, 604 (D.C. Cir. 1980)); accord Thurmond v. Compaq Computer Corp., 198 F.R.D. 475, 481 (E.D. Tex. 2000); B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of N.Y., Inc., 168 F.R.D. 161, 165 (S.D.N.Y. 1996); Allen v. West Point-Pepperell Inc., 848 F. Supp. 423, 428 (S.D.N.Y. 1994); Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76, 80 (S.D.N.Y. 1986).

A minority of courts "recognize the inherently privileged nature of [facts revealed by counsel], at least in certain circumstances." 1 Spahn, supra, at 358. For example, Florida courts have allowed deponents to omit from their answers facts known only from lawyer-client communications. Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 1377, 1387 (Fla. 1994) (barring questioning of deponents that would require them to reveal the contents of privileged communications); MCC Management of Naples, Inc. v. Arnold & Porter, LLP, No. 2:07-CV-387-FTM-29-SPC, 2010 WL 1817585, at *3 (M.D. Fla. May 5, 2010) (explaining that deponents should answer questions to the best of their knowledge without reference to confidential information obtained from counsel).

When a client testifies to historical facts at a deposition or trial, a follow-up question may ask for the source of the witness's facts. Courts have disagreed on whether a client can invoke the attorney-client privilege regarding the source of knowledge that a client obtained from his lawyer. The more common practice is to "permit the client to claim privilege as to the source of the facts." 1 Spahn, supra, at 166; see Thurmond, 198 F.R.D. at 483 (approving questions that "aimed at determining the level of [the client's] knowledge, not the source of the knowledge"). However, at least one court has allowed a party to ask questions on "when [plaintiff's] officers first learned the relevant facts and from whom." Johnson Matthey, Inc. v. Research Corp., No. 01 CIV. 8115 (MBM) (FM), 2002 WL 1728566, at *4 (S.D.N.Y. July 24, 2002) (emphasis added).

Corporate agents often learn additional facts about an incident through the investigative efforts of counsel, perhaps from counsel's reports regarding interviews with employees or consultations with experts, as well as through any root-cause analysis prepared under counsel's supervision. In sum, under the majority approach, a deponent must answer questions that ask "what happened," regardless of how the deponent came to know those facts. When these questions are phrased properly, the deponent can answer them without "volunteering that he learned the facts from counsel." Thurmond, 198 F.R.D. at 483; see also Young v. Kimberly-Clark Corp., 219 N.C. App. 172, 179-80, 724 S.E.2d 552, 557-58 (2012) (holding that the work product doctrine did not immunize a party from identifying "all persons having knowledge or information relating to the subject matter of this action, including persons contacted by plaintiff or her counsel" (quoting interrogatory)).

When a client complies with the above rules and testifies only about facts – even facts that she knows only from privileged communications – that testimony alone does not waive the privilege that protects the communications themselves. "[A] client does not normally lose the privilege as to communications with his attorney merely because he testifies during his deposition or at trial to the same events or facts that his/her lawyer discussed with him." Kan. Wastewater, Inc. v. Alliant Techsys., Inc., 217 F.R.D. 525, 528-29 (D. Kan. 2003). When the Kansas Wastewater court reached this conclusion, it noted repeatedly that the challenged questions "did not ask [the deponent] to reveal the substance of any communication between himself and counsel." Id. at 528.

CONCLUSION

Investigations into construction catastrophes and other types of accidents are often conducted under time pressures. Interviews need to happen while details are fresh in witnesses' minds, and evidence must be collected before it is disturbed or destroyed. Clients and counsel alike must be cognizant of potential missteps and be prepared to take necessary precautions to ensure communications and investigations remain protected to the extent possible.

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Professional Summary

Dixie Wells represents clients in lawsuits involving engineering issues, higher education law, complex commercial transactions, and products liability. Regardless of the substantive law at issue, she focuses her practice in managing mass litigation and handling litigation arising from single events where suits are filed in multiple courts. Ms. Wells applies the same attention to detail as a lawyer that she did as a structural engineer. In addition, she relies on her engineering background when handling cases involving technical issues and when working with experts. Her experience includes representing Fortune 100 companies in commercial litigation, medical products cases, environmental exposure cases, and antitrust class actions, and representing universities in claims involving student-athletes and student affairs.

Ms. Wells obtained her undergraduate degree in civil engineering from Duke University (B.S.E., magna cum laude, 1991) where she was a Benjamin N. Duke Scholar, her master's degree in systems engineering from the University of Virginia (M.S., 1993), and her law degree from Wake Forest University School of Law (J.D., magna cum laude, 1999) where she was a Fletcher Scholar. While in law school, Ms. Wells served as Editor-in-Chief of the Wake Forest Law Review, was a member of the Moot Court Board, and was a member of the Order of the Coif.

Before attending law school, Ms. Wells was a research scientist with the Virginia Transportation Research Council from 1993-1996 where her research focused on the maintenance, repair, rehabilitation and replacement of bridges. She obtained her professional engineer license in North Carolina in 1996.

Awards and Honors

- Chambers USA: America's Leading Lawyers for Business, "Leader in the Field" for Litigation (2017-2019)
- Benchmark Litigation, North Carolina Litigation Star, General Commercial, and Product Liability (2016-2020)
- Peer Review Rating of AV® in Martindale Hubbell
- Outstanding Volunteer Award, North Carolina Association of Defense Attorneys (2016)

- North Carolina Super Lawyers Magazine, Business Litigation, Civil Litigation, Schools & Education (2013-2019)
- "Top 50 Women in North Carolina" (2014-2019)
- "Top 100 Super Lawyers in North Carolina" (2016, 2018, 2019)
- The Best Lawyers in America®, Bet-the-Company Litigation; Commercial Litigation (2010-2019)
- Business North Carolina, Legal Elite, Litigation (2012-2014, 2019)

Professional Associations and Memberships

- Wake Forest University School of Law, Board of Visitors (Appointed 2019)
- Fourth Circuit Judicial Conference, Permanent Member
- Chief Justice Joseph Branch Inn of Court
  - Board of Directors (2011-2019, President 2019)
  - Master (2012–present)
  - Senior Barrister (2007-2012)
  - Barrister (1999-2002)
  - Pupil (1997-1999)
- International Association of Defense Counsel (2016-present)
- Duke University, Pratt School of Engineering, Engineering Alumni Council (2009-2017)
  - Immediate Past President (2016-2017)
  - President (2015-2016)
  - Vice President (2014-2015)
- North Carolina Bar Association, Litigation Section
  - Council Member (2006-2009)
  - Membership Chair (2004-2006)
- Guilford Inn of Court (2003-2005)
- Expert Technical Group on Maintenance, Repair and Rehabilitation Unit Costs for Bridge Management Systems sponsored by the Federal Highway Administration (1994-1996)
- National Cooperative Highway Research Program Panel, Project 20-5, Topic 25-06, "Collecting and Managing Cost Data for Bridge Management Systems" (1994-1996)
- Technical Advisory Group on Maintenance, Repair and Rehabilitation Unit Costs for the American Association of State Highway and Transportation Officials Pontis Task Force (1993-1994)
- Professional Engineer License, North Carolina, inactive

Prior Legal Experience

- Adjunct Professor of Trial Practice, Elon University School of Law, 2008
- Smith Moore LLP, 2002-2005, 2006-2008
- Smith, Helms, Mulliss, & Moore, LLP, 2000-2002
- Clerkship, United States District Court for the Middle District of North Carolina, Hon. N. Carlton Tilley, Jr., 1999-2000

Notes: