Monday, October 25
4:30pm-6:00pm

411 - Is This Communication Privileged?

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Wendy Breau
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Session 411

Faculty Biographies

Nicholas Billings

Nicholas M. Billings is vice president and assistant general counsel for Apartment Investment and Management Company (AIMCO). AIMCO is a real estate investment trust, or REIT, that acquires, manages and redevelops apartment properties in the United States. Mr. Billings oversees issues, employees and vendors in the areas of litigation, insurance, employment and document management.

Prior to joining AIMCO, Mr. Billings worked as a litigator at the Denver law firm of Hollland & Hart.

Mr. Billings graduated from Dartmouth College and University of Virginia School of Law before clerking on the Tenth Circuit Court of Appeals.

Wendy Breau

Wendy Breau is a director with Ernst & Young in their global quality and risk management team. Her responsibilities include assisting member firms worldwide with their professional indemnity insurance and litigation matters.

Prior to joining Ernst & Young, Ms. Breau was a litigation partner with Freeman, Freeman & Salzman PC and Dickinson Wright in Chicago, where she practiced in the areas of commercial, accountants' liability and employment litigation.

Ms. Breau currently is the vice-chair of the ACC's litigation committee and volunteers with Ovarian Cancer Canada in Toronto.

Ms. Breau received a BA from Providence College and her JD from Case Western Reserve School of Law.

Stephen Roth

Stephen E. Roth is the vice president & general counsel of America's Collectibles Network, Inc. (ACN) in Knoxville, Tennessee. ACN is a privately-held multichannel retailer that sells jewelry and gemstones on a national television network under its Jewelry Television(R) and JTV(R) brands and on the internet at www.jtv.com.

Prior to joining ACN, Mr. Roth was a shareholder in Baker Donelson, a firm with offices throughout the Southeast and in Washington, DC. His practice focused on intellectual property litigation. Mr. Roth served on Baker Donelson's board of directors, as the managing shareholder of the firm's Knoxville office, as chair of the firm's Commercial Litigation Practice Group, and as the chair of the Intellectual Property Practice Group.

While in private practice, he was recognized in The Best Lawyers in America and SuperLawyers.

Mr. Roth has served as the chair of the Tennessee Bar Association's Intellectual Property Section, as a member of the board of directors of the Knoxville Bar Association and as president of the Rotary Club of Knoxville. Mr. Roth has also served as the secretary (vice-chair) of the Knox County Election Commission, and has been active in numerous local, state, and national political campaigns. He is a frequent member of the leadership teams for the capital campaigns of Legal Aid of East Tennessee.

Mr. Roth received his BA and JD degrees from the University of Tennessee, where he became a member of Phi Beta Kappa and the Order of the Coif.

Is This Communication Privileged

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3 Myths Of In-House Attorney-Client Privilege

Law360, New York (May 03, 2010) -- Corporate employees too often believe that they are having privileged communications with in-house lawyers, when in fact they are not. This happens when corporate employees believe one or more of three myths.

These myths probably developed because corporations and their in-house lawyers want the privilege to apply to as many communications as possible. Corporations understand that in-house attorneys are a readily available source of a powerful tool — the privilege — that can keep information secret from competitors, governments and litigants.

In-house lawyers want their corporate clients to be as honest and open with them as possible. The result can be a tacit understanding between in-house lawyers and their corporate clients that all of their communications will be privileged. That understanding is wrong, and it is usually based on one of the following myths.

Myth #1: The Privilege Applies Equally to Outside and In-House Counsel

This first myth actually is true on the surface. In-house counsel have the same capacity as outside counsel to have privileged communications with clients.

The first significant case to address the question noted that the "apparent factual differences between these house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege." United States v. United Shoe Machine Corp., 89 F. Supp. 357, 360 (D. Mass. 1950).

Numerous other courts have reached the same conclusion. There is no question that in-house lawyers can have privileged communications with their clients to the same extent that outside lawyers can. Corporate employees expect that their communications with outside counsel are protected by the privilege, and they see no reason to have a different expectation with respect to in-house counsel.

The problem is that despite what courts say about this in the abstract, they often do not treat in-house and outside counsel equally. The difference in treatment is a result of the fact that a "communication is not privileged simply because it is made by or to a person who happens to be a lawyer." Diversified Industries Inc. v. Meredith, 572 F. 2d 596, 602 (8th Cir. 1977).

A communication is privileged only if the dominant purpose of the communication is to further the objectives of the attorney-client relationship. 2,202 Ranch LLC v. Superior Court, 113 Cal. App. 4th 1377, 1390 (2003).

In other words, the communication must be made for the purpose of seeking, obtaining, or providing legal assistance. Restatement, The Law Governing Lawyers § 118. “For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice.” Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725, 743 (2009).

The reality is that outside counsel face less scrutiny than do in-house counsel when the question is whether the lawyer provided legal advice or business advice. Most corporate legal advice involves at least some element of business advice, and whether any particular communication is “legal” or “business” in nature can be unclear.

But when there is a challenge to a claim of privilege involving an outside lawyer, it makes sense to presume that the corporation hired outside counsel to provide legal advice. After all, the corporation already has employees who can render business advice. When a corporate officer picks up the phone to call outside counsel, it is probably to seek the lawyer’s legal advice.

But do corporations necessarily turn to in-house counsel for the same purpose? Some courts have said no, for two reasons. The first is that in-house lawyers often have dual legal and business roles, whether explicitly or implicitly. The second is that the in-house lawyer’s employment and constant availability creates a risk that the corporation will attempt to shield business communications by filtering them through in-house lawyers.

For these reasons, the New York Court of Appeals held that the need to apply the attorney-client privilege cautiously and narrowly is “heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure.” Rossi v. Blue Cross & Blue Shield, 73 N.Y.2d 588, 593 (1989).

A good example of this “heightened” scrutiny occurred in TVT Records v. Island Def Jam Music Group, 214 F.R.D. 143 (2003). Island Def Jam attempted to withhold from discovery internal e-mails sent by two of its in-house lawyers.

The court noted that it is more “complicated” to apply the privilege to communications from “in-house counsel as opposed to outside counsel because ‘in-house attorneys are more likely to mix legal and business functions.’” Id. at 144 (quoting Bank Brussels Lambert v. Credit Lyonnais SA, 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002)).

The court pointed out that the in-house lawyers held titles that included the words “Business and Legal Affairs” and that as “the titles indicate, these representatives served within the company not only as lawyers, but as high-ranking management executives.” Id. at 145. The court examined each e-mail at issue, finding that several of the e-mails addressed “business strategy and negotiations” instead of legal questions and were not privileged. Id.

Because communications with in-house counsel are more likely to be scrutinized when the corporation claims the privilege, the best thing in-house counsel can do is to educate their corporate clients about what will and will not be protected by the privilege and the differences between legal and non-legal advice. At the very least, this should minimize surprises when a litigation opponent seeks discovery of a communication.

Myth #2: All Corporate Employees Can Have Privileged Communications With In-House Counsel

As with the first myth, this myth is in once sense literally true. Ever since the United States Supreme Court rejected the “control group” test in Upjohn Co. v. United States, 449 U.S. 383 (1981), it has been true that, depending on the circumstances, it is possible for any corporate employee to have a privileged conversation with the corporation’s attorney. The problem, again, for in-house attorneys is that many corporate employees believe that they can discuss any corporate legal matter with an in-house attorney under the cloak of the privilege. This is a myth.

The problem stems from the fact that the in-house attorney's client is the corporation, not each of the corporation's employees. Not every corporate employee is entitled to have a privileged communication with a corporate attorney as to every legal matter. For a communication to be privileged, the communication must be within the scope of the employee's responsibility. D.I. Chadbourne Inc. v. Superior Court, 60 Cal. 2d 723, 736 (1968).

This usually does not present a problem for outside lawyers, who generally only seek out and speak with corporate employees who are involved in the legal matter at hand. But in-house lawyers may work in the same office as corporate employees who are outside of the client umbrella as to any particular legal matter. Those employees may even attend meetings in which in-house counsel provide legal advice. To the extent in-house counsel provides legal advice to such employees, the privilege that might otherwise attach to that advice could be waived. Id. at 735.

Another context in which in-house counsel uniquely face this issue is when they report directly or indirectly to corporate executives. An executive in charge of a business unit might have a lawyer as a direct report in that business unit. In this case, the executive may be heard to refer to the lawyer as "my lawyer." But of course, the lawyer's client is the corporation, not the executive, who happens to the lawyer's boss. When the company asks the lawyer for advice that has nothing to do with the executive, the in-house lawyer's communications with the executive likely are not privileged.

A final difference in this regard is that corporate employees of all levels may expect that they can seek advice from in-house counsel (but not outside counsel) when their personal interests conflict with those of the corporation. This may stem from the fact that an in-house attorney may be seen as a fellow employee — someone who is in the same boat as other employees.

Even when in-house counsel investigates the conduct of another employee, the employee may view in-house counsel as someone who — unlike outside counsel — is likely to protect his or her interests. In these cases, in-house lawyers must ensure that they disclose the truth about their representation.

California Rule of Professional Conduct 3-600 provides that when "dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent."

Once again, this myth presents the problem that corporations and their employees view the privilege as protecting more communications with in-house counsel than it does. By explaining the boundaries of the privilege to corporate employees, in-house counsel can avoid having unnecessary and unprivileged conversations with corporate employees.

Myth #3: Including In-House Lawyers in the Conversation Creates a Privilege

The most absurd of the three myths is the idea that by copying an in-house lawyer on an e-mail or inviting the lawyer to a meeting, the corporation can cloak otherwise nonprivileged communications with the privilege. The worst promoters of this myth are outside litigation counsel, who frequently list e-mails on privilege logs solely because an in-house lawyer was copied on them.

In a recent jury trial, I successfully offered into evidence an e-mail in which the plaintiff's CEO wrote to the company's head of human resources and other executives, with a copy to the general counsel. The CEO's e-mail was a "reply to all" to an e-mail from the head of human resources, who had addressed her original e-mail to the

CEO and copied the general counsel. The CEO's e-mail did not seek legal advice or respond to any legal advice. Yet, my opponent argued that because the general counsel received a copy, the entire e-mail chain was privileged. The judge disagreed.

As reported decisions make clear, the judge reached the right result. "Documents prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made primarily for legal advice." Pacamor Bearings Inc. v. Minebea Co., 918 F. Supp. 491, 511 (D.N.H. 1996).

Therefore, a "corporation cannot be permitted to insulate its files from discovery simply by sending a 'cc' to in-house counsel." United States Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 163 (E.D.N.Y. 1994). Similarly, "the mere fact that an attorney attended a meeting does not render everything said or done at that meeting privileged." Miner v. Kendall, 1997 WL 695587 (D. Kan. 1997).

If the law were otherwise, corporations could protect every corporate communication and decision from disclosure by copying an in-house lawyer on every e-mail and inviting a lawyer to every meeting. While that would make discovery easier (there wouldn't be much of it), it would not promote the purpose of the attorney-client privilege, which is to allow clients to speak freely with their lawyers about legal matters.

Nevertheless, it seems common for corporate employees to copy lawyers on e-mails for no purpose other than to assert a privilege later. In-house lawyers should counsel clients that such communications likely will not be privileged, which at the very least, again, could eliminate surprises in litigation.

Of course, there is a risk that educating corporate clients about these myths will result in clients excluding in-house lawyers from conversations in which the lawyer would have otherwise participated. But when clients do communicate with lawyers, they need to know whether the communication will be disclosed in litigation. These myths give clients a false sense of security. And guess whom the clients will blame when the myths are busted in a lawsuit?

--By Christopher S. Ruhland, Orrick Herrington & Sutcliffe LLP

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Protecting the Attorney-Client Privilege for In-House Counsel with Dual Legal and Business Roles

Contributed by Carrie L. Huff and David A. Dodds

In recent years, the corporate attorney-client privilege has been under increased attack by regulators and prosecutors. When the decision is made by a corporation to invoke rather than to waive the attorney-client privilege, it is important that internal communications with in-house counsel are afforded maximum protection. However, the applicability of the privilege can be difficult to determine when in-house counsel has dual legal and business roles. Moreover, the expanding role of e-mail in most companies—and the inclusion of in-house counsel as a party to numerous e-mail communications—has greatly increased the number of documents that are the subject of difficult privilege determinations.

This article summarizes the general approaches that federal courts have taken in analyzing whether privilege attaches to communications with in-house counsel. The article also sets forth examples of how courts have considered particular communications. Finally, the article provides a list of recommendations for maximizing the protection afforded by the attorney-client privilege to communications with in-house counsel.

The Attorney-Client Privilege Applies to Communications with In-House Counsel[1]

It is well-settled that the attorney-client privilege applies to communications involving both in-house and outside counsel.[2] Generally, the attorney-client privilege protects communications between a lawyer and client only to the extent that such communications are 1) made for the purpose of seeking or providing legal advice, as opposed to business advice; 2) confidential when made; and 3) kept confidential by the client.[3] The party asserting the attorney-client privilege has the burden of establishing that all elements of the privilege are satisfied.[4]

Legal, as Opposed to Business, Advice Is Required for the Attorney-Client Privilege to Protect Communications with In-House Counsel

It is difficult to predict whether a court will characterize a given communication as legal advice or business advice, particularly when in-house counsel acts in both legal and business capacities. "[T]he mere fact that a communication is made directly to an attorney, or an attorney is copied on a memorandum, does not mean that the communication is necessarily privileged."[5]

Business Advice is Not Privileged

Generally, communications made by and to an in-house counsel with respect to business matters or business advice are not protected by the attorney-client privilege.[6]

Legal Advice Must Predominate for the Privilege to Apply

To invoke the attorney-client privilege, courts generally hold that the legal aspects of the communication must *predominate*.[7] Stated another way, the communication must be primarily for the purpose of rendering legal advice or assistance.[8] This does not mean that the communication has to be entirely legal. In the corporate context, "legal and business issues are often inextricably intertwined."[9] "This is inevitable when legal advice is rendered in the context of commercial transactions or in the operations of a business in a corporate setting. The mere fact that business considerations are weighed in the rendering of legal advice does not vitiate the attorney-client privilege."[10]

Some courts have observed that "[i]f the document was prepared for purposes of simultaneous review by legal and non-legal personnel, it cannot be said that the *primary* purpose of the document is to secure legal advice. Therefore, one of the critical elements of the attorney-client privilege is absent at the outset."[11]

However, courts have approved redaction or excision as an approach for the privileged portions of mixed communications that include both business and legal matters.[12] Likewise, courts have concluded that business considerations must be disclosed when a communication includes both non-privileged business and privileged legal matters: "'[w]hen the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected because legal considerations are also involved.'"[13]

Some courts have held that "'when the legal advice is merely incidental to business advice, the privilege does not apply.'"[14] For example, in a case involving in-house counsel who was a member of the company's Personnel Action Review Committee ("PARC") and despite the company's representations that the primary purpose of the PARC meetings was to render legal advice, the court concluded that the PARC served predominantly a business purpose – terminating the plaintiff.[15] The court based its conclusion on internal company documents, including policy documents, which stated that the purpose of the PARC was to review and approve proposed employee terminations.[16] Therefore,

the court concluded that no privilege attached to the discussions at the PARC meetings.

A Lawyer's Place on the Organizational Chart is a Consideration in Determining Whether a Communication is Privileged

In deciding whether privilege applies to a communication with in-house counsel, courts will examine the circumstances to determine whether the in-house counsel was acting as a lawyer rather than as a business advisor or management decision-maker. "One important indicator of whether a lawyer is involved in giving legal advice or in some other activity is his or her place on the corporation's organizational chart. Some courts have held that there is a presumption that a lawyer in the legal department or working for the general counsel is most often giving legal advice, while the opposite presumption applies to a "lawyer … who works for the Financial Group or some other seemingly management or business side of the house."[17]

In-house Counsel with Dual Roles or Titles must Show that a Communication was Made in a Legal Capacity in order to Invoke Privilege

A showing that a communication was made by a lawyer in his capacity as a lawyer was required in a case where the in-house attorney also was a company vice president and had certain responsibilities outside the lawyer's sphere.[18] In an employment discrimination case where an in-house counsel was also the company's Vice President and Director of Employee Relations, the attorney-client privilege did not attach to documents where there was nothing to indicate that this lawyer requested or received the documents in his capacity as a legal advisor and he was not referred to as "counsel" in any of the documents.[19]

Sample Document-By-Document Privilege Analysis of Communications Involving In-House Counsel

Communications Involving Regulatory or Compliance Issues

The Supreme Court in *Upjohn Co. v. United States* discussed the importance of the attorney-client privilege in the context of a corporate counsel's communications with corporate employees for the purpose of obtaining information necessary to provide a basis for legal advice to the corporation.[20] The Supreme Court rejected the narrow "control group" test[21] adopted by the lower court, explaining that it "not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[22] The Supreme Court noted that "[i]nformation, not available from upper-echelon management, was needed *to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas*."[23]

Following *Upjohn*, courts have consistently recognized the attorney-client privilege in the context of confidential communications between corporate employees and in-house counsel for the purposes of securing legal advice regarding compliance with the law. By way of example, one court held that conversations between in-house counsel and the company's president in which the in-house counsel raised concerns regarding antitrust compliance were privileged. Although the advice was unsolicited and the president did not disclose confidential information to in-house counsel at these meetings, counsel rendered legal advice based, at least in part, on company confidential information previously disclosed to him by management personnel generally. Under these circumstances, the court held that the conversations were protected by privilege.[24]

Moreover, some courts since *Upjohn* have taken a broad view of legal advice in applying the attorney-client privilege in the context of tasks performed by in-house counsel that involve non-routine business matters with regulatory agencies. By way of example, one court that analyzed privilege in the environmental regulatory context acknowledged that "[m]any of the tasks performed by counsel could have been undertaken by non-attorneys and the advice given made by an employee with no legal background."[25] However, the court held the privilege applied, explaining that "because the transaction was *not a routine business matter and required considerable involvement with a state regulatory agency*, it is clear that the subject matter was one of particular concern to the client and an area where the expectation of confidentiality arguably is greater."[26]

In contrast to the foregoing cases, the recent decision in *In re Vioxx Products Liability Litigation* rejected a pharmaceutical company's assertion of the attorney-client privilege under a "pervasive regulation" theory.[27] Specifically, Merck & Co. had argued that virtually every communication sent to its legal department (or in which the legal department was involved) was privileged by virtue of the pervasive nature of governmental regulation of the drug industry.[28] The court-appointed special master noted that accepting such a theory would effectively immunize must of the industry's internal communications because most drug companies are structured such that virtually every communication leaving the company must first go through the legal department for review, comment, and approval.[29]

The special master in *Vioxx* rejected a wholesale claim of privilege with respect to grammatical, editorial, and word-choice comments made by in-house counsel on non-legal type communications such as scientific reports, articles,

and study proposals.[30] The special master further rejected the argument that internal e-mails distributing these drafts to multiple legal and non-legal departments within the company were privileged because they were part of a "collaborative effort to accomplish a legally sufficient draft."[31] However, the special master agreed that privilege protection should be afforded to in-house counsel's internal comments on legal instruments, such as patent applications or contracts, and to internal drafts and communications of in-house counsel regarding preparation of the company's response to warning letters issued by the Food and Drug Administration ("FDA").[32] The district court adopted the special master's report.[33]

Communications in Internal Investigations

Courts have held that communications and data collected by in-house counsel during internal investigations are protected from disclosure pursuant to the attorney-client privilege and the attorney work product doctrine.[34] In one case involving an internal investigation conducted in response to an IRS summons, the in-house counsel in question served in dual capacities as a senior vice president and as acting general counsel.[35] The in-house counsel was directed by the chairman of the board to serve as counsel to a special ad hoc committee.[36] Under the committee's directive, the in-house counsel investigated alleged improper political contributions and in that process, he interviewed company officers, directors and employees.[37] The court noted that "[t]he distinction between investigative conduct evidenced by [in-house counsel] as management executive and as corporate attorney is not a bright one."[38] The court accepted the attorney's testimony that he acted in his capacity as general counsel for purposes of the investigation.[39] Although the report of counsel's investigation was signed by him as "senior vice president" and not as "acting general counsel," the court did not find "the descriptive title to be determinative of his function, however."[40]

Communications among Company Non-legal Employees, where In-house Attorneys have been Copied

When a communication by a non-lawyer is simultaneously distributed to both lawyers and non-lawyers within a company, it is not automatically considered to have been prepared primarily to seek legal advice; therefore, the attorney-client privilege may not apply.[41] Stated another way, courts will not permit a corporation to insulate its files from discovery simply by sending a "cc" to in-house counsel.[42] Courts have typically held that the privilege does not apply in this context unless the claimant can demonstrate that the communication would not have been made but for the client's need for legal advice and services.[43]

Communications among Company Non-legal Employees that Transmit or Reflect Legal Advice Given or Sought

Internal communications between company non-legal employees in which the employees discuss or transmit legal advice given by counsel are protected by the privilege.[44] Moreover, the privilege protects communications between company non-legal employees regarding matters with respect to which the company intends to seek legal advice.[45] Similarly, the privilege protects communications containing information compiled by company non-legal employees for the purpose of seeking legal advice and later communicated to counsel.[46]

Communications between In-house Counsel

Given the frequency with which in-house attorneys are charged both with assessing the legal aspects of a transaction and implementing the transaction, it is not uncommon for an in-house counsel to act as the "attorney" for purposes of one communication and "the client" for purposes of another. Such communications between in-house counsel within a company are protected by the attorney-client privilege to the extent they are made to secure legal advice.[47]

Communications from Counsel Distributed to Company Non-legal Employees

Although a communication from an attorney to a corporate employee with respect to legal advice given the corporate client may be privileged, courts have held that "the privilege attaches only if the communication is disseminated to an employee who needs to know the material because he has a direct responsibility over the subject matter."[48] The confidentiality necessary to preserve the privilege may be lost by disclosure of the privileged communication to a corporate employee who does not have responsibility for the subject matter of the communication.[49]

Drafts of Documents

Drafts may be considered privileged if it is shown that "they were prepared with the assistance of an attorney for the purpose of obtaining legal advice and/or contain information a client considered but decided not to include in the final version."[50] However, drafts of letters or other documents to be submitted to third parties lose the cloak of confidentiality necessary for protection of the attorney-client privilege when they are transmitted to third-parties.[51]

Cover Letters and Transmittal Letters

Such documents are not privileged if they do not include confidential client communications.[52]

Handwritten Notes of In-house Counsel

Such documents may be considered privileged if they include client confidences and not a mere recitation of factual information.[53]

Recommendations for Protecting the Attorney-Client Privilege

In-house counsel should consider the following guidelines to maximize the protections afforded by the attorney-client privilege.

- Consider the organization's corporate structure and, if possible, place in-house counsel (and their staff) within the organization's legal department.
- Use the title of legal counsel when communicating about legal matters.
- Whenever possible, separate legal and business communications.
- Confirm that the names of all authors and recipients are listed on legal communications. This information will be required to make an evidentiary showing of privilege.
- Designate legal communications as "privileged." But do not designate all communications as "privileged" to avoid losing the unique designation.
- Review written corporate policies for any committees with legal counsel representation. Emphasize in written policies the role of legal counsel to provide legal advice to such committees and the purpose of such committees to act on such legal advice.
- Avoid disseminating privileged legal communications to outside third-parties.
- Limit internal distributions of privileged legal communications to only those employees who have direct responsibility over the subject matter of the communication.
- Consider retaining outside counsel to handle particularly sensitive matters. Confidential communications with outside counsel are likely to be characterized as legal advice.[54]

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[1] This article focuses on federal attorney-client privilege law. Each state also has attorney-client privilege law that may or may not be aligned with federal privilege law on particular points.

[2] *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981) (privilege applied to written questionnaires in-house counsel provided to corporate employees as part of internal investigation regarding subsidiary's alleged involvement in illegal payments to foreign officials). *See also United States Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994); *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990).

[3] E.g., *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002); *United States v. Lockheed Martin Corp.*, 995 F. Supp. 1460, 1464 (M.D. Fla. 1998); In re *LTV Sec. Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981).

[4] *E.g.* ,*United States v. Munoz*, 233 F.3d 1117, 1128 (9th Cir. 2000); *United States v. Rodriguez*, 948 F.2d 914, 916 (5th Cir. 1991).

[5] *Phelps Dodge*, 852 F. Supp. at 160.

[6] *E.g.*, *Phelps Dodge*, 852 F. Supp. at 160; *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 514 (M.D.N.C. 1986); *Coleman v. American Broad. Cos.*, 106 F.R.D. 201, 205-06 (D.D.C. 1985).

[7] *E.g.*, *Leonen*, 135 F.R.D. at 99.

[8] *In re Vioxx Prods. Liability Litig.*, 501 F. Supp. 2d 789, 798-99 (E.D. La. 2007); *Carolina Power*, 110 F.R.D. at 514.

[9] *Leonen*, 135 F.R.D. at 98–99.

[10] *Coleman*, 106 F.R.D. at 206.

[11] *United States v. IBM Corp.*, 66 F.R.D. 206, 213 (S.D.N.Y. 1974) (emphasis added); In re *Vioxx*, 501 F. Supp. 2d at 805.

[12] *E.g.*, *Barr Marine Prods. Co. v. Borg-Warner Corp.*, 84 F.R.D. 631, 640 (D. Pa. 1979); *see also In re Grand Jury Subpoenas*, 561 F. Supp. 1247, 1258 (E.D.N.Y. 1982) ("Notwithstanding that both business and legal considerations are interwoven throughout the drafts, these considerations must be isolated and treated differently 'in the interest of preserving the integrity of the privilege itself.'") (citations omitted).

[13] *In re Grand Jury Subpoenas*, 561 F. Supp. at 1258 (quoting *SCM v. Xerox Corp.*, 70 F.R.D. 508, 518 (D. Conn. 1976)).

[14] *Neuder v. Battelle Pac. Northwest Nat'l Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000) (quoting *Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bureau*, 150 F.R.D. 193, 197 (D. Kan. 1993)).

[15] *Id.* at 293-4.

[16] *Id.* at 294 & nn.1, 2.

[17] *Boca Investerings P'ship v. United States*, 31 F. Supp. 2d 9, 12 (D.D.C. 1998). Other courts have applied a presumption of legal advice only to communications between a corporation and its outside counsel. *E.g.*, *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1073, 1076 (N.D. Cal. 2002).

[18] *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984).

[19] *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 636, 644 (S.D.N.Y. 1987).

[20] 449 U.S. 383, 392 (1981).

[21] The "control group" test restricts the availability of the attorney-client privilege in the corporate context to those officers who play a "substantial role" in deciding and directing a corporation's legal response. *Id.* at 393.

[22] *Id.* at 392. The Supreme Court in *Upjohn* declined to articulate an alternative privilege standard to the "control group" test, instead citing to the legislative history of Federal Rule of Evidence 501 for the proposition that "the recognition of privilege based on a confidential relationship . . . should be determined on a case-by-case basis." *Id.* at 396-97. Nevertheless, the Court held that the communications at issue in *Upjohn* were protected by the attorney-client privilege because they were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. *Id.* at 394-95.

[23] *Id.* at 394 (emphasis added).

[24] *In re Sealed Case*, 737 F.2d at 101.

[25] *Phelps Dodge*, 852 F. Supp. at 160.

[26] *Id.* (emphasis added).

[27] *In re Vioxx*, 501 F. Supp. 2d at 800-804.

[28] *Id.*

[29] *Id.* at 801.

[30] *Id.* at 802. The special master further justified the denial of the pharmaceutical company's claims of privilege because the company had failed to demonstrate on a document-by-document basis that the comments of its in-house counsel about technology, science, public relations, or marketing were primarily related to legal assistance. *Id.* at 807.

[31] *Id.* at 803.

[32] *Id.* at 802.

[33] *Id.* at 815.

[34] *E.g., Upjohn,* 449 U.S. at 397 (attorney-client privilege protects notes taken by counsel during employee interviews in the course of an internal investigation).

[35] *United States v. Lipshy*, 492 F. Supp. 35, 40 (N.D. Tex. 1979).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 41.

[39] *Id.* at 41–42.

[40] *Id.* at 41 n.4. The court in this same case also discussed whether the materials requested by the IRS summons were protected by the attorney work product. The court found that the in-house counsel's investigation was motivated by the anticipation of likely future litigation, a requirement of the work product doctrine. *Id.* at 44–47.

[41] *In re Vioxx*, 501 F. Supp. 2d at 805; *Neuder*, 194 F.R.D. at 295 (quoting *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 915 F. Supp. 491, 511 (D.N.H. 1996)).

[42] *Phelps Dodge*, 852 F. Supp. at 163-64. In *Vioxx*, the special master concluded that a corporation's simultaneous distribution of an e-mail to both lawyers and non-lawyers cannot usually be claimed as primarily for the purpose of legal advice or assistance. *See*

501 F. Supp. 2d at 805. However, the special master suggested that the lawyers' copies of the same e-mail might have been protected by the attorney-client privilege had the e-mail been sent to the lawyers through a blind copy or through a wholly separate e-mail communication. *Id.* at 805-06.

[43] *Leonen,* 135 F.R.D. at 99 (citing *First Chicago Int'l v. United Exchange Co. Ltd.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989)); *see also Phelps Dodge*, 852 F. Supp. at 163 (denying attorney-client privilege to communications among company employees, where attorneys had been copied, based on findings that "all were written for some other purpose than to seek legal advice and would have been prepared whether or not the attorney was sent a copy").

[44] *See ChevronTexaco*, 241 F. Supp. 2d at 1077.

[45] *Id.*

[46] *AT&T Corp. v. Microsoft Corp.*, No. 02-0164 MHP (JL), 2003 WL 21212614, at *3 (N.D. Cal. Apr. 18, 2003).

[47] *E.g., ChevronTexaco*, 241 F. Supp. 2d at 1077. Similarly, in-house attorneys may constitute "the client" for purposes of a corporation's privileged communications with its outside counsel. *Id.* at 1076-77.

[48] *E.g., In re Grand Jury Subpoenas*, 561 F. Supp. at 1258-59.

[49] *See id.*

[50] *Phelps Dodge*, 852 F. Supp. at 163.

[51] *Phelps Dodge*, 852 F. Supp. at 162-63; *Carolina Power*, 110 F.R.D. at 517.

[52] *Phelps Dodge*, 852 F. Supp. at 163; *Carolina Power*, 110 F.R.D. at 517.

[53] *Phelps Dodge*, 852 F. Supp. at 164. In addition, attorney notes are generally not considered subject to work product protection unless made in "anticipation of litigation." *E.g., United States v. El Paso*, 682 F.2d 530, 542 (5th Cir. 1982) ("The work product doctrine is not an umbrella that shades all materials prepared by a lawyer, however. The work product doctrine focuses only on materials assembled and brought into being in anticipation of litigation.").

[54] *See ChevronTexaco*, 241 F. Supp. 2d at 1073, 1076 (communications between a client and outside counsel are presumed to be made for the purpose of obtaining legal advice).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLIED IRISH BANKS, p.l.c.,	:	
Plaintiff,	:	03 Civ. 3748 (DAB) (GWG)
-v.-	:	OPINION AND ORDER
BANK OF AMERICA, N.A. and CITIBANK, N.A.,	:	
Defendants.	:	

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

Allied Irish Banks, p.l.c. ("AIB") brought this action against Citibank, N.A. and Bank of America, N.A. ("BofA") for claims arising out of a rogue trading scheme perpetrated by one of AIB's traders, John Rusnack. PricewaterhouseCoopers LLP ("PwC-US") was one of AIB's auditors. During discovery, BofA served a document subpoena on an entity called PricewaterhouseCoopers International Limited ("PwCIL"). PwCIL withheld certain responsive documents under the work product doctrine and attorney-client privilege. BofA then filed this motion to compel the production of these documents. Shortly thereafter, PwC-US filed a motion to intervene to stop the disclosure of some of the documents withheld by PwCIL on the ground that they are protected by the work product doctrine. For the reasons below, BofA's motion to compel (Docket # 65) is granted in part and denied in part. PwC-US's motion to intervene (Docket # 77) is granted. Its motion for a protective order will be the subject of further proceedings as set forth below.

I. BACKGROUND

A. Facts

PwCIL is a "UK-registered limited liability company, the members of which are the

independently-organized professional services entities that use the PricewaterhouseCoopers name." See Declaration of Lawrence W. Keeshan, filed Aug. 30, 2007 (Docket # 69) ("Keeshan Decl."), ¶ 5. PwCIL does not provide client-related services, and thus did not provide any services to AIB or its affiliates. Id. ¶¶ 5, 17. Instead, PwCIL "facilitates and coordinates its member firms' activities, including protection of the PricewaterhouseCoopers brand." See Non-Party PricewaterhouseCoopers International Limited Response to Bank of America, N.A.'s Motion to Compel the Production of Documents, filed Aug. 30, 2007 (Docket # 71) ("PwCIL Resp."), at 2; Keeshan Decl. ¶ 5. PwCIL is overseen by its Chief Executive Officer, its Global Board and a group called the Global Leadership Team. Keeshan Decl. ¶ 5.

During the period of time at issue in this case, the Global Board was composed of partners, principals, or employees of PwCIL's member firms, who served for fixed terms and acted as directors under British law. Keeshan Decl. ¶ 7. Members of the Global Board worked principally for their member firms, not the Global Board itself. Id.

The Global Leadership Team consisted of PwCIL's CEO, individuals the CEO appointed to manage PwCIL's affairs, and the Territory Senior Partners of the major PwCIL member firms or regional groupings. Id. ¶ 10. The CEO and "his management team" (but not the Territory Senior Partners) spent substantially all of their time working on PwCIL's affairs, although they remained partners or employees of their member firms and were paid by those firms. Id. The Global Leadership Team acted "both directly and through a number of subordinates." Id. ¶ 12. These "subordinates" were partners or employees of the member firms, some of whom worked full time on PwCIL matters and others of whom divided their time between PwCIL and the member firms. Id.

PwCIL's "Managing Partner – Operations," Amyas Morse, was responsible for PwCIL's risk management with respect to legal issues, and chaired the "Global Operations Committee." Id. ¶ 14. This Committee consisted of operations leaders from larger PwCIL member firms who advised Morse on the needs and priorities of member firms in addition to consulting with each other about common responses to shared risk issues such as litigation and insurance matters. Id. ¶ 15. PwCIL also coordinated assistance between member firms through the Global Board and the Global Leadership Team. Id. ¶ 16.

Lawrence W. Keeshan was both the Global General Counsel for PwCIL and a principal of PwC-US from July 1, 1998 until September 20, 2006. Id. ¶¶ 2-3. PwC-US – along with PricewaterhouseCoopers Ireland Ltd. ("PwC-Ireland") – provided auditing services for AIB and its affiliates. Id. ¶ 17. As Global General Counsel for PwCIL, Keeshan provided legal counsel to the Global Board, the Global Leadership Team and the Global Operations Committee. Id. ¶ 16. Keeshan learned of Rusnack's fraudulent trading scheme in February 2002, id. ¶ 17, and thereafter "PricewaterhouseCoopers-affiliated professionals were contacted by and cooperated with US government agencies conducting civil and criminal investigations into the Allfirst fraud," id. ¶ 18.

B. Procedural History

BofA filed this motion to compel in August 2007.[1] BofA ultimately withdrew its motion

[1] See Notice of Motion by Defendant Bank of America, N.A., filed Aug. 2, 2007 (Docket # 65); Memorandum of Law in Support of Defendant Bank of America, N.A.'s Motion to Compel the Production of Doicuments [sic] By Non-Party Pricewaterhouse Coopers International, filed Aug. 2, 2007 (Docket # 66) ("BofA Mem."). PwCIL filed opposition papers. See Declaration of Sarah L. Cave, filed Aug. 30, 2007 (Docket # 68); Keeshan Decl.; Declaration of William E. White, filed Aug. 30, 2007 (Docket # 70) ("White Decl."); PwCIL Resp. BofA filed reply papers. See Supplemental Declaration of Donald Rosenthal Pursuant to

as to certain documents and now seeks production of the following documents, numbered according to PwCIL's August 2007 privilege log (see Revised Privilege Log, dated Aug. 24, 2007 (attached as Ex. A to White Decl.) ("Revised Privilege Log")): Document ## 1-7, 9, 11-41, 43-47, 49-56, 58-59, 62, 69-71. See BofA Reply at 21-22.

Shortly after BofA filed its motion to compel, PwC-US filed a motion to intervene in the case in order to obtain a protective order to preclude the disclosure of a subset of these documents: specifically, Document ## 7, 11-17, 19, 22-30, 32-41, 43-47, 49, 52-56, 58, 62. See Non-Party PricewaterhouseCoopers LLP's Memorandum of Law in Support of Motion to Intervene and for a Protective Order, filed Oct. 3, 2007 (Docket # 80) ("PwC-US Mem."), at 1 n.1.[2] On December 21, 2007, at the request of the Court, PwCIL submitted copies of the documents to the Court for in camera review.

The documents at issue can be divided into three categories. The first consists of communications between Keeshan and the Global Board and Global Leadership team regarding AIB. The second category consists of communications between Keeshan, other persons at

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28 U.S.C. § 1746, filed Sept. 14, 2007 (Docket # 73); Reply Memorandum of Law in Support of Defendant Bank of America, N.A.'s Motion to Compel the Production of Documents by Non-Party Pricewaterhouse Coopers International, filed Sept. 14, 2007 (Docket # 74) ("BofA Reply").

[2] See Non-Party PricewaterhouseCoopers LLP's Notice of Motion to Intervene and for a Protective Order, filed Oct. 3, 2007 (Docket # 77); Declaration of Sarah L. Cave, filed Oct. 3, 2007 (Docket # 78); Declaration of Steven M. Witzel, filed Oct. 3, 2007 (Docket # 79) ("Witzel Decl."); PwC-US Mem. BofA opposed the motion, see Memorandum of Law in Opposition to Non-Party Pricewaterhouse Coopers LLP's Motion to Intervene and for a Protective Order, filed Nov. 2, 2007 (Docket # 83) ("BofA Resp."); Declaration of Donald Rosenthal Pursuant to 28 U.S.C. § 1746, filed Nov. 2, 2007 (Docket # 84), and PwC-US filed a reply, see Non-Party PricewaterhouseCoopers LLP's Reply Memorandum of Law in Further Support of Its Motion to Intervene and for a Protective Order, filed Nov. 16, 2007 (Docket # 86).

PwCIL, and employees of PwC-US, PwC-Ireland and/or PricewaterhouseCoopers LLP (UK) ("PwC-UK"). This category includes documents responding to a request by Keeshan that attorneys from member firms prepare legal summaries of claims against their respective firms. Third are documents sent to or shared with the PricewaterhouseCoopers network's insurance provider, L & F Indemnity Limited. Keeshan Decl. ¶ 28.

II. DISCUSSION

A. Adequacy of Privilege Log

Before discussing each of the three categories of documents, we begin by addressing BofA's argument that the insufficiency of some of PwCIL's descriptions in the privilege log should result in a denial of protection. BofA Mem at 14-16.

PwCIL's privilege log contains, as applicable to each document listed, information on the type of document, its date, its author, its recipients, persons copied on the document, persons to whom the document was forwarded, the author of the responsive portion of any attachment, and a description of the subject matter of the document. While the log does not provide every piece of factual information necessary to demonstrate all aspects of the claims of privilege, the log does provide enough detail "to permit a judgment as to whether the document is at least potentially protected from disclosure." United States v. Constr. Prod. Research, Inc., 73 F.3d 464, 473 (2d Cir.1996). Cases rejecting claims of privilege based on the inadequacy of the privilege log alone typically involve an absence of basic information such as names of recipients, dates, or subject matters of documents – or a failure to produce a log at all. See, e.g., Aurora Loan Services, Inc. v. Posner, Posner & Associates, P.C., 499 F. Supp. 2d 475, 479 (S.D.N.Y. 2007); OneBeacon Ins. Co. v. Forman Int'l Ltd., 2006 WL 3771010, at *3, *7, *8 (S.D.N.Y.

Dec. 15, 2006). While a claim of privilege may be rejected based on lesser inadequacies, the Court exercises its discretion not to do so here in light of the fact that both sides have now made full submissions on the claims of privilege. See, e.g., NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 131 (N.D.N.Y. 2007).

B. Communications Within PwCIL and the Attorney-Client Privilege

The first category of documents consists of communications between PwCIL's in-house counsel, Keeshan, and the Global Board and Global Leadership Team of PwCIL (Document ## 18, 29, 30, 37, 49 and 70-71). PwCIL asserts attorney-client privilege with respect to these documents. We begin by discussing the law governing attorney-client privilege.

1. Law Governing the Assertion of the Attorney-Client Privilege

Because this Court's subject matter jurisdiction is based upon diversity, see Complaint, filed May 23, 2003 (Docket # 1), ¶ 10, state law provides the rule of decision concerning the claim of attorney-client privilege. See Fed. R. Evid. 501; Dixon v. 80 Pine St. Corp., 516 F.2d 1278, 1280 (2d Cir. 1975). While neither party has addressed the choice of law issue in its motion papers, this Court previously applied New York privilege law to a motion to compel in this case, see Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. 96, 102-03 (S.D.N.Y. 2007), and both parties cite to cases applying New York law in their memoranda of law. Thus, the Court will apply New York privilege law. See id.

In New York, the statutory codification of the privilege is as follows:

> [A]n attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication . . . .

N.Y.C.P.L.R. § 4503(a)(1). For the privilege to apply, the communication from attorney to client must be made "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." Rossi v. Blue Cross & Blue Shield of Greater N.Y., 73 N.Y.2d 588, 593 (1989). The communication itself must be "primarily or predominantly of a legal character." Id. at 594. "The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 379 (1991).

"The proponent of the privilege has the burden of establishing that the information was a communication between client and counsel, that it was intended to be and was kept confidential, and [that] it was made in order to assist in obtaining or providing legal advice or services to the client." Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C., 191 Misc. 2d 154, 166 (N.Y. Sup. Ct. 2002); accord People v. Mitchell, 58 N.Y.2d 368, 373 (1983) (citing cases). A communication between an attorney and the agent or employee of a corporation may be privileged where the agent "possessed the information needed by the corporation's attorneys in order to render informed legal advice." In re Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 218-19 (S.D.N.Y. 2001) (citing Upjohn Co. v. United States, 449 U.S. 383, 391 (1981)).

"Generally, communications made between a defendant and counsel in the known presence of a third party are not privileged." People v. Osorio, 75 N.Y.2d 80, 84 (1989) (citing cases). Rather, "disclosure of attorney-client communication to a third party or communications with an attorney in the presence of a third party, not an agent or employee of counsel, vitiates the confidentiality required for asserting the privilege." Delta Fin. Corp. v. Morrison, 13 Misc. 3d 441, 444-45 (N.Y. Sup. Ct. 2006).

Under New York law, "the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." Spectrum Sys., 78 N.Y.2d at 377 (citing cases). It is also the burden of the party asserting a privilege to establish that it has not been waived. See John Blair Commc'ns, Inc. v. Reliance Capital Group, 182 A.D.2d 578, 579 (1st Dep't 1992). Such showings must be based on competent evidence, usually through affidavits, deposition testimony or other admissible evidence. See von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 147 (2d Cir.), cert. denied, 481 U.S. 1015 (1987); Bowne of N.Y. City, Inc. v. AmBase Corp., 150 F.R.D. 465, 472 (S.D.N.Y. 1993). The burden cannot be met by "'mere conclusory or ipse dixit assertions'" in unsworn motion papers authored by attorneys. von Bulow, 811 F.2d at 146 (quoting In re Bonanno, 344 F.2d 830, 833 (2d Cir. 1965)).

2. Discussion

BofA argues that PwCIL has not met its burden of establishing the privilege because, inter alia, PwCIL has not identified in what capacity the recipients of the communications were acting – that is, whether they were acting as members of the Global Board or Global Leadership Team or in their respective capacities at their member firms. See BofA Mem. at 15. As noted, where attorney-client communications are shared with third parties, the privilege is normally extinguished. See, e.g., Osorio, 75 N.Y.2d at 84 (citing cases). Thus, to the extent any of these individuals were acting in their capacities as employees of the member firms, any privilege – assuming it were demonstrated – would be vitiated. In addition, even where materials are shared within a corporate organization, a corporation asserting the attorney-client privilege has the burden of showing "that it preserved the confidentiality of the communication by limiting

dissemination only to employees with a need to know." Bank of N.Y. v. Meridien Biao Bank Tanz. Ltd., 1996 WL 474177, at *2 (S.D.N.Y. Aug. 21, 1996) (citing 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence, ¶ 503(b)[04] at 503-49 to 503-50 (1988)).

Here, all of the communications have multiple recipients. PwCIL, however, has provided only the most rudimentary descriptions of the roles and functions of the individuals who received copies of these documents. See Ex. B to White Decl. A description of the function of each individual is indispensable here inasmuch as PwCIL admits to having "acted . . . through" at least some individuals who "divided their time" between PwCIL and their member firms. Keeshan Decl. ¶ 12.

With respect to five of the seven documents (## 18, 29, 30, 37, and 49), the documents were authored by or shared with two individuals – Ann L. MacDougall and Steven M. Witzel – who are each identified only as "[a]n attorney involved with preparing for potential litigation relating to the AIB matter." See Ex. B. to White Decl. A sixth document, Document # 71, was shared with a Michael D. Kelley, who is identified only with the single phrase, "Global Marketing" – a phrase that is nowhere linked to PwCIL. See id. Nor does this phrase explain Kelley's function with respect to these communications, including why it was necessary that he participate in them. Each of these three individuals is also identified as working for PwC-US. See id. PwCIL and PwC-US, however, are separate corporate entities. If a privileged PwCIL attorney-client communication is shared with an individual not acting on behalf of PwCIL, the privilege has been lost (barring the applicability of the common interest rule).[3] Thus, the

[3] PwCIL does not assert the common interest rule with respect to any of the documents in this category, however. See PwCIL Resp. at 16. Even if it had, the rule would not apply for the reasons discussed in the next section.

capacity in which these individuals acted when they viewed these documents is critical to the assertion of the privilege. Here, PwCIL has provided no evidence that MacDougall, Kelley or Witzel were acting on behalf of PwCIL, as opposed to acting on behalf of their member firms, when they received these documents. Accordingly, PwCIL cannot assert the attorney-client privilege with respect to these documents. In addition, with respect to Kelley, there is no evidence of his need to know the contents of the communication at issue.

A clearer factual showing has been made with Document # 70, however. With respect to this document, each of the recipients is identified as being a member of or working for either the Global Board or the Global Leadership Team, and the description of their functions suggests that there was a reason for each to participate in the communication. Accordingly, the motion is denied with respect to Document # 70.

The elements of the privilege have otherwise been established with respect to this document. The Court recognizes that BofA is arguing that "it is not at all clear that the communications in question were predominantly legal, rather than business, in nature given that it was in the nature of PwCIL's business to monitor the quality of the services provided by its member firms." BofA Mem. at 10. However, PwCIL has filed a declaration from its General Counsel at the time, Keeshan, stating that this communication (among others) was made "so that [the Global Board and Global Leadership Team] could assess and address potential legal claims and reputational/monetary risks arising from the Allfirst fraud." Keeshan Decl. ¶ 19. Keeshan directed that this document be prepared, and it was "used in the course of providing legal analysis to the Global Board and Global Leadership Team, as well as in discussions with PricewaterhouseCoopers in-house attorneys." Id. ¶ 20. In light of the absence of evidence

contradicting Keeshan's assertions, the Court accepts that PwCIL has met its burden of showing that Document # 70 was made "in order to render legal advice or services to the client." Spectrum Sys. Int'l. Corp., 78 N.Y.2d at 379, and was not for purely business purposes.

C. Communications Between PwCIL and Personnel of Its Member Firms and the Common Interest Rule

The second category of documents consists of communications between attorneys for PwCIL (including Keeshan) and various personnel from member firms, principally PwC-US, PwC-Ireland and/or PwC-UK. With respect to these documents, PwCIL asserts protection under the common interest rule.

The common interest rule is not a separate privilege but "'an extension of the attorney client privilege.'" United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (quoting Waller v. Fin. Corp. of Am., 828 F.2d 579, 583 n.7 (9th Cir. 1987)). The rule

> serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. . . . Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected. . . . The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter, . . . and it is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply . . . . Neither is it necessary for the attorney representing the communicating party to be present when the communication is made to the other party's attorney.

Id. at 243-44 (citations and internal quotation marks omitted).

New York courts applying the common interest rule to civil proceedings have often looked to federal case law for guidance. See, e.g., U.S. Bank Nat'l Ass'n v. APP Int'l Fin. Co., 33 A.D.3d 430, 431 (1st Dep't 2006) ("the federal courts have been instructive in [the doctrine's] applicability"); Stenovich v. Wachtell, Lipton, Rosen & Katz, 199 Misc. 2d 99, 106-08 (N.Y.

Sup. Ct. 2003). Therefore, we look not only to New York but also to federal case law to determine the applicability of the rule.

The common interest rule is intended to allow clients to share information with an attorney for another party who shares the same legal interest. See SR Int'l Bus. Ins. Co. Ltd. v. World Trade Center Prop., LLC, 2002 WL 1334821, at *3 (S.D.N.Y. June 19, 2002). As is true for any privilege, the common interest rule is narrowly construed. See, e.g., United States v. Weissman, 195 F.3d 96, 100 (2d Cir. 1999) (per curiam) ("Privileges should be narrowly construed and expansions cautiously extended.") (citing Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990)); see also Aetna Cas. and Sur. Co. v. Certain Underwriters at Lloyd's London, 176 Misc. 2d 605, 612 (N.Y. Sup. Ct. 1998) (the common interest rule "is subject to severe limitations and a 'narrow construction'"), aff'd, 263 A.D.2d 367 (1st Dep't 1999). There are two elements of the common interest rule: (1) the party who asserts the rule must share a common legal interest with the party with whom the information was shared and (2) the statements for which protection is sought were designed to further that interest. See Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc., 215 F.R.D. 466, 471 (S.D.N.Y. 2003); Johnson Matthey, Inc. v. Research Corp., 2002 WL 1728566, at *6 (S.D.N.Y. July 24, 2002). The interest must be "primarily or predominantly . . . legal rather than . . . commercial." U.S. Bank Nat'l Ass'n, 33 A.D.3d at 431 (emphasis omitted) (citing Gulf Islands Leasing, 215 F.R.D. at 471); accord Yemini v. Goldberg, 12 Misc. 3d 1141, 1144 (N.Y. Sup. Ct. 2006) ("business-oriented or personal communications are not covered by the 'common interest' exception").

Before a communication can be protected under the common interest rule, the communication must meet the elements of the attorney-client privilege. Gulf Islands Leasing,

215 F.R.D. at 470. Thus, with regard to the "interest" that must be shown, case law has repeatedly held that communications regarding business matters – even where litigation is pending or imminent – do not qualify for protection from discovery under the common interest rule. See, e.g., id. at 472. As one New York case has held, "[t]here must be a substantial showing by parties attempting to invoke the protections of the privilege of the need for a common defense [as opposed to the mere existence of a] common problem." Finkelman v. Klaus, 2007 WL 4303538, at *4 (N.Y. Sup. Ct. Nov. 28, 2007) (internal quotation marks and citations omitted; bracketing in original).

New York law appears to restrict the doctrine to communications with respect to legal advice "in pending or reasonably anticipated litigation." Aetna, 176 Misc. 2d at 612; see also Parisi v. Leppard, 172 Misc. 2d 951, 956 (Sup. Ct. N.Y. Co. 1997) ("[a] proper assertion of the privilege in a given instance therefore will rest on whether the exchange was for the purpose of giving and receiving shared legal counsel in or in anticipation of litigation, as opposed to transmitting information that was business-oriented . . . in nature") (citing Rossi, 73 N.Y.2d at 593); accord Bank of Am., N.A. v. Terra Nova Ins. Co. Ltd., 211 F. Supp. 2d 493, 498 (S.D.N.Y. 2003); Yemini, 12 Misc.3d at 1142.

There are two subcategories of documents for which PwCIL seeks protection under the common interest rule. The first subcategory – consisting of Document ## 1-7, 9, 11-13, 16-17 – are communications with lawyers and others in member firms that Keeshan says were for the purpose of "coordinat[ing] a consistent legal strategy in response to the Allfirst fraud and . . . potential claims arising from that fraud." Keeshan Decl. ¶ 22. Keeshan says that this effort "was undertaken to avoid, and prepare for, the possibility of litigation." Id. According to

Keeshan, these communications "were made as part of a cooperative effort, and were not directed to any disciplinary or remedial actions that PwCIL might take against any member firm." Id.

The second subcategory – consisting of Document ## 14-15, 19-28, 31-36, 38-41, 43-47, 52-56, 58-59, 62 – are documents arising from a request by Keeshan that attorneys from member firms prepare legal summaries of claims against their respective firms. Keeshan Decl. ¶ 24. Keeshan made this request "to facilitate [Keeshan's] advice to the Global Board and Global Leadership Team with respect to major pending and potential claims facing the . . . network." Id. The summaries "also helped to facilitate a discussion among counsel to the various network firms regarding legal risks – including potential claims – then facing the network and their response to addressing those matters." Id. Keeshan contends in his affidavit that PwCIL and its member firms had "a common interest in avoiding and defending against potential legal claims that could arise from the Allfirst fraud." Id. ¶ 26; accord id. ¶ 23. PwC-US lawyers drafted summaries of the AIB matter that were updated multiple times, id. ¶ 24, and that included, according to Keeshan, only information regarding actual or potential litigation in which "the . . . network faced potential claims that were material to [it]," id. ¶ 25.

PwCIL's assertion of the common interest rule suffers from a critical defect, however. As previously noted, New York state law applies the common interest doctrine only with respect to legal advice "in pending or reasonably anticipated litigation." Bank of Am, 211 F. Supp. 2d at 498 (emphasis, internal quotation marks and citation omitted). Thus, for the purportedly privileged attorney-client communications to remain privileged, PwCIL must show that it "reasonably anticipated" litigation in common with the other firms in its network. Federal law

would require the same showing in this instance because the only interest that is alleged to be common among PwCIL and the member firms is their defense of potential claims against them relating to the Allfirst fraud. If, in fact, PwCIL did not reasonably anticipate any claims against it, there would be no common interest.

Here, PwCIL offers only one piece of evidence on this question: the affidavit from Keeshan, its General Counsel during the relevant time period. While this affidavit states unequivocally that Keeshan anticipated that legal claims might be brought against member firms after the Allfirst fraud, he does not say that he actually anticipated litigation against PwCIL. Rather he states only that "in cases where large potential claims existed against member firms, [he] would generally be concerned about the possibility" of a claim against PwCIL. Keeshan Decl. ¶ 18 (emphasis added).

In the context of the work product doctrine, it has been held that "[w]hether material was prepared 'in anticipation of litigation' requires a determination of the subjective question of whether the party actually thought it was threatened with litigation and the objective question of whether that belief was reasonable." Gulf Islands Leasing, 215 F.R.D. at 475. There is no reason why the same test should not be applied in the context of the common interest doctrine.

We do not need to consider the "objective" question of whether PwCIL could have reasonably believed that it was threatened with litigation (the topic of the bulk of the briefing by the parties on this issue). Here, there is a complete lack of evidence that Keeshan or anyone else at PwCIL actually thought PwCIL was threatened with litigation at the time of these communications – let alone evidence that these communications were prepared in anticipation of that litigation. Thus, PwCIL has not met the subjective component of the test.

Notably, the documents themselves are devoid of any reference to this topic. No affidavit or deposition testimony has been offered from anyone at PwCIL stating that at the time these documents were prepared, PwCIL viewed itself as being threatened with litigation. Keeshan's views as to what claims he "generally" would have been "concerned" about are simply insufficient to show that PwCIL actually thought it was threatened with litigation and engaged in the various communications at issue to further its own interest in not being sued.

Because the common interest extension of the attorney-client privilege is not met, there is no need to address BofA's other arguments attacking the assertion of this privilege.

D. Applicability of the Work Product Doctrine

What remains to be discussed is the applicability of the work product doctrine to (1) the first two categories of documents for which there has not been a showing of attorney-client privilege, and (2) the third category of documents, consisting of documents characterized as "communications with [PwCIL's] insurer," PwCIL Resp. at 13 n.18; see Keeshan Decl. ¶ 28 (referring to Documents ## 50-51, 69).[4]

While state law governs the question of attorney-client privilege in a diversity action, federal law governs the applicability of the work product doctrine. See, e.g., Weber v. Paduano, 2003 WL 161340, at *3 (S.D.N.Y. Jan. 22, 2003) (citing cases). The work product doctrine is codified in Fed. R. Civ. P. 26(b)(3), which provides that a party is not entitled to obtain discovery of "documents and tangible things that are prepared in anticipation of litigation or for

[4] While the Revised Privilege Log asserts the attorney-client and common interest privileges with respect to Document # 51, we discuss only the applicability of the work product doctrine because this is the only argument that PwCIL raises with respect to this document. See PwCIL Resp. at 13 n.18; Keeshan Decl. ¶ 28.

trial by or for another party or its representative" unless the party makes a showing of substantial need and lack of undue hardship.

PwCIL, however, cannot claim work product protection under Fed. R. Civ. P. 26(b)(3) because that rule refers to protection given to a "party" or its representative, and PwCIL does not fit into either category. See Ramsey v. NYP Holdings, Inc., 2002 WL 1402055, at *6 (S.D.N.Y. June 27, 2002) (quoting 8 C. Wright, A. Miller & R. Marcus, Federal Practice & Procedure: Civil § 2024 at 354-56 (2d ed. 1994)).[5] Nonetheless, courts have recognized that "the inapplicability of Rule 26(b)(3) does not preclude granting similar immunity under the common-law work-product doctrine or the 'good cause' balancing test that is incorporated in Federal Rule of Civil Procedure 26(c)." Haus v. City of New York, 2006 WL 3375395, at *3 (S.D.N.Y. Nov. 17, 2006) (internal citations omitted). Notably, Rule 45 specifically permits non-parties to seek protection from a subpoena that "requires disclosure of privileged or other protected matter." Fed. R. Civ. P. 45(c)(3)(A)(iii).

Here, however, it is not necessary to explore the contours of what work product protection would be available to PwCIL under "common law" work product immunity since it could not prevail even under the Rule 26(b)(3) standard. Under Rule 26(b)(3), the party asserting work product protection "bears the burden of establishing its applicability to the case at hand." In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002, 318 F.3d 379, 384 (2d Cir. 2003) (citing cases). This includes demonstrating that the doctrine applies and that it has not been waived. See, e.g., Allied Irish Banks, 240 F.R.D. at 105. The burden is a "heavy

[5] As was noted in Ramsey, 2002 WL 1402055, at *6 n. 5, cases that have applied Rule 26(b)(3) to non-parties typically have done so where no litigant raised the issue of the rule's applicability.

one." In re Grand Jury Subpoenas, 318 F.3d at 384. "Three conditions must be met to earn work product protection. The material must (1) be a document or a tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by his representative." Allied Irish Banks, 240 F.R.D. at 105 (internal quotation marks, citations and bracketing omitted).

As discussed previously in the context of the common interest doctrine, PwCIL has failed to show that it actually anticipated litigation at the time of the creation of the documents. For this reason alone, its claim to work product privilege must fail.

While it is not necessary to reach the issue, the Court notes that even if PwCIL had shown that it harbored some concern about litigation against itself, PwCIL has not shown that any of the documents were prepared "because of the prospect" of that litigation. United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998).(emphasis in original) (internal quotation marks and citation omitted). Work product protection is not available for documents "that would have been created in essentially similar form irrespective of litigation." Id. at 1202. Thus, even if PwCIL had shown it anticipated litigation on the AIB matter, it failed to provide evidence that the documents would not have been prepared in essentially the same form irrespective of that litigation, as required by Adlman, 134 F.3d at 1202. No testimony or affidavit has been presented to the Court on this point – a failing specifically noted in an earlier decision in this case, Allied Irish Bank, 240 F.R.D. at 107. Significantly, the withheld documents themselves appear to relate to litigation against the member firms – not against PwCIL – and thus it is perfectly plausible that even if PwCIL had not expected to be sued itself, it would have undertaken the same exercise to investigate the claims against its member firms.

E. PwC-US's Motion to Intervene

PwC-US has moved to intervene to assert work product protection with respect to Document ## 7, 11-17, 19, 22-30, 32-41, 43-47, 49, 52-56, 58, 62. See PwC-US Mem. at 1 n.1. BofA objects to intervention and also to the assertion of work product protection.

1. Law on Intervention

Intervention is available under Fed. R. Civ. P. 24(a)(2) to a party that "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Under this rule, intervention is granted where "(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties." MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 389 (2d Cir. 2006). The only elements disputed here are whether the motion is "timely" and whether PwCIL adequately protects PwC-US's interests.

Here, PwC-US sought to file its motion one week after the briefing was completed on BofA's motion to compel production from PwCIL. While the delay in making this motion was unnecessary inasmuch as PwC-US was apparently aware of the need for the motion by the time BofA made its own motion, the relatively short delay caused no prejudice to BofA or anyone else. After considering the factors that govern the judgment of timeliness, see MasterCard Int'l Inc., 471 F.3d at 390, the Court will not deem the motion untimely.

As for the question of adequate representation, it is obvious that PwCIL does not represent PwC-US's interests. As BofA has vociferously (and correctly) argued in the context of the common interest rule, the two entities are independent, and thus they cannot assert privileges on behalf of the other. Indeed, the inadequacy of PwCIL's representation is demonstrated by the fact that, as will be discussed shortly, PwCIL's and PwC-US's showings as to whether each anticipated litigation differ substantially.

Accordingly, the motion to intervene is granted. See, e.g., United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1293 (D.C. Cir. 1980) (motion to intervene granted to permit party to assert work product privilege); In re Katz (Jamil v. United States), 623 F.2d 122, 125 (2d Cir. 1980) (attorney-client privilege). Sackman v. Liggett Group, Inc., 167 F.R.D. 6, 22 (E.D.N.Y. 1996) (joint defense privilege).

2. Merits of the Claim

The documents at issue (or their attachments) were either authored or received by Steven M. Witzel, an attorney for PwC-US. Witzel Decl. ¶ 1. Witzel states that he anticipated that PwC-US would become "involved in litigation" as a "potential defendant[]" in a lawsuit arising out of the Allfirst fraud, id. ¶¶ 6, 7, 12, and that he would not have engaged in the communications at issue had there been no threat of litigation, id. ¶¶ 6, 7, 12, 15. He also states that he expected these materials to be kept confidential within the PwC network, and that they would not be shared with outside firms. Id. ¶ 13.

If PwC-US came within Rule 26(b)(2), its submission would show all the elements required to obtain work product protection. BofA argues, however, that the common law protection afforded to such documents is narrower than the rule-based protection and that,

because BofA is not its adversary, PwC-US should not be entitled to assert the doctrine. See BofA Resp. at 13-16.

There is some force to the argument that there should be lesser protection afforded to work product where an adversary is not seeking to obtain the material at issue. Nonetheless, to vindicate the underlying purposes of the doctrine, case law makes clear that some protection should be afforded. These purposes are "preventing discovery from chilling attorneys' ability to formulate their legal theories and prepare their cases, preventing opponents from free-loading off their adversaries' preparation, and preventing disruption of ongoing litigation." In re Student Fin. Corp., 2006 WL 3484387, at *12 (E.D. Pa. Nov. 29, 2006). Thus, courts should afford work product protection to non-parties if disclosure would "(1) alter attorney behavior, (2) reward sloth, or (3) interfere with ongoing litigation." Haus, 2006 WL 3375395, at *3 (citing Abdell v. City of New York, 2006 WL 2664313, at *4 (S.D.N.Y. Sept. 14, 2006)).

Here, the first two factors favor work product protection. If an attorney representing an accounting firm knew that the adversary of his firm's client might obtain his work product, he would understandably be more circumspect in creating such work product in the future. Even though the accounting client's adversary is not the accountant's adversary, there is a close relationship between an accounting firm and its client, and an attorney for an accounting firm would naturally not wish to create material that could be used to the detriment of the firm's client. Of course, the "freeloader" problem exists here as well, even though BofA is not now an adversary. If BofA can show no substantial need for the materials and no undue hardship in obtaining them, there does not seem to be a reason to give BofA the advantage of PwC-US's diligence as expressed in its work product. Accordingly, the Court will accord work product

protection to these materials.

As to the question of whether BofA has shown a "substantial need" for any of these materials and "undue hardship" in trying to obtain them by other means, BofA is obviously at a disadvantage in making this argument since it cannot examine the materials. The Court too finds itself unable to make an intelligent assessment of these questions based on its in camera review because of its lack of knowledge regarding many of the matters recounted in the documents. Accordingly, the Court will defer a ruling on the questions of "substantial need" and "undue hardship" to allow for fuller disclosure from PwC-US to BofA regarding the contents of the documents at issue. The mechanism for this disclosure will be discussed at a conference that will be held on April 7, 2008 at 11:00 a.m. in Courtroom 17-A, 500 Pearl Street, New York New York. Following the disclosure, BofA will be given a new opportunity to seek to overcome the work product protection afforded the documents.

Conclusion

Bank of America's motion to compel (Docket # 65) is granted in part and denied in part. PwC-US's motion to intervene (Docket # 77) is granted. Its motion for a protective order is disposed of as set forth above.

SO ORDERED.

Dated: March 26 2008
New York, New York

_____
GABRIEL W. GORENSTEIN
United States Magistrate Judge

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Dated: March 26, 2008
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge

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DUNWODY DISTINGUISHED LECTURE IN LAW: NOTE: CLICKING AWAY CONFIDENTIALITY: WORKPLACE WAIVER OF ATTORNEY-CLIENT PRIVILEGE

NAME: Adam C. Losey*

BIO:

* J.D. expected May 2009, University of Florida College of Law. For my mother and father, whom I love and admire more than any other two people in the world, and whose wisdom, guidance, and many sacrifices made everything possible for me. Thanks also to the editorial staff of the Florida Law Review for all their hard work.

SUMMARY:
... Common Usage of Personal E-mail on Company Computers In Curto, the court determined that widespread use of personal e-mail by various employees in the workplace had bearing on the objective reasonableness of an individual employee's expectation of privacy in using personal e- mail. ... The universal application of a rebuttable presumption that an employee has waived attorney-client privilege could avert a direct collision between these two schools of thought and establish a semblance of predictability in workplace waiver cases. ... If this broad interpretation is adopted in workplace waiver cases, employers would still be permitted to monitor employee communications, but they would be prevented from using these communications against an employee in litigation. ... Chaos in the Courts Courts have struggled in determining whether an employee waived attorney-client privilege by checking an otherwise privileged e-mail on a company computer. ... Where an employer has provided in its policies that an employee has no expectation of privacy while using an employer-owned computer, it is unwise to give weight to an employee's erroneous subjective belief of privacy stemming from use of a personal password-protected e-mail account, as doing so would allow and encourage the employee to circumvent the employer's policies. ... The court further stated that prior cases on employee expectations of privacy were not controlling as (1) they did "not address the confidentiality of an employee's e-mails and personal computer files with regard to the attorney-client privilege or attorney work product immunity , " and (2) "none of the cases involve d an employee working from a home office."

TEXT:
[*1180]

I. Introduction: Barbara Hall and Her Daughters

Barbara Hall, an administrative assistant, often arrives at work an hour and a half early solely to check her personal e-mails n1 on her employer's computer. n2 Afterwards, "[i]n the grand tradition of Chekhov, or perhaps 'Days of Our Lives,' Barbara Hall carries on a dialogue throughout the workday with her two daughters, both of whom work at an event-planning company in Cleveland and use its e-mail system for such exchanges." n3 When she gets home from work, Barbara continues to use her workplace e-mail account to send personal e- mails. n4

Barbara Hall and her daughters are not alone. The average employee is estimated to spend nearly an hour a day on personal Internet use. n5 While this behavior at work may be economically detrimental, n6 "[v]ery few companies today have a rule against all personal use of electronic communication . . . . Employers are becoming more realistic about people's need to send an occasional personal message from work." n7 Few companies will fire an employee solely for sending a personal e-mail from [*1181] work, n8 and the modern corporate attitude toward personal e-mail in the workplace is one of begrudged tolerance coupled with surveillance. n9

From 1996 to 2006, the percentage of employers monitoring of employee Internet use skyrocketed by more than 45%. n10 As of 2006, 80% of employers regularly monitor employee Internet use. n11 "[Employer computer] monitoring takes various forms, with 36% of employers tracking content, keystrokes, and time spent at the keyboard. Another 50% store and review employees' computer files. Companies also keep an eye on e-mail, with 55% retaining and reviewing messages." n12 While an estimated 90% of companies that monitor employee communications notify their employees about the possibility of monitoring, n13 many employees are oblivious to the fact that a permanent record may exist of their Internet and e-mail use at work. n14

This ignorance has resulted in serious consequences for employee litigants. At risk are the communications between attorney and client that have been extended special legal protections throughout history. n15 This Note discusses workplace monitoring of these privileged communications. [*1182]

Generally, American n16 courts have held that employers are free to monitor n17 employee computer use, n18 and even government employers and supervisors can monitor employee computer usage without probable cause. n19 Accordingly, employees who e-mail an attorney from the workplace, or from a workplace e-mail account, n20 often lose the evidentiary protections of attorney-client privilege. n21 This loss of privilege subsequently allows an employer to forensically recover n22 a current or former employee's otherwise privileged e-mails to use against the employee in litigation. n23 This disclosure is particularly devastating to the employee, as these types of e-mails are often damning. n24 The employee's [*1183] lawyer may even be vulnerable to a malpractice lawsuit for failing to advise the employee on how to take precautions to avoid waiver. n25

The typical workplace waiver situation involves an employee, using an employer- owned computer, communicating with an attorney regarding an action adverse to the employer. n26 The employer usually has some sort of written policy providing notice to employees that their computer use is subject to monitoring. n27

[*1184]

In these workplace waiver cases, a schism is quietly developing. Some courts are discreetly (and perhaps inadvertently) abandoning the traditionally accepted narrow interpretation of attorney-client privilege in favor of a broad protective approach on public policy grounds. Others continue to adhere to traditional doctrine. A clash between these two schools of thought may be inevitable. The universal application of a rebuttable presumption that an employee has waived attorney-client privilege could avert a direct collision between these two schools of thought and establish a semblance of predictability in workplace waiver cases.

Part II points out the growing and unspoken abandonment of traditional approaches in these non-traditional cases. Part III describes the hodgepodge of emerging case law on the subject. Part IV attempts to identify the underlying source of difficulty in these abstruse cases. Part V teases the logically pertinent variables out of existing case law, and uses these variables as building blocks to construct a workplace waiver presumption. Finally, Part VI advocates the universal adoption of this workplace waiver presumption.

Barbara Hall's e-mail conversations with her daughters "range from the mundane business of trading recipes to the more textured landscape of family illness and romantic relationships[,]" n28 and would not be protected by attorney-client privilege. n29 Yet, Barbara might be surprised to learn that if she were to e-mail an attorney to ask if she might be fired for sending personal e-mails on company time, n30 her otherwise privileged e-mail could likely be used against her by her employer in any future litigation. n31 She would then find herself out of work, and finally forced to use a personal e-mail account for personal e-mail.

[*1185]

II. The Evolution of Attorney-Client Privilege

A. The Traditional Approach

Attorney-client privilege protects from discovery confidential communications made between an attorney and client for the purpose of obtaining legal assistance. n32 The purpose behind the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." n33

Yet, as discovery is intended to be broad and inclusive, n34 the Supreme Court noted in 1947 that the "privilege limitation must be restricted to its narrowest bounds." n35 In 1961, Professor Wigmore stated that

> [the privilege's] benefits are all indirect and speculative; its obstruction is plain and concrete . . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle. n36

Thus, the traditional viewpoint is that when the privilege is in question "[a] court must balance the possibility that the privilege indirectly promotes free and honest communication with the policy of liberal discovery to enhance the search for truth[,]" n37 with the court's thumb on the scale favoring waiver. In workplace waiver cases, application of the traditional approach involves balancing the possible chilling effect of admitting the employee's communications against the truth-seeking value of the communications, while construing the privilege as narrowly as possible.

B. The Modern Approach

When Wigmore and the Supreme Court originally advocated the narrow construction of attorney-client privilege, personal computers and [*1186] e-mail did not exist. n38 Technology has since revolutionized interpersonal communications, n39 and attorney-client communication now regularly occurs in a manner and form that would be completely alien to Wigmore. E-mail combines the accountability of a pen-and-ink letter with the convenience of a phone call. n40 It can be instantly accessed from a computer anywhere in the world, and it has forever blurred the line between formal correspondence and casual communication.

Hence, antiquated legal rubrics may not apply to modern legal questions involving e-mail. In an attempt to honor the policies behind attorney-client privilege, some courts have deemed it necessary to break with tradition and interpret the privilege broadly. n41 This broad interpretation has created a judicial bulwark protecting employees against what some judges view as an unfair practice by employers. If this broad interpretation is adopted in workplace waiver cases, employers would still be permitted to monitor employee communications, but they would be prevented from using these communications against an employee in litigation. Although no court has explicitly articulated this broadened approach, at least one court has undoubtedly adopted it. n42 Another court attempted to finesse the traditional approach through explanation, while the court's reasoning suggested application of the broad approach. n43

This broad approach to attorney-client privilege is not unprecedented. "Historically, the attorney-client privilege subordinates the need for information to determine truth to the need for a sphere of autonomy . . . ." n44 Courts have been slowly backing away from the traditional approach in certain situations since "the privilege carries through policy purposes-encouraging attorney-client communication to enhance compliance with the law and facilitating the administration of justice. . . ." n45

C. Possible Chilling Effects

If courts apply the traditional, narrow view of attorney-client privilege, it is unclear whether employees would be discouraged from speaking with counsel while at work. Nothing prevents an employee in the workplace or at home from communicating with an attorney on a personally owned computer, n46 or via another medium of communication. n47 Yet courts in workplace waiver cases have used the argument that "personal communications with attorneys were exchanged at the office out of necessity arising from the long business hours at [the employee's workplace]" n48 to tie the exclusion of evidence to the purpose of the privilege. While one court ignored this argument for procedural reasons, n49 another court used essentially the same reasoning to justify its decision to protect privileged e-mails. n50

It is clear that an overworked employee could bring a personal computer into work and e-mail his attorney from his personal e-mail [*1187] account, n51 or could pick up the telephone to speak with his attorney in lieu of sending an e-mail. It is not unusual for an employee to routinely bring a personal computer to work, n52 and some undoubtedly already use the telephone to communicate with their attorney while at work. Still, denying privilege in these cases could significantly chill attorney-client communication.

E-mail is particularly useful for legal communications, n53 and forcing an employee to bring a separate personal computer to work to ensure privacy would be burdensome to the employee and potentially still subject the employee to monitoring. n54 Further, allowing employers to use technologically sophisticated methods to covertly intercept attorney-client communications could allow the employer to fold the protections of privilege into a paper tiger. n55 If an employee's privileged communications with an attorney can be intercepted without the employee's knowledge and used against the employee, the employee has a strong incentive to avoid seeking legal advice. This is the chilling effect the privilege is designed to prevent.

[*1188]

D. Intersection with the Work Product Doctrine

The work product doctrine, n56 now codified in the Federal Rules of Civil Procedure, n57 is derived from the Supreme Court's decision in Hickman v. Taylor. n58 The doctrine is distinct from and more expansive than attorney-client privilege. n59 "[I]n [a] civil context, work-product protection is not absolute, but is a 'qualified privilege or immunity'" n60 that protects documents and tangible things otherwise discoverable that are prepared in anticipation

of litigation by a party or by the party's representative, unless opposing counsel demonstrates a need for its disclosure. n61

"The work product doctrine reflects a policy that attorneys should be free to investigate all aspects of his client's case and devise strategy and tactics without the fear that such information can be obtained by opposing counsel through discovery." n62 As the policy rationale behind the work product doctrine differs from the rationale for attorney-client privilege, "[a] split of authority exists as to whether the work-product doctrine should be treated the same as the attorney-client privilege for waiver purposes." n63

Because some courts treat waiver questions differently when viewed through the lens of attorney-client privilege or work product doctrine, n64 an employee's claim of work product protection might be stronger than the employee's attorney-client privilege claim in a workplace waiver situation. n65 In many cases involving employee waiver of attorney-client privilege, the employee has also claimed that the communications were protected by the work product doctrine. n66

For example, Martha Stewart's forwarding of a privileged e-mail to her daughter was found to constitute waiver of attorney-client privilege, yet [*1189] was still considered protected under the work product doctrine, because Stewart did not "substantially increase the risk that the Government would gain access to materials prepared in anticipation of litigation." n67 However, in Lynch v. Hamrick, n68 Juanita Lynch's privileged telephone conversations held in the presence of her daughter received no such protection through application of the work product doctrine. n69 The contrast between these cases illustrates how courts are particularly friendly to litigants who have made a technological blunder.

The Stewart court reasoned that, as "'[d]isclosure to third persons in no way indicates a party's intent to allow his adversary access to work product materials, waiver is therefore not warranted.'" n70 This rationale could be extended to workplace waiver situations, especially when an employee attempts to remove traces of the privileged materials from the employer's computer system. However, it is clear that the work product doctrine has taken a backseat to attorney-client privilege. To date, all courts addressing workplace waiver have simply lumped the two concepts together or given work product claims token consideration. n71

III. Chaos in the Courts

Courts have struggled in determining whether an employee waived attorney-client privilege by checking an otherwise privileged e-mail on a company computer. n72 The decisions center around whether the employee-client had an objectively reasonable expectation of privacy when communicating with an attorney. n73 Courts have generally taken a [*1190] fact-specific approach in determining the objective reasonableness of the employee's belief. The different variables that courts have considered will be discussed in the following subsections.

A. The Employer's Policies Regarding Computer Use and Monitoring

Every court addressing workplace waiver has first looked to the employer's policies n74 regarding employee computer use. Some courts have treated policy language indicating that an employee has no expectation of privacy on workplace computers to be a necessary condition to establish waiver, while others have found such language to be in itself sufficient to establish waiver.

An example of this "necessary and sufficient" approach can be seen in Banks v. Mario Industries of Virginia, Inc., n75 in which an employee used an employer-owned computer to prepare a memorandum for his attorney regarding his planned resignation. n76 The employee printed the letter and sent it via non- electronic mail, and then single deleted n77 the electronic copy [*1191] of the letter. n78 The employer later forensically recovered n79 the memorandum, and sought to use it as evidence against the employee. n80 The court held that since "[the employer's] employee handbook provided that there was no expectation of privacy regarding [the employer's] computers[,]" and "[the employee] created the pre-resignation memorandum on a work computer located at [the employer's] office[,]" n81 ipso facto attorney-client privilege did not protect the deleted memorandum from discovery. n82

Most courts, however, have followed a "necessary but not sufficient" approach. An example of this approach can be seen in Scott v. Beth Israel Medical Center Inc. n83 In Scott, a physician used his employer's e-mail system to write several e-mails to his attorney regarding a suit against his employer for wrongful termination. n84 While the court found that the employee-physician had waived privilege, n85 it treated the presence of appropriate policy language n86 as an important factor in determining waiver. n87 The court based its decision primarily on the policy language, explaining that the employer's e-mail policy meant, in effect, that the employer looked over the employee's shoulder each time he sent an e-mail. Thus, the privileged e-mail could not have been sent in confidence. n88

The weight given to this variable hinges on the court's interpretation of the strength of the policy language. What constitutes sufficiently strong language depends largely on the surrounding circumstances. An employer's blanket statement that an employee is not entitled to any expectation of privacy may be all that is needed in some situations. n89 Yet, in another situation, an employer may need to specifically describe the method used to monitor employees for the court to consider the language sufficient to establish waiver. n90

[*1192]

B. Employee Use of a Password-Protected E-mail Account

In workplace waiver cases, an employee will often use a personal password- protected e-mail account to e-mail counsel. n91 In Curto v. Medical World Communications, Inc., n92 the Eastern District of New York considered the use of a password to be an appropriate factor in considering whether attorney-client privilege should protect employee data stored on an employer-owned computer. n93 In National Economic Research Associates, Inc. v. Evans, n94 the Superior Court of Massachusetts found the existence of a password to be a determinative factor. n95 A California appellate court reasoned that "[b]y proffering evidence that these electronic documents were password-protected and placed in a folder called 'Attorney' for the explicit purpose of protecting them from disclosure, defendant satisfied the initial evidentiary burden imposed on privilege claimants." n96

While these holdings seem to indicate that password protection equates to privacy, this generalization is not necessarily true. "[An employee] does not have an absolute expectation of privacy in records kept or accessed on his workplace computer, even if password protected." n97 In Long v. [*1193] Marubeni America Corporation, n98 the Southern District of New York considered the use of a personal password-protected e-mail account to be irrelevant. n99 The court, referring to language in the employer's policy handbook, held that the employee's erroneous subjective belief that using a personal password-protected e-mail account equated to privacy was inconsequential. n100

Where an employer has provided in its policies that an employee has no expectation of privacy while using an employer-owned computer, n101 it is unwise to give weight to an employee's erroneous subjective belief of privacy stemming from use of a personal password-protected e-mail account, as doing so would allow and encourage the employee to circumvent the employer's policies. n102 However, password protection may be relevant in analyzing work

product claims. n103

C. Common Usage of Personal E-mail on Company Computers

In Curto, the court determined that widespread use of personal e-mail by various employees in the workplace had bearing on the objective reasonableness of an individual employee's expectation of privacy in using personal e- mail. n104 The court made a specific reference to the fact that "several other MWC employees, including its president, had personal [e-mail] accounts on their work computers." n105

The fact that personal e-mail accounts are widely used in the workplace does not necessarily mean that those employees expected their communications to be private. n106 This inference of privacy from common [*1194] use may be rational in exceptional circumstances, n107 but it is questionable whether such an inference is objectively reasonable. n108

D. Employee Attempts to Delete Privileged Material

The Curto court reasoned that an employee's attempt to single delete n109 privileged files was a reasonable precaution to prevent inadvertent disclosure. n110 The Evans court reached a similar conclusion regarding an employee's attempt to double delete privileged files. n111 In both cases, the employer discovered the files. n112

These attempts to delete information surely created a subjective belief in the mind of the employee that the communication was made inaccessible to the employer. n113 Yet, in light of commonly used technology, n114 that belief was objectively unreasonable. That the employer was able to recover the documents, even when a document was purportedly double deleted n115 illustrates this point.

[*1195]

Further, the employers in both Curto and Evans made clear that employees had no expectation of privacy while using a work computer. n116 Thus, even if the employees' actions in Curto and Evans were to be considered reasonable precautions to prevent inadvertent disclosure, an ex post facto measure to prevent disclosure does not automatically equate to a showing of an objectively reasonable expectation of privacy at the time of the communication. n117 The employee's attempted deletion might be more relevant in a work product analysis. n118

E. Employer Enforcement of any Existing Policies

In upholding an employee's privilege claims, the Curto court considered the frequency of the employer's enforcement of its computer usage policy. n119 The court acknowledged that no other court had previously found this factor to be relevant, n120 but stated that "it goes right to the heart of the overriding question which guides the Court's analysis: was [the employee's] conduct so careless as to suggest that she was not concerned with the protection of the privilege." n121

The court further stated that prior cases on employee expectations of privacy were not controlling as (1) they did "not address the confidentiality of [an] employee's e-mails and personal computer files with regard to the attorney-client privilege or attorney work product immunity[,]" and (2) "none of [the] cases involve[d] an employee working from a home office." n122

Curto suggests that consideration of the employer's habitual enforcement would not be appropriate in all situations, and the court's [*1196] explicit limitation of its holding makes this conclusion clear. n123 Moreover, the Curto court downplayed the importance of employer enforcement, stating that the factor was "in no way . . . dispositive" and characterizing it "as a 'sub- factor' to be examined, along with [other factors] . . . ." n124 Curto's token defense justifying consideration of the frequency of the employer's enforcement of its computer use policy illustrates its relative unimportance.

F. The Location of the Computer

The physical location of the computer has logical and legal significance in workplace waiver cases. It is true that an employer-owned computer does not cease to be employer-owned if it is taken into an employee's home. n125 However, technologically sophisticated surveillance intruding into an individual's home has been frowned upon by the Supreme Court in other contexts. n126 Allowing an employee to take a computer into his or her home, then later using information stored on that computer against the employee, smacks of a Trojan Horse. n127

In upholding an employee's privilege claims, the Curto court was careful to note that

[t]he Court's holding is limited to the question of whether an employee's personal use of a company-owned computer in her home waives any applicable attorney- client privilege or work product immunity that may attach to the employee's computer files and/or e-mails. It does not purport to address an employee's right to privacy in an office computer in general. n128

By limiting its holding in this way, the Curto court indicated that a computer's location can be determinative. Another recent case has cited [*1197] Curto to "highlight[] the perils" of an employee using an employer-issued computer in the home. n129

A more interesting question would be posed by an employee accessing a workplace e-mail account n130 from home. It is doubtful that this scenario would be viewed as analogous to using an employer-owned computer at home, as the employee would have had the option to use a personal e-mail account, and thus it would seem less of an employer-set snare.

G. The Forensic Method Used to View an Employee's E-mails

The Evans court took issue with the method used by the employer to monitor its employee's e-mail usage. n131 The employer in Evans used software that routinely took "screen shots" n132 of what the employee was viewing on the employer's computer. n133 The court was shocked that this surveillance was possible. n134 Yet, the employer stated in its policy manual that "Network administrators can read your mail!" n135 While shocking to the court, n136 this particular forensic method may be relatively commonplace. n137

While stopping short of declaring this method of surveillance per se unacceptable, the Evans court stated that:

The bottom line is that, if an employer wishes to read an employee's attorney- client communications unintentionally stored in a temporary file on a company-owned computer that were made via a private, password-protected e-mail account accessed through the Internet, not the company's Intranet, the employer must plainly

communicate to the employee that:

1. all such e-mails are stored on the hard disk of the company's computer in a "screen shot" temporary file; and

[*1198]

2. the company expressly reserves the right to retrieve those temporary files and read them.

Only after receiving such clear guidance can employees fairly be expected to understand that their reasonable expectation in the privacy of these attorney-client communications has been compromised by the employer. n138

Such a detailed instruction as to how an employee is being monitored seems unnecessary when the employer's policy manual states "[n]etwork administrators can read your mail!" n139 Moreover, forcing an employer to lay out the specific technical procedure used to monitor an employee might aid employees in circumventing the monitoring systems.

However, the Evans court's reaction to the employer's method of surveillance seemed ultimately grounded in a concern for fairness. n140 The court's holding stemmed from its belief that the method used was overly invasive and that the employee was not given adequate notice of monitoring. n141 Thus, if a court considers a method of surveillance to be inherently unfair, n142 it may justifiably require a company to take extraordinary steps to ensure notice. n143

H. Fairness and Public Policy

The Curto court specifically considered the "overarching issue of fairness" as a variable. n144 All courts, whether implicitly or explicitly, have considered issues of fairness and public policy. It may be that all workplace waiver decisions are reverse-engineered to match whatever the court feels is the fair result. The sparsity of case law coupled with rich factual situations has resulted in malleable judicial standards. The danger reliance on a court's interpretation of what is fair or in the interest of [*1199] public policy is that what different judges consider to be "fair" differs wildly.

A good example of a court reverse-engineering a workplace waiver decision based upon what it believes to be in the interest of public policy can be seen in Sims v. Lakeside School, n145 in which an employee used his employer's laptop to communicate with his attorney and the employer later forensically recovered the e- mails. n146 The court stated "that [the employee] was on notice that he did not possess a reasonable expectation of privacy in the contents of his laptop[,]" n147 yet the court held that "[n]otwithstanding defendant Lakeside's policy in its employee manual, public policy dictates that such communications shall be protected to preserve the sanctity of communications made in confidence." n148 The only legal support cited by the Sims court for deciding the case on public policy grounds was a ninety-two-year-old case that does not once mention attorney-client privilege, n149 thus making the court appear intellectually disingenuous.

While the Sims court may well be correct that it is not in the public interest to allow employers to use in litigation information gained from spying on employees, its unilateral imposition of this policy viewpoint with no legitimate legal support illustrates the danger of judicial imposition of public policy judgments. As Justice White said, "[t]he task of defining the objectives of public policy and weighing the relative merits of alternative means of reaching those objectives belongs to the legislature." n150 While it is important for a court to have the discretion to consider issues of fairness and public policy, it is more important that a court carefully consider the factual circumstances and principles

of [*1200] existing law. n151 Widespread judicial application of subjective interpretations of fairness would result in chaos. It would simply be impossible to establish any semblance of uniformity in workplace waiver cases.

IV. Making Sense of it All

A. The Knowledge Gap

Much of the difficulty in these cases stems from the employee-employer knowledge gap. n152 Most employees have an erroneous belief that e-mail communications made on a company computer are private, n153 even though a person with a moderate technological knowledge base would consider that belief unreasonable. Whether an objectively reasonable person possesses moderate technological knowledge remains an open question.

Judges are put in the unenviable position of trying to determine who should bear the consequences of this knowledge gap. n154 They are forced to decide whether a commonly held incorrect belief is an objectively reasonable belief. This position is made all the more difficult by the fact that few judges have significant experience with technology, n155 and some [*1201] appear to personally identify with technologically unsophisticated employees. n156

Interestingly, when faced with ambiguity, courts that regularly deal with technological questions rule differently in technology-related cases than courts that do not. n157 This observation suggests that the judge's level of technological sophistication corresponds to the judge's interpretation of what is an objectively reasonable level of technological sophistication. n158

B. Modern vs. Traditional Approach to Attorney-Client Privilege

Some courts have adopted a modern approach to attorney-client privilege in workplace waiver cases. These courts have broadly interpreted the privilege in an attempt to deal with situations where these courts feel the privilege should be upheld. They may do so either for public policy reasons, or because they feel that the traditional approach is unable to cope with issues involving technology. Other courts have adhered to Wigmore's traditional approach. While it is possible that courts adopting the modern, broad approach have done so unwittingly, the difference of breadth has naturally led to inconsistent holdings and will continue to do so until some uniformity is established. n159

V. The Workplace Waiver Presumption

A. The Bright-Line Fallacy

It has been noted that "[t]o date, courts have not developed bright-line approaches for determining when attorney-client privilege protects data [*1202] stored on an employer-issued computer." n160 Without a bright-line approach, courts will continue to consider a legion of variables, leading to inconsistency. Yet, some variability may be desirable. An attempt to produce clarity through the imposition of a forced bright-line test would cause unnecessary rigidity.

Thus, it would be a mistake for a court, in a workplace waiver case, to hold that either (1) privilege is always

waived in the presence of policy language stating that the employee has no expectation of privacy; or (2) privilege is never waived as a matter of public policy. Workplace waiver issues involve sophisticated questions of law and nuanced factual inquiries, and they require an equally nuanced analysis to achieve a just resolution. By teasing the logically pertinent variables out of existing workplace waiver case law, a standardized yet nuanced approach can be developed.

B. Distillation of Logically Pertinent Variables

It is generally accepted that in workplace waiver cases a court should first look to the language of the employer's policies. If the policies make clear that the employee has no expectation of privacy while using a workplace computer, then it is logical to establish a presumption that privilege has been waived. This presumption could be rebutted if the employee shows that (1) the location of the computer or (2) the actions of the employer rendered this policy language ineffective. Depending on the circumstances, a court might also consider analyzing the issue under the work product doctrine.

However, problems may emerge when considering such variables as (1) use of a personal password-protected e-mail account, (2) other employees' use of personal e- mail at work, (3) employee attempts to delete or hide files from the employer, (4) the forensic method used by the employer to recover information, or (5) any other technologically related facts where the court is unable to easily determine the objective relevance of the evidence.

Under the traditional, narrow construction of attorney-client privilege, these variables are likely insignificant. Under a modern, broad approach to attorney-client privilege, they might be pertinent. Either way, courts need specialized outside help in these cases. Court-appointed experts, n161 special masters, n162 or even adversarial testimony by the parties' competing [*1203] experts n163 could go a long way in assisting in the determination of the objective reasonableness of an employee's belief.

By all accounts, the use of a presumption is the logical first step in workplace waiver cases. Courts should first place the burden on the employer to show language in its policy manual that facially establishes that the employee had no objectively reasonable expectation of privacy. The employee would then be free to rebut that presumption by presenting evidence showing that the employee had an objectively reasonable expectation of privacy despite the language in the employer's policy manual. If the court has any doubt as to whether evidence presented by the employee to rebut the presumption is relevant, then the court should call in specialized outside help.

VI. Conclusion: Adoption of the Workplace Waiver Presumption

Courts can and should distill existing case law to determine the logically pertinent factual variables in workplace waiver cases, but a jurisprudential clash may be inevitable. Courts that have adopted the broad (modern) approach to attorney- client privilege, and those that have held fast to Wigmore's narrow (traditional) interpretation are on a collision path.

The application of the workplace waiver presumption, described in this Note, is the best way to avert a direct collision between these two schools of thought and to achieve a semblance of predictability in these cases. Adherents to both the modern and traditional approaches would be able to use this presumption without compromising their viewpoints. This presumption would give courts a workable, flexible rubric that would prove invaluable in working through workplace waiver issues. It is clear that the adoption of the workplace waiver presumption is the logical first step in the development of workplace waiver jurisprudence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawCivil ActionsDamagesEvidencePrivilegesAttorney-Client PrivilegeScopeEvidencePrivilegesAttorney-Client PrivilegeWaiver

FOOTNOTES:

n1 "The abbreviated version of 'electronic mail' has been written as 'email,' 'Email,' or 'E-mail'" yet "dictionaries have not taken a position" on which abbreviation is correct. Elaine R. Firestone & Stanford B. Hooker, Careful Scientific Writing: A Guide for the Nitpicker, the Novice, and the Nervous, 48 Soc'y for Tech. Comm. 505, 506 (2001). The Supreme Court has repeatedly used both "email" and "e-mail" within the same opinion. See *United States v. Williams, 128 S. Ct. 1830, 1845 (2008)* (using email and e-mail interchangeably); compare *Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2669 (2007)* (using email), with *id. at 2698* (using e-mail). "Newly coined nonce words of English are often spelled with a hyphen, but the hyphen disappears when the words become widely used. For example, people used to write 'non-zero' and 'soft- ware' instead of 'nonzero' and 'software'; the same trend has occurred for hundreds of other words. Thus it's high time for everybody to stop using the archaic spelling 'e-mail.'" Donald E. Knuth, Email (let's drop the hyphen), http://www-cs- faculty.stanford.edu/knuth/email.html (last visited Sept. 27, 2008).

n2 Katie Hafner, Putting All Your E-Mail in One Basket, N.Y. Times, June 26, 2003, at G1.

n3 Id.

n4 "'I don't even bother with my home account any more,' [Barbara] said. 'When I'm home, I log onto the work e-mail because everyone has my work e-mail address. It's just easier.'" Id.

n5 Is That Work Related?, 24 No. 5 Legal Mgmt., Sept.- Oct. 2005, at 8, 8.

n6 "It's estimated that 'cyberslacking' is responsible for up to a 40% loss in employee productivity and can waste up to 60% of a company's bandwidth!" Jay P. Kesan, Cyber-Working or Cyber-Shirking?: A First Principles Examination of Electronic Privacy in the Workplace, *54 Fla. L. Rev. 289, 290 (2002).*

n7 Larry Keller, Monitoring Employees: Eyes in the W o r k p l a c e , C N N . c o m , J a n . 2 , 2 0 0 1 , http://archives.cnn.com/2001/CAREER/trends/01/02/surveillence/; see also Nathan Watson, Note, The Private Workplace and the Proposed "Notice of Electronic Monitoring Act": Is "Notice" Enough?, *54 Fed. Comm. L.J. 79, 96 (2001)* ("Many people take care of personal business on company time and, for the most part, many employers do not mind this behavior as long as it is within reason.").

n8 However, many companies are firing employees for e- mail misuse. "Increasingly, employers are fighting back by firing workers who violate computer privileges. Fully 26% of employers have terminated employees for e-mail misuse." 2006 AMA Survey: Workplace E-Mail, Instant Messaging & Blog Survey; see also Kim Zetter, Employers Crack Down on Personal Net Use, PC World, Aug. 25, 2006, available at http://www.pcworld.com/article/id,126835/ article.html.

n9 "[W]hile [companies] may not fire people for sending personal e-mail messages, they keep reading them." Keller, supra note 7.

n10 Ericka Chickowski, Monitoring Employee Internet Usage, Processor, Apr. 14, 2006, at 29, 29.

n11 Id.

n12 2005 AMA Survey: Electronic Monitoring & Surveillance Survey.

n13 Kyle Schurman, E-mail & Your Legal Rights, Smart Computing, July 2001, at 140, 140-41.

n14 "'Many people are unaware that a permanent record exists of their Internet and e-mail use at work,' says Max Messmer, Chairman of Accountemps. 'Most organizations actively monitor Web use by employees to ensure it complies with established corporate policy.'" Is That Work Related?, supra note 5, at 8.

n15 See Max Radin, The Privilege of Confidential Communication Between Lawyer and Client, *16 Cal. L. Rev. 487, 488* (1927-1928) ("Advocates equally from very ancient times could not be called as witnesses against their clients while the case was in progress. Cicero in prosecuting the Roman governor of Sicily regrets that he cannot summon the latter's patronus, Hortensius . . . ."); Ken M. Zeidner, Note, Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance, *22 Cardozo L. Rev. 1315, 1320 (2001)* ("The notion that an attorney may not give testimony against his client is deeply rooted in Roman law.").

n16 Most European employees enjoy greater workplace privacy protections than their American counterparts. See generally Kesan, supra note 6, at 307-11 (outlining workplace privacy protections in the United Kingdom, France, Germany, and Italy).

n17 Or not to monitor. Employers choose to monitor their employees for a variety of reasons, but it should be noted that they normally need not do so. See, e.g., *Doe v. XYC Corp., 887 A.2d 1156, 1162 (N.J. Super. Ct. App. Div. 2005)* ("The duty to monitor employee's internet activities does not exist.").

n18 For a critical discussion of employer-employee privacy law in the United States, see generally Rafael Gely, Distilling the Essence of Contract Terms: An Anti-Antiformalist Approach to Contract and Employment Law, *53 Fla. L. Rev. 669 (2001)*, which criticizes "[t]he argument, which according to employers has become a truism, . . . [that] since employers 'buy' the time of employees, employers presumptively have the right to control all aspects of the employees' life while at work, and at times even outside of work."

n19 See *United States v. LeBlanc, 490 F.3d 361, 365 (5th Cir. 2007)* (noting that the Supreme Court has held that "government employers and supervisors may conduct warrantless, work-related searches of employees' desks and offices without probable cause . . . .").

n20 "[S]ending a message over [a company's] e-mail system [is] like placing a copy of that message in the company files." *In re Asia Global Crossing, Ltd., 322 B.R. 247, 259 (Bankr. S.D.N.Y. 2005).*

n21 When a federal question is being litigated in the federal courts, the attorney-client privilege is a question of federal common law. See *Fed. R. Evid. 501*. When a claim or defense is governed by state law (e.g., in a diversity action) state privilege law is applicable. Id. For the purposes of this Note, due to the sparsity of case law on the subject, cases from all jurisdictions will be similarly considered.

n22 Computer forensics is defined as "the art and science of applying computer science to aid the legal process." Christopher L.T. Brown, Computer Evidence: Collection and Preservation 3 (2006). "The primary focus of many computer forensics investigations is the extraction of digital evidence . . . ." Id. at 127. Deleting an e-mail, or a file, generally does not make it inaccessible to a skilled computer forensics expert. For the purposes of this Note, the reader need be aware that if the user of a computer views or composes an e- mail, a forensic expert may be able to recover the e-mail regardless of whether the e-mail was intentionally saved on the computer.

n23 See *Fed. R. Evid. 801(d)(2)(A)* (stating the party admission exemption to the definition of hearsay).

n24 Good examples of the types of communications involved in workplace waiver cases are (1) a draft memorandum from Plaintiff to [a corporate officer], prepared by Plaintiff and her counsel; (2) a 'chronology of events' describing events underlying many of Plaintiff's claims, prepared by Plaintiff and her counsel; (3) drafts of Plaintiff's EEOC complaint prepared by Plaintiff and her counsel; and (4) various e-mails sent amongst Plaintiff and her counsel.Curto v. Med. World Commc'ns, Inc., No. 03- *CV-6327, 2006 WL 1318387*, at *2 (E.D.N.Y. May 15, 2006).

n25 See Audrey Rogers, New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept, *47 Fla. L. Rev. 159, 189 & n.160 (1995).*

n26 See, e.g., Long v. Marubeni Am. Corp., No. 05- *Civ.- 639, 2006 WL 2998671*, at *1 (S.D.N.Y. Oct. 19, 2006) (describing employees Kevin Long and Ludvic Presto using their employer's computers "that were issued to them to perform their respective work assignments, to send and receive e-mail messages to each other and to their attorney" regarding a civil rights action against their employer); *Curto, 2006 WL 1318387*, at *1-2 (noting that employee Curto used an assigned company-owned laptop to frequently e-mail her attorney concerning an EEOC complaint against her employer); Kaufman v. SunGard Inv. Sys., No. 05- *CV- 1236, 2006 WL 1307882*, at *1 (D.N.J. May 10, 2006) ("Kaufman and OSI, a financial software company owned by Kaufman, initiated suit action against SunGard, alleging, among other claims, breach of contract in connection with SunGard's acquisition of OSI's assets and hiring of Kaufman as a senior executive . . . . [E- mails related to the litigation] were sent from and received on SunGard's e-mail system during Kaufman's employment with SunGard."); Nat'l Econ. Research Assocs. v. Evans, No. 04-2618- *BLS2, 2006 WL 2440008*, at *1 (Mass. Super. Ct. Aug. 3, 2006) (using his employer's computer, employee Evans contacted an attorney for advice regarding his leaving the company and working with a competitor); *Banks v. Mario Indus. of Va., Inc., 650 S.E.2d 687, 695 (Va. 2007)* (describing how employee Cook used his employer's computer to prepare, print, and delete a privileged document to send to his attorney regarding legal action adverse to his employer).

n27 See, e.g., *Long, 2006 WL 2998671*, at *1 (noting that the employee handbook stated that personal use of company computers was prohibited, and that employees '"have no right of personal privacy in any matter stored in, created, received, or sent over the e-mail, voice mail, word processing, and /or internet systems provided' by [the employer]"); *Curto, 2006 WL 1318387*, at *1 ("Employees should not have an expectation of privacy in anything they create, store, send, or receive on the computer system. The computer system belongs to the

company and may be used only for business purposes. Employees expressly waive any right of privacy in anything they create, store, send, or receive on the computer or through the Internet or any other computer network. Employees consent to allowing personnel of [MWC] to access and review all materials employees create, store, send, or receive on the computer or through the Internet or any computer network. Employees understand that [MWC] may use human or automated means to monitor use of computer resources."); *Kaufman, 2006 WL 1307882,* at *4 ("SunGard policy . . . provided that all emails were subject to monitoring. SunGard warned: The Company has the right to access and inspect all electronic systems and physical property belonging to it. Employees should not expect that any items created with, stored on, or stored within Company property will remain private. This includes desk drawers, even if protected with a lock; and computer files and electronic mail, even if protected with a password."); *Evans, 2006 WL 2440008,* at *2-3 (listing a series of provisions in the employer's policies and procedures manual stating that employee e-mails are subject to monitoring); *Banks, 650 S.E.2d at 695* (noting that the "employee handbook provided that there was no expectation of privacy regarding [company computers]").

n28 Hafner, supra note 2.

n29 Unless, of course, one or both of her daughters happened to be an attorney, and Barbara contacted that daughter for legal advice.

n30 To which the attorney should respond "yes." See supra note 8. If the attorney Barbara consulted was also her husband, she might also be able to seek the protections of the spousal privilege. See *Sprenger v. Rector & Bd. of Visitors of Va. Tech, 2008 WL 2465236,* at *2-3 (W.D. Va. June 17, 2008) (discussing employee spousal privilege in the workplace, and noting that "[t]he attorney-client privilege is similar to the [spousal] privilege").

n31 See *Fed. R. Evid. 801(d)(2)(A)* (stating the party admission exemption to the definition of hearsay).

n32 See Bryan S. Gowdy, Note, Should the Federal Government Have an Attorney-Client Privilege?, *51 Fla. L. Rev. 695, 697 (1999)* (citing Dean Wigmore's definition of the attorney-client privilege).

n33 *Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).*

n34 The Court often references "the broad discovery authorized by the Federal Rules of Civil Procedure . . . ." *Codd v. Velger, 429 U.S. 624, 638 (1977).*

n35 *Hickman v. Taylor, 329 U.S. 495, 506 (1947).*

n36 8 John Henry Wigmore, Evidence in Trials at Common Law § 2291 (John T. McNaughton ed., rev. ed. 1961).

n37 *Suburban Sew'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 257 (N.D. Ill. 1981).*

n38 While e-mail has arguably been around since the late 1960s, e-mail did not exist in its modern form

until 1972, when an engineer named Ray Tomlinson chose the "@" symbol for e- mail addresses and wrote software to send the first network e- mail. Barry M. Leiner et. al., A Brief History of the Internet, http://arxiv.org/html/cs/9901011v1.

n39 See Stephen J. Snyder & Abigail E. Crouse, Applying Rule 1 in the Information Age, Sedona Conf. J., Fall 2003, at 165, 167 ("Computers have revolutionized the way people live and do business . . . and email has revolutionized the way people communicate.").

n40 Just as a phone call can be made from any phone hooked up to a telephone service provider, e-mail can be sent with ease from any computer in the world with an Internet connection and a web browser. There are approximately one billion such computers in the world today, and by 2015 that number will double. See Siobhan Chapman, PC Numbers Set to Hit One Billion, C o m p u t e r w o r l d U K , J u n e 1 2 , 2 0 0 7 , http://www.techworld.com/news/index.cfm?NewsID=9119. As in correspondence by letter, a permanent record exists of an e-mail communication. Some argue that the existence of these two qualities in a single method of communication is risky, stating that "email is more like a dangerous power tool than like a harmless kitchen appliance [and] many, perhaps most, of us have suffered the equivalent of burns, lost fingers, electric shocks, and bone fractures." Janet Malcolm, Pandora's Click, N.Y. Rev. Of Books, Sept. 27, 2007, at 8, 8 (book review).

n41 See, e.g., *Sims v. Lakeside Sch., No. C06-1412RSM, 2007 WL 2745367,* at *2 (W.D. Wash. Sept. 20, 2007) ("[P]ublic policy dictates that [privileged] communications shall be protected to preserve the sanctity of communications made in confidence.").

n42 See supra note 41 and accompanying text.

n43 See *In re Teleglobe Commc'ns Corp., 493 F.3d 345, 361 n.13 (3d Cir. 2007).*

n44 Bryan T. Camp, Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998, *56 Fla. L. Rev. 1, 131 (2004).*

n45 *In re Teleglobe, 493 F.3d at 360* (citation omitted).

n46 This observation assumes that the employee owns a personal computer, and has Internet access. Approximately 90% of American families with an annual household income more than $ 50,000 in 2003 owned a personal computer with an Internet connection. See U.S. Census Bureau, Computer and Internet Use in the United States: 2003, at 2 (2005), available at http://www.census.gov/prod/2005pubs/p23-208.pdf. This number has likely risen since 2003, and will continue to rise. See supra note 40. Because an employee consulting an attorney to obtain legal advice is likely to have an annual household income of more than $ 50,000, the underlying assumption is reasonable.

n47 Phone calls, letters, and face-to-face conversations are not yet antiquated to the point of obsolescence. Moreover, an employee could easily purchase and use a personally owned electronic device capable of sending and receiving e-mail, such as a BlackBerry or IPhone. Ample alternatives to e-mail remain for an employee to privately communicate with his or her attorney.

n48 Kaufman v. SunGard Inv. Sys., No. 05- *CV-1236, 2006 WL 1307882,* at *4 (D.N.J. May 10, 2006).

n49 Id.

n50 See Nat'l Econ. Research Assocs. v. Evans, No. 04- 2618- *BLS2, 2006 WL 2440008,* at *5 (Mass. Super. Ct. Aug. 3, 2006) ("If [the employer's] position were to prevail, it would be extremely difficult for company employees who travel on business to engage in privileged e-mailed conversations with their attorneys . . . . Pragmatically, a traveling employee could have privileged e-mail conversations with his attorney only by bringing two computers on the trip-the company's and his own.").

n51 However, bringing in a personal computer might not be enough to avoid employer surveillance, as the employee would likely be forced to use the employer's Internet connection or network to send e-mail. See supra note 20.

n52 See, e.g., *United States v. Barrows, 481 F.3d 1246, 1247 (10th Cir. 2007)* ("Mr. Barrows brought his personal computer to work."); Gernady v. Pactiv Corp., No. 02- *C-8113, 2005 WL 241472,* at *8 (N.D. Ill. Jan. 24, 2005) ("On January 22, 2001, Gernady brought his personal computer to work even though he had previously been notified that he was not allowed to do so."); *United States v. Murray, No. NMCCA 200501175, 2007 WL 1704288,* at *1 (N.M. Ct. Crim. App. Jan. 11, 2007) ("The appellant sometimes brought his personal laptop computer to work so that he could listen to music while working."); *Am. Airlines, Inc. v. Geddes, 960 So. 2d 830, 831 (Fla. 3d DCA 2007)* ("The mechanics had begun bringing their personal computers from home, keeping them in a closet area near the break room where the mechanics await their work assignments.").

n53 "According to the 2007 ABA Legal Technology Survey Report, more than 99 percent of the ABA members surveyed reported using email in their practices." Joshua Poje, Sanctions Just a Click Away: Email's Ethical Pitfalls, The E-Public Lawyer, Summer 2008, http://www.abanet.org/govpub/ePL/summer08/email.html. However, there are some critics of e-mail. "'E-mail is a party to which English teachers have not been invited . . . . E-mail has just erupted like a weed, and instead of considering what to say when they write, people now just let thoughts drool out onto the screen[.]'" Sam Dillon, What Corporate America Cannot Build: A Sentence, N.Y. Times, Dec. 7, 2004, at A23 (quoting R. Craig Hogan).

n54 See supra note 51.

n55 "[P]aper tigers [are] fierce in appearance but missing in tooth and claw." Bob Hepple, Enforcement: The Law and Politics of Cooperation and Compliance, in Social and Labour Rights in a Global Context 238, 238 (Bob Hepple ed., 2002).

n56 Federal law governs issues concerning the work product doctrine in diversity cases in federal courts. See, e.g., *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc., 176 F.R.D. 269, 276 (N.D. Ill. 1997).*

n57 See *Fed. R. Civ. P. 26(b)(3).*

n58 *329 U.S. 495, 514 (1947).*

n59 See *United States v. Nobles, 422 U.S. 225, 238 n.11 (1975).*

n60 *United States v. Armstrong, 517 U.S. 456, 474 (1996)* (Breyer, J., concurring).

n61 See *Fed. R. Civ. P. 26(b)(3).*

n62 Rogers, supra note 25, at 179 n.117.

n63 Id.

n64 Id. at 179-80 n.117.

n65 This approach has not worked well for employee litigants to date. Generally, courts finding waiver or upholding attorney-client privilege reach the same result in their work product analysis. See, e.g., Long v. Marubeni Am. Corp., No. 05- *Civ.-639, 2006 WL 2998671,* at *4 (S.D.N.Y. Oct. 19, 2006) (noting the employees waived attorney-client privilege and work product protections by voluntary disclosure); Curto v. Med. World Commc'ns, Inc., No. 03- *CV-6327, 2006 WL 1318387,* at *5-9 (E.D.N.Y. May 15, 2006) (concluding employee is entitled to either or both attorney-client privilege or work product doctrine protections for the same reasons).

n66 See, e.g., *Long, 2006 WL 2998671,* at *2-5; *Curto, 2006 WL 1318387,* at *2.

n67 *United States v. Stewart, 287 F. Supp. 2d 461, 469 (S.D.N.Y. 2003).*

n68 *968 So. 2d 11 (Ala. 2007).*

n69 *Id. at 14.*

n70 *Stewart, 287 F. Supp. 2d at 469* (quoting Jeff A. Anderson et al., The Work Product Doctrine, *68 Cornell L. Rev. 760, 884 (1983)).*

n71 See supra note 65.

n72 Compare Long v. Marubeni Am. Corp., No. 05- *Civ.- 639, 2006 WL 2998671,* at *1-3 (S.D.N.Y. Oct. 19, 2006) (refusing to shield communications because employee waived privilege by checking e-mails on company computer), and Kaufman v. SunGard Inv. Sys., No. 05- *CV-1236, 2006 WL 1307882,* at *1-3 (D.N.J. May 10, 2006) (reasoning that although employee deleted privileged e- mails on company laptop that were later recovered by a computer technician, employee had waived privilege), and *Banks v. Mario Indus. of Va., Inc., 650 S.E.2d 687, 695-96 (Va. 2007)* (preparing an otherwise privileged communication on a company computer waived the employee's privilege), with *Sims v. Lakeside Sch., No.C06-1412RSM, 2007 WL 2745367,* at *2 (W.D. Wash. Sept. 20, 2007) (holding that public policy demanded that employee's privileged communications be protected), and Curto v. Med. World Commc'ns, Inc., No. 03- *CV-6327, 2006 WL 1318387,* at *4-5

(E.D.N.Y. May 15, 2006) (concluding employee had not waived privilege by leaving traces of privileged e-mails on a company computer, although company policy stated all e-mails viewed on company computer were subject to monitoring), and Nat'l Econ. Research Assocs. v. Evans, No. 04-2618- *BLS2, 2006 WL 2440008,* at *3-5 (Mass. Super. Ct. Aug. 3, 2006) (checking e-mail on company computer did not waive employee privilege).

n73 The attorney-client privilege protects from disclosure thosecommunications from clients to their attorneys that were part of the clients' efforts to obtain legal advice or assistance. The communication must be confidential for the privilege to apply. A communication is confidential when (1) the client subjectively believes the communication is confidential and (2) that the belief is objectively reasonable.Paul R. Rice, Electronic Evidence: Law and Practice 132-33 (2005); see also *Bogle v. McClure, 332 F.3d 1347, 1358 (11th Cir. 2003)* ("To determine if a particular communication is confidential and protected by the attorney-client privilege, the privilege holder must prove the communication was '(1) intended to remain confidential and (2) under the circumstances was reasonably expected and understood to be confidential.'" (quoting *United States v. Bell, 776 F.2d 965, 971 (11th Cir. 1985))); United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981)* ("A communication is protected by the attorney-client privilege . . . if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential.").

n74 Most employers have some sort of written policy allowing the employer to monitor employee computer use. See supra note 27 and accompanying text. In the event that an employer had no such policy language, the lack of a policy would likely be determinative. See Transocean Capital, Inc. v. Fortin, No. 05- 0955- *BLS2, 2006 WL 3246401,* at *4 (Mass. Super. Ct. Oct. 20, 2006) (upholding privilege, noting that "[the employer] did not have its own Policies or Procedures Manual or Employment Manual setting forth the Company's policy regarding the review of emails on the Company's network").

n75 *650 S.E.2d 687 (Va. 2007).*

n76 *Id. at 695.*

n77 The term "deleted" has a legion of different meanings in the context of electronic discovery. Counter-intuitively, clicking "delete" on a computer file does not actually delete the file. It merely removes the computer's reference mark to the document. Thus, the term "single deleted" or "once deleted" should be used to refer to documents whose reference mark has been removed, and "double deleted" should be used to refer to documents that have actually been overwritten and truly been made inaccessible. See Ralph C. Losey, e-Discovery: Current Trends and Cases 192-93 (2008). It seems clear that the Banks court was referring to single deletion, which is arguably not a reasonable precaution taken to prevent the disclosure of a privileged document. See *Banks, 650 S.E.2d at 695.*

n78 *Banks, 650 S.E.2d at 695.*

n79 See supra note 22.

n80 *Banks, 650 S.E.2d at 695.*

n81 Id.

n82 *Id. at 695-96.*

n83 *2007 N.Y. Slip Op. 27429* (N.Y. Sup. Ct. Oct. 17, 2007).

n84 Id. at *1.

n85 Id. at *4-6.

n86 For the full text of the policy language, see id. at *2.

n87 Id. at *5.

n88 Id. at *3.

n89 See *Banks v. Mario Indus. of Va., 650 S.E.2d 687, 695 (Va. 2007).*

n90 See discussion infra Part III.G.

n91 See, e.g., Long v. Marubeni Am. Corp., No. 05- *Civ.- 639, 2006 WL 2998671*, at *1 (S.D.N.Y. Oct. 19, 2006) ("In [the employees' communicating with their attorney on an employer-owned computer], the [employees] used private password-protected e-mail accounts."); Curto v. Med. World Commc'ns, Inc., No. 03- *CV-6327, 2006 WL 1318387*, at *3 (E.D.N.Y. May 15, 2006) ("Plaintiff did take reasonable precautions to prevent inadvertent disclosure in that she sent the e-mails at issue through her personal AOL account which did not go through the Defendants' servers."); Nat'l Econ. Research Assocs. v. Evans, No. 04-2618- *BLS2, 2006 WL 2440008*, at *1 (Mass. Super. Ct. Aug. 3, 2006) ("Many of these attorney-client communications were conducted by e-mail, with Evans sending and receiving e-mails from his personal, password- protected e-mail account with Yahoo rather than his NERA e-mail address."). But see Kaufman v. SunGard Inv. Sys., No. 05- *CV-1236, 2006 WL 1307882*, at *1 (D.N.J. May 10, 2006) ("These e-mails [between Kaufman and her attorneys] were sent from and received on SunGard's e-mail system during Kaufman's employment with SunGard.").

n92 No. 03- *CV-6327, 2006 WL 1318387* (E.D.N.Y. May 15, 2006).

n93 Id. at *5, *8.

n94 No. 04-2618- *BLS2, 2006 WL 2440008* (Mass. Super. Ct. Aug. 3, 2006).

n95 The Evans court stated that:The bottom line is that, if an employer wishes to read an employee's attorney-client communications unintentionally stored in a temporary file on a company-owned computer that were made via a private, password- protected e-mail account accessed through the Internet, not the company's Intranet, the employer must plainly communicate [this] to the employee . . . .Id. at *5.

n96 People v. Jiang, *31 Cal. Rptr. 3d 227 (Cal. Ct. App. 2005)*, withdrawn *33 Cal. Rptr. 3d 184, 203 (Cal. Ct. App. 2005)).*

n97 *Campbell v. Woodard Photographic, Inc., 433 F. Supp. 2d 857, 861 n.4 (N.D. Ohio 2006).*

n98 No. 05- *Civ.-639, 2006 WL 2998671* (S.D.N.Y. Oct. 19, 2006).

n99 "The plaintiffs contend they used their private password-protected e-mail accounts to communicate with their attorney, and with each other, to protect the confidentiality of their communications. However, when the plaintiffs determined to use MAC's computers to communicate, they did so cognizant that MAC's ECP was in effect . . . ." Id. at *3.

n100 Id.

n101 As in all the cases cited in this sub-section. See *Long, 2006 WL 2998671*, at *1; Curto v. Med. World Commc'ns, Inc., No. 03- *CV-6327, 2006 WL 1318387*, at *1 (E.D.N.Y. May 15, 2006); Jiang, *31 Cal. Rptr. 3d at 197-98;* Nat'l Econ. Research Assocs. v. Evans, No. 04-2618- *BLS2, 2006 WL 2440008*, at *3 (Mass. Super. Ct. Aug. 3, 2006).

n102 This argument presents a slippery slope. Rewarding an employee for attempting to hide evidence seems unwise, as it rewards an employee for what essentially amounts to spoliation.

n103 An employee's use of a password protected account arguably decreases the risk that emails would be discovered.

n104 *Curto, 2006 WL 1318387*, at *3 & n.2.

n105 Id.

n106 Many employees may well continue to use personal e-mail accounts at work despite their knowledge that they have no expectation of privacy in their communications, as they have nothing to hide.

n107 The argument is stronger when control-group executives are in the habit of using personal e-mail at work, as in Curto. See supra note 105 and accompanying text. It would be further strengthened if the employee were instructed by a supervisory employee to use a personal e-mail account for e- mails, such as to send them a work-related file.

n108 Where an employee was merely aware that other rank-and-file employees used personal email at work, or where co- workers with no supervisory authority represented to the employee that personal e-mail at work was shielded from surveillance, an inference of privacy would be less reasonable.

n109 See supra note 77.

n110 *Curto, 2006 WL 1318387,* at *3. Yet, it seems clear that the Curto court was referring to single deletion, which is arguably not a reasonable precaution "taken . . . to prevent inadvertent disclosure of [a privileged document] . . . ."Id.

n111 Nat'l Econ. Research Assocs. v. Evans, No. 04- 2618- *BLS2, 2006 WL 2440008,* at *1 (Mass. Super. Ct. Aug. 3, 2006). Evans is a great example of a technologically unsophisticated person attempting to double delete a file. The employee deleted all his personal files and ran a disk defragmenter under the false assumption that running the program would prevent recovery of his files. Id.

n112 See *Curto, 2006 WL 1318387,* at *1; *Evans, 2006 WL 2440008,* at *2.

n113 Otherwise, why would the employee bother to delete the file? While the employee might argue that the deletion was merely an attempt to eliminate e-mail clutter, this sort of housekeeping deletion would still create the subjective belief that the e-mail was made inaccessible to their employer.

n114 Recovery of deleted data from computers through the use of forensic software has been commonplace since the early 1990s. See David W. Hendron, The Continuing Evolution of Computer Forensics, L. Enforcement Q., Winter 2005-2006, at 19, 19-20.

n115 With some effort, double deleted data can be recovered.Even when data on a [computer] disk is deleted and overwritten, a 'shadow' of the data might remain . . . . [This] shadow data [is the] result of the minor imprecision[s] that naturally [occur] when data [is] being written on a disk. The arm that writes data onto a disk has to swing to the correct place, and it is never perfectly accurate. Skiing provides a good analogy. When you ski down a snowy slope, your skis make a unique set of curving tracks. When people ski down behind you, they destroy part of your tracks when they ski over them but they leave small segments. A similar thing happens when data is overwritten on a disk-only some parts of the data are overwritten leaving other portions untouched. A disk can be examined for shadow data in a lab with advanced equipment (e.g. scanning probe microscopes, magnetic force microscopes) and the recovered fragments can be pieced together to reconstruct parts of the original digital data.Eoghan Casey, Digital Evidence and Computer Crime 240 (2d ed. 2004).

n116 See *Curto, 2006 WL 1318387,* at *1; *Evans, 2006 WL 2440008,* at *2-3.

n117 The objective reasonability of a person's belief that his or her communications are private is determined at the time the communications were made. See, e.g., *United States v. Inigo, 925 F.2d 641, 657 (3d Cir. 1991); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980).*

n118 This conclusion follows because an employee's attempt to delete emails likely decreases the risk that the emails would be discovered.

n119 *Curto, 2006 WL 1318387,* at *4-5.

n120 Id.

n121 Id. at *5.

n122 Id.

n123 See infra note 128 and accompanying text.

n124 *Curto, 2006 WL 1318387,* at *8.

n125 The converse is true regarding an employee's personal computer taken to work. See supra notes 51-52 and accompanying text.

n126 "The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States, 533 U.S. 27, 34 (2001).* Kyllo answered this question by placing harsh limitations on the warrantless use of technology to cross the "'firm line [of privacy] at the entrance to the house.'" *Id. at 40* (quoting *Payton v. New York, 445 U.S. 573, 590 (1980)).* Although the Kyllo case involved the Fourth Amendment and criminal law, the Court's articulation of its desire to protect the home against invasive technological surveillance implies that the Court would have similar protectionist leanings in workplace waiver cases.

n127 The Supreme Court has previously frowned upon "a Trojan horse dressed up in legal form." *NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 844 (1984).*

n128 *Curto, 2006 WL 1318387,* at *8 (emphasis added).

n129 Geer v. Gilman Corp., No. 3:06- *CV-889, 2007 WL 1423752,* at *4 (D. Conn. Feb. 12, 2007).

n130 See supra note 20.

n131 Nat'l Econ. Research Assocs. v. Evans, No. 04- 2618- *BLS2, 2006 WL 2440008,* at *4 (Mass. Super. Ct. Aug. 3, 2006).

n132 "A screen shot is [an electronically] printed [or electronically stored] page depicting the visual images seen on a computer monitor when connected to a web page." *SCC Commc'ns Corp. v. Anderson, 195 F. Supp. 2d 1257, 1258 n.4 (D. Colo. 2002).*

n133 *Evans, 2006 WL 2440008,* at *4.

n134 "This Court does not agree that any reasonable person would have known this information. Certainly, until this motion, this Court did not know of the [possibility of] routine storing of 'screen shots' from private Internet e-mail accounts on a computer's hard disk." Id.

n135 Id. at *3.

n136 Id. at *4.

n137 See supra note 12 and accompanying text.

n138 *Evans, 2006 WL 2440008,* at *5.

n139 Id. at *3.

n140 Id.

n141 Id. at *3-4.

n142 Raising the question, what exactly is an "unfair" method of surveillance? Employers use a myriad of methods to keep an eye on employees, running the gamut from peeping over the employee's shoulders to keystroke monitoring and e-mail duplication and review. See supra note 12 and accompanying text. Intuitively, the more sophisticated methods of surveillance would be more likely to be deemed unfair as they appear harsh as a natural consequence of their effectiveness.

n143 Even if a court determines a method is inherently unfair, the employer could still continue to use that method of surveillance to watch over employees. The employer would simply be unable to use the information gained in litigation.

n144 Curto v. Med. World Commc'ns, Inc., No. 03- *CV- 6327, 2006 WL 1318387,* at *3 (E.D.N.Y. May 15, 2006) (citation omitted).

n145 *No. C06-1412RSM, 2007 WL 2745367* (W.D. Wash. Sept. 20, 2007).

n146 Id. at *1.

n147 Id.

n148 Id. at *2.

n149 Although the Sims court indicates otherwise in the parenthetical following its citation:Notwithstanding defendant Lakeside's policy in its employee manual, public policy dictates that such communications shall be protected to preserve the sanctity of communications made in confidence. See e.g., *United States v. Louisville & Nashville R.R., 236 U.S. 318, 336, 35 S.Ct. 363, 369 (1915)* (recognizing that the attorney-client privilege is predicated upon the belief that it is in the public interest to encourage free and candid communications between clients and their attorneys, by protecting the confidentiality of such

communications).Id.

n150 *Lowe v. SEC, 472 U.S. 181, 213 (1985)* (White, J., concurring).

n151 Admittedly, stare decisis concerns are particularly weak in workplace waiver cases as they involve application of evidentiary rules. See, e.g., *Payne v. Tennessee, 501 U.S. 808, 828 (1991)* ("Considerations in favor of stare decisis . . . [are at their weakest in cases] involving procedural and evidentiary rules.").

n152 "[I]nadequacy in the law [related to employee privacy in the workplace] is primarily based on the fact that many employees do not know the extent of their privacy rights regarding their company-provided e-mail accounts. In fact, many employees operate under the false assumption that personal e-mail messages sent from work are protected from their employer's scrutiny." Corey A. Ciocchetti, Monitoring Employee E-Mail: Efficient Workplaces vs. Employee Privacy, *2001 Duke L. & Tech. Rev. 26, 1 (2001);* see also supra notes 13-14 and accompanying text.

n153 See supra notes 13-14 and accompanying text.

n154 "Hard cases, it is said, make bad law." *Ex Parte Long, 3 W.R. 19* (Q.B. 1854, Lord Campbell, C.J.).

n155 According to Judge Posner, "[e]veryone knows that younger people are on average more comfortable with computers than older people . . . ." *Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997).* It is also common knowledge that most judges do not typically take the bench until they have practiced law for years. However, a growing number of Federal Judges are being recognized for their technological sophistication and adroitness in handling electronic discovery issues. These judges, including Judge David A. Baker of the Middle District of Florida, Judge Shira A. Scheindlin of the Southern District of New York, Judge Paul W. Grimm of the District of Maryland, Judge John M. Facciola of the District of Columbia, Judge David J. Waxse of the District of Kansas, and Judge Rudi M. Brewster of the Southern District of California, have been referred to as electronic discovery "rock stars." See Jason Krause, Rockin' Out the E-Law, *94 A.B.A. J. 48 (2008).*

n156 See supra note 134 and accompanying text.

n157 See Joseph A. Grundfest & A.C. Pritchard, Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation, *54 Stan. L. Rev. 627, 724-25 (2002)* ("These findings also suggest that the more frequently judges view technology cases, the more likely they are to adopt pro-defendant interpretations of the statute.").

n158 Id.

n159 However, this inconsistency may become moot. It is possible that employee privacy rights in the United States will broaden over time to the point that workplace waiver is no longer an issue. Most countries outside the United States offer significantly more privacy rights for employees, and the United States may eventually fall into line with the rest of the world and legislatively establish broader privacy rights for employees in the workplace. Moreover, business entities within the United States may voluntarily broaden the privacy rights of their employees through widespread revisions to employee policy manuals. The impetus behind

this broadening of employee privacy rights may come from upper level management, and other control group employees. Control group employees are often responsible for making decisions regarding employee privacy and employee surveillance, and yet they themselves are employees. Thus, there is a strong incentive for the employee-authors of employee policy manuals to broaden employee privacy rights per the employer's policies.

n160 Kelcey Nichols, Note, Hiding Evidence From the Boss: Attorney-Client Privilege and Company Computers, *3 Shidler J.L. Com. & Tech. 6, 4 (2006),* available at http://www.lctjournal.washington.edu/Vol3/a006Nichols.html.

n161 See *Fed. R. Evid. 706*.

n162 See *Fed. R. Civ. P. 53*.

n163 See *Fed. R. Evid. 702*.

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Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud

NEW YORK – Deputy Attorney General Mark R. Filip announced today that the Department of Justice is revising its corporate charging guidelines for federal prosecutors throughout the country.

The new guidance revises the Department's Principles of Federal Prosecution of Business Organizations, which govern how all federal prosecutors investigate, charge, and prosecute corporate crimes. The new guidelines address issues that have been of great interest to prosecutors and corporations alike, particularly in the area of cooperation credit.

First, the revised guidelines state that credit for cooperation will not depend on the corporation's waiver of attorney-client privilege or work product protection, but rather on the disclosure of relevant facts. Corporations that disclose relevant facts may receive due credit for cooperation, regardless of whether they waive attorney-client privilege or work product protection in the process. Corporations that do not disclose relevant facts typically may not receive such credit, like any other defendant.

While prior guidance had allowed federal prosecutors to request, under special conditions, the disclosure of non-factual attorney-client privileged communications and work product -- which the old guidelines designated "Category II" information -- the new guidance forbids it, with two exceptions well established in existing law.

"The changes that the Department announces today are in keeping with the long-standing tradition of refining the Department's policy guidance in light of lessons learned from our prosecutions, as well as comments from others in the criminal justice system, the judiciary, and the broader legal community," said Deputy Attorney General Filip.

The new Principles introduce changes beyond the question of attorney-client privilege and work product waivers. They instruct prosecutors not to consider a corporation's advancement of attorneys' fees to employees when evaluating cooperativeness. They also make clear that the mere participation in a joint defense agreement will not render a corporation ineligible for cooperation credit. In addition, the new guidance provides that prosecutors may not consider whether a corporation has sanctioned or retained culpable employees in evaluating whether to assign cooperation credit to the corporation.

The revisions and policy changes announced today will be committed for the first time to the United States Attorneys Manual, which is binding on all federal prosecutors within the Department of Justice. The revised Principles will be effective immediately.

The changes announced today were made after careful review within the Department of Justice, and after consultation with several organizations and individuals who expressed an interest in the issues presented. In this regard, Filip noted, "the Department is very grateful for the opportunity to engage in extended and thoughtful dialogue with Senate Judiciary Committee Chairman Patrick Leahy, Sen. Arlen Specter, and other members of Congress, along with representatives of various groups, reflecting a diverse array of voices - including, for example, the criminal defense bar, the civil liberties community, the business community, and former Department of Justice officials."

For more information about the Department's Principles of Federal Prosecution of Business Organizations, please visit http://www.usdoj.gov.

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Title 9, Chapter 9-28.000

Principles of Federal Prosecution of Business Organizations

9-28.000 Principles of Federal Prosecution of Business Organizations[1]

9-28.100 Duties of Federal Prosecutors and Duties of Corporate Leaders

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating allegations of wrongdoing and by bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. These interests include, to take just a few examples: (1) protecting the integrity of our free economic and capital markets; (2) protecting consumers, investors, and business entities that compete only through lawful means; and (3) protecting the American people from misconduct that would violate criminal laws safeguarding the environment.

In this regard, federal prosecutors and corporate leaders typically share common goals. For example, directors and officers owe a fiduciary duty to a corporation's shareholders, the corporation's true owners, and they owe duties of honest dealing to the investing public in connection with the corporation's regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal cases are designed to serve.

A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in which we do our job as prosecutors—including the professionalism we demonstrate, our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation, and also our appreciation that corporate prosecutions can potentially harm blameless investors, employees, and others—affects public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion. This endeavor requires the thoughtful analysis of all facts and circumstances presented in a given case. As always, professionalism and civility play an important part in the Department's discharge of its responsibilities in all areas, including the area of corporate investigations and prosecutions.

9-28.200 General Considerations of Corporate Liability

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations

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[1] While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed further below. In doing so, prosecutors should be aware of the public benefits that can flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm—*e.g.*, environmental crimes or sweeping financial frauds—may be committed by a business entity, and there may therefore be a substantial federal interest in indicting a corporation under such circumstances.

In certain instances, it may be appropriate, upon consideration of the factors set forth herein, to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in Section X, *infra*. Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in Section XI, *infra*.

Where a decision is made to charge a corporation, it does not necessarily follow that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.

Agents may act for mixed reasons—both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. *See United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope

of employment is "whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated, at least in part, by an intent to benefit the corporation."). In *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Cir. 1985), for example, the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite the corporation's claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." *Id.* at 407. The court stated, "Partucci was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." *Id.*; *see also United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (internal citation omitted) (quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir. 1945)).

9-28.300 Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM § 9-27.220, *et seq.* Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of

corporations for particular categories of crime (*see infra* section IV);

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (*see infra* section V);

3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (*see infra* section VI);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (*see infra* section VII);

5. the existence and effectiveness of the corporation's pre-existing compliance program (*see infra* section VIII);

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (*see infra* section IX);

7. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (*see infra* section X);

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions (*see infra* section XI).

B. Comment: The factors listed in this section are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Some of these factors may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. In addition, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law.

In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following

statements of principles that summarize the considerations they should weigh and the practices they should follow in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met, taking into account the special nature of the corporate "person."

9-28.400 Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal misconduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, tax, and criminal law enforcement policies. In applying these Principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required by the facts presented.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*, voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business. With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, Environmental and Natural Resources, and National Security Divisions, as appropriate.

9-28.500 Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive

and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management. On the other hand, it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role and conduct of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority . . . who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.

USSG § 8C2.5, cmt. (n. 4).

9-28.600 The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges and how best to resolve cases.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it. The corporate structure itself (*e.g.*, the creation or existence of subsidiaries or operating divisions) is not dispositive in this analysis, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates may be considered, if germane. *See* USSG § 8C2.5(c), cmt. (n. 6).

9-28.700 The Value of Cooperation

A. General Principle: In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.

Cooperation is a potential mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (*e.g.*, suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.

This dynamic—*i.e.*, the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions—can have negative consequences for both the government and the corporation that is the subject or target of a government investigation. More specifically, because of corporate attribution principles concerning actions of corporate officers and employees (*see, e.g., supra* section II), uncertainty about exactly who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation. For example, it may not matter under the law which of several possible executives or leaders in a chain of command approved of or authorized criminal conduct; however, that information if known might bear on the propriety of a particular disposition short of indictment of the corporation. It may not be in the interest of a corporation or the government for a charging decision to be made in the absence of such information, which might occur if, for example, a statute of limitations were relevant and authorization by any one of the officials were enough to justify a charge under the law. Moreover, and at a minimum, a

protracted government investigation of such an issue could, as a collateral consequence, disrupt the corporation's business operations or even depress its stock price.

For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government—and ultimately shareholders, employees, and other often blameless victims—by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business operations. In addition, and critically, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

9-28.710 Attorney-Client and Work Product Protections

The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1981). As the Supreme Court has stated, "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.

For these reasons, waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative. Nonetheless, a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so; indeed, such waivers occur routinely when corporations are victimized by their employees or others, conduct an internal investigation, and then disclose the details of the investigation to law enforcement officials in an effort to seek prosecution of the offenders. However, the contention, from a broad array of voices, is that the Department's position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all.

The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement

mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so. The critical factor is whether the corporation has provided the facts about the events, as explained further herein.

9-28.720 Cooperation: Disclosing the Relevant Facts

Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must disclose the relevant facts of which it has knowledge.[2]

(a) Disclosing the Relevant Facts – Facts Gathered Through Internal Investigation

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others' misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts

[2] There are other dimensions of cooperation beyond the mere disclosure of facts, of course. These can include, for example, providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records. This section of the Principles focuses solely on the disclosure of facts and the privilege issues that may be implicated thereby.

are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel.

Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product materials. Accordingly, 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.[3] On this point the Report of the House Judiciary Committee, submitted in connection with the attorney-client privilege bill passed by the House of Representatives (H.R. 3013), comports with the approach required here:

> [A]n . . . attorney of the United States may base cooperation credit on the facts that are disclosed, but is prohibited from basing cooperation credit upon whether or not the materials are protected by attorney-client privilege or attorney work product. As a result, an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.

H.R. Rep. No. 110-445 at 4 (2007).

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[3] By way of example, corporate personnel are typically interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product. To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers' interviews. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents.

In short, so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process.[4] Likewise, a corporation that does not disclose the relevant facts about the alleged misconduct—for whatever reason—typically should not be entitled to receive credit for cooperation.

Two final and related points bear noting about the disclosure of facts, although they should be obvious. First, the government cannot compel, and the corporation has no obligation to make, such disclosures (although the government can obviously compel the disclosure of certain records and witness testimony through subpoenas). Second, a corporation's failure to provide relevant information does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for that cooperation. Whether the corporation faces charges will turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in Section III above. If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, or if the other factors weigh against indictment, then the corporation should not be indicted, irrespective of whether it has earned cooperation credit. The converse is also true: The government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a relevant potential mitigating factor, but it alone is not dispositive.

(b) Legal Advice and Attorney Work Product

Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege. Such communications can naturally have a salutary effect on corporate behavior—facilitating, for example, a corporation's effort to comply with complex and evolving legal and regulatory regimes.[5] Except as noted in

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[4] In assessing the timeliness of a corporation's disclosures, prosecutors should apply a standard of reasonableness in light of the totality of circumstances.

[5] These privileged communications are not necessarily limited to those that occur contemporaneously with the underlying misconduct. They would include, for instance, legal advice provided by corporate counsel in an internal investigation report. Again, the key measure of cooperation is the disclosure of factual information known to the corporation, not the

subparagraphs (b)(i) and (b)(ii) below, a corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit.

Likewise, non-factual or core attorney work product—for example, an attorney's mental impressions or legal theories—lies at the core of the attorney work product doctrine. A corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation's eligibility to receive cooperation credit.

(i) Advice of Counsel Defense in the Instant Context

Occasionally a corporation or one of its employees may assert an advice-of-counsel defense, based upon communications with in-house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue. In such situations, the defendant must tender a legitimate factual basis to support the assertion of the advice-of-counsel defense. *See, e.g., Pitt v. Dist. of Columbia*, 491 F.3d 494, 504-05 (D.C. Cir. 2007); *United States v. Wenger*, 427 F.3d 840, 853-54 (10th Cir. 2005); *United States v. Cheek*, 3 F.3d 1057, 1061-62 (7th Cir. 1993). The Department cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would otherwise be the appropriate course of prosecutive action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices. Accordingly, where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.

(ii) Communications in Furtherance of a Crime or Fraud

Communications between a corporation (through its officers, employees, directors, or agents) and corporate counsel that are made in furtherance of a crime or fraud are, under settled precedent, outside the scope and protection of the attorney-client privilege. *See United States v. Zolin*, 491 U.S. 554, 563 (1989); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007). As a result, the Department may properly request such communications if they in fact exist.

9-28.730 Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation has engaged in conduct intended to impede the investigation. Examples of such conduct could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.

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disclosure of legal advice or theories rendered in connection with the conduct at issue (subject to the two exceptions noted in Section VII(2)(b)(i-ii)).

In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law.[6] Neither is it intended to limit the otherwise applicable reach of criminal obstruction of justice statutes such as 18 U.S.C. § 1503. If the payment of attorney fees were used in a manner that would otherwise constitute criminal obstruction of justice—for example, if fees were advanced on the condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false—these Principles would not (and could not) render inapplicable such criminal prohibitions.

Similarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate.

Finally, it may on occasion be appropriate for the government to consider whether the corporation has shared with others sensitive information about the investigation that the government provided to the corporation. In appropriate situations, as it does with individuals, the government may properly request that, if a corporation wishes to receive credit for cooperation, the information provided by the government to the corporation not be transmitted to others—for example, where the disclosure of such information could lead to flight by individual subjects, destruction of evidence, or dissipation or concealment of assets.

9-28.740 Offering Cooperation: No Entitlement to Immunity

A corporation's offer of cooperation or cooperation itself does not automatically entitle it to immunity from prosecution or a favorable resolution of its case. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents. Thus,

[6] Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, sometimes arise in the course of an investigation under certain circumstances—to take one example, to assess conflict-of-interest issues. Such questions can be appropriate and this guidance is not intended to prohibit such limited inquiries.

a corporation's willingness to cooperate is not determinative; that factor, while relevant, needs to be considered in conjunction with all other factors.

9-28.750 Qualifying for Immunity, Amnesty, or Reduced Sanctions Through Voluntary Disclosures

In conjunction with regulatory agencies and other executive branch departments, the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division has a policy of offering amnesty only to the first corporation to agree to cooperate. Moreover, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

9-28.760 Oversight Concerning Demands for Waivers of Attorney-Client Privilege or Work Product Protection By Corporations Contrary to This Policy

The Department underscores its commitment to attorney practices that are consistent with Department policies like those set forth herein concerning cooperation credit and due respect for the attorney-client privilege and work product protection. Counsel for corporations who believe that prosecutors are violating such guidance are encouraged to raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General. Like any other allegation of attorney misconduct, such allegations are subject to potential investigation through established mechanisms.

9-28.800 Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*. *See United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions."). As explained in *United States v. Potter*, 463 F.3d 9 (1st Cir. 2006), a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts, because "[e]ven a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." *Id.* at 25-26. *See also United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (noting that a corporation "could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks"); *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formulaic requirements regarding corporate compliance programs. The fundamental questions any prosecutor should ask are: Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work? In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.[7] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the

[7] For a detailed review of these and other factors concerning corporate compliance programs, *see* USSG § 8B2.1.

organization's compliance with the law. *See, e.g., In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968-70 (Del. Ch. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. Prosecutors also should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist United States Attorneys' Offices in finding the appropriate agency office(s) for such consultation.

9-28.900 Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as improving an existing compliance program or disciplining wrongdoers, in determining whether to charge the corporation and how to resolve corporate criminal cases.

B. Comment: In determining whether or not to prosecute a corporation, the government may consider whether the corporation has taken meaningful remedial measures. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and

organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.

Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct. Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. Although corporations need to be fair to their employees, they must also be committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. Prosecutors should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its acceptance of responsibility and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider as to appropriate disposition of a case.

9-28.1000 Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs. Determining whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, and is a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the relevance of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing, and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

On the other hand, where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims.[8] Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.

9-28.1100 Other Civil or Regulatory Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of

[8] Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See id.* § 9-27.641.

non-criminal alternatives to prosecution—*e.g.*, civil or regulatory enforcement actions—the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to a serious violation, a pattern of wrongdoing, or prior non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied through civil or regulatory actions. In determining whether a federal criminal resolution is appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

9-28.1200 Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor at least presumptively should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's misconduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, *inter alia*, such factors as the [advisory] sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *Id.*

9-28.1300 Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, as with individuals, prosecutors should generally seek a plea to the most serious, readily provable

offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-530. This means, *inter alia*, that the corporation should generally be required to plead guilty to the most serious, readily provable offense charged. In addition, any negotiated departures or recommended variances from the advisory Sentencing Guidelines must be justifiable under the Guidelines or 18 U.S.C. § 3553 and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and that ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters or corporate monitors. *See* USSG §§ 8B1.1, 8C2.1, *et seq*. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in fraud against the government (*e.g.*, contracting fraud), a prosecutor may not negotiate away an agency's right to debar or delist the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals as outlined herein. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. *See supra* section VIII.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is entirely truthful. To do so, the prosecutor may request that the corporation make appropriate disclosures of relevant factual information and documents, make employees and agents available for debriefing, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible personnel are identified and, if appropriate, prosecuted. *See generally supra* section VII. In taking such steps, Department prosecutors should recognize that attorney-client communications are often essential to a corporation's efforts to comply with complex regulatory and legal regimes, and that, as discussed at length above, cooperation is not measured by the waiver of attorney-client privilege and work product protection, but rather is measured by the disclosure of facts and other considerations identified herein such as making witnesses available for interviews and assisting in the interpretation of complex documents or business records.

These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

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OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 April 2010 [1]

Case C-550/07 P

Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd
v
European Commission

(Appeal – Competition – Administrative procedure – Commission's powers of investigation – Documents copied in the course of an investigation and later placed on the file – Protection of confidentiality of communications between lawyers and their clients ('legal professional privilege') – Internal group correspondence with an in-house lawyer – In-house lawyer admitted to a Bar or Law Society – Article 14 of Regulation (EEC) No 17 – Regulation (EC) No 1/2003)

[1] – Original language: German.

EN

I – Introduction

1. Does the protection of communications between lawyers and their clients ('legal professional privilege'), [2] guaranteed as a fundamental right under the law of the European Union, also extend to internal exchanges of opinions and information between the management of an undertaking and an 'enrolled in-house lawyer' employed by that undertaking? [3] That, in essence, is the question which the Court has been asked to resolve in this appeal. [4] It has a practical significance for the future application and implementation of European competition law which cannot be underestimated and has lost none of its relevance even after the modernisation of the law governing antitrust proceedings carried out by Council Regulation (EC) No 1/2003. [5]

2. The background to this case is formed by a search (an 'investigation' or 'inspection') conducted by the European Commission, as competition authority, in February 2003 at the business premises of Akzo Nobel Chemicals Ltd (Akzo) and Akcros Chemicals Ltd (Akcros) in the United Kingdom. [6] In the course of that search, the Commission officials took photocopies of certain documents which the representatives of Akzo and Akcros regarded as being exempt from seizure because, in their view, they were covered by legal professional privilege.

2 – The term used in the language of the case.

3 – I use the term 'enrolled in-house lawyer' here and hereafter to mean a lawyer who works as an employee in the legal department of a company or group of companies and who has also been admitted to a Bar or Law Society in accordance with the applicable provisions of national law.

4 – This case has generated keen interest in the legal profession (see, *inter alia*, Gray, M., 'The Akzo Nobel Judgment of the Court of First Instance', *Irish Journal of European Law* 14 (2007), p. 229-242; Prieto, C., 'Pouvoirs de vérification de la Commission et protection de la confidentialité des communications entre avocats et clients', *La semaine juridique – édition générale* 2007, II-10201, p. 35-37; Cheynel, B., 'Heurs et malheurs du, "*legal privilege*" devant les juridictions communautaires', *Revue Lamy de la Concurrence – Droit, Économie, Régulation* 2008, No 14, p. 89-93; Mykolaitis, D., 'Developments of Legal Professional Privilege under the Akzo/Akcros Judgment', *International Trade Law and Regulation* 2008, p. 1-6; Weiß, W., 'Neues zum legal professional privilege', *Europarecht* 2008, p. 546-557). The anticipation of a final decision seems to have been so intense in certain quarters that legal commentators were writing on what they took to be a Court judgment as early as last year (Brüssow, R., 'Das Anwaltsprivileg des Syndikus im Wirtschaftsstrafverfahren', in: Arbeitsgemeinschaft Strafrecht des Deutschen Anwaltvereins [ed.], *Strafverteidigung im Rechtsstaat*, Baden-Baden 2009, p. 91-106; in this regard, see also Huff, M., 'Recht und Spiel', in: *Frankfurter Allgemeine Zeitung* No 183, 10 August 2009, p. 28).

5 – Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

6 – 'The appellants'.

3. This gave rise to a legal dispute between the two companies concerned and the Commission. Akzo and Akcros brought proceedings before the Court of First Instance (now: 'the General Court') against, on the one hand, the Commission's decision ordering the investigation and, on the other hand, the Commission's decision to place a number of disputed documents on the file. By judgment of 17 September 2007 [7] ('the judgment under appeal'), the General Court dismissed the first action as inadmissible and the second action as unfounded.

4. This appeal is concerned exclusively with the question whether the General Court was justified in dismissing the second action as unfounded. At this stage of the proceedings, only two of the disputed documents remain of interest. These are printouts of emails between the general manager of Akcros and an employee of Akzo's in-house legal department who was also a member of the Netherlands Bar.

II – Legal context

5. The legal context of this case is defined by Regulation No 17, [8] Article 14 of which reads as follows:

'(1) In carrying out the duties assigned to it by Article [105 TFEU] and by provisions adopted under Article [103 TFEU], the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To this end the officials authorised by the Commission are empowered:

(a) to examine the books and other business records;

(b) to take copies of or extracts from the books or business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and means of transport of undertakings.

(2) The officials of the Commission authorised for the purpose of these investigations shall exercise their powers upon production of an authorisation in writing …

(3) Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation …

…'

[7] – Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2007] ECR II-3523.

[8] – Council Regulation (EEC) No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

6. Regulation No 1/2003, which modernised the European law on antitrust proceedings and replaced Regulation No 17, is not applicable to this case, since the material facts took place before 1 May 2004. [9]

III – Background to the dispute

A – *The investigations conducted by the Commission and their administrative consequences*

7. As the General Court's findings of fact show, [10] the background to this dispute is an investigation conducted by the European Commission in its capacity as competition authority. In early 2003, the Commission, by a decision [11] under Article 14(3) of Regulation No 17, ordered an investigation to be carried out at the premises of Akzo and Akcros as well as at their subsidiaries in order to safeguard evidence of possible anti-competitive practices ('the decision ordering the investigation'). The companies concerned were required by that decision to submit to those investigations.

8. On the basis of the decision ordering the investigation, on 12 and 13 February 2003, Commission officials, assisted by representatives of the Office of Fair Trading (OFT), [12] carried out an investigation at the premises of Akzo and Akcros in Eccles, Manchester (United Kingdom). [13] During the investigation, the Commission officials took photocopies of a considerable number of documents.

9. In the course of those operations, the representatives of Akzo and Akcros informed the Commission officials that certain documents were likely to be covered by the protection of confidentiality of communications between lawyers and their clients. The Commission officials replied that it was necessary for them to examine briefly the documents in question so that they could form their own opinion as to whether the documents should be privileged. Following a long discussion, and after the Commission officials and the OFT officials had reminded the representatives of Akzo and Akcros of the consequences of obstructing investigations, it was decided that the leader of the investigating team would

[9] – On the replacement of Regulation No 17 by Regulation No 1/2003, see Article 43(1) in conjunction with Article 45 of Regulation No 1/2003.

[10] – In this regard and in relation to the following points, see paragraphs 1 to 14 of the judgment under appeal.

[11] – Commission Decision C (2003) 85/4 of 30 January 2003, as amended by Commission Decision C (2003) 559/4 of 10 February 2003.

[12] – The UK competition authority.

[13] – The investigation took place in the context of antitrust case COMP/38.589 concerning plastic additives, in particular heat stabilisers; for further information in this regard, see the statement published by the Commission on 14 February 2003 (MEMO/03/33).

briefly examine the documents in question, with a representative of Akzo and Akcros at her side.

10. During the examination of the documents in question, a dispute arose in relation to various documents which the General Court – on the basis of the submissions advanced by Akzo and Akcros – classified into two categories of documents ('Set A' and 'Set B').

11. *Set A* consists of two documents. The first of those two documents is a two-page, typewritten memorandum dated 16 February 2000 from the general manager of Akcros to one of his superiors. According to the appellants, this memorandum contains information gathered by the general manager in the course of internal discussions with other employees. The information was gathered for the purpose of obtaining outside legal advice in connection with the competition law compliance programme put in place by Akzo. The second document is another copy of the memorandum, but bears manuscript notes referring to contacts with a lawyer used by Akzo and Akcros, including, in particular, mention of his name.

12. After obtaining the appellants' observations concerning those first two documents, the Commission officials were not in a position to reach a final conclusion on the spot as to whether the documents should be privileged. They therefore took copies of them and placed them in a sealed envelope which they took away on completion of the investigation.

13. *Set B* likewise comprises several documents. These are, on the one hand, a number of handwritten notes made by Akcros' general manager, which are said by the appellants to have been written during discussions with employees and used for the purpose of preparing the typewritten memorandum in Set A and, on the other hand, two emails exchanged between Akcros' general manager and Mr S., Akzo's coordinator for competition law. The latter is enrolled as an Advocaat of the Netherlands Bar and, at the material time, was a member of the Akzo group's legal department and was therefore employed by that group on a permanent basis.

14. After examining the documents in Set B and obtaining the observations of Akzo and Akcros, the head of the investigating team took the view that they were definitely not privileged. Consequently, she took copies of them and placed the copies with the rest of the file, without isolating them in a sealed envelope.

15. On 17 February 2003, Akzo and Akcros sent the Commission a letter setting out the reasons why, in their view, the documents in Set A and Set B were protected by legal professional privilege. By letter of 1 April 2003, the Commission informed the undertakings concerned that the arguments put forward by them in their letter of 17 February 2003 were insufficient to show that the documents in question were covered by legal professional privilege. However, the Commission gave them the opportunity to submit observations on those

provisional conclusions within two weeks, after which it would adopt a final decision.

16. By decision of 8 May 2003, [14] the Commission refused to recognise the claim of Akzo and Akcros to legal professional privilege in respect of the documents in dispute ('the rejection decision'). In Article 1 of that decision, the Commission rejects the request by Akzo and Akcros that the documents in Set A and Set B be returned and that the Commission confirm that all copies of those documents in its possession had been destroyed. In Article 2 of the rejection decision, the Commission announces its intention to open the sealed envelope containing the documents in Set A and to add them to file, although it points out that it will not undertake this before expiry of the time-limit for bringing an action against the decision.

B – *The court proceedings*

1. The proceedings at first instance

17. Akzo and Akcros together brought two actions for annulment before the General Court, one against the decision ordering the investigation [15] (Case T-125/03) and the other against the rejection decision [16] (Case T-253/03). In respect of both decisions, they also lodged an application for interim relief under Article 242 EC and Article 243 EC (now: Article 278 TFEU and Article 279 TFEU) (Joined Cases T-125/03 R and T-253/03 R).

18. On 8 September 2003, in connection with the proceedings for interim relief, the Commission complied with the request of the President of the General Court and sent the President, under confidential cover, a copy of the Set B documents and the sealed envelope containing the Set A documents.

19. On 30 October 2003, the President of the General Court dismissed the application for interim relief in Case T-125/03 R, [17] but granted in part the application for interim relief in Case T-253/03 R. Accordingly, the President suspended the operation of the rejection decision of 8 May 2003 in so far as, in that decision, the Commission had decided to open the sealed envelope containing the Set A documents; he also ordered those documents to be kept by the Registry of the General Court pending the Court's decision in the main action. Similarly, the President took formal note of the Commission's statement that it would not

[14] – C(2003) 1533 final.

[15] – See point 7 of this Opinion, above.

[16] – See point 16 of this Opinion, above.

[17] – Order of the President in Joined Cases T-125/03 R and T-253/03 R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2003] ECR II-4771.

permit third parties access to the Set B documents until judgment was given in Case T-253/03.

20. On appeal by the Commission, the order of the President of the General Court of 30 October 2003 in the proceedings for interim relief was set aside by the President of the Court of Justice on 27 September 2004, [18] in so far as the former had suspended the operation of the rejection decision of 8 May 2003 and ordered the Set A documents to be kept by the Registry of the General Court. In addition, the President of the Court of Justice took formal note of the Commission's statement that it would not allow third parties to have access to the Set A documents until judgment was given in Case T-253/03.

21. The Registry of the General Court subsequently returned the sealed envelope containing the Set A documents to the Commission by letter of 15 October 2004.

22. In the main proceedings, the General Court gave the judgment under appeal on 17 September 2007. In that judgment, it dismissed the action for annulment brought by Akzo and Akcros against the decision ordering the investigation (Case T-125/03) as inadmissible and their action for annulment of the rejection decision (Case T-253/03) as unfounded.

2. The appeal proceedings against the judgment under appeal

23. By document of 30 November 2007, [19] Akzo and Akcros together lodged this appeal against the judgment of 17 September 2007. This appeal is concerned solely with the question whether or not the two emails exchanged between Mr S. and Akcros' general manager were covered by legal professional privilege. The appellants claim that the Court should:

– set aside the judgment under appeal in so far as it rejected the claim for legal professional privilege in respect of communications with Akzo Nobel's in-house lawyer;

– annul the Commission's rejection decision of 8 May 2003 in so far as it refuses to return the email correspondence with Akzo Nobel's in-house lawyer;

– order the Commission to pay the costs of this appeal and of the proceedings before the General Court in so far as they concern the plea raised in the present appeal.

[18] – Order of the President in Case C-7/04 P[R] *Commission* v *Akzo and Akcros* [2004] ECR I-8739.

[19] – The original of the appeal, initially sent by fax, was lodged at the Registry of the Court of Justice on 8 December 2007.

24. The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs.

25. Before the Court of Justice, the parties presented, first, written submissions and then, on 9 February 2010, oral argument on the appeal.

3. Other parties to the proceedings at first instance and new interveners

26. In the proceedings at first instance, the General Court granted leave to intervene in support of the forms of order sought by Akzo and Akcros in Joined Cases T-125/03 and T-253/03 to the following associations: [20] the Council of the Bars and Law Societies of the European Union (CCBE), the Algemene Raad van de Nederlandse Orde van Advocaten (General Council of the Netherlands Bar) (ARNOVA), the European Company Lawyers Association (ECLA), the American Corporate Counsel Association – European Chapter (ACCA) and the International Bar Association (IBA). Those associations are also taking part in these appeal proceedings as *other parties to the proceedings*, in support of Akzo and Akcros.

27. Furthermore, in accordance with the first paragraph of Article 40 of the Statute and Article 93(1) in conjunction with Article 123 of the Rules of Procedure of the Court, the President of the Court of Justice has granted leave to intervene in support of the forms of order sought by Akzo and Akcros on appeal to the following Member States: [21] Ireland, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland.

28. However, the President of the Court of Justice refused to grant leave to intervene in support of the forms of order sought by Akzo and Akcros on appeal to the following associations, on the ground that they have not established a legitimate interest in the result of the case (second paragraph of Article 40 of the Statute of the Court): [22] the Association of General Counsel and Company Secretaries of the FTSE 100 (GC 100), the Chamber of Commerce of the United States of America (CCUSA), the International Chamber of Commerce (ICC), the American Bar Association (ABA), the Law Society of England and Wales (LSEW) and the United States Council for International Business (USCIB).

[20] – Orders of the President of the Fifth Chamber of the General Court of 4 November 2003 and of 10 March 2004, and of the President of the First Chamber of the General Court of 26 February 2007.

[21] – Order of the President of 8 July 2008 in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others*.

[22] – See the six orders of the President of 5 February 2009 in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others* and – in relation to the second application by the LSEW – the order of the President of 17 November 2009 in Case C-550/07 P Akzo *Nobel Chemicals and Akcros Chemicals* v *Commission and Others*.

29. At first instance, the General Court itself had refused to grant leave to intervene in support of the forms of order sought by Akzo and Akcros in Joined Cases T-125/03 and T-253/03 to two further associations: [23] the European Council on Legal Affairs and the Section on Business Law of the International Bar Association.

C – *The Commission's interim completion of the administrative procedure*

30. As the Commission informed the Court of Justice at the end of the written stage of the appeal proceedings, the administrative procedure of which the investigation carried out at the premises of Akzo and Akcros in 2003 formed part has now closed. By decision of 11 November 2009, the Commission, on the basis of Article 81 EC in conjunction with Articles 7 and 23(2) of Regulation No 1/2003, imposed fines totalling EUR 173 860 400 on 24 plastic additives producers. [24] The addressees of that decision included not only Akros Chemicals Ltd but also, among others, several companies of the Akzo Nobel group, although not Akzo Nobel Chemicals Ltd.

31. According to its unchallenged submission, the Commission did *not* rely on the two disputed emails in the abovementioned decision imposing fines of 11 November 2009.

IV – Legal assessment

32. In their appeal, Akzo and Akcros do not pursue all the issues which formed the subject-matter of the proceedings at first instance. On appeal, the legal debate is instead confined to only some of the documents in 'Set B', more specifically the two emails exchanged between Mr S. and Akcros' general manager, copies of which the Commission placed on the file following the investigation.

A – *Interest in bringing proceedings*

33. Before assessing the merits of the appeal, it is necessary to consider whether Akzo and Akcros are entitled to claim an interest in bringing these proceedings.

34. The requirement for an interest in bringing proceedings ensures at a procedural level that the courts are not asked to give expert opinions on purely hypothetical questions of law. Accordingly, the existence of an interest is a mandatory condition of admissibility which must be examined by the Court of its own motion and which may be relevant at various stages of the proceedings. Thus, there is no doubt that an interest must exist at the time when an action or an appeal

[23] – Orders of the Court of First Instance (now: the General Court) (Fifth Chamber) of 28 May 2004.

[24] – Antitrust case COMP/38.589 – 'Heat stabilisers'; see in this regard the Commission's press release of 11 November 2009 (IP/09/1695).

is first brought; however, it must also continue to exist beyond that time and up to the Court's decision in the case. [25]

35. For a person to have an interest in bringing appeal proceedings the appeal must be likely, if successful, to procure an advantage for that party. [26]

36. The Commission doubts that such an interest exists in this case, for two reasons. First, the two emails to which the dispute is now confined are automatically excluded from the scope of legal professional privilege because they were not drafted in connection with the exercise of the rights of defence. Second, in the main proceedings, the Commission has since issued the decision imposing fines of 11 November 2009, in which it did not rely on those two emails; consequently, the interest of Akzo and Akcros in bringing proceedings has by now ceased to exist, if it had not done so already.

37. Neither of the Commission's two objections is valid.

38. With regard to the first argument, the question whether the General Court was justified in denying the claim for legal professional privilege in respect of the two documents concerned is not an issue of admissibility; it goes to the merits of the appeal. The appellants would have no interest in bringing proceedings only if it were *manifest* that the content of the two emails exchanged between Mr S. and Akcros' general manager indisputably did not fall in any respect within the scope of legal professional privilege. However, the judgment under appeal does not contain any findings of fact in relation to the content of those emails or the context in which they were sent because those factors were not relevant to the adjudication given by the General Court. Accordingly, the existence of an interest in bringing proceedings cannot automatically be ruled out in this appeal. At this stage of the proceedings, any more detailed examination of the content and context of the emails in question would inevitably raise issues of both admissibility and substance and would also be inappropriate for reasons of procedural economy.

39. The second argument advanced by the Commission, to the effect that the appellants' interest in pursuing these appeal proceedings ceased to exist when the decision imposing fines of 11 November 2009 was given, is equally inconclusive.

[25] – With regard to the requirement of an interest in bringing appeal proceedings, see Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13, and my Opinion in Case C-413/06 P *Bertelsmann & Sony* v *Impala* [2008] ECR I-4951, point 74.

[26] – *Rendo and Others* v *Commission* (cited in footnote 25, paragraph 13); Case C-174/99 P *Parliament* v *Richard* [2000] ECR I-6189, paragraph 33; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 21; Case C-277/01 P *Parliament* v *Samper* [2003] ECR I-3019, paragraph 28; Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-00000, paragraph 33; and Case C-519/07 P *Commission* v *Koninklijke Friesland Campina* [2009] ECR I-00000, paragraph 63.

40. Thus, in response to a question put at the hearing, the Commission was forced to concede that one of the two appellants in these proceedings, namely Akzo Nobel Chemicals Ltd, was not an addressee of the decision imposing fines of 11 November 2009 in the first place. Consequently, *that* company's interest in bringing proceedings could certainly not be called into question by the abovementioned decision imposing fines. This fact alone is sufficient to support the conclusion that there is no further need to consider whether Akros Chemicals Ltd, the second appellant, has an interest in bringing proceedings either since this is a joint appeal. [27]

41. In any event, the interest of the undertakings concerned in bringing proceedings against investigative measures cannot be made dependent on whether or not the Commission relied on a document which may be covered by legal professional privilege in a subsequent decision imposing fines. Any breach of legal professional privilege during an investigation represents a serious interference with a fundamental right which is committed not when the Commission actually relies on a document exempt from seizure in a substantive decision but as soon as a Commission official removes a document or takes a copy of it. By extension, therefore, such interference with a fundamental right is not remedied or 'made good' by the fact that the Commission does not in the end adduce the document in question as evidence. The interference continues in being at least for as long as the Commission has the document or a copy of it in its possession. The undertaking concerned retains its interest in bringing legal proceedings against that measure for the same length of time. [28]

42. Reference must be made in this connection to the principle of effective judicial protection, which is recognised in settled case-law as a general principle of European Union law ('EU law') [29] and stems from the constitutional traditions common to the Member States as well as from Articles 6 and 13 of the ECHR. [30] This principle has now also found its way into the first paragraph of Article 47 of

[27] – See to this effect Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 30 and 31.

[28] – If Commission officials have taken note of the content of the document, the interference with a fundamental right may go on after the document has been returned or destroyed. In those circumstances, the interest in bringing proceedings likewise continues in being.

[29] – Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; *Unión de Pequeños Agricultores* v *Council* (cited in footnote 26, paragraph 39); Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 335.

[30] – European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR', signed in Rome on 4 November 1950). The Court has consistently held that the ECHR has special significance in determining the standard of fundamental rights which the European Union must observe; see, *inter alia*, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 29, with further references); see also Article 6(3) TEU.

the Charter of Fundamental Rights of the European Union; [31] the Charter has been legally binding since the entry into force of the Treaty of Lisbon (Article 6(1) TEU), and is therefore, at the present stage of these proceedings, the criterion for assessing whether the appellants currently still have an interest in bringing proceedings.

43. Undertakings in whose premises the Commission conducts an investigation must be given the opportunity to seek a comprehensive and effective judicial review of the legality of both the decision ordering that investigation and the individual steps taken during the investigation.

44. Commission officials regularly remove many documents (or copies of them) in the course of investigations. It is in the nature of such investigations that documents which at first sight appear to be relevant prove not to be admissible as evidence on closer examination. Similarly, antitrust proceedings initially brought against certain undertakings may be discontinued for lack of evidence after the findings of an investigation have been evaluated. An 'area devoid of legal protection' would be created if, in such circumstances, the undertakings concerned were denied access to the Courts of the European Union for the purpose of challenging the legality of an investigation, or individual measures connected with an investigation, conducted by Commission officials.

45. The appellants therefore continue to have an interest in pursuing the proceedings. Their appeal is admissible.

B – *Substantive analysis of the appeal*

46. The appeal lodged by Akzo and Akcros is based on three pleas in law which are directed against paragraphs 165 to 185 of the judgment under appeal. The appellants claim, in essence, that the General Court was wrong to refuse their claim for legal professional privilege in respect of internal correspondence with the Akzo group's enrolled in-house lawyer.

47. In EU law, the protection of legal professional privilege has the status of a general legal principle in the nature of a fundamental right. This follows, on the one hand, from the principles common to the legal systems of the Member States: [32] legal professional privilege is currently recognised in all 27 Member

[31] – The Charter of Fundamental Rights of the European Union was solemnly proclaimed first in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and then again in Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1).

[32] – See, for example, Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, in particular paragraph 18. See also the Opinion of Advocate General Léger in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, point 182; and the Opinion of Advocate General Poiares Maduro in *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 30, point 39). In addition, see the order in Case T-30/89 *Hilti* v *Commission* [1990] ECR II-163, paragraphs 13 and 14.

States of the European Union, in some of which its protection is enshrined in case-law alone, [33] but in most of which it is provided for at least by statute if not by the constitution itself. [34] On the other hand, the protection of legal professional privilege also derives from Article 8(1) of the ECHR (protection of correspondence) in conjunction with Article 6(1) and (3)(c) of the ECHR [35] (right to a fair trial) as well as from Article 7 of the Charter of Fundamental Rights of the European Union [36] (respect for communications) in conjunction with Article 47(1), the second sentence of Article 47(2) and Article 48(2) of that Charter (right to be advised, defended and represented, respect for rights of the defence).

48. Legal professional privilege serves to protect communications between a client and a lawyer who is independent of that client. On the one hand, it is the essential corollary to the client's rights of defence [37] and, on the other hand, it is based on the specific role of the lawyer as 'collaborating in the interests of justice' [38] and as being required to provide, in full independence, and in the overriding interests of justice, such legal assistance as the client needs. [39]

[33] – This is the case in the United Kingdom and Ireland, which operate 'common law' legal systems.

[34] – Legal professional privilege is enshrined in constitutional law in particular in Bulgaria (Article 30(5) of the Bulgarian Constitution) and Spain (Article 24(2) of the Spanish Constitution); furthermore, legal professional privilege is also based on constitutional provisions in Italy, Portugal and Romania, among others, and on statutory provisions with the status of constitutional law in Sweden.

[35] – It is true that the case-law of the European Court of Human Rights (ECtHR) usually refers only to Article 8 of the ECHR; in this regard, see, for example, *Campbell* v *the United Kingdom*, 25 March 1992, Series A No. 233; *Niemietz v. Germany*, 16 December 1992, Series A No. 251-B; *Foxley v. the United Kingdom*, No. 33274/96, 20 September 2000; *Smirnov v. Russia*, No. 71362/01, 7 June 2007, ECHR 2007-VII; and *André and Other v. France*, No. 18603/03, 24 July 2008. However, mention is sometimes also made of Article 6 of the ECHR (see, for example, *Niemietz v. Germany*, op. cit., § 37, and *Foxley v. the United Kingdom*, op. cit., § 50).

[36] – It is true that, at the time when the Commission decisions at issue were adopted, the Charter of Fundamental Rights did not yet produce binding legal effects comparable to primary law. However, as a material legal source, it shed light even then on the fundamental rights which are guaranteed by EU law (see, *inter alia*, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 38; and point 108 of my Opinion in the latter case.

[37] – *AM & S* (cited in footnote 32, paragraphs 20 and 23); see to the same effect the judgment of the ECtHR in *André and Other v. France* (cited in footnote 35, § 41).

[38] – A lawyer is more commonly described in German legal terminology as '*Organ der Rechtspflege*' (organ of the administration of justice); however, in so far as is relevant here, there is no substantive difference between that term and the phrase 'collaborating in the interests of justice' used by the Court of Justice in *AM & S*.

[39] – *AM & S* (cited in footnote 32, paragraphs 20, 23 and 24); similarly, the judgment of the ECtHR in *Niemietz v. Germany* (cited in footnote 35, § 37).

49. Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR and by Articles 47 and 48 of the Charter of Fundamental Rights, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations. [40]

50. Neither side in these proceedings is seriously calling into question the existence of legal professional privilege as such. However, the scope of the protection afforded by legal professional privilege is fiercely disputed. More specifically, the issue is whether and, if so, to what extent internal company or group communications with enrolled in-house lawyers are covered by the protective scope of legal professional privilege. It is the answer to this question which will ultimately determine the extent of the Commission's powers of investigation in antitrust proceedings under Article 14 of Regulation No 17 (for future cases: Articles 20 and 21 of Regulation No 1/2003). [41]

1. The scope of legal professional privilege and the alleged infringement of the principle of equality (first plea in law)

51. The appellants rely primarily on their first plea in law. In that plea, Akzo and Akcros accuse the General Court of having misinterpreted the principle of legal professional privilege as defined by the Court of Justice in *AM & S*, [42] and of having thereby infringed the principle of equality.

(a) The scope of legal professional privilege in accordance with *AM & S* (first part of the first plea in law)

52. In the first part of the first plea in law, [43] Akzo and Akcros, supported by several other parties to the proceedings, submit that the General Court erred in adopting a purely 'literal' interpretation of the judgment of the Court of Justice in *AM & S* instead of interpreting and applying it in accordance with its spirit and purpose. The appellants take the view that, on a 'teleological interpretation' of *AM & S*, the Court would have had to conclude that the disputed email exchange

[40] – *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 30, paragraph 32).

[41] – The Commission's powers of investigation in reviewing mergers of European companies under Article 13 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation, OJ 2004 L 24, p. 1) are similar to, and only slightly less extensive than, those under Article 20 of Regulation No 1/2003.

[42] – Cited in footnote 32.

[43] – I am referring to paragraphs 10 to 43 of the appeal here.

with Akzo's enrolled in-house lawyer, Mr S., was covered by legal professional privilege.

53. First of all, the United Kingdom is right to point out that the Court's judgment in *AM & S* is not a statute. This immediately casts doubt on whether the appellants' reference to methods of interpretation such as the literal and purposive approaches has any bearing here. Ultimately, however, this issue can be left unresolved. What Akzo and Akcros actually contend is that the General Court misconstrued the scope of legal professional privilege as established in *AM & S*. I shall examine that contention below.

54. In *AM & S*, the Court recognised that 'the confidentiality of written communications between lawyer and client' must also be protected at Community level (now, at European Union level). For the purposes of reliance on that protection, the Court identified two cumulative conditions ('criteria') which it had drawn from a combination of the laws of all the Member States at that time: [44]

– First, the communication with the lawyer must have a connection with the exercise of the client's rights of defence: it must be a 'communication' made 'for the purposes and in the interests of the client's rights of defence' (*connection with the rights of defence*).

– Second, it must be a communication with an independent lawyer, that is to say with a lawyer who is 'not bound to the client by a relationship of employment' (*independence of the lawyer*).

55. The parties to the proceedings all share the view that, at its current stage, the dispute between them is now concerned only with the second of these criteria, that is to say the independence of the lawyer with whom communications were exchanged. [45] There is, however, a fierce dispute between them as to how that criterion of independence is to be understood. At the hearing in particular, each side accused the other of adopting an excessively formalistic approach and of losing sight of the principles underlying the criterion of independence.

56. Unlike the Commission, the appellants, the parties intervening in support of them and the other parties to the proceedings take the view that the criterion of the independence of the lawyer concerned must not be interpreted *negatively* so as to exclude enrolled in-house lawyers but *positively*, by reference to the professional and ethical obligations to which lawyers admitted to a Bar or Law Society are

[44] – *AM & S* (cited in footnote 32, paragraphs 21 and 22).

[45] – In so far as the Commission calls into question the connection with the rights of defence in this case, it does so only in the context of the appellants' *interest in bringing proceedings*; see in this regard points 33 to 45 of this Opinion, above.

generally subject. [46] They submit that because of the professional ethical obligations applicable to him an in-house lawyer who is also a member of a Bar or Law Society automatically enjoys the same independence as an external lawyer who pursues his profession on a self-employed basis or as an employee of a law firm. The guarantees as to the independence of an *advocaat in dienstbetrekking* under Netherlands law [47] (also referred to as a '*Cohen advocaat*' [48]) which were applicable to Mr S. in this case are in fact particularly extensive.

57. I do not find this line of argument convincing.

58. In *AM & S*, the requirement of independence is unequivocally linked to the fact that the lawyer in question must *not be in a relationship of employment* with his client. The explicit reference to this fact at two points in the grounds of the judgment [49] would have been redundant if the Court had intended that the formal act of admission to a Bar or Law Society and the professional ethical obligations associated with such admission would alone be sufficient to guarantee the independence of an in-house lawyer.

59. In *AM & S*, the Court therefore deliberately interpreted legal professional privilege as meaning that the protection which it affords does not extend to internal company or group communications with enrolled in-house lawyers. This becomes particularly apparent when the judgment is compared with the Opinion of Advocate General Sir Gordon Slynn. The Advocate General referred to the detailed discussion of the position of in-house lawyers which had taken place in that case and pronounced himself resolutely in favour of the proposition that legal professional privilege should also be granted to lawyers who are 'professionally qualified and subject to professional discipline' and are 'employed full time … in the legal departments of private undertakings'. [50] The Court did not concur with that view in its judgment in *AM & S*.

60. In the judgment in *AM &* S, the concept of the independence of lawyers is instead determined *not only positively* – by reference to professional ethical obligations [51] – *but also negatively* – by reference to the absence of an

[46] – Ireland goes further than this, in that it seems to want to extend the protection afforded by legal professional privilege even to in-house lawyers whose 'independence' is guaranteed by provisions of employment law alone (paragraph 12 of the statement in intervention).

[47] – A Netherlands enrolled in-house lawyer.

[48] – The term '*Cohen advocaat*' refers to the name of the president of a working group set up ahead of the reform of the Netherlands rules governing professional ethics.

[49] – *AM & S* (cited in footnote 32, paragraphs 21 and 27).

[50] – Opinion of Advocate General Sir Gordon Slynn in *AM & S* (cited in footnote 32, at p. 1655).

[51] – *AM & S* (cited in footnote 32, paragraph 24).

employment relationship. [52] [53] It is only where an in-house lawyer is subject, as a member of a Bar or Law Society, to the professional ethical obligations commonly applicable in the European Union *and*, furthermore, is not in an employment relationship with his client that communications between the two are protected by legal professional privilege under EU law.

61. The reasoning behind this is that an enrolled in-house lawyer, despite his membership of a Bar or Law Society and the professional ethical obligations associated with such membership, does not enjoy *the same degree of independence* from his employer as a lawyer working in an external law firm does in relation to his clients. Consequently, an enrolled in-house lawyer is less able to deal effectively with any conflicts of interest between his professional obligations and the aims and wishes of his client than an external lawyer.

62. Militating against the proposition that an enrolled in-house lawyer is sufficiently independent is, first, the fact that, as an employee, such a lawyer is often required to follow work-related instructions issued by his employer and is in any event part and parcel of the structures of the company or group by which he is employed. In the words of the General Court, an enrolled in-house lawyer is 'structurally, hierarchically and functionally' [54] dependent on his employer, whereas this is not true of an external lawyer in relation to his clients.

63. The appellants and some of the other parties to the proceedings raise the objection that, under Netherlands law, an *advocaat in dienstbetrekking* such as Mr S. is expressly exempt from the instructions of his employer in the context of the provision of legal advice. Indeed, the undertaking and its enrolled in-house lawyers conclude a separate agreement to that effect [55] which is regulated by the Netherlands Bar Association. Differences of opinion relating to the nature and substance of legal advice provided by an enrolled in-house lawyer do not entitle the employer to take disciplinary measures against the enrolled in-house lawyer and certainly not to terminate the employment relationship. Disputes may be referred either to the *Raad van Toezicht* (Supervisory Council) set up by the Bar Association to oversee professional ethics, or to the national courts.

64. There is no doubt that such schemes are exemplary. They strengthen the position of enrolled in-house lawyers within the undertaking in which they are employed. Nevertheless, they are not capable of guaranteeing that enrolled in-

[52] – *AM & S* (cited in footnote 32, paragraphs 21 and 27).

[53] – See also the Opinion of Advocate General Léger in *Wouters and Others* (cited in footnote 32, point 181): '[The independence of lawyers] must also be demonstrated vis-à-vis the client, who may not become his lawyer's employer.'

[54] – Paragraph 168 of the judgment under appeal.

[55] – Namely the *professioneel statuut voor de advocaat in dienstbetrekking* (rules of professional practice applicable to enrolled in-house lawyers).

house lawyers enjoy a degree of independence equal to that of external lawyers. After all, extensive protection given in a document is not necessarily effective in practice. Thus, even if an undertaking has a contractual obligation not to issue instructions to its enrolled in-house lawyers on matters of substance, this does not guarantee that the relationship between an enrolled in-house lawyer and his employer will be genuinely free from direct or indirect pressure and influence in the course of day-to-day business. The question whether an enrolled in-house lawyer is in fact able to give independent legal advice is determined rather by the conduct and attitude adopted by his employer on each individual occasion.

65. That aside, it is doubtful whether it is really possible in practice to impose a penalty every time an employer intentionally or unintentionally calls into question the independence of one of its enrolled in-house lawyers. After all, the persons concerned are likely to be reluctant to allow every single dispute to be escalated and thus to keep calling into question the basis for the continuation of their working relationship. There is also a real danger that, in eagerness to show obedience to their employer, enrolled in-house lawyers will 'choose' to give legal advice the substance of which will be acceptable to that employer.

66. However, even if it were to be assumed, as the appellants do, that schemes such as those provided for under Netherlands law can be effective, this in no way alters the fact that enrolled in-house lawyers are for the most part *economically dependent* on their employer; this issue was the subject of heated debate between the parties to the proceedings both in the written procedure and also, and in particular, at the hearing. [56]

67. It is true that an external lawyer is also economically dependent to some extent on his clients. If a client is not satisfied with the legal advice or defence provided by his external lawyer, the client may withdraw the instruction or, as the case may be, refrain from engaging his services in the future. It should be noted in this regard that, unlike enrolled in-house lawyers and other corporate jurisconsults, external lawyers do not have any protection against dismissal. For lawyers who make their living largely from giving advice to and acting in legal proceedings on behalf of one or a small number of large clients, this may come to pose a serious threat to their independence.

68. However, for external lawyers, such a threat is and remains more of an exception and is not consistent with the typical role of a lawyer in private practice or of an independent law firm. A self-employed lawyer usually works for a large number of clients, which, in the event of a conflict of interests between his professional ethics and the aims and wishes of a client, makes it easier for him, if necessary, to withdraw his services of his own accord in order to safeguard his independence.

[56] – The background to this discussion was the differing views of the parties on the 'incentive structure' for the activities of enrolled in-house lawyers and external lawyers.

69. In the case of an enrolled in-house lawyer, the situation is different. As an employed person, an enrolled in-house lawyer is typically – rather than only exceptionally – characterised by complete economic dependence on his employer, who alone provides him with most of his income in the form of a salary. In so far as the relevant national rules of professional ethics contain any provision at all allowing enrolled in-house lawyers to take on external instructions alongside their activities as employees of the undertaking for which they work, [57] such instructions will generally be of only minor financial significance to them and will in no way alter their economic dependence on their employer. The degree to which enrolled in-house lawyers are economically dependent on their employer is therefore usually far greater than the degree to which external lawyers are dependent on their clients. The fact, raised by a number of the parties to the proceedings, that enrolled in-house lawyers are protected against dismissal under employment law likewise does nothing to alter their economic dependence.

70. In addition to their economic dependence on their employer, enrolled in-house lawyers usually exhibit a considerably stronger *personal identification* with the undertaking for which they work, as well as with its corporate policy and corporate strategy than would be true of external lawyers in relation to the business activities of their clients.

71. Both their considerably greater economic dependence and their much stronger identification with the client – their employer – militate against the proposition that enrolled in-house lawyers should enjoy the protection afforded by legal professional privilege in respect of internal company or group communications. [58]

72. Consequently, the line of argument advanced to that effect by the appellants and the other parties supporting them must be rejected.

73. Some of the parties to the proceedings, in particular the Netherlands and ARNOVA, raise the objection that it is disproportionate to refuse to extend the protection afforded by legal professional privilege to internal company communications with enrolled in-house lawyers as a general principle. They argue that the Commission could take a ‘more lenient approach’, so to speak, by ascertaining on a case-by-case basis whether a given in-house lawyer satisfies the requirement of independence; to that end, they could contact the national authorities. The Netherlands and ARNOVA apparently assume that general

[57] – This is the case in particular in Germany. In the Netherlands, too, according to information provided to the Court at the hearing, an *advocaat in dienstbetrekking* is permitted to work for external clients.

[58] – The situation is different only where an enrolled in-house lawyer, in addition to his work in the legal department of an undertaking or group of undertakings, also works for external clients unconnected with his employer. His communications with such external clients are protected by legal professional privilege because he is independent of them.

information about the provisions governing the profession of lawyer in a particular Member State would itself be sufficient to make it possible to determine conclusively whether an in-house lawyer is independent.

74. This argument is also untenable, however. As I have already said, the question whether an enrolled in-house lawyer is able to give independent legal advice or is exposed to pressure and influence is determined definitively by the practice actually adopted by an undertaking in its day-to-day business. In this regard, an abstract assessment of the legal provisions governing the status of enrolled in-house lawyers in a particular Member State is not significant in itself since it sheds no light either on the reality of the working relationships within the undertaking in question or on the economic dependence of an enrolled in-house lawyer and the extent to which he identifies personally with his employer.

75. The first part of the first plea in law is therefore unfounded.

(b) The alleged infringement of the principle of equality (the second part of the first plea in law)

76. In the second part of the first plea in law, Akzo and Akcros, as well as most of the parties intervening in support of them at both instances, claim that the General Court infringed the principle of equality by treating in-house lawyers differently from external lawyers in relation to legal professional privilege. [59]

77. The principle of equal treatment and non-discrimination is a general legal principle of EU law [60] which has now also found expression in Articles 20 and 21 of the Charter of Fundamental Rights. The same principle is also laid down in Article 14 of the ECHR and in Protocol No 12 to the ECHR, to which some of the parties to the proceedings have made incidental reference. [61]

78. According to settled case-law, the general principle of equal treatment or non-discrimination requires that comparable situations must not be treated

[59] – Paragraphs 44 to 48 of the appeal.

[60] – Case C-334/03 *Commission* v *Portugal* [2005] ECR I-8911, paragraph 24; and Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57; see to similar effect, previously, Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7; Case 215/85 *Raiffeisen Hauptgenossenschaft* [1987] ECR 1279, paragraph 23; and Case C-85/97 *SFI* [1998] ECR I-7447, paragraph 30.

[61] – Protocol No 12 to the ECHR was opened for signature in Rome on 4 November 2000 and entered into force on 1 April 2005. It has not as yet been signed by all the Member States of the European Union and has been ratified by only a small number of them (Spain, Luxembourg, the Netherlands, Romania, Cyprus and Finland); see in this regard the status of ratifications published on the Council of Europe's website at <http:conventions.coe.int> (last visited on 21 February 2010). This low level of commitment moderates the significance of the protocol for the purposes of the resolution of this case.

differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [62]

79. In this connection, the elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the provision which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account. [63]

80. As mentioned above, [64] legal professional privilege serves to protect communications between a client and a lawyer who is independent of that client. It is, on the one hand, the essential corollary to the client's rights of defence and, on the other hand, is based on the specific role of the lawyer in 'collaborating in the interests of justice' and as being required to provide, in full independence, and in the overriding interests of justice, such legal assistance as the client needs.

81. Contrary to the submission made by ECLA, employment as an in-house lawyer is a highly relevant factor in the assessment of a lawyer's independence. For, as discussed in detail above, [65] a salaried in-house lawyer – notwithstanding his membership, if any, of a Bar or Law Society and the professional ethical obligations associated with such membership – does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his clients. In most cases, enrolled in-house lawyers work exclusively, or in any event primarily, for a single 'client' – their employer – whereas a lawyer in private practice tends to have a much larger and evolving client base and to give legal advice to 'all those in need of it'. [66]

82. With regard to their respective degrees of independence when giving legal advice or providing representation in legal proceedings, there is therefore usually a significant difference between a lawyer in private practice or employed by a law firm, on the one hand, and an enrolled in-house lawyer, on the other. The fact that they are significantly less independent makes it more difficult for enrolled in-house lawyers to deal effectively with a conflict of interests between their professional obligations and the aims and wishes of their undertaking.

[62] – Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56; Case C-127/07 *Arcelor Atlantique et Lorraine and Others* ('*Arcelor*') [2008] ECR I-9895, paragraph 23; and Case C-558/07 *S.P.C.M and Others* [2009] ECR I-0000, paragraph 74.

[63] – See to this effect *Arcelor* (cited in footnote 62, paragraph 26).

[64] – See points 48 and 49 of this Opinion, above.

[65] – See the comments made on the first part of the first plea in law, in particular points 61 to 72 of this Opinion.

[66] – *AM & S* (cited in footnote 32, paragraph 18).

83. Contrary to the view taken by ARNOVA, that difference is not irrelevant solely because the national legislature – in this case, the Netherlands legislature – accorded the same treatment in law to external lawyers and enrolled in-house lawyers (*advocaten in dienstbetrekking*). After all, such equal treatment relates only to the formal act of admitting an in-house lawyer to a Bar or Law Society and the professional ethical obligations incumbent on him as a result of such admission. On the other hand, that legislative framework does nothing to alter the economic dependence of an enrolled in-house lawyer and the far greater extent to which he identifies personally with his client, [67] who is also his employer. Consequently, irrespective of any legal equivalence, the fact remains that there is a significant difference between lawyers in private practice or employed in law firms and enrolled in-house lawyers in relation to their degree of independence.

84. It was on the basis of that very difference that the General Court concluded, without erring in law, that it is not appropriate to extend legal professional privilege to internal company or group communications with enrolled in-house lawyers. Consequently, it cannot be concluded that the principle of equal treatment has been infringed.

85. The second part of the first plea in law is therefore also unfounded.

(c) Interim conclusion

86. Since the first plea in law is unfounded in its entirety, consideration must now be given to the second plea in law, advanced in the alternative.

2. The alleged need to extend the scope of legal professional privilege (second plea in law)

87. By their second plea in law, Akzo and Akcros claim that, in its determination of the scope of legal professional privilege, the General Court failed to take account of significant developments in the 'legal landscape' which made it necessary to reconsider the case-law in *AM & S*, in order in particular to avert the risk of infringement of the rights of defence and the principle of legal certainty. They are supported in this submission by many of the interveners at first and second instance.

(a) The alleged changes 'in the legal landscape' (the first part of the second plea in law)

88. The changes in the 'legal landscape' referred to by the appellants relate, on the one hand, to the status of enrolled in-house lawyers in the legal systems of the Member States and, on the other hand, to the modernisation of the law governing antitrust proceedings carried out by Regulation No 1/2003.

[67] – See once again in this regard the comments made on the first part of the first plea in law, in particular points 66 to 71 of this Opinion.

(i) The status of enrolled in-house lawyers in the national legal systems

89. With regard, first, to the status under the national legal systems of corporate jurisconsults in general and enrolled in-house lawyers in particular, it is common ground between the parties to the proceedings that the relevant provisions in the now 27 Member States of the European Union vary greatly; in relation to legal professional privilege in particular, there is no discernible general trend towards treating enrolled in-house lawyers in the same way as lawyers in private practice. ECLA makes this point very succinctly when it says that 'there is no uniform answer to the question of privilege of in-house lawyers in all Member States'. [68] In the same vein, the appellants themselves refer to a 'lack of uniform tendency at national level'. [69]

90. The General Court concurs with that assessment. It holds that 'it is not possible … to identify tendencies which are uniform or have clear majority support … in the laws of the Member States'. On the basis inter alia of that finding, the General Court refuses to pave the way for an 'extension of the personal scope of protection of [legal professional privilege] beyond the limits laid down by the Court of Justice in *AM & S*'. [70]

91. The appellants and numerous other parties to the proceedings, on the other hand, take the view that even the changes in the laws of a small number of Member States towards an extension of legal professional privilege to enrolled in-house lawyers are reason enough to reverse the case-law in *AM & S* at European Union level. They are of the opinion that the General Court was wrong to make the development of that case-law contingent on a majority trend among the Member States.

92. In responding to this claim, it must be remembered first that the Court of Justice of the European Union – consisting of the Court of Justice, the General Court and specialised courts – is to ensure that in the interpretation and application of the Treaties the law is observed (Article 19(1) TEU [71]). At an early stage, the Court of Justice inferred from the character of the Community (now: the European Union) as a community governed by the rule of law that, within its jurisdiction, certain principles based on the rule of law must apply and fundamental rights must be protected, even if they have not, or not yet, been laid down in writing. [72]

68 – Paragraph 52 of ECLA's response.

69 – Paragraph 52 of the Akzo and Akcros' appeal.

70 – Paragraph 170 in conjunction with paragraph 177 of the judgment under appeal.

71 – See to the same effect the first paragraph of Article 220 EC and Article 164 of the EEC Treaty.

72 – See for example – in relation to the withdrawal of administrative measures giving rise to individual rights – Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly*

93. Where the Court of Justice answers questions concerning the existence or non-existence of a general legal principle by reference to the laws of the Member States, it generally draws on the constitutional traditions [73] or legal principles common to the Member States. [74]

94. Such recourse to common constitutional traditions or legal principles is not necessarily subject to the precondition that the practice in question should constitute a tendency which is uniform or has clear majority support. It depends rather on an *evaluative comparison* of the legal systems which must take due account, in particular, not only of the aims and tasks of the European Union but also of the special nature of European integration and of EU law. [75]

95. Accordingly, it is by no means inconceivable that even a legal principle which is recognised or even firmly established in only a minority of national legal systems will be identified by the Courts of the European Union as forming part of EU law. This is the case in particular where, in view of the special characteristics of EU law, the aims and tasks of the Union and the activities of its institutions, such a legal principle is of particular significance, [76] or where it constitutes a growing trend.

96. Thus, only recently, the Court held the prohibition of discrimination on grounds of age to be a general principle of EU law, [77] even though, at that time, that prohibition did not appear to constitute a tendency which was uniform or had

of the ECSC (‘*Algera*’) [1957] ECR 39, at p. 55, and – in relation to the protection of fundamental rights at European Union level – Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 4.

[73] – See, for example, *Internationale Handelsgesellschaft* (cited in footnote 72, paragraph 4); Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13; Case 44/79 *Hauer* [1979] ECR 3727, paragraph 15; Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 13; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 68 and 69; *Advocaten voor de Wereld* (cited in footnote 62, paragraph 45); and Case C-555/07 *Kücükdeveci* [2010] ECR I-0000, paragraph 20.

[74] – See, for example, *Algera* (cited in footnote 72, at p. 56); *AM & S* (cited in footnote 32, paragraphs 18 to 21); and Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* v *Council and Commission* (‘*FIAMM*’) [2008] ECR I-6513, paragraphs 170, 171 and 176.

[75] – See to this effect, for example, *Internationale Handelsgesellschaft* (cited in footnote 72, paragraph 4) and the Opinions of Advocate General Roemer in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, at p. 989, and of Advocate General Poiares Maduro in *FIAMM* (cited in footnote 74, points 55 and 56).

[76] – See to this effect the Opinions of Advocate General Roemer in *Zuckerfabrik Schöppenstedt* v *Council* (cited in footnote 75, at p.1989) and of Advocate General Poiares Maduro in *FIAMM* (cited in footnote 74, points 55 and 56).

[77] – Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75, and *Kücükdeveci* (cited in footnote 73, paragraph 21).

clear majority support in the national legal systems or even in the constitutional law of the Member States. [78] However, that principle was consistent with a specific task incumbent on the European Union in combating discrimination (Article 19 TFEU, formerly Article 13 EC) and had also been given specific expression by the Union legislature in the form of a directive; [79] moreover, it mirrored a more recent trend in the protection of fundamental rights at Union level, to which the European Parliament, the Council and the Commission had jointly given expression on the occasion of the solemn proclamation of the Charter of Fundamental Rights (see, in particular, Article 21 thereof), [80] the Heads of State and Government of the Member States having previously given their endorsement at the Biarritz European Council (October 2008).

97. The right of access to the file referred to by some of the parties to the proceedings at the hearing, as recognised by the Courts of the European Union in the context of antitrust proceedings conducted by the Commission in its capacity as competition authority, [81] may likewise not have been recognised in this form in all the Member States. This might have been because some Member States did not previously have competition authorities of their own and, in others, because the competition authorities appeared only as prosecutor in court proceedings. The Commission, on the other hand, is entrusted with both the investigation and the decision concluding the proceedings; in administrative proceedings of this kind, the right of access to the file is an essential component of the rights of defence and, therefore, the expression of a basic procedural guarantee based on the rule of law. It was therefore logical that the Courts of the European Union should recognise the right of access to documents at European level.

98. With respect to the legal professional privilege at issue here, however, there are no comparable circumstances apparent which would support the proposition that EU law should be brought into line with the legal position in a minority of Member States. The extension of the protection afforded by legal professional privilege to internal company or group communications with enrolled in-house lawyers is not justified on grounds of any special characteristics exhibited by the

[78] – The prohibition of age discrimination is enshrined in particular in Article 6 of the Finnish Constitution and – specifically in relation to employment – in Article 59(1) of the Portuguese Constitution.

[79] – Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303 p. 16); see in this regard *Kücükdeveci* (cited in footnote 73, paragraph 21).

[80] – Again, see expressly to this express effect now *Kücükdeveci* (cited in footnote 73, paragraph 22).

[81] – Fundamental in this regard are Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54; Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 38; and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraphs 29 and 30, the latter confirmed in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865.

tasks and activities of the European Commission as competition authority and it does not currently constitute a growing trend among the Member States, be it in the area of competition law or in any other field.

99. First, the tasks, powers and activities in general of the European Commission as competition authority are essentially no different in the context of antitrust proceedings from those of the Member States' competition authorities; more specifically, the Commission's search powers for the purposes of investigations are in fact even less extensive than those of many national authorities. [82] Consequently, if the vast majority of the Member States have no need to deny the competition authorities access to communications between an undertaking and its enrolled in-house lawyers, it is safe to assume that there is no compelling need to extend the scope of legal professional privilege at European Union level either.

100. Next, as far as the recent developments in the national legal systems are concerned, there is still no evidence of a clear – let alone growing – trend towards the protection of internal company and group communications with enrolled in-house lawyers.

101. Of the now 27 Member States of the European Union a significant number continue to prohibit in-house lawyers from becoming members of a Bar or Law Society at all; [83] in the vast majority of those Member States, this automatically means that internal company communications with in-house lawyers do not benefit from the protection afforded by legal professional privilege. [84]

102. In a number of other Member States, the legal position in relation to legal professional privilege for enrolled in-house lawyers cannot be considered sufficiently established, either because there are no specific legal provisions on the matter or there is as yet no settled case-law or administrative practice. [85] As a

[82] – In particular, as was discussed at the hearing, the Commission has no power to use direct force under Article 14 of Regulation No 17 or Articles 20 and 21 of Regulation No 1/2003.

[83] – This is the case in particular in Bulgaria, the Czech Republic, Estonia, Greece, France, Italy, Cyprus, Luxembourg, Hungary, Austria, Romania, Slovenia, the Slovak Republic, Finland and Sweden. With specific regard to the legal position in Cyprus, it should also be noted that, while practising advocates may be members of an undertaking's board of directors, they may not work as employees or managing directors of that undertaking.

[84] – Although German law allows in-house lawyers to be members of a Bar or Law Society (Syndikusanwälte), it does not grant them legal professional privilege in respect of internal company communications with their employer. In-house lawyers in Greece, on the other hand, despite being unable to become members of a Bar or Law Society, appear in certain circumstances to enjoy a comparatively extensive professional privilege.

[85] – Denmark, Spain, Latvia, Lithuania, Malta and Romania fall into this category. Moreover, the legal position in Belgium is at present extremely unclear. It is true that specific legal provisions on the professional status of *juristes d'entreprise* (society of in-house lawyers), who are subject to particular professional ethical obligations if registered with the *Institut des juristes d'entreprise* (bar association for in-house lawyers) (IJE), have been in force since the year 2000.

result, national legislation, administrative practice and case-law sometimes seem to draw on the solutions applied at European Union level rather than the other way round. [86]

103. Only in a small minority of the 27 Member States does the protection afforded by legal professional privilege currently apply also to internal company or group communications with in-house lawyers. This phenomenon is restricted to the common-law area [87] and to a small number of other Member States – inter alia the Netherlands – [88] but it is certainly not a more recent development which constitutes a growing trend among the Member States. The changes in the law at national level since *AM & S*, [89] geared towards extending legal professional

However, the professional privilege applicable to Belgian *juristes d'entreprise* appears – not least because Article 5 of the Law of 1 March 2000 makes no reference to Article 456 of the Belgian Code pénal (Criminal Code) – to be less extensive than that applicable to *avocats* (lawyers) and, furthermore, does not currently appear to be recognised by the Belgian competition authority (*Auditoriat du Conseil de la concurrence*) as covering internal company communications with in-house lawyers (see in this regard Marchandise, P., and Sabbe, S., 'Akzo, "op zijn Belgisch": de renaissance van het surrealisme?', *TBM-RCB* 2009, p. 54; Cattaruzza, J., 'Reactie IBJ op het gewijzigd standpunt van het Auditoriaat inzake vertrouwelijkheid adviezen bedrijfsjurist', *TMB-RCB* 2008, p. 42); the matter awaits clarification by the Belgian courts.

86 – This appears to be the case, for example, in Finland and Slovenia. In Belgium also, the position currently adopted by the competition authorities (see footnote 85 above) can ultimately be explained by their having drawn on the case-law of the courts of the Union, in particular the judgment, under appeal here, in Joined Cases T-125/03 and T-253/03.

87 – This includes the United Kingdom and Ireland, but not Cyprus (see footnote 83 above); the legal position in Malta seems unclear. It must be noted incidentally that, in some non-Member States from the common-law area, in particular the United States of America, the protection afforded by legal professional privilege can also in certain circumstances be extended to in-house lawyers (see in this regard, fundamentally, the judgment of the US Supreme Court in *Upjohn* v *United States*, 449 U.S. 383 (1981); see also Walkowiak, V.S., 'Attorney-client privilege in civil litigation', American Bar Association, Illinois, 2008, p. 7). This does not, however, appear to be an unbroken trend in the common-law world; thus, for example, the Australian Federal Court, despite its essential recognition of 'legal professional privilege for in-house counsel', seems to have been subjecting the independence of in-house lawyers to increasing scrutiny of late (see the decisions of the Federal Court of Australia in *Telstra* v *Minister for Communications, Information Technology and the Arts [No 2]* [2007] FCA 1445 and *Rich* v *Harrington* [2007] FCA 1987).

88 – The other Member States are, more specifically, Greece, Portugal and Poland. With respect to Poland, it must be pointed out that Polish law recognises the separate profession of *radcowie prawni* (legal adviser), whose members are subject to similar professional ethical obligations as *adwokaci* (lawyers); when employed as salaried in-house lawyers, they are covered by a professional privilege similar to legal professional privilege.

89 – See in particular the Netherlands and Poland. The current legal position in Belgium is also based on a more recent law, although, as I have already mentioned, the substance of that position is at present unclear (see footnote 85 above). In France, a '*réforme des professions du droit*' (reform of the legal professions) is under discussion (see in this regard *inter alia* the report of the *Darrois-Kommission*, presented to the French President on 8 April 2009), although this does not yet appear to have led to a change in the current law relating to legal professional privilege, nor even to a draft law with regard to that specific question; draft Law No 2383 on the

privilege to certain in-house lawyers, likewise seem to me to be too isolated to be regarded as a clear trend.

104. Accordingly, I take the view that the legal position in the now 27 Member States of the European Union, even some 28 years after *AM & S*, has not developed in such a way as would require – today or in the foreseeable future – the case-law at European Union level to be changed so as to recognise enrolled in-house lawyers as benefiting from legal professional privilege.

105. Furthermore, it should be noted that the European Union legislature has also recently signalled that it is more opposed to than in favour of the idea of treating lawyers in private practice and enrolled in-house lawyers in the same way in relation to legal professional privilege. Those signals were discussed at length with the parties to the proceedings at the hearing.

106. Thus, although, during the process of drawing up legislation to modernise European law governing antistrust proceedings (Regulation No 1/2003) and to revise the EC Merger Regulation (Regulation No 139/2004), members of the European Parliament tabled proposals aimed at extending legal professional privilege to in-house lawyers, [90] those proposals were ultimately not adopted by the legislature. [91]

107. Contrary to the view of ECLA, representations made in this way by the European Union legislature are not irrelevant solely because they are – at least in part – prompted by 'legislative policy considerations'. [92] On the contrary, it is precisely when called upon to develop EU law by recognising general legal principles that the Court cannot disregard the opinions of the European Union institutions motivated by legislative policy.

108. Moreover, contrary to the view taken by the appellants and some of the other parties to the proceedings, the two directives which seek to facilitate practice

modernisation of the legal professions (*projet de la loi de modernisation des professions judiciaries et juridiques réglementées*), introduced in March 2010, in any event concerns only some other partial aspects of that reform and does not concern legal professional privilege.

90 – With regard to Regulation No 1/2003, see Parliamentary Document A5-0229/2001 final (Evans Report), specifically Amendment 10 relating to Article 14(3) of the Commission's proposal for a regulation COM(2000) 582 final; with regard to Regulation No 139/2004, see Parliamentary Document A5-0257/2003 final (Della Vedova Report), specifically Amendment 5 relating to the 34th recital and Amendment 25 relating to Article 13(1) of the Commission's proposal for a regulation COM(2002) 711 final.

91 – In the case of Regulation No 1/2003, the Parliament as a whole did not itself support the amendments proposed by its own members. With regard to Regulation No 139/2004, while the amendments were approved by the Parliament, the Council did not include them in the Regulation.

92 – The term used in the language of the case.

of the profession of lawyer contain nothing which would provide compelling support for the proposition that self-employed lawyers and enrolled in-house lawyers should be treated in the same way in relation to legal professional privilege.

109. It is true that Directive 98/5, [93] as Article 1(3) thereof makes clear, applies to both self-employed and salaried lawyers. Article 8 of that directive provides that a lawyer registered in a host Member State under his home-country professional title may practise as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise to the extent that the host Member State so permits for lawyers registered under the professional title used in that State. However, that article makes clear only that a Member State whose legal system recognises enrolled in-house lawyers must not refuse to allow lawyers from other Member States to practise their profession in this way. It in no way implies that the Union legislature regards self-employed lawyers and enrolled in-house lawyers as enjoying the same degree of independence.

110. Furthermore, Directive 77/249 [94] had already contained a reference to 'lawyers who are in the salaried employment of a public or private undertaking'. Indeed, the Court made express reference to that directive in *AM & S*, but it did not infer from it that enrolled in-house lawyers also benefit from legal professional privilege. [95]

111. In short, neither of the two directives relating to the profession of lawyer militates in favour of extending legal professional privilege to enrolled in-house lawyers.

112. Finally, the provisions of EU law on the combating of money laundering and terrorist financing, which expressly recognise professional privilege for 'independent legal professionals', were discussed at the hearing before the Court of Justice. [96] Akzo interprets that provision as also covering enrolled in-house

[93] – Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36).

[94] – See in particular Articles 2 and 6 of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

[95] – *AM & S* (cited in footnote 32, paragraph 26).

[96] – Article 22(2) in conjunction with Article 2(1)(3)(b) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15); see to the same effect Article 6(3)(2) in conjunction with Article 2a(5) of the earlier Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77), as amended by Directive 2001/97/EC (OJ 2001 L 344, p. 76); see also in this regard *Ordre des barreaux francophones et germanophone and Others*, cited in footnote 30.

lawyers. Such an interpretation might at first sight be supported by the preamble to Directive 2005/60, which refers to 'legal professionals, as defined by the Member States'. [97] It is, however, contradicted by the recommendations of the Financial Action Task Force ('FATF') cited by the Commission, [98] which are to be relied on for the purposes of interpreting that directive; those recommendations expressly exclude salaried in-house lawyers from the category of persons subject to their requirements. [99] It is true that these proceedings are not the appropriate forum in which to take a definitive view on the interpretation of Directive 2005/60. For our purposes here, however, it is sufficient to conclude that the provisions of EU law on money laundering and terrorist financing certainly cannot be construed as providing a clear signal in favour of the proposition that legal professional privilege should be extended to enrolled in-house lawyers.

113. For all these reasons, the line of argument advanced by the appellants and the other parties to the proceedings supporting them to the effect that there has been a shift in the 'legal landscape' in relation to the status of enrolled in-house lawyers must be rejected.

(ii) Modernisation of the law governing antitrust proceedings under Regulation No 1/2003

114. With reference to paragraphs 172 and 173 of the judgment under appeal, the appellants cite a further ground by way of justification for extending legal professional privilege to internal company or group communications with enrolled in-house lawyers. They submit that the modernisation of the law governing antitrust proceedings carried out by Regulation No 1/2003 leads to an increasing need for internal corporate legal advice, the role of which in preventing infringements of competition law cannot be underestimated. The legal advice given by enrolled in-house lawyers is particularly valuable in day-to-day business because it can be obtained more quickly and more economically and because it is based on an intimate knowledge of the undertaking concerned and its business. In addition, a number of parties to the proceedings have made reference to the growing importance of 'compliance programmes' within undertakings, which serve to ensure that the undertaking conducts itself in accordance with the law and the relevant rules and regulations.

97 – Recital 19 in the preamble to Directive 2005/60.

98 – The FATF (or *Groupe d'action financière*, GAFI) is an inter-governmental body which was established in Paris in 1989 by the then 'G 7' countries and now has 35 members, including the European Commission.

99 – The interpretative notes are contained in the '40 Recommendations' which the FATF published in 2003 (available at http://www.fatf-gafi.org, last visited on 10 February 2010). Under point (e) of the glossary to those recommendations, employees are excluded from the meaning of '[d]esignated non-financial businesses and professions'.

115. In the view of many of the parties to the proceedings, the effective provision of internal corporate legal advice and a successful compliance programme are dependent on the possibility of free and faithful internal company or group communications with enrolled in-house lawyers. Otherwise, they submit, the company's management will be averse to disclosing sensitive information to an enrolled in-house lawyer and the enrolled in-house lawyer will be inclined to give advice orally rather than in writing, thus compromising the quality and usefulness of the legal advice in question.

116. It should be pointed out first of all in this regard that the changes made to the rules governing the scope of the Commission's powers of investigation as part of the modernisation of the law governing antitrust proceedings were not applicable to the search, at issue here, of Akzo's and Akros' business premises. The investigation started in early 2003 and did not therefore fall within the scope *ratione temporis* of Regulation No 1/2003, which entered into force on 1 May 2004 (see in this regard Article 45(2) of that regulation). Nevertheless, the argument based on the new law governing antitrust proceedings should not be dismissed solely on grounds of the scope *ratione temporis* of Regulation No 1/2003. After all, the volume of internal company or group legal advice may have increased just in the run-up to the introduction of the new system.

117. In substance, however, neither the increased importance of enrolled in-house lawyers nor the indisputable usefulness of their legal advice – including under the scheme of Regulation No 1/2003 at issue here – supports the proposition that internal company or group communications should be placed under the protection of legal professional privilege. Nor can an extension of legal professional privilege to enrolled in-house lawyers be justified simply by reference to their in-depth knowledge of the undertaking concerned and its business.

118. On the contrary, the reference made by a number of parties to the proceedings to the enrolled in-house lawyer's closeness to his employer proves to be a double-edged sword. On the one hand, such closeness saves an enrolled in-house lawyer the job of having to spend an extensive amount of time familiarising himself afresh with the facts of a particular case each time his advice is sought and enables him to build up a basis of trust with his in-house interlocutors. On the other hand, it is precisely that special proximity to the undertaking concerned and its business which calls the independence of the enrolled in-house lawyer seriously into question. [100] He lacks the necessary distance from the client – his employer – that would characterise genuinely independent legal advice.

119. When an undertaking calls on the services of one of its enrolled in-house lawyers, it is not ultimately communicating with a neutral third party but with a

[100] – On the question of independence, see, in addition, my comments on the first plea in law, in particular points 61 to 72 of this Opinion.

person who is a member of its own staff, despite all the professional ethical obligations to which that person is subject by virtue of his membership of a Bar or Law Society. Such 'in-house' communications do not merit the protection afforded by legal professional privilege, no matter how often they are made, how highly significant they are or how useful they are to the undertaking.

120. Nor does the reference made by many of the parties to the proceedings to the compliance programmes operated by undertakings lead to a different conclusion. As the Commission has submitted without being contradicted, much of the internal corporate legal advice given under compliance programmes is general in nature and has no specific connection with the current or future exercise of the rights of defence. For this reason alone, therefore, communications exchanged between an undertaking and its enrolled in-house lawyer 'for compliance purposes' do not generally fulfil the first condition laid down in *AM & S.* [101] Consequently, the General Court was right to find that this kind of internal corporate legal advice is 'not directly relevant' to the issue of legal professional privilege. [102]

121. All things considered, therefore, a departure from the case-law in *AM & S* likewise cannot ultimately be justified by reference to the advantages and significance of internal corporate legal advice or to the procedural-law reform carried out by Regulation No 1/2003.

(b) The alleged infringement of the rights of defence and the principle of legal certainty (second part of the second plea in law)

122. The appellants and a number of the interveners supporting them at first and second instance submit that it is an infringement of the rights of defence to exclude internal company or group communications with an enrolled in-house lawyer. Such a practice, they submit, is also contrary to the principle of legal certainty.

(i) The principle of legal certainty in relation to the rights of defence

123. Akzo and Akcros base their claim in this regard on the rights of defence in conjunction with the principle of legal certainty. They refer to the fact that, in European competition law, Article 81 EC (now Article 101 TFEU) is often applicable in combination with corresponding provisions of national law (see in this regard Article 3 of Regulation No 1/2003). They submit that it is unacceptable

[101] – *AM & S* (cited in footnote 32, paragraphs 21 and 22); see also *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 30, paragraphs 32 and 35), where the Court makes clear the link between legal professional privilege and judicial proceedings or the preparation for such proceedings; see in addition my comments on the first plea in law (point 54 of this Opinion, above).

[102] – Paragraph 172 (*in fine*) of the judgment under appeal.

that the protection of communications with enrolled in-house lawyers should depend on whether investigations are conducted by the Commission or by a national competition authority.

124. The principle of legal certainty is a fundamental principle of EU law. [103] This principle requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. [104] In other words, individuals must know their rights and obligations precisely and be able to rely on them. [105]

125. Transposed to this context, the foregoing means that an undertaking whose premises are searched by a competition authority as part of an antitrust investigation must know for certain whether it can rely on legal professional privilege in respect of internal company or group communications with enrolled in-house lawyers.

126. The relevant EU law satisfies those requirements. As interpreted by the existing case-law in *AM & S*, [106] it provides that internal company or group communications with enrolled in-house lawyers do *not* fall within the scope of the protection afforded by legal professional privilege. There is no legal uncertainty in this regard.

127. With regard to the relationship between investigations conducted by the European Commission and investigations conducted at national level, Regulation No 17, like Regulation No 1/2003, is based on a clear delimitation of the respective competences of the competition authorities. A search is ordered and carried out either by the Commission or by a national competition authority. It is always clear from the decision ordering the investigation (investigation authorisation), which must be presented to the undertaking in writing, which authority has ordered the search (Article 14(2) and (3) of Regulation No 17 or Article 20(3) and (4) of Regulation No 1/2003).

128. If the Commission conducts an investigation, the rules governing that investigation are determined by EU law; if a national authority conducts an investigation, the rules governing that investigation are determined by national

[103] – Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30; Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 37; and Case C-201/08 *Plantanol* [2009] ECR I-00000, paragraphs 43 and 44.

[104] – Case C-226/08 *Stadt Papenburg* [2010] ECR I-00000, paragraph 45; similarly, see Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 79.

[105] – Case C-158/06 *ROM-projecten* [2007] ECR I-5103, paragraph 25; and Case C-345/06 *Heinrich* [2009] ECR I-00000, paragraph 44.

[106] – *AM & S* (cited in footnote 32); see in this regard my comments on the first plea in law (points 52 to 75 of this Opinion, above).

law (see expressly to this effect now Article 22(2) of Regulation No 1/2003 [107]). This also includes the corresponding rules on legal professional privilege.

129. It is true that officials from the national competition authority may assist the Commission in an investigation which it is conducting (Article 14(5) and (6) of Regulation No 17 or Article 20(5) and (6) of Regulation No 1/2003), just as, conversely, Commission officials may take part in investigations conducted by the national competition authorities by lending support to the latter (Article 13(2) of Regulation No 17 or the second subparagraph of Article 22(2) of Regulation No 1/2003). However, this does nothing to change the division of competences relating to the ordering and conduct of investigations or the legal provisions applicable, including the rules on legal professional privilege.

130. Consequently, the principle of legal certainty in relation to the rights of defence, in particular in relation to the rules of legal professional privilege applicable to a particular search, is satisfied.

131. The appellants raise the objection that it is unacceptable that the fate of the self-same internal company document should depend on whether it is a national competition authority or the Commission which attempts to take it away in the course of a search.

132. Although that objection expresses an entirely understandable concern, it is none the less untenable from a legal point of view.

133. Neither the principle of legal certainty nor the rights of defence require that EU law and national law should apply the same standards in their respective spheres of application and thus ensure the same protection by way of legal professional privilege. The general legal principles of EU law and the protection afforded to fundamental rights at European Union level are applicable only within the scope of application of EU law. [108] Conversely, national legal principles and the protection of fundamental rights at national level may not extend beyond national spheres of competence.

134. It would certainly simplify the legal position if the procedural provisions applicable to searches conducted under competition law and the associated rules on legal professional privilege were harmonised throughout the European Union. As EU law currently stands, however, such total harmonisation does not exist. Whether it should be introduced is a question of legislative policy which it is for

[107] – See, incidentally, recital 5 in the preamble to Regulation No 1/2003, which states that proof of an infringement of Articles 81(1) and 82 EC (now Articles 101(1) and 102 TFEU) must be furnished ‘to the requisite legal standard’, without prejudice to the national legal provisions on the standard of proof.

[108] – See to this effect Article 51 of the Charter of Fundamental Rights, as well as Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 31; *Mangold* (cited in footnote 77, paragraph 75); and Case C-427/06 *Bartsch* [2008] ECR I-7245, paragraphs 15 and 25.

the European Union legislature alone to decide; the undertakings concerned certainly cannot bring about such harmonisation themselves by reference to the rights of defence and the principle of legal certainty. [109]

135. Finally, the appellants, supported *inter alia* by Ireland, submit that a legal professional privilege applicable at national level to internal company or group communications with enrolled in-house lawyers could be eroded through the system for the exchange of information between European competition authorities under Article 12 of Regulation No 1/2003.

136. As the Commission contends, without being contradicted in this regard, there was no exchange of information between the competition authorities in this case. The argument based on Article 12 of Regulation No 1/2003 is therefore nugatory.

137. The question of whether and, if so, to what extent Article 12 of Regulation No 1/2003 is even capable of giving rise to an exchange of documents and information which fall within the scope of legal professional privilege can therefore be left unanswered for the purposes of this appeal. At this point, I would merely note in passing that that provision – in particular its reference to 'confidential information' – is indeed open to an interpretation which, on the one hand, is compatible with fundamental rights and, on the other hand, for the purposes of sincere cooperation (Article 4(3) TEU), does not require any competition authority involved to do anything which would be at odds with the provisions applicable to it in respect of legal professional privilege. [110]

138. All things considered, the claim that the General Court infringed the principle of legal certainty in relation to the rights of defence is therefore unfounded.

(ii) The right to unimpeded advice, defence and representation

139. The alleged infringement of the rights of defence is also said to exist – in particular by Ireland, ACCA and ECLA – in the fact that it is less attractive for undertakings to seek legal advice from an enrolled in-house lawyer if internal company or group communications with that lawyer are not protected by legal

[109] – In any event, reliance on the rights of defence would not on its own be capable of harmonising the legal position in every case. On the contrary, for most Member States, whose national law currently does not extend the protection of legal professional privilege to internal company or group communications, any change in the case-law established in *AM & S* would lead to a compartmentalisation of the legal position at national and EU levels.

[110] – On the interpretation of acts of the European Union in a manner compatible with the fundamental freedoms, see, for example, *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 30, paragraph 28) and Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-00000, paragraphs 47 and 48; see to similar effect Case C-413/06 P *Bertelsmann & Sony* v *Impala* [2008] ECR I-4951, paragraph 174.

professional privilege. These parties to the proceedings consider that this constitutes, in particular, an infringement of Article 6(3)(b) and (c) of the ECHR, according to which everyone charged with a criminal offence has the right to have adequate time and the facilities for the preparation of his defence and to defend himself in person or through legal assistance of his choosing. [111] Some of the parties to the proceedings also refer incidentally in this regard to Article 8 of the ECHR as well as to Articles 47 and 48 of the Charter of Fundamental Rights.

140. That submission does not hold water.

141. With regard first of all to the ECHR, the European Court of Human Rights does not as yet appear to have expressed support for the recognition of legal professional privilege in respect of internal company or group communications with enrolled in-house lawyers. On the contrary, the findings of the ECtHR in its judgment in *André and Other v. France*, concerning the role of the lawyer as an organ of the administration of justice (‘*auxiliaire de justice*’) and as an intermediary between the courts and individuals subject to the law (‘*intermédiaire*’) point to an understanding of the independence of lawyers which is not dissimilar to that on which the Court of Justice of the European Union based its judgment in *AM &* S. [112]

142. In those circumstances, EU law as it currently stands does *not* afford a lower level of protection than the ECHR in restricting legal professional privilege to communications with external lawyers. Consequently, the requirement of consistency in the first sentence of Article 52(3) of the Charter of Fundamental Rights likewise does not necessitate an extension of the protection afforded by legal professional privilege under EU law to internal company or group communications with enrolled in-house lawyers.

143. It is true that, with respect to the protection of fundamental rights, the ECHR merely guarantees a minimum standard which EU law is at liberty to exceed at any time (the second sentence of Article 52(3) of the Charter of Fundamental Rights). Ireland has rightly referred to this fact. None the less, for

[111] – It is true that the European Union, as the Commission rightly objects, is not directly bound by Article 6 of the ECHR because it has not as yet acceded to that convention. None the less, that provision is the expression of fundamental principles based on the rule of law which are also recognised as general legal principles in Union law (see *inter alia* Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 21; and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 68. In addition, rights contained in the Charter of Fundamental Rights which correspond to rights guaranteed by the ECHR have the same meaning and scope as those laid down in the ECHR (first sentence of Article 52(3) of the Charter of Fundamental Rights).

[112] – Judgment in *André and Other v. France* (cited in footnote 35, § 42 *in fine*); indeed, at the beginning of that judgment (§ 15), the ECtHR, under the heading ‘*5. Le droit communautaire*’ (5. Community Law) cites extracts *inter alia* from *AM & S* (cited in footnote 32, paragraphs 18 to 24).

the reasons that follow, it would not be appropriate to extend the scope of the protection afforded by legal professional privilege under EU law to internal company or group communications with enrolled in-house lawyers.

144. First of all, it is doubtful to begin with whether the second sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights (in conjunction, where appropriate, with Article 48(2)) is even open to the interpretation that it guarantees for undertakings a right to be advised, defended and represented by their own salaried enrolled in-house lawyers.

145. However, even assuming that the right to be advised, defended and represented under the Charter of Fundamental Rights also extends to the consultation of a company's or a group's own enrolled in-house lawyers, this by no means rules out the possibility that certain objectively justified restrictions may apply when the services of enrolled in-house lawyers are used. After all, the degree of protection offered by a fundamental right may vary depending on the circumstances. [113]

146. For example, in-house lawyers are not always allowed to represent their own employer – that is to say the undertaking in whose legal department they work – in court. [114] Moreover, the fact that not all lawyers are permitted to appear before all national courts does not constitute an infringement of a fundamental

[113] – Thus, for example, the ECtHR extends the protection of Article 8 of the ECHR to business premises but at the same time points out that that protection need not necessarily be as extensive as it would in the case of private premises (the judgment in *Niemietz v. Germany*, cited in footnote 35, § 31, final clause, reads: '[the entitlement of Contracting States to interfere] might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case'; see, similarly, the phrase 'to a certain degree' in § 29 of the same judgment; see also ECtHR, *Société Colas Est and Others v. France*, judgment of 16 April 2002, No. 3791/97, ECHR 2002-III, §§ 41 and 49). Similarly, the German Bundesverfassungsgericht (Federal Constitutional Court) has held, with regard to protection of the right to a private life, that the public authorities have access to all but 'the core of a person's private life' (Order of 14 September 1989, BVerfGE 80, 367, which contains a detailed definition of the protection afforded to personal diary records against seizure by the prosecution services).

[114] – In Germany, for example, Paragraph 46(1) of the Bundesrechtsanwaltsordnung (Rules governing the profession of lawyer in the Federal Republic of Germany) prohibits a Syndikusanwalt from representing his employer in his capacity as lawyer before courts and tribunals; a Syndikusanwalt may therefore appear only before courts not subject to the statutory requirement of representation by a lawyer, as may everyone – including non-lawyers. The Courts of the European Union apply a similar practice: with regard to applications signed by directors of the applicants who are members of a Bar or Law Society, see the orders in Case T-79/99 *Euro-Lex* v *OHIM* [1999] ECR II-3555, paragraphs 28 and 29; Case T-184/04 *Sulvida* v *Commission* [2005] ECR II-85, paragraphs 9 and 10; and Case T-40/08 *EREF* v *Commission* [2009] ECR II-00000, paragraphs 25 and 26, against which an appeal is pending (Case C-75/10 P *EREF* v *Commission*); with regard to an appeal signed by the applicant himself, see also the order in Case C-174/96 P *Lopes* v *Court of Justice* [1996] ECR I-6401, paragraph 11.

right, [115] although it undoubtedly restricts the choice available to potential clients when searching for the most suitable counsel.

147. In the same vein, the extent of the protection afforded to communications between a client and his lawyer may vary depending on whether or not there is a relationship of employment between the two of them. This does not mean that communications between an undertaking and its enrolled in-house lawyers are entirely unprotected. Like any normal communication between private individuals, the former fall within the scope of the protection afforded to the *general* confidentiality of written correspondence and communications provided for in Article 7 of the Charter of Fundamental Rights (Article 8 of the ECHR). The dispute revolves around whether internal company or group communications with enrolled in-house lawyers also attract, in addition, the *special protection* against seizure provided by legal professional privilege for the purpose of facilitating the exercise of the rights of defence and ensuring the proper administration of justice.

148. ECLA rightly submits in this regard that, in the light of their crucial importance, the fundamental rights at issue here must in principle be interpreted extensively. However, even on an extensive interpretation, the legal professional privilege inferred from those rights must not be extended beyond the scope of its actual spirit and purpose. Legal professional privilege not only serves to ensure the rights of defence of the client but is also an expression of the lawyer's status as an independent legal adviser and 'collaborat[or] in the administration of justice' who gives legal advice 'to all those who need it'. [116] Consequently, the freedom to engage in unimpeded and reliable communications with his client which legal professional privilege creates for a lawyer must be exercised by him in such a way as to ensure the proper administration of justice. In order to be able to avoid conflicts of interest between his professional obligations and the aims and wishes of his client, a lawyer must not enter into a relationship of dependence with his client. [117]

149. An enrolled in-house lawyer, however, is in just such a relationship of dependence. As I have already said, an enrolled in-house lawyer is not only part and parcel of the structures of the undertaking in whose legal department he works as an employee but is also more economically dependent on and identifies much more strongly with that undertaking than an external lawyer would. [118] There is

[115] – ECtHR *Meftah and Others v. France*, judgment of 26 July 2002 (Application No 32911/96, ECHR 2002-VII, §§ 45 to 48 and the case-law cited there).

[116] – *AM & S* (cited in footnote 32, paragraph 18).

[117] – See also the Opinion of Advocate General Léger in *Wouters and Others* (cited in footnote 32, point 181).

[118] – See my comments on the first part of the first plea in law, in particular points 61 to 72 of this Opinion.

therefore a structural danger that an enrolled in-house lawyer – even if, as is usually the case, he is himself of good character and has the best intentions – will encounter a conflict of interests between his professional obligations and the aims and wishes of his company.

150. The susceptibility of an enrolled in-house lawyer to conflicts of interest also makes it difficult for him to raise an effective opposition to any abuses of legal professional privilege. Such abuse may, for example, consist in handing over evidence and information to an undertaking's legal department, under cover of a request for legal advice, for the sole or primary purpose, ultimately, of preventing the competition authorities from gaining access to that evidence and information. At worst, the functional departments of an undertaking may be tempted to misuse the company's or group's internal legal department as a place for storing illegal documents such as cartel agreements and records of meetings between the parties to those cartels and of the modus operandi of a cartel.

151. In view of the specific conflicts of interest and risks of abuse which may arise within an undertaking or a group of undertakings, it seems appropriate to me *not* to extend the protection afforded by legal professional privilege to internal company or group communications with enrolled in-house lawyers. The same arguments which I articulated above in connection with the Charter of Fundamental Rights are also applicable, in my view, to the corresponding provisions of the ECHR.

152. By reference to the case-law of the ECtHR, Ireland submits that the confidentiality of the relationship between a client and his lawyer outweighs the mere possibility of abuse. [119] In this regard, however, Ireland overlooks the fact that the case-law which it cites relates to the conventional communications between a client and his external lawyer, in which the aforementioned risks of abuse specifically linked to internal company or group communications with enrolled in-house lawyers do not generally arise and there is as a rule no fear of conflicts of interest in any other regard either.

153. ECLA raises the objection that the independence of an enrolled in-house lawyer should not be assessed in the abstract by reference to his status as an employee but must be examined specifically on a case-by-case basis, taking into account in particular his ethical obligations as a member of a Bar or Law Society. That argument must be dismissed for the reasons already given. [120] Ethical obligations alone are not sufficient to secure for enrolled in-house lawyers an independence comparable to that of self-employed lawyers, since they provide no information on the practices actually employed by an undertaking in its day-to-

[119] – 'The mere possibility of abuse is outweighed by the need to respect the confidentiality attached to the lawyer-client relationship' (ECtHR, *Campbell v. United Kingdom*, cited in footnote 35, § 52 *in fine*).

[120] – See in this regard my comments on the first plea in law in points 64 to 71 of this Opinion.

day business. Furthermore, ECLA disregards the fact that enrolled in-house lawyers are usually far more economically dependent on and identify personally much more strongly with their employer than a self-employed lawyer typically does in relation to his client. In the light of those fundamental differences, there are objective grounds for making a generalisation and drawing a distinction between enrolled in-house lawyers and external lawyers in relation to legal professional privilege.

154. The claim relating to infringement of the right to unimpeded advice, defence and representation is therefore unfounded.

(iii) Further fundamental rights

155. Certain parties to the proceedings, in particular Ireland and ECLA, claim that other fundamental rights have also been infringed, namely the fundamental right to property and the freedom to choose an occupation. [121] Ireland and ECLA submit that the freedom to choose an occupation is affected because the lack of legal professional privilege for internal company or group communications makes it difficult for an enrolled in-house lawyer to pursue his profession and puts him at a disadvantage in relation to self-employed lawyers. ECLA takes the view that the fundamental right to property is affected because the refusal to grant legal professional privilege to internal communications with enrolled in-house lawyers forces undertakings to seek external legal advice in certain circumstances and thus to incur considerable additional expenditure.

– Admissibility of the claims

156. In so far as Ireland, as intervener, submits that the freedom to choose an occupation has been infringed, that claim is inadmissible from the outset. It is settled case-law that an intervener is not prohibited from using arguments different from those used by the party it is supporting, provided that he thereby seeks to support the forms of order sought by that party. [122] It may not, however, raise submissions different from those of the party which it is supporting. [123] Since Akzo and Akcros, as appellants, have not made any claim as to infringement of the right to property and the right to choose an occupation, Ireland, as intervener,

[121] – Ireland relies in this regard on Article 15 of the Charter of Fundamental Rights, ECLA on Article 1 of the First Additional Protocol to the ECHR.

[122] – Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, at p. 18; Case C-185/00 *Commission* v *Finland* [2003] ECR I-14189, paragraph 91; and Case C-113/07 P Selex *Sistemi Integrati* v *Commission and Eurocontrol* [2009] ECR I-00000, paragraph 54.

[123] – Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraphs 23 and 24; and Case T-114/02 *Babyliss* v *Commission* [2003] ECR II-1279, paragraph 417; see also, to much the same effect, Case C-301/06 *Ireland* v *Parliament* [2009] ECR I-00000, paragraph 34 in conjunction with paragraph 57, in which the Court did not consider the submission in respect of fundamental rights put forward by the Slovak Republic in its capacity as intervener.

is precluded from claiming infringement of those fundamental rights in these appeal proceedings.

157. It is true that ECLA, as an intervener in the proceedings at first instance, and unlike Ireland, has the status of 'another party to the proceedings' in the appeal, and, as a result, is no longer subject to the specific restrictions applicable to interveners (Articles 115 and 116(1) of the Rules of Procedure). However, ECLA too must not, in its response, go beyond the subject-matter of the proceedings at first instance (Article 116(2) of the Rules of Procedure). As the infringement of the right to property and the right to choose an occupation alleged by ECLA was not introduced into the subject-matter of the proceedings at first instance either by Azko and Akros or by ECLA itself, the raising of these claims now, on appeal, is inadmissible. [124]

– Merits of the claims

158. The claims raised by Ireland and ECLA are unfounded in substance also.

159. With regard first of all to the *freedom to choose an occupation*, it cannot be assumed that the fact that legal professional privilege does not afford protection to internal company or group communications makes it excessively difficult or indeed impossible for enrolled in-house lawyers to pursue their occupation. First, as many parties to these appeal proceedings have submitted, the importance of internal company legal advice in the European Union has grown steadily in recent years, even though, in most Member States, in-house lawyers cannot rely on legal professional privilege. Secondly, the principal field of activity for in-house lawyers – including those who are members of a Bar or Law Society – is not advising and representing their employer in judicial and quasi-judicial proceedings but giving general legal advice without specific reference to the exercise of the rights of defence.

160. With regard next to the *right to property*, it is not clear how the law governing legal professional privilege at European Union level can have the effect of infringing that fundamental right. The refusal to grant legal professional privilege to internal company or group communications with enrolled in-house lawyers does not lead to the restriction or removal of proprietary rights by the organs of the European Union. If an undertaking decides to spend money on external legal advice, it does so of its own motion. It is true that the framework of legislation on legal professional privilege may have some bearing on that decision. However, the connection with the undertaking's proprietary interests is far too indirect and remote for it to be possible to speak of an interference with that fundamental right.

[124] – Settled case-law; see, more recently, Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-00000, paragraphs 59 and 60; Case C-97/08 P *Akzo Nobel and Others* v *Commission*, cited in footnote 26, paragraph 38; and Case C-554/08 P *Carbone-Lorraine* v *Commission* [2009] ECR I-00000, paragraph 32.

161. The claims relating to fundamental rights raised by Ireland and ECLA must therefore be dismissed as inadmissible *per se* and, in any event, as unfounded.

(c) Interim conclusion

162. Since, then, the second plea in law is also unfounded, the third plea in law, raised very much in the alternative, must be considered.

3. The principles of conferral and national procedural autonomy (third plea in law)

163. By their third plea in law, Akzo and Akros, supported by a number of interveners at first and second instance, argue that the Member States alone are competent to determine the precise scope of legal professional privilege. In this regard, they rely in particular on the national procedural autonomy of the Member States. They also rely on the competence of the Member States to lay down the rules governing the profession of lawyer as well as on the principle of conferral.

(a) The principle of the procedural autonomy of the Member States and the alleged *renvoi* of EU law to national law

164. It is submitted first of all that legal professional privilege falls within the scope of the rights of defence and is therefore part of procedural law. In the absence of any rules in this regard under EU law, it is left to the Member States, by virtue of their procedural autonomy, to determine the scope of legal professional privilege. To the same effect, other parties to the proceedings, in particular ECLA and CCBE, maintain that, with respect to legal professional privilege, EU law contains a *renvoi* to the national law governing the profession of lawyer. EU law does lay down the requirement that lawyers should be independent. However, it is left to the provisions of national law to define which lawyers in the Member State concerned are to be regarded as independent lawyers for the purposes of legal professional privilege.

165. That submission is not convincing.

166. Neither Article 14(1) to (3) of Regulation No 17 nor the general principle of the protection of legal professional privilege contains any form of *renvoi* to national law. It is true that, in *AM & S*, the Court refers to the legal systems of the Member States. It does so, however, with the declared aim of developing uniform standards across the European Union for the protection of legal professional privilege, despite all the differences between the national provisions on this matter. [125]

[125] – *AM & S* (cited in footnote 32, in particular paragraphs 18 to 22, especially paragraph 21); to the same effect, see also the Opinion of Advocate General Warner in that case (pp. 1630 and 1631) See in addition the settled case-law on the autonomous interpretation of Community- or Union-law concepts, for example Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-195/06

167. Indeed, the interpretation and application of legal professional privilege in a uniform manner across the European Union is essential for the purposes of investigations conducted by the Commission in antitrust proceedings.

168. The uniform application of EU law would be adversely affected if decisions on the lawfulness of acts adopted by the organs of the Union were made by reference to provisions or principles of national law; the lawfulness of such acts – in this case, the lawfulness of search measures carried out by the Commission as European competition authority – can be judged only in the light of EU law. [126] The introduction of special criteria stemming from the legislation or constitutional law of a particular Member State would damage the substantive unity and efficacy of EU law as well as of the internal market. [127]

169. Differences in the substance and scope of legal professional privilege depending on the Member State in which the Commission conducts an investigation would ultimately lead to a legal patchwork which would not be compatible with the principle of the internal market. The very purpose of making the Commission the supranational competition authority was to subject all undertakings in the European Union to uniform rules in the field of competition law and to create equal conditions of competition (a 'level playing field') for them in the internal market.

170. The fact that legal professional privilege under EU law is in the nature of a fundamental right also supports the proposition that its scope of application should be interpreted in a uniform manner. The fundamental rights applicable within the ambit of EU law must be substantively the same for all citizens of the European Union and for all undertakings affected by EU law. In antitrust proceedings, all undertakings in regard to which the Commission conducts an investigation must enjoy the same protection in relation to their fundamental rights under EU law irrespective of the place in which a search is carried out.

171. Contrary to the view of the CCBE, the determination of the substance and scope of legal professional privilege in proceedings under competition law cannot be left to the Member States in accordance with the principle of subsidiarity. For, on the one hand, the law governing antitrust proceedings (Regulation No 17 or Regulation No 1/2003) forms part of the competition rules necessary for the functioning of the internal market, the determination of which falls within the exclusive competence of the European Union (Article 3(1)(b) TFEU); the principle of subsidiarity is therefore not applicable in this field (Article 5(3) TEU).

Österreichischer Rundfunk [2007] ECR I-8817, paragraph 24; and Case C-66/08 *Kozlowski* [2008] ECR I-6041, paragraph 42.

[126] – *Internationale Handelsgesellschaft* (cited in footnote 72, paragraph 3) and *Hauer* (cited in footnote 73, paragraph 14).

[127] – *Hauer* (cited in footnote 73, paragraph 14).

On the other hand, exercise of the rights conferred on an individual by the Treaty – in this case, reliance on legal professional privilege – must not be dependent on considerations of subsidiarity. [128]

172. National law is applicable in the context of investigations conducted by the Commission as European competition authority only in so far as the authorities of the Member States lend their assistance, in particular with a view to overcoming opposition by the undertakings concerned through the use of direct coercion (Article 14(6) of Regulation No 17 or Article 20(6) of Regulation No 1/2003). However, the question of which documents and business records the Commission may examine and copy as part of its searches under antitrust legislation is determined exclusively in accordance with EU law.

173. All things considered, the argument advanced by the appellants and the parties to the proceedings intervening in their support to the effect that the substance and scope of legal professional privilege are dictated by national law must therefore be dismissed.

(b) The principle of conferral

174. The appellants and some of the parties intervening in their support, in particular ECLA, rely incidentally on the principle of conferral. They submit that the European Union does not have competence to determine which lawyers are to benefit from legal professional privilege in respect of communications with their clients.

175. Under the principle of conferral, the European Union is to act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein (first sentence of Article 5(2) in conjunction with the first sentence of Article 5(1) TEU, formerly Article 5(1) EC). [129] All competences not conferred upon the European Union in the Treaties remain with the Member States (Article 4(1) and the second sentence of Article 5(2) TEU).

176. There is no foundation for the assertion that the European Union does not have competence to determine the scope of legal professional privilege in relation to investigations conducted by the Commission in antitrust proceedings.

177. Article 14 of Regulation No 17, which lays down the Commission's powers of investigation in antitrust proceedings, is based on Article 87 of the EEC Treaty

[128] – See to this effect, in relation to the exercise of the fundamental freedoms of the internal market, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 81.

[129] – See also Opinion 2/94 ('ECHR accession') [1996] ECR I-1759, paragraphs 23 and 24; and Case C-403/05 *Parliament* v *Commission* [2007] ECR I-9045, paragraph 49.

(now Article 103 TFEU). [130] Indeed, as Article 3(1)(b) TFEU now makes clear, the competence of the European Union is exclusive in nature.

178. Legal professional privilege, which sets limits on the Commission's powers of investigation, [131] is itself based, as I have already said, on a general legal principle of EU law which is in the nature of a fundamental right. [132] The determination of its substance and its scope is one of the essential tasks of the Court of Justice of the European Union, which has jurisdiction to ensure that in the interpretation and application of the Treaties the law is observed (second sentence of Article 19(1) TEU).

179. The line of argument put forward by the appellants and a number of the parties supporting them to the effect that the European Union lacks competence must therefore be rejected.

180. ECLA, together with a number of other parties to the proceedings, submits incidentally that it would be an encroachment upon the competence of each Member State to regulate the profession of lawyer if EU law were not guided by the relevant national rules on the protection afforded by legal professional privilege to communications with in-house lawyers.

181. That objection does not hold water either. It is certainly indisputable that, as EU law currently stands, Member States are competent to regulate the exercise of the profession of lawyer. [133] In exercising that competence, however, they must, here as in other areas of law, [134] take into account the relevant provisions of EU law and respect the competences of the European Union. [135]

182. As I said earlier, it falls within the – exclusive – competence of the European Union to lay down the competition rules necessary for the functioning of the internal market and the substance and limits of the powers of investigation

[130] – Articles 20 and 21 of Regulation No 1/2003, which will apply to future cases, also have a basis in the Treaties, that is to say Article 83 EC (now Article 103 TFEU).

[131] – *AM & S* (cited in footnote 32, in particular paragraphs 18 and 22).

[132] – See point 47 of this Opinion, above.

[133] – Case 107/83 *Klopp* [1984] ECR 2971, paragraph 17; and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 99.

[134] – See *inter alia* Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21, concerning direct taxation; Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 24, concerning the organisation of education systems and the content of teaching; and Case C-169/07 *Hartlauer* [2009] ECR I-00000, paragraph 29, concerning the organisation of social security systems.

[135] – See to that effect *Klopp* (cited in footnote 133, paragraphs 17 and 18); see also the Opinion of Advocate General Poiares Maduro in Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, point 82.

available to the Commission as European competition authority. The latter measures are not specifically in the nature of rules governing the exercise of a profession, either by virtue of their subject-matter or by virtue of the objectives they pursue. They may at most have indirect effects on the activities of the undertakings concerned as well as on those of the lawyers instructed by them. However, such effects are only general and have an impact in the same way as numerous other rules applied by the European Union and the Member States in a wide variety of legal fields – tax law, criminal law, balance sheet law and public procurement law spring immediately to mind – may periodically affect the day-to-day business of undertakings and lawyers. This cannot be regarded as an encroachment upon the competence of each Member State to regulate the exercise of the profession of lawyer.

183. In short, the submissions advanced by a number of parties to the proceedings with respect to the division of competences are therefore unfounded.

(c) Further arguments

184. Finally, I shall turn to a further two arguments which have been raised against the judgment under appeal.

185. First of all, ECLA argues that EU law must not ‘withdraw’ or ‘erode’ the protection afforded by legal professional privilege to communications with in-house lawyers under national law.

186. It should be noted in this regard that national law may grant such protection only within its corresponding scope of application, that is to say, in particular, in relation to investigations conducted by national competition authorities in antitrust proceedings initiated by them. In the context of such national proceedings and search measures, any protection afforded by legal professional privilege is neither ‘withdrawn’ nor ‘eroded’ by EU law; on the contrary, it continues to apply without restriction. The case-law in *AM & S* applies only to competition proceedings and investigations conducted by the Commission; it does not affect the law governing national proceedings.

187. Generally speaking, it is inherent in multi-level structures such as the European Union that rules which are substantively different may exist at local, regional, national and supranational level, although their spheres of application will differ. As I have already said, harmonisation of the legal position at European Union level and at national level must remain a matter for the European Union legislature alone. [136]

[136] – See in this regard points 133 and 134 of this Opinion, above.

188. Secondly, ACCA submits that EU law must extend the protection afforded by legal professional privilege even to communications with in-house lawyers who are members of a Bar or Law Society in a third country.

189. That claim must be rejected. Even if – contrary to the solution which I have proposed – legal professional privilege were to be extended to internal company or group communications with in-house lawyers who are members of a Bar or Law Society within the European Economic Area, the inclusion, in addition, of lawyers from third countries would not under any circumstances be justified.

190. For, unlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as collaborators in the administration of justice. It cannot be the task of the Commission or the Courts of the European Union to verify, at considerable expense, that this is the case on each occasion by reference to the rules and practices in force in the third country concerned, particularly since there is no guarantee that there will be an efficient system of administrative cooperation with the authorities of the third country on every occasion.

(d) Interim conclusion

191. The third plea in law is therefore also unfounded.

4. Summary

192. Since none of the pleas in law raised by Akzo and Akros is well founded and none of the arguments advanced by the interveners can be upheld, the appeal must be dismissed in its entirety.

193. If, however, the Court were to come to the conclusion that internal company or group communications with enrolled in-house lawyers are covered by legal professional privilege, it would have to set aside the judgment under appeal and then refer the case back to the General Court for further clarification of the facts (Article 61 of the Statute of the Court of Justice). It would then be necessary to establish whether, on the basis of their content and context, the two emails at issue served the exercise of the rights of defence.

V – Costs

194. If, as I propose in this case, the appeal is dismissed, the Court will make a decision as to costs (first paragraph of Article 122 of the Rules of Procedure) the

details of which are set out in Article 69 in conjunction with Article 118 of the Rules of Procedure.

195. It follows from the first subparagraph of Article 69(2) in conjunction with Article 118 of the Rules of Procedure that the unsuccessful party is to be ordered to pay the costs if they have been applied for. The second subparagraph of Article 69(2) of the Rules of Procedure provides that, where there are several unsuccessful parties, the Court is to decide how the costs are to be shared. As the Commission has applied for costs and the appellants have been unsuccessful in their submissions, the latter must be ordered to bear the costs; they must pay these costs jointly and severally since they brought the appeal jointly. [137]

196. Ireland, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, on the other hand, must each bear their own costs, in accordance with the first subparagraph of Article 69(4) of the Rules of Procedure.

197. Other parties to the proceedings who support an appeal by making submissions to the Court may also be ordered to bear their own costs, by analogous application of the third subparagraph of Article 69(4) of the Rules of Procedure. [138] As CCBE, ARNOVA, ECLA, ACCA and IBA have made submissions in support of the appeal brought by Akzo and Akros and those submissions have been unsuccessful, it seems appropriate – in derogation from what was said in point 195 – that they should each be ordered to pay their own costs.

VI – Conclusion

198. In the light of the foregoing considerations, I propose that the Court should rule as follows:

(1) The appeal is dismissed.

(2) Ireland, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland shall each bear their own costs.

(3) The Conseil des barreaux européens, the Algemene Raad van de Nederlandse Orde van Advocaten, the European Company Lawyers Association, the American Corporate Counsel Association (European

[137] – See to the same effect Joined Cases C-122/99 P and C-125/99 P *D and Sweden* v *Council* [2001] ECR I-4319, paragraph 65; in that case, D and the Kingdom of Sweden had in fact brought two separate appeals but were none the less ordered to pay the costs jointly and severally.

[138] – See to that effect, for example, Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 56; Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P *International Power and Others* v *NALOO* [2003] ECR I-11421, paragraph 187; and Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware* v *Council* [2009] ECR I-00000, paragraph 118.

Chapter) and the International Bar Association shall each bear their own costs.

(4) The remainder of the costs of the proceedings shall be borne jointly and severally by Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd.

Association of Corporate Counsel

Changes to loss contingency disclosure regime under FASB's exposure draft

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On July 20, 2010, the Financial Accounting Standards Board ("FASB") released the long-anticipated exposure draft for its Proposed Accounting Standards Update addressing disclosure of loss contingencies (the "2010 Proposal").1 This proposal, which would amend Accounting Standard Codification ("ASC") Topic 450 if adopted, would increase the amount of information regarding potential loss contingencies presented in the footnotes to financial statements. These changes would affect several areas of disclosure, most notably litigation, beginning in fiscal years ending after December 15, 2010, for public companies and the following fiscal year for nonpublic entities. The deadline for comments on the exposure draft, which was originally August 20, 2010, has been extended by FASB to September 20, 2010. The 2010 Proposal, while a significant retreat from the original proposal published in 2008, remains a source of concern for many companies and their advisors, especially those subject to significant litigation. Thus far, the 2010 Proposal has not been met with significant commentary by the American Bar Association (the "ABA") and other professional organizations, but a response from the ABA is anticipated. While many of the 2010 Proposal's requirements would also impact nonpublic entities, this summary focuses on disclosure obligations for public companies.

Background

The Current Standard

The current ASC 450 is the successor to Statement of Financial Accounting Standards No. 5, Accounting for Contingencies ("FAS 5").2 ASC 450 mandates disclosure of contingencies (such as litigation contingencies) in companies'

footnotes to financial statements issued in connection with periodic reports and registration statements (such as Forms 10-Q and 10-K as well as Forms S-1, S-3, and S-4). The purpose of this standard is to provide meaningful disclosure of litigation that is pending, threatened, or, in certain circumstances, unasserted. The disclosure requirement is not limited to litigation for which the company has accrued a liability, and it extends to litigation for which a loss is "reasonably possible," as described below.

ASC 450-20, which is the subtopic governing loss contingencies, splits such contingencies into three classes: "probable," "reasonably possible," and "remote." Probable contingencies are those that are likely to result in an asset impairment or liability, and they are required to be accrued when the loss can be "reasonably estimated." "Reasonably possible" contingencies are less than probable but more than remote. Contingencies fitting this description are not recognized on a company's financial statements, but the nature of the contingency must be disclosed in the footnotes to the financial statements along with a reasonable estimate of potential loss, if possible, or an explanation as to why the estimate cannot be made. Finally, no disclosure is required for remote contingencies, with remote being defined as only a "slight" chance of occurring. The current standard allows companies to exercise judgment on disclosure matters. Partly because of this flexibility, the current standard has been criticized as providing less than adequate disclosure.

Because ASC 450 is an accounting standard, it is part of the audit response process that involves the reporting company and the litigating counsel who provides responses directly to the company's auditors. Precisely because this process contemplates communications between the company's counsel and a third party (auditors), it raises issues of potential violations of **attorneyclient privilege**. For this reason, the audit response process follows the guidelines issued by the ABA that are tailored to the current ASC 450 standard, specifically, the ABA's Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (the "ABA Statement").3

The 2008 Proposal

The 2010 Proposal is not FASB's first attempt at enhancing contingency loss disclosure. In June 2008, FASB issued its initial exposure draft (the "2008 Proposal") on this topic, with the goal of making disclosure under FAS 5 more robust. The 2008 Proposal contained a number of significant changes to FAS 5 and FAS 141, Business Combinations. One of the concerns expressed in the 2008 Proposal was that the current standard based on disclosure of contingencies that are "reasonably possible" was not compelling adequate disclosure. Therefore, the

2008 Proposal would have required disclosure of a broader range of loss contingencies, including remote contingencies that were expected to be resolved within one year and could result in a "significant financially disruptive effect." Companies would have been obligated to disclose the "amount of the claim or assessment" against them or, in the event there was no claim or assessment amount, their "best estimate of the maximum exposure to loss." Last, and perhaps most controversial, the 2008 Proposal would have required companies to include a number of sensitive assessments in their litigation disclosures, including a "qualitative assessment of the most likely outcome." The 2008 Proposal was met by widespread protests in the corporate, accounting and legal communities. Many parties expressed the view that FASB's new requirements in the 2008 Proposal, if adopted, could result in disclosure of sensitive information, infringe on **attorney-client privilege** and allow plaintiffs to use the information from a company's disclosure against it. FASB attempted to address these concerns by including an exemption for "prejudicial information," but this exemption was so limited that the ABA and other professional organizations published strong statements of opposition. The public outcry delayed ratification of the amendments and eventually led to the release of the 2010 Proposal, a scaled-back version of the 2008 Proposal.

The 2010 Proposal

Purpose

The 2010 Proposal is intended to address issues that are similar to the 2008 Proposal, namely investor concerns that disclosures about loss contingencies under ASC 450-20 "do not provide adequate and timely information" for proper assessment of "the likelihood, timing, and magnitude" of potential losses. The 2010 Proposal is aimed specifically at enabling financial statement users to understand the nature of loss contingencies, their potential magnitude and their potential timing, if known. Unlike the 2008 Proposal, however, the 2010 Proposal focuses on the disclosure of publicly available information rather than on estimates of likelihood of exposure.

Scope of Disclosure

The 2010 Proposal applies to all loss contingencies covered by ASC 450-20, which includes pending and threatened litigation. While this alert's focus is on the impact of litigation disclosure, it is important to note that the disclosure practices imposed by the 2010 Proposal would also apply to several other categories of loss contingencies, many of which the 2008 Proposal did not address. The categories covered in the 2010 Proposal include environmental obligations (ASC 410-30),

guarantees (ASC 460-10), retirement benefits under multiemployer plans (ASC 715-80), and business combinations (ASC 805-20).

Disclosure Threshold

Some of the existing standards under the current ASC 450-20 remain in the 2010 Proposal. Companies must still recognize "probable" loss contingencies and disclose "reasonably possible" (more than remote) contingencies in the notes to their financial statements. Accrual and measurement of contingencies remain the same as under the existing ASC 450-20.

However, the 2010 Proposal adds a new threshold requiring that certain remote loss contingencies must also be disclosed. Disclosure of a remote contingency may be required due to the "nature, potential magnitude, or potential timing (if known) to inform users about the entity's vulnerability to a potential severe impact." The term "severe impact" is defined as a "significant financially disruptive effect on the normal functioning of an entity." It is a higher threshold than a "material" impact, but it includes matters that are less than "catastrophic." "Catastrophic" events are those that would cause bankruptcy.

To help companies make the determination as to whether a remote contingency could cause a "severe impact," the 2010 Proposal provides several criteria to consider. While an individual company will have to "exercise judgment in assessing its specific facts and circumstances," each should consider a remote contingency's potential impact on operations, the cost of defending its contentions, and the effort and resources that management will be forced to expend in resolving the contingency. With regard to litigation, the amount of damages claimed would not be the sole determining factor for disclosure, although it should certainly be included in the analysis. However, companies should not consider potential recoveries from other sources, such as insurance and indemnification arrangements, in assessing whether disclosure is required.

Qualitative Disclosure Requirements

In addition to expanding the threshold for disclosure, the 2010 Proposal would increase the amount of information disclosed in connection with loss contingencies. The 2010 Proposal promotes enhanced disclosure as contingencies become less uncertain and more facts become available. To that end, disclosures should be "more extensive as additional information about a potential unfavorable outcome becomes available."

As to the contents of a company's disclosures, the 2010 Proposal dictates inclusion

of the following information for contingencies that meet the previously described disclosure thresholds:

- Information that enables users to ÆÆunderstand the loss contingency's "nature and risks"
- "For individually material conÆÆtingencies, sufficiently detailed information to enable financial statement users to obtain additional information from publicly available sources such as court records"
- For aggregated disclosure, the ÆÆbasis for aggregation and "information that would enable financial statement users to understand the nature, potential magnitude, and potential timing (if known) of loss."

FASB provides additional guidelines for disclosure of litigation contingencies. Such disclosures should include:

- the name of the court or agency in which proceedings are pending;
- the date proceedings were instituted;
- the principal parties;
- the factual basis for the claim;
- the basis for the defense or a statement that the company has not yet formulated its defense;
- the current status of a litigation ÆÆcontingency; and
- for litigation that has advanced ÆÆbeyond the early stages, more extensive disclosure regarding potential unfavorable outcomes (such as increases/decreases in the magnitude or likelihood of loss) as information becomes available and, if known, the anticipated timing of, or next steps toward, resolution.

Note that many of the foregoing items are already required to be disclosed by public companies pursuant to Item 103 of the Securities and Exchange Commission's (SEC) Regulation S-K.

Quantitative Disclosure Requirements

Perhaps the most significant expansion of disclosure requirements under the 2010 Proposal would be the quantitative estimates of losses. The 2010 Proposal does not require companies to estimate a maximum amount of loss, as would have been required under the 2008 Proposal. However, the 2010 Proposal requires disclosure of amounts claimed by plaintiffs or indicated in expert witness testimony. It is unclear what type of disclosure is contemplated in the 2010 Proposal if there are multiple expert witnesses or the amounts claimed differ from various expert opinions. Similar to the current standard, the 2010 Proposal mandates disclosure of

an estimated range of loss or an explanation as to why such an estimate cannot be made. The 2010 Proposal also allows companies to aggregate their disclosure of similar contingencies as long as they also provide the basis for such aggregation.

Each company would be required to disclose the following for any contingency that meets the "reasonably possible" standard:

- Publicly available quantitative information, such as the amount claimed by a plaintiff or the amount of damages indicated by the testimony of an expert witness.
- If it can be estimated, the potential loss or range of loss and the amount accrued, if any.
- If the potential loss cannot be estimated, the reason why.
- Any other relevant non-**privileged** information that "would be relevant to financial statement users to enable them to understand the potential magnitude of the possible loss."
- Information about possible recoveries from insurance and other sources only if "it has been provided to the plaintiff(s) in a litigation contingency, it is discoverable by either the plaintiff or a regulatory agency, or it relates to a recognized receivable for such recoveries."
- In making a disclosure regarding insurance recoveries, a company must also disclose any denial, contestation or reservation of rights by an insurer over those recoveries. Furthermore, the company may not offset its potential recovery amounts against its loss contingencies.

For remote contingencies that meet the previously outlined disclosure threshold, a company must provide the same publicly available quantitative information, relevant non-**privileged** information, and information regarding potential recoveries as for "probable" and "reasonably possible" contingencies, but it is not obligated to disclose estimates of losses.

No Exemption for Prejudicial Disclosures

Unlike the 2008 Proposal, the 2010 Proposal does not include an exemption for disclosure if such disclosure would be prejudicial to the detriment of the disclosing company. FASB's rationale for the omission of the exemption is its belief that the 2010 Proposal does not require the disclosure of prejudicial information (e.g., predictions regarding likelihood of loss). FASB also believes that aggregation of disclosure by class of litigation further eliminates concerns about violations of **attorney-client privilege**. However, the 2010 Proposal did not eliminate all concerns about **attorney-client privilege** and still remains problematic, as discussed further below.

Tabular Presentation

In addition to new qualitative and quantitative disclosures, the 2010 Proposal also would require public companies to present a table showing reconciliations of recognized loss contingencies by class. Such a table would present:

- carrying amounts of accruals at the beginning and end of the relevant period;
- the amount accrued during the period for newly recognized loss contingencies;
- increases for changes in estimates for previously recognized contingencies;
- decreases for changes in estimates for previously recognized contingencies; and
- decreases for cash payments or other settlements during the relevant period.

A reconciliation would need to be shown for each separate type of contingency. Furthermore, public companies would be obligated to describe "significant activity in the reconciliations" and disclose the line items in the statement of financial position and the statement of financial performance in which recognized (accrued) loss contingencies are included. Loss contingencies that occurred and were resolved in the same period would be excluded from the table unless they were incurred in connection with a business combination.

Effective Date

For public companies, the 2010 Proposal amendments would take effect for fiscal years ending after December 15, 2010, and interim periods in the subsequent fiscal years. Nonpublic companies would not be required to adopt the amendments until the first annual period beginning after December 15, 2010, and for the interim periods occurring after that initial annual period.

FASB would not require comparative disclosures for any period occurring before initial adoption, but early adoption would be permitted.

Anticipated Issues

Although the 2010 Proposal eliminated several provisions of the 2008 Proposal that presented the most significant issues, it still raises a number of concerns, including the following:

- The enhanced disclosure requireÆÆments under the 2010 Proposal may result in the unintended waiver of the **attorney-client privilege** as auditors seek more litigation-specific language from litigation counsel. It is unclear whether, as a result of expanded disclosure requirements, the ABA Statement will remain unchanged or whether additional guidance will be issued to assist litigating

counsel in responding to auditors' requests.

- The requirement to disclose claimed amounts may be misleading because often these amounts are inflated.
- In addition, it is unclear how not taking into account insurance or indemnification recoveries could be helpful in assessing the potential impact of remote contingencies.
- The examples of disclosure offered in the 2010 Proposal, which provide model disclosures detailing the claims, defenses, and other non-**privileged**, discoverable details of two opposing parties, raise a number of issues regarding the density and ultimate usefulness of the resulting litigation disclosure, compared to the burden of reviewing discoverable material for identification of such details as well as performing analyses of whether any such matters are in fact non-**privileged** and discoverable. Most corporate litigation matters in the United States are complex and entail numerous claims and defenses, and the disclosure of all allegations, defenses, and claims could be prohibitively expensive, lengthy, and possibly meaningless to the investors yet extremely useful to the adversaries.
- The requirement to disclose "remote" contingencies with potentially severe impact necessitates speculation, which may result in meaningless or misleading disclosure.

Further, the aggregation method described in the 2010 Proposal does not allow for aggregated disclosure for loss contingencies that are not sufficiently similar in "nature, terms, and characteristics." Even where various cases address a similar issue, the 2010 Proposal states that matters with "significantly different timings of expected future cash outflows" or "litigations in jurisdictions that have different legal characteristics that could affect the potential timing or the potential magnitude of the loss" should not be disclosed on an aggregated basis. These guidelines could result in disclosures that are impractically lengthy for users of financial statements and maddeningly time-consuming for companies to prepare. In addition, limiting the extent to which similar loss contingencies can be aggregated increases the likelihood that a company may have to disclose prejudicial information that is traceable to a specific matter.

- Notably, the disclosures of contingencies are subject to antifraud liability, and requirements to disclose information that is potentially misleading or speculative (such as aggregation of litigation, disclosure of remote contingencies with potential severe impact, omission of potential insurance or indemnification recoveries, or recitation of expert testimony on damages) may put companies at risk for securities litigation by investors for material misstatements or omissions in documents submitted to the SEC.
- The 2010 Proposal would require quantitative disclosure of numerous items,

including claimed amounts, numbers of pending cases, accrued amounts and amounts of damages offered by expert witnesses, among others, all of which would have to be presented in Interactive Data Format (i.e., XBRL). These requirements could make the preparation of public filings of financial statements an excessively complicated and lengthy affair, requiring significantly more preparation and resources than the current process.

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GENERAL COMMON INTEREST AGREEMENT

This Common Interest Agreement (the "Agreement") is made by and between the undersigned Parties and counsel ("Counsel") on behalf of themselves and their respective clients (each a "Party" and collectively the "Parties").

1. **The Parties and the Matter**. The Parties hereto are ABC, Inc., DEF, Inc. and GHI, Inc. The Parties have consistent and overlapping interests with regard to _____ (the "Matter"). The undersigned Counsel represent their respective clients in matters involving the Matter.

2. **Common Interests**. In connection with the Matter and any subsequent or related matter, the Parties and their Counsel have concluded there is a mutuality of interest in a legal analysis of this matter. This mutuality of interest includes at least the following: _____. The Parties and Counsel wish to continue to pursue separate but common interests and avoid any claim or suggestion of waiver of the privileges enjoyed by the Parties. The Parties therefore acknowledge and agree that their interests will be best served if Counsel can exchange information subject to the continued protection of the attorney/client privilege, and other privileges or immunities that may apply under relevant law.

3. **Sharing of Common Interest Materials**. The Parties and their Counsel agree to cooperate with one another reasonably in the legal analysis of the Parties' common interests, as permitted by law pursuant to the joint defense or common interest doctrine. While each Party retains the right to determine which information in its possession it shall disclose to the other Party, the Parties and their Counsel contemplate that, to further their common interests and in order that the Parties may exchange privileged information, any and all of the following, whether disclosed orally or in documents, shall be covered by this Agreement: (a) factual analysis; (b) mental impressions; (c) legal memoranda; (d) witness interviews and statements; (e) summaries; (f) transcripts; (g) reports and expert opinion; and (h) any other information which would otherwise be protected from disclosure to third parties under any theories ("Common Interest

Materials"). This list is not intended to be all inclusive; it represents examples of mutual efforts. Additional items of mutual interest may be generated. The Parties would not disclose such common interest materials but for their mutual and common interests.

4. **Preservation of Privileges**. The Parties and their Counsel agree that the disclosure of the Common Interest Materials is not intended to waive any applicable privilege or protection. The Parties and their Counsel agree that the Common Interest Materials will be protected from disclosure by the attorney/client privilege, or other privileges or immunities that may apply under relevant law.

5. **No Disclosure to Third Parties**. No information obtained as a result of this Agreement by a Party or its Counsel shall be disclosed to any third party (except representatives (as defined below) of the Party and other attorneys within the same law firm as the Party's Counsel) without the express consent of the Party who first made the information available under this Agreement. Each Party agrees that Common Interest Materials received pursuant to this Agreement shall not be provided to any person not involved in making decisions regarding the matter or regarding any subsequent or related proceeding.

6. **Limited Use of Common Interest Materials**. The Common Interest Materials and information derived therefrom shall be used by the recipient Party solely for purposes of evaluating and assisting in the legal analysis of this issue or of any subsequent or related proceeding arising out of the same set of facts. Nothing in this Agreement restricts in anyway the use by a Party of information or statements obtained other than pursuant to this Agreement. Any documents shared by any Counsel or any Party in connection with the common interest effort shall be returned upon request to the Counsel providing them and no copy shall be retained.

7. **Notice of Discovery Demands**. In the event the Party receives a request, including a subpoena, for the production of documents, which may include Common Interest Materials that the Party received pursuant to this Agreement, the recipient Party shall promptly notify the Party who provided the Common Interest Material called for by the request and shall give such Party

copies of any writings or documents, including subpoenas, summons and the like, which relate to the attempt by the third party to obtain the information. Each Party to this Agreement shall use reasonable efforts to litigate any challenge to the assertion of the attorney/client privilege, or other privileges that exist or may exist as a result of this Agreement or the Parties' respective individual privileges.

8. **No Waivers**. This Agreement shall not create any agency or similar relationship among the Parties. No Party shall have authority to waive any applicable privilege or doctrine on behalf of any other Party; nor shall any waiver of an applicable privilege or doctrine by the conduct of any Party be construed to apply to any other Party. No Party will enter into a settlement with a third party that would require or result in the disclosure of Common Interest Material provided by the other Party.

9. **Separate Representation**. Nothing in this Agreement shall be construed to affect the separate and independent representation of each Party by its respective Counsel.

10. **Withdrawal**. Any Party to this Agreement may withdraw upon prior written notice to the other Parties, in which this Agreement prospectively shall no longer apply to the withdrawing party; however, this Agreement shall continue to protect all Common Interest Materials disclosed by or to the withdrawing Party prior to that Party's withdrawal. Each Party to this Agreement has an affirmative duty to withdraw when, in good faith, it determines that it no longer has a commonality of interests, and to give prompt written notice of such withdrawal to the other Parties and their Counsel. The withdrawing Party shall continue to be bound by this Agreement with regard to any common interest materials provided, disclosed, received, learned or obtained from the Party prior to withdrawal.

11. **Possible Conflicts**. Each Counsel has fully advised his client that the client is represented only by its own attorneys in this matter; that while the attorneys representing the other Party have a duty to preserve the confidence as disclosed pursuant to this Agreement, they owe a duty of loyalty only to their own client.

12. **Additional Parties**. Upon agreement of the Parties, additional individuals or entities may be permitted to join the Agreement at future time.

13. **Successor Counsel**. This Agreement shall remain in effect and be binding upon successor Counsel in accordance with its terms and may be terminated by successor Counsel only in accordance with its terms.

14. **Enforcement**. The Parties agree that injunctive relief is the appropriate means to enforce this Agreement and stipulate that a violation of the Agreement would constitute irreparable harm.

15. **Effective Date**. This Agreement may be executed in counterparts, each of which shall constitute an integrated and enforceable whole. This Agreement memorializes and supersedes the prior oral understanding among Counsel regarding defense materials and applies to all communications and other exchanges of information (whether written or oral) among Counsel related to this action and any subsequent or related proceeding prior to and subsequent to the execution of this Agreement.

16. **Modifications**. This Agreement cannot be modified except in writing signed by all Counsel.

17. **Authority**. This Agreement is signed by Counsel for the respective Parties, who represent that they are attorneys in fact with authority to bind their respective clients to the terms of this Agreement.

ACCEPTED AND AGREED:

FIRM NAME LLP _____ ATTORNEY Counsel for _____ ADDRESS CITY, STATE ZIP Phone: _____ Date Signed: _____	FIRM NAME LLP _____ ATTORNEY Counsel for _____ ADDRESS CITY, STATE ZIP Phone: _____ Date Signed: _____
FIRM NAME LLP	FIRM NAME LLP

_____ ATTORNEY Counsel for _____ ADDRESS CITY, STATE ZIP Phone: _____ Date Signed: _____	_____ ATTORNEY Counsel for _____ ADDRESS CITY, STATE ZIP Phone: _____ Date Signed: _____

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SUMMARY:
... Internal corporate investigations have become an established response to allegations of improprieties on the part of the corporation, its officers, or its employees. ... In this context, a corporation must confront two issues: (1) whether the attorney-client privilege has been waived and (2) if waiver has occurred, whether disclosure of part of a privileged communication results in a waiver not only as to matters actually disclosed, but also to all other communications regarding the same subject matter. ... In In re Sealed Case, the District of Columbia Circuit Court of Appeals held that selective disclosure of the results of an internal corporate investigation to the SEC constituted a waiver of the attorney-client privilege with respect to the documents withheld. ... In addition to the attorney-client privilege and to a limited extent, the self-evaluation privilege, the work product doctrine also protects the confidentiality of materials related to an internal corporate investigation. ... In order to take full advantage of the protections of the attorney-client privilege and the work product doctrine, counsel conducting an internal corporate investigation must be aware of their respective underlying rationales. ... Corporate counsel must recognize the importance of confidentiality and the parameters of both the attorney-client privilege and work product doctrine from the outset of an internal investigation. ...

TEXT:
[*49]

I. Introduction

Internal corporate investigations have become an established response to allegations of improprieties on the part of the corporation, its officers, or its employees. A corporation may initiate an internal investigation in response to an ongoing government investigation or agency subpoena, pursuant to a consent decree with the Securities and Exchange Commission (SEC), the Internal Revenue Service (IRS), or another government agency. An investigation may also be prompted internally, through either a complaint or grievance from an employee or group of employees. Regardless of whether the investigation begins from inside or outside the organization, the corporation has a significant interest in protecting the confidentiality of counsel's findings and the investigative file. As company managers can appreciate, disclosure of non-public corporate information can lead to unforeseen and undesirable third-party actions, criminal prosecutions, or civil enforcement actions by government agencies against the corporation. Thus, the results of an

investigation conducted as part of a good faith effort to respond to, investigate, and resolve an internal company problem could provide a road map for an adversary to establish civil or criminal liability of the corporation, its officers, or its directors. In today's complex business and regulatory environment, such an occurrence is one that every CEO can appreciate and, most critically, will want to avoid.

[*50] In light of the potential problems that can occur in the context of an internal investigation, corporate counsel - whether drawn from in-house or hired from the outside - should seek to minimize corporate exposure to adverse proceedings. To that end, the corporation and its counsel must be active in structuring the investigation so as to take full advantage of the protections of the attorney-client privilege and the work product doctrine. Maximizing the protections afforded by the attorney-client privilege and work product doctrine, while at the same time minimizing the potential hazards that may arise during an investigation, should be a principal goal of counsel in overseeing any serious internal investigation.

II. Background

An integral part of analyzing an internal corporate investigation is to first establish a clear understanding of the legal protections that are likely to be involved. Part A examines the characteristics of the attorney-client privilege. n2 Part B analyzes the components of the work product doctrine. n3

A. Attorney-Client Privilege

The attorney-client privilege protects confidential communications between an individual and his/her attorney. It has been noted that the attorney-client privilege "interferes with the truth seeking mission of the legal process," and therefore is not "favored." n4 The Supreme Court, however, has expressly recognized that the attorney-client privilege enjoys a special position as "the oldest of the privileges for confidential communications known to the common law," and that the privilege serves a salutary and important purpose, "[to] encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." n5

[*51] Where the client is a corporation, the application of this privilege becomes slightly more complicated. In general, a corporation is entitled to the same protection of confidentiality that individual clients receive under the attorney-client privilege. n6 The difficulty in applying the privilege in the corporate context arises from the inanimate nature of a corporation, which can only "speak" to its attorney through its agents. n7 Yet it is clear that the corporation's lawyer represents not individual agents but the corporation and thus, application of the attorney-client privilege often turns on which corporate officials and employees sufficiently personify the corporate entity as a client. n8

1. Essential Elements of the Attorney-Client Privilege

The essential elements of the privilege are contained in Judge Wyzanski's widely-cited opinion in United States v. United Shoe Machinery Corp. n9 The privilege applies if: (1) the person asserting the privilege is or seeks to become a client; (2) the person to whom the communication was made is an attorney or his subordinate, acting in his capacity as an attorney with respect to the communication; (3) the communication relates to a fact of which the attorney was informed by the client in confidence; (4) the communication relates to the seeking of legal advice or assistance and is not for the purpose of committing a crime or tort; and (5) the privilege has been claimed and not waived. n10

The burden is on the proponent to demonstrate that the attorney-client privilege applies. n11 If that party demonstrates its applicability, then communications between attorney and client, absent waiver, will receive absolute and complete protection from disclosure. n12 However, transferring these requirements into the corporate context poses a significant challenge.

2. Defining Client in the Corporate Context

a. Corporate Employees With Relevant Information

Upjohn Co. v. United States n13 is the starting point for determining who the client is in the corporate context. As explained below, Upjohn is notable for its holding with respect to the applicability of [*52] the attorney-client privilege in connection with an internal corporate investigation.

In Upjohn, independent accountants, conducting an audit for the Upjohn Company, informed the company's in-house general counsel that certain improper payments had been made to foreign government officials to win government business. n14 The general counsel, outside counsel, and the Chairman of the Board decided to conduct an internal investigation of the matter. n15

As part of this investigation, Upjohn's attorneys sent a letter containing a questionnaire to all of its foreign managers. n16 The letter, signed by Upjohn's Chairman, stated that the company's general counsel was conducting an investigation into the matter and that management needed full information concerning any possible illegal payments. n17 The enclosed questionnaire sought detailed information concerning such payments, and the responses were to be sent directly to the general counsel. n18 Recipients of the questionnaire were instructed "to treat the investigation as 'highly confidential' and not to discuss it with any one, other than Upjohn employees, who might be helpful in providing the requested information." n19 Upjohn's attorneys kept the responses confidential. n20 Upjohn's general counsel and outside counsel also interviewed these managers and some thirty-three other Upjohn officers or employees. n21

The company voluntarily submitted a preliminary report to both the SEC and the IRS. n22 The IRS later sought all the files relating to the investigation, including the written questionnaires, and notes and memoranda of counsel-employee interviews. n23 Upjohn objected to the production of these materials on attorney-client privilege and work product grounds. n24

In deciding to apply the privilege to the communications of lower-level managers, the Court rejected the "control group" test, under which only those communications between counsel and upper-echelon (or "control group") management would be privileged. n25 The court [*53] observed that, in the context of rendering legal advice to a corporation concerning actual or potential difficulties, it is natural for counsel to obtain "relevant information" from not only "control group" employees, but "middle-level - and indeed lower-level - employees" as well. n26 Citing the purpose behind the privilege - namely, "full and frank communication between attorneys and their clients" - the Court rejected the "narrow" control group test and held that such a test, "cannot, consistent with the principles of the common law, ... govern the development of the law in this area." n27

Upjohn gives broad protection to the confidential communications of any corporate employee - not just control group members - who, during a legal investigation, supplies relevant information to corporate counsel. n28 In Upjohn, the following factors supported application of the privilege: (1) the interviews occurred at the direction of corporate counsel; (2) employee communications were made to corporate counsel acting as such; (3) the information sought was not available from "control group" management; (4) the communications were within the scope of the employees' duties; and (5) the employees were aware that they were being questioned in order for the corporation to secure legal advice. n29 Although lower federal courts have not required all of the Upjohn factors to be present before finding certain communications privileged, n30 counsel would be well to emulate as many of these Upjohn factors as possible in order to maximize the chances that a court will find investigative files privileged.

Although Upjohn ultimately applied the privilege to communications between counsel and lower-level corporate employees, its holding is not universally followed and the opinion is still the subject of much interpretation, especially in federal diversity cases and state court litigation.

b. Limits

There are some limitations to the Upjohn decision that should be noted. First, the holding in Upjohn is grounded in the

federal common law of attorney-client privilege. n31 In other words, Upjohn will [*54] apply in federal question cases that use federal common law to decide privilege questions. n32 However, Upjohn may not necessarily apply in diversity proceedings where the federal court, in deciding privilege questions, is obligated to use state privilege law, which could vary from state to state. n33

Second, the ruling in Upjohn is not binding upon state courts. In fact, according to one recent survey, only fourteen states (either through judicial decision or legislative enactment) have adopted Upjohn's rule on corporate attorney-client privilege, eight states have adopted the "control group" test, and the remaining states have not definitively decided on a particular approach. n34 Thus, if attorney-client questions in the corporate context are litigated in state court, counsel should consult the relevant state's law on attorney-client privilege to determine the applicable privilege standard.

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c. Former Employees

There is authority for the proposition that former corporate employees who, during the course of an investigation, communicate with corporate counsel about a matter within that former employee's scope of employment, will also enjoy the protections of the attorney-client privilege. n35 In his concurring opinion, Chief Justice Burger stated that a former employee's communications are privileged when the employee "speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment." n36 Many lower federal courts have endorsed this view and found communications between corporate counsel and former employees to be privileged. n37 Although protection for the communications of former employees reflects a majority view in the law, there is contrary authority grounded in state law. n38 Of course, as is the case with any issue, counsel litigating former-employee questions should research the law of the relevant jurisdiction to determine the applicability of the attorney-client privilege to former employees.

3. Communications With An Attorney

The protections of the attorney-client privilege extend to communications with an attorney's agent only if the attorney is using the agent to facilitate the rendering of legal advice and the agent is acting under the direct supervision of the attorney. n39 Communications from agents, not acting pursuant to direction from counsel, will likely not be held as [*56] privileged. n40 Generally, corporate communications with either in-house or outside counsel are treated the same for purposes of the attorney-client privilege. n41

In addition, if a corporation hires a specially-appointed counsel, pursuant to a consent decree with the SEC, to investigate and formulate legal advice, all materials are privileged. n42 However, the privilege will not apply if such counsel is hired mainly to investigate and report to the board of directors, or as one court put it, if special counsel is engaged "not for their legal acumen but for their skill as investigators." n43

These protections are significant in the context of internal corporate investigations because counsel, in order to gather, analyze, and assess the facts and legal implications of an investigation, will frequently require assistance from accountants, investigators, and other attorneys. As the next section bears out, merely being a "lawyer" will not automatically render communications to and from the corporate client as privileged. n44 Rather, counsel and his/her agent must be acting principally as a lawyer. n45 In order to qualify for the privilege, a lawyer must, at a minimum, be involved not only in investigating the facts, but also in formulating and rendering legal advice and opinion. n46 Communications that only incidentally implicate counsel's legal judgment and advice will generally not be shielded under the attorney-client privilege. n47

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4. Communications For the Purpose of Seeking Legal Advice

A corollary to the requirement that communications be made to an attorney or his/her agent is that such communications be made for the purpose of seeking legal advice. n48 The attorney-client privilege does not cover communications that are made for non-legal purposes. n49 For example, if corporate counsel acts as a business and not a legal adviser, the attorney-client privilege does not apply. n50 Moreover, if both a corporation and its counsel prepare a document for review, without a clear legal aim, it may not be privileged. n51 The privilege will not apply if a lawyer is hired solely as an accountant, n52 or when the lawyer acts as a negotiator or business agent. n53 On the other hand, some courts have held that, despite their technical nature, the attorney-client privilege does protect communications between an inventor and his patent attorney. n54

In practice, corporate counsel wears many hats - advising and assisting the corporation with financial, business, technical, or human resource issues. Neither the corporation nor its counsel should have to forfeit the privilege because counsel has additional non-legal responsibilities. Judge Wyzanski made this point clear in an oft-quoted passage:

The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in [*58] the ... public interest that the lawyer should regard himself as more than predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice. n55

However, in the context of an internal investigation, corporate counsel must always keep in mind, regardless of the nature of their work, that their participation in a project must be seen chiefly as a provider of legal advice to the corporation. To the extent this is done and can be proven, corporate counsel will be in a much stronger position for asserting privilege as to communications and other investigative material which, although embodying factual and non-legal information, has as its main purpose the rendering of legal advice. Thus, despite the myriad of case law both upholding and rejecting privilege claims in the investigative context, counsel would be well to maintain and document its relationship with the corporate client during an investigation that is marked by traditional norms of seeking and rendering legal advice. This core principle - namely that investigative material that is the product of an attorney-client relationship should be protected - is embodied in the unanimous Upjohn opinion, as well as other federal court opinions. n56

The courts, cognizant that the attorney-client privilege operates as a truth-sheltering device, will construe the privilege strictly. Assertions of the privilege where proof of legal advice is tenuous or ambiguous are often rejected. For example, in Federal Trade Commission v. TRW, Inc., counsel for a credit reporting company (TRW), in anticipation of a Federal Trade Commission (FTC) investigation, hired an [*59] outside research firm for the ostensible purpose of putting technical information concerning TRW's computerized credit reporting system into a form that lawyers could understand. n57 Although the proposal indicated that the research firm was hired "to advise TRW ... on the status of its procedures under the Fair Credit Reporting Act," the court ultimately rejected TRW's assertion of attorney-client privilege because of an inadequate showing that the privilege requirements were met. n58

5. Self-Evaluative Privilege

Despite judicial reluctance to fashion new privileges, n59 some lower courts have adopted a so-called "self-evaluative" or "self-critical analysis" privilege. n60 First announced in the 1970 case, Bredice v. Doctors Hosp. Inc., n61 the self-evaluation privilege is designed to encourage parties to "engage in candid self-evaluation without fear that such criticism will later be used against them." n62 It is an elusive privilege, and one not broadly recognized by the courts. The self-evaluation privilege has been applied in hospital contexts, n63 employment discrimination cases, n64

government-obligated reports, n65 and in environmental [*60] litigation. n66 Because some courts have invoked its protections, the self-evaluation privilege may serve an important alternative argument in support of non-disclosure of sensitive intra-corporate files.

In general, the party asserting the privilege must demonstrate that the material to be protected satisfies at least three criteria: (1) the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; and (3) the information must be of the type whose flow would be curtailed if discovery were allowed. n67 In addition to these basic requirements, self-evaluative material must have been prepared with the expectation that it would be kept confidential and it must, in fact, have been confidential. n68

6. Waiver of Attorney-Client Privilege

The attorney-client privilege is intended to encourage the client to share, with his/her attorney, information that is otherwise confidential. n69 When this privilege is waived, it is said that communications revealed to third parties lose their confidential nature, n70 or reflect a client's lack of intent to keep matters confidential. n71 In the interests of fairness and in furtherance of the adversarial system of justice, some communications may lose their privilege. n72

Waiver of the attorney-client privilege is an important notion, especially in the context of internal company investigations. In its attempt to investigate and resolve misfeasance, the corporation, with the assistance [*61] of its counsel, may invariably find itself making limited disclosures of internal investigations to the government, a court, the public, or third parties. Good faith disclosures to a government agency could, for example, end up in the hands of opposing counsel in a subsequent civil matter, thus forcing the corporation and its counsel to defend against assertions that the privilege was waived. There are several common ways in which the privilege can be waived:

a. Disclosure to Third Parties

The basic rule is that attorney-client communications that are disclosed to third parties, not for the purpose of assisting the attorney in rendering legal advice, lose their privilege. n73 Privilege-waiving disclosures to third parties can arise in a number of contexts, including disclosure of materials to: a client's underwriter and accountant; n74 a corporation's investment banker; n75 one's adversary in separate litigation, n76 even if under a confidentiality agreement; n77 and a witness in preparation for testimony. n78

It should be noted that if counsel shares privileged information with a third party for the purpose of preparing a joint or common defense, then the privilege generally is not waived. n79 The so-called "joint defense" theory may allow counsel conducting an internal corporate investigation to disclose privileged communications to present and former employees, or other co-defendants and their attorneys, without [*62] sacrificing the confidentiality protections of the attorney-client privilege. n80 As one court explained it, the joint defense privilege is meant to recognize "the advantages of, and even, the necessity for, an exchange or pooling of information between attorneys representing parties sharing such a common interest in litigation, actual or prospective." n81

b. Disclosure to a Government Agency

Waiver issues frequently arise in connection with the disclosure of investigative materials to government agencies such as the SEC, IRS, and the Environmental Protection Agency (EPA). In this context, a corporation must confront two issues: (1) whether the attorney-client privilege has been waived and (2) if waiver has occurred, whether disclosure of part of a privileged communication results in a waiver not only as to matters actually disclosed, but also to all other communications regarding the same subject matter. n82 Currently, there is a significant and widely recognized split among the federal courts as to whether disclosure of sensitive investigative information should result in a limited waiver (of material actually disclosed) or a broad waiver (of potentially every document related to the same subject matter of those materials actually disclosed). n83

i. Limited Waiver Theory

The Eighth Circuit's en banc decision in Diversified Industries v. Meredith, n84 is a leading and widely cited case for the proposition that disclosure of investigative material to a federal agency should only result in a limited waiver of the attorney-client privilege. In Diversified Industries, the court held that compelled disclosure to the SEC of a corporate report describing a "slush fund" amounted to only a limited [*63] waiver of the attorney-client privilege - limited in that the privilege would be deemed waived as to the government, but not as to private third parties. n85 The court refused to order the corporation to produce the report for inspection to private plaintiffs in pending civil litigation on the grounds that a contrary ruling could undermine corporate incentives to initiate counsel-conducted internal investigations. n86 Although its holding has been expressly adopted in some district courts, n87 Diversified's limited waiver theory is the minority view in the federal courts of appeals. n88

At least one court has qualified the limited waiver approach. It suggested that a corporation might preserve the right to assert the privilege in subsequent proceedings if, at the time of disclosure, it took affirmative steps to preserve the privilege. n89

ii. Subject-Matter Waiver

The limited waiver approach, which a minority of courts has adopted, sharply contrasts with the majority rule, which effectively holds that disclosure to the government encompasses broad subject matter waiver as to third parties. Courts in the First, n90 Second, n91 Third, n92 Fourth, n93 and the D.C. Circuit, n94 have adopted broad subject- [*64] matter waiver rules. Each has held, under various formulations, that disclosure of confidential communications to governmental agencies constitutes a general broad-based waiver of the attorney-client privilege, and thus, such material can be made available to unrelated third parties. n95

In In re Sealed Case, the District of Columbia Circuit Court of Appeals held that selective disclosure of the results of an internal corporate investigation to the SEC constituted a waiver of the attorney-client privilege with respect to the documents withheld. n96 In re Sealed Case involved an outside counsel's internal corporate investigation into possible illegal foreign payments and illegal political contributions. n97 Counsel submitted a final report to the SEC, along with notebooks containing the lawyers' notes of interviews and certain corporate records and documents. n98 The corporation did not disclose thirty-eight additional documents that were in the investigative files. n99 Subsequently, the grand jury subpoenaed the previously disclosed documents, as well as those remaining in counsel's investigative files. n100 The court cited three factors in support of its holding that the privilege had been waived with respect to the withheld documents: (1) the corporation's final report to the SEC emphasized that it was based on a review of all relevant files made available to counsel conducting the investigation; (2) the corporation had allowed the SEC to access its files and asserted that all relevant supporting documents were included, when in fact two of the documents in question had been removed; and (3) the documents in question were particularly significant because they impeached the official version of the report [*65] and cast doubt on its veracity. n101 The court further rejected the corporation's argument that disclosure would discourage voluntary corporate cooperation with the government; the court stated that the SEC, or any other government agency, could expressly agree to limitations on further disclosure consistent with their legal responsibilities. n102

Similar to the D.C. Circuit, the Fourth Circuit, in In re Martin Marietta Corp., held that a corporation's disclosure of privileged material submitted to the United States Attorney constituted waiver of the corporation's attorney-client privilege, even as to material withheld from disclosure. n103 Martin Marietta had conducted an internal investigation into alleged fraudulent accounting procedures related to contracts with the Department of Defense. n104 The company subsequently disclosed the results of its investigation to the United States Attorney in a Position Paper describing why the company should not face indictment. n105 A former employee indicted for conspiracy to defraud the Department of Defense sought disclosure, pursuant to *Federal Rule of Criminal Procedure 17(c)*, n106 of the corporation's audit papers and witness statements generated during the investigation. In enforcing the former employee's subpoena, the court rejected the limited waiver doctrine and held that the privilege had been waived as to the undisclosed details

underlying the published data. n107 However, the court afforded greater protection under the work product doctrine and remanded for a further determination of its applicability. n108

There is no clear judicial consensus whether waiver as to third parties encompasses only that material which was disclosed to a government agency, or includes all related documents concerning the same [*66] subject matter. The Fourth and D.C. Circuits have extended the waiver of the attorney-client privilege to include communications not disclosed, reasoning that the privilege "should be available only at the traditional price; a litigant who wishes to assert confidentiality must maintain genuine confidentiality." n109 Conversely, it has been held that disclosure of a final investigative report does not result in a waiver of the attorney-client privilege with respect to the underlying documentation for the report. n110 In truth, the determination of the scope of a waiver is nuanced and factual. As the Sixth Circuit observed, the rule that disclosure of some material results in disclosure of all material on the same subject matter is not determinative, because "subject matter can be defined narrowly or broadly." n111 "We are thus persuaded," the court noted, "by the line of cases that try to make prudential distinctions between what was revealed and what remains privileged." n112

c. Placing Communications At Issue

Another frequently litigated question is 'at issue' waiver. Asserting a claim or defense that puts at issue otherwise confidential communications waives the attorney-client privilege as to those communications. This waiver issue may arise in a number of contexts.

[*67]

i. Disclosure of Special Litigation Committee Reports

In response to a shareholder derivative action, a corporation may engage outside counsel to conduct an internal investigation under the direction of a special litigation committee. n113 In certain circumstances, the court may grant the corporation's motion to terminate the derivative action based upon the report of the special litigation committee. n114 To the extent a corporation affirmatively relies on the committee's report, courts may deem the attorney-client privilege waived and order the report disclosed. n115

ii. Advice-of-Counsel Defense

The attorney-client privilege may also be waived when the client asserts claims or defenses that put the attorneys' advice at issue in the litigation. n116 For example, a party seeking to assert, as a defense against a claim of willful patent infringement, the fact that they relied on the advice of counsel, and thus did not act willfully, will be found to have waived the privilege. n117 One widely-cited case in this area holds that, in order for the privilege to be waived, the waiving party must take some "affirmative act" to put the protected information at issue: waiver of the privilege is therefore proper - and disclosure of the material is appropriate - because concealment would deny the opposing party access to information vital to its defense. n118 The fact that a party asserts a defense that will make an attorney's advice relevant does not waive the privilege. Rather, the advice of counsel "is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication." n119

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iii. Reasonable Remedial Acts by Employer Defense

The assertions of a corporation that, in response to allegations of work-place harassment or discrimination, it has implemented reasonable remedial or compliance programs may, in some cases, constitute waiver of the attorney-client privilege. This issue arises when the corporation directs its counsel to conduct an internal investigation into allegations

of impropriety, and then, based on the investigative report, the corporation asserts that it has taken appropriate remedial measures. n120 This issue of waiver through the assertion of reasonable remediation efforts has become more pronounced in light of recent Supreme Court holdings where, in cases of supervisor harassment within Title VII of the 1964 Civil Rights Act, n121 the employer may escape liability if it can show: (1) it exercised reasonable care to prevent and promptly correct the supervisor's sexual harassment and (2) the victim unreasonably failed to take advantage of any corrective or preventive opportunities, that the employer provided, or to otherwise avoid harm. n122 Thus, the corporation may find itself defending against waiver of privilege arguments to the extent it bases its "reasonable response" defense on an attorney-directed internal investigation. When such an internal investigation is used to affirmatively plead this defense, "the adequacy of the employer's investigation becomes critical to the issue of liability." n123 Thus, the only way the plaintiff "can determine the reasonableness of the [employer's] investigation is through full disclosure of the [report's] contents." n124 One court has held that both the attorney-client privilege and the work product doctrine were waived where the employer, based in part on an outside counsel's report, asserted the affirmative defense that it took effective remedial action and that the plaintiff's alleged conduct was welcomed. n125

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d. Crime - Fraud Waiver

The attorney-client privilege will not apply where legal advice has been obtained in furtherance of an illegal or fraudulent act. n126 To establish the crime - fraud exception, the party that is seeking discovery need only establish a prima facie showing that the advice was obtained in furtherance of an illegal or fraudulent act. n127 The party need not show that a crime or fraud occurred; it is sufficient that a crime or fraud was the objective of the communication. n128 A party that is seeking discovery must come forward with at least some evidence that, if believed, would establish the elements of an ongoing or imminent crime or fraud. n129 However, an attorney's ignorance of his client's purpose is irrelevant. n130

B. Work Product Doctrine

In addition to the attorney-client privilege and to a limited extent, the self-evaluation privilege, the work product doctrine also protects the confidentiality of materials related to an internal corporate investigation. *Federal Rule of Civil Procedure 26(b)(3)*, codifying the work product doctrine as enunciated in Hickman v. Taylor, n131 defines the elements of the work product doctrine in the federal courts. n132 In relevant part, Rule 26(b)(3) states that:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, [*70] opinions, or legal theories of an attorney or other representative of a party concerning the litigation. n133

Thus, the work product doctrine, which applies equally in criminal prosecutions, n134 shields: (1) documents or tangible things prepared in anticipation of litigation or for trial; (2) by or for another party or that party's representative; (3) unless the party seeking discovery demonstrates both substantial need for those materials and it is unable, without undue hardship, to obtain the equivalent of those materials. n135 Similar to the attorney-client privilege, the work product doctrine will not prevent an adversary from obtaining information from a witness or independent source simply

because that information was disclosed earlier to counsel, or is contained in a document not otherwise discoverable. n136

The purpose behind the work product doctrine is to "preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries." n137 The Hickman court explained that, without protection for a lawyer's work product, "much of what is now put down in writing would remain unwritten," undermining the efficiency, fairness, and sharpness of the adversarial system. n138

In structuring an internal corporate investigation, counsel must consider from the outset both the policy and the requirements underlying the work product doctrine in order to more effectively utilize its protections. The three elements to the work product doctrine are examined below.

1. Anticipation of Litigation

In order for the work product protections to attach, materials must have been prepared in anticipation of litigation, even if the litigation concerns an unrelated matter. n139 Materials prepared with only a remote [*71] possibility of, or mere speculation as to, future litigation generally will not be protected. n140 The question whether documents were so prepared is inherently a factual question, and the courts will look to see that the materials were prepared "because of" a litigation need (in which case materials would be protected), and not merely prepared as part of the normal course of a corporation's business (in which case materials would be without protection). n141 A leading treatise succinctly put it:

The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation. n142

Courts construe this requirement strictly, as one court put it:

[The] mere fact that litigation does eventually ensue does not, by itself, cloak materials with the work product privilege; the privilege is not that broad. Rather, we look to whether in light of the factual context the document can fairly be said to have been prepared or obtained because of the prospect of litigation. n143

Therefore, it is critical that corporate counsel document the legal nature of his or her involvement in the investigation. To the extent the court views counsel's involvement in an investigation as business - and not legal - in nature, the materials that counsel has generated risk losing the protection of the work product doctrine. n144

[*72] Although it is not always easy to determine whether the "anticipation of litigation" requirement has been met, it has been held that in the context of a regulatory agency's investigations, there exists not just the "mere possibility of future litigation," but "reasonable grounds for anticipating litigation." n145 Thus, where corporate investigations are conducted to specifically address allegations of corporate misconduct, courts seem more willing to construe materials generated from the investigative process as predicates to litigation, even though litigation may not ultimately ensue.

The more serious the allegations, the greater the likelihood that litigation will result, and the more likely a court

will find materials generated therein as being protected under the work product doctrine. In In re Grand Jury Investigation, the investigation concerned possible criminal wrongdoing. In ruling that the work product doctrine applied, the Third Circuit observed that in the context of the ongoing criminal investigation, "litigation of some sort [is] almost inevitable. The most obvious possibilities include criminal prosecutions, derivative suits, securities litigation, or even litigation by Sun to recover the illegal payments." n146 The court distinguished other cases that dealt with the discoverability of internal IRS memoranda prepared during the investigative and settlement phases of a tax audit - situations where litigation was not very likely. n147 Some courts have refused to find that investigative materials were generated in anticipation of litigation, even though the investigation could have resulted in litigation. n148 However, as the preceding discussion suggests, material [*73] generated during the course of an internal investigation - so long as that material is produced because of, or with an eye toward, litigation - will be protected under the work product doctrine.

2. Documents Prepared By A Party, His Attorney, Or His Representative

The work product doctrine protects materials that others, besides counsel, have prepared at counsel's request. n149 As a result, non-attorneys may be involved in the creation of protected work product. As the advisory committee notes to Rule 26(b)(3) make clear, the work product doctrine extends "not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf." n150 There are some cases that have limited the work product protection to materials prepared by, or at the direction of, an attorney. n151 However, the clear trend, consistent with the language and intent of Rule 26(b)(3), is that materials need not have been prepared by, or under the direction of, counsel in order to constitute work-product. n152

3. Substantial Need and Undue Hardship

The work product doctrine provides only a qualified protection of confidentiality: if the party requesting the material has a substantial need for the information and cannot obtain the substantial equivalent without undue hardship, a court can order disclosure of the material. n153 [*74] However, the law, consistent with Hickman and Rule 26(b)(3), recognizes a distinction between materials that do not reveal any of the attorney's mental processes ("ordinary work product") and materials that reveal the opinions, conclusions, and mental impressions of the attorney ("opinion work product"). n154 Recorded witness statements are examples of ordinary work product; an attorney's notes of an oral interview or a memorandum analyzing the situation are examples of opinion work product. For policy reasons, opinion work product receives greater protection from disclosure than ordinary work product. n155

a. Ordinary Work Product

With regard to ordinary work product, courts have reached varied conclusions when interpreting the substantial need and undue hardship requirements. n156 A review of these decisions reveals that the determination of need and undue hardship depends largely on the facts in each case. Relevant circumstances include: (1) the nature of the materials requested; (2) the effort involved in composing or assembling the materials; (3) the potential for alternate sources of information; (4) the importance of the materials in relation to the issues at hand; and (5) the procedural posture in which the claim arises. n157 From the perspective of counsel conducting an internal corporate investigation, these factors introduce uncertainties with regard to the applicability of the work product doctrine.

b. Opinion Work Product

In contrast to the protection accorded ordinary work product, opinion work product is discoverable, if at all, only upon a showing of [*75] extraordinary need. Although the Supreme Court in Upjohn declined to decide whether opinion work product should receive absolute protection from disclosure, n158 the current trend is to view opinion work product as absolutely protected, barring "very rare and extraordinary circumstances," n159 such as when the attorney has engaged in illegal conduct or fraud. n160

4. Waiver of Work Product Protection

Due to the differences in purpose between the attorney-client privilege and the work product doctrine, the standards for their waiver differ slightly. Therefore, an analysis of waiver of work product must be made with reference to the doctrine's underlying purpose, which is to protect material from an adversary in litigation. In light of this purpose, disclosure to a third party will not waive the work product privilege, "unless such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." n161 Waiver of work product will occur to the extent disclosure "substantially increases" the possibility of an opposing party obtaining the information. n162 Thus, disclosures to non-adversaries made in the course of trial preparation should be allowed without waiver of the privilege. In other words, "while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege." n163

[*76] In general, no waiver will result if information is shared with another party who possesses a "common interest" - one who anticipates litigation against a common adversary on the same issue or issues. n164 In cases where work product is shared with, or disclosed to, a party with a "common interest," waiver of work product has not been found. n165 The same waiver analysis applies in the context of work product disclosures to governmental agencies. In Permian Corp. v. U.S., a case involving the transfer of work product to the SEC pursuant to an inquiry into the adequacy of a company's registration statement for a proposed share exchange, the court affirmed the district court in finding no waiver as to certain documents. n166 The Permian court held that, under the circumstances, the disclosure to the SEC was not adversarial, but was done pursuant to a confidentiality agreement to assist the SEC with its review. n167 By contrast, waiver was found in In re Subpoenas Duces Tecum, where disclosure of documents to the SEC was to persuade the SEC not to engage in a formal investigation of possible wrongdoings. n168

In addition to disclosures to adversaries, the protections of the work product doctrine also may be waived through the testimonial use of work product documents during a deposition, n169 or during trial. n170

When waiver of work product protection is found, courts must decide on the scope of the waiver. Unlike waiver of the attorney-client privilege, which often results in the waiver of all communications on [*77] the same subject matter, waiver of work product material is generally limited to those documents that are actually disclosed. n171 However, some courts, invoking fairness principles, have found waiver not only with regards to disclosed materials, but also to undisclosed related materials. n172

5. Crime-Fraud Exception

Similar to the crime-fraud exception to the attorney-client privilege, no protection of confidentiality is accorded to work product completed in furtherance of a crime or fraud. n173 However, unlike the waiver rule applied to the attorney-client privilege, an attorney's knowledge of the crime or fraud is relevant in the context of work product protection. n174 Thus, if the attorney is ignorant of the crime or fraud, work product protection is waived only as to information furnished to the attorney and not as to his mental impressions, conclusions, opinions or legal theories. n175

III. Analysis

In light of the myriad and often conflicting decisional law of the federal courts, corporations must possess a thorough understanding of both attorney-client privilege and work product doctrine to more effectively facilitate internal investigations. To this end, Part A examines the interrelationship between these two doctrines. Part B clarifies the importance of confidentiality in the corporate environment.

A. The Interrelationship Between the Attorney-Client Privilege and Work Product Doctrine

In order to take full advantage of the protections of the attorney-client privilege and the work product doctrine, counsel conducting an internal corporate investigation must be aware of their respective underlying rationales. The attorney-client privilege exists to protect the [*78] confidentiality of communications between client and counsel; it is designed to encourage the full and candid disclosure of relevant information. n176 In contrast, the work product doctrine promotes the adversarial nature of our justice system by safeguarding the fruits of an attorney's trial preparation from the discovery attempts of his/her opponents. n177 The purpose of the work product doctrine is to protect information from disclosure to opposing parties, rather than to all others outside a particular confidential relationship. n178

In accordance with these underlying objectives, the attorney-client privilege affords absolute protection against disclosure of confidential communications between a client and his/her attorney, while the work product doctrine provides only a qualified protection to the fruits of an attorney's efforts with regard to all aspects of a given case, even those outside the scope of confidential client communications. n179 Stated more simply, the attorney-client privilege provides absolute protection for a limited class of communications; the work product doctrine provides qualified protection to a potentially broader class of communications and documents. n180

If one possesses an understanding of the doctrines' slightly different rationales, it is possible to better appreciate the case law that may, at the same time, uphold one doctrine and reject the other. For example, a corporation may lose on a privilege claim but win on work product, or vice versa. In In re Martin Marietta Corp., the court held that, despite waiver of the attorney-client privilege, the corporation's decision to disclose the results of an internal investigation to the government did not constitute waiver of the protection for opinion work product. n181 In Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc., n182 the defendant corporation lost on its ordinary work product argument, and was forced to turn over the factual findings of an investigation. However, the corporation prevailed with respect to attorney-client privilege and opinion work product materials, namely employee interviews and counsel's written legal conclusions. n183

To the extent state law bears on the matter, such as those instances when a federal court, sitting in diversity, must apply state law to attorney-client [*79] disputes, judicial outcomes can be equally perplexing. In Connolly Data Sys. v. Victor Technologies, Inc., n184 the court held that the attorney-client privilege, under California law, did not apply to communications with a corporate client's former employee. At the same time, the court held that, under Federal Rule 26(b)(3), these communications were protected from disclosure under the work product doctrine. n185 In dicta, the court noted that if federal law had applied to the attorney-client issue, the communications with former employees would have been protected under governing Ninth Circuit law. n186

In order to come within the requirements of both principles, counsel conducting an internal corporate investigation must consider the interrelationship between the attorney-client privilege and the work product doctrine when communicating with clients and others. Such a strategy will place the client-corporation in a far more favorable position should it decide to resist subsequent requests for disclosure. It is therefore essential that corporate counsel become actively involved in structuring and overseeing the internal corporate investigation at the earliest possible stage, as well as directing the method and progress of such investigation, with an eye toward keeping sensitive materials protected. Specific strategies are described infra at Section IV.

B. Importance of Confidentiality

As part of its internal corporate investigation, counsel may conduct many employee interviews. Although these communications may be protected under the attorney-client privilege or the work product doctrine, they have the potential to undermine the confidentiality of the investigation in several ways. First, disclosure to lower or mid-level employees of confidential information gathered during the investigation may be construed as a breach in confidentiality, unless the disclosure is necessary to convey or implement legal advice. n187

Second, although most employees may not be authorized to waive the corporation's attorney-client privilege, n188

an employee may decide, [*80] for whatever reason, to disclose to a third party the subject matter of communications obtained from counsel.

Counsel can address these potential problems through specific instructions that outline the importance of maintaining the confidentiality of communications pertinent to the internal investigation. In addition, counsel must limit his or her own disclosures of confidential information within the corporation to those upper-level management and directors who need the information for decision-making purposes.

Instructions given to employees concerning the need to maintain confidentiality implicate many potential ethical issues. Counsel for the corporation owes an allegiance to the corporation as an entity, rather than to any individual employee. n189 In many circumstances, the interests of individual employees may be adverse to the interests of the corporation, and if the corporation decides to waive the protections of the attorney-client privilege and work product doctrine, it may be to the employee's detriment. As a result, it is not difficult to imagine a situation where the corporation, in an effort to minimize exposure to liability, will move against one of its employees, where an investigation suggests culpable conduct on the employee's part.

In the interests of candor, n190 counsel should instruct employees that he/she represents the corporation, that he/she is not their attorney, that employees cannot, on their own, assert the attorney-client privilege to bar disclosure of the contents of an interview, n191 and that the corporation possesses the attorney-client privilege, but may waive it and disclose the information, to the detriment of the employee. n192 To the extent the employee agrees to be interviewed, counsel, to its benefit, may avoid any conflict-of-interest problems that might otherwise result from the seemingly joint representation of both the corporation and employee. n193

[*81] Fact-finding is a primary goal of any investigation, therefore an employee with relevant information is important to that effort. Thus, any corporate-type Miranda warning given to an employee must not be overstated, such that the employee refuses to offer any information.

Corporate counsel must recognize the importance of confidentiality and the parameters of both the attorney-client privilege and work product doctrine from the outset of an internal investigation. This outline is not meant to provide exhaustive research for litigation of these issues, but serves to advise counsel of the relevant concerns, so that these issues can be considered from the outset. Adherence to these general recommendations, along with the exercise of caution in areas of uncertainty, should place the corporation in the best possible position if these issues are subsequently litigated.

IV. Conclusion

This article has highlighted certain of the privileges accorded to lawyers that arise within the context of internal corporate investigations. The article examined the underpinnings and characteristics of the attorney-client privilege, and explored the impact of Upjohn in the context of internal investigations. Mention was made of the corporate self-evaluation privilege, which, although not widely recognized by the courts, may still represent a valid privilege in some jurisdictions. Finally, the contours of the work product doctrine were analyzed, with an eye to the circumstances under which the doctrine can be properly invoked, and waived, during an investigation.

Given the spate of recent corporate debacles from Enron Corp. to Arthur Andersen, internal corporate investigations have taken on increased importance. Regardless of the political and financial climate, however, corporate counsel must always be vigilant of its role as advocate of the corporate entity during an investigation. The end product of counsel's work should reflect fidelity to the corporation and responsiveness to the standards of public accountability. Striking this balance is critical.

Ideally, business decisions should reinforce legal decisions concerning the content and course of an investigation. Although the former is beyond the scope of this article, we do offer a limited set of practical recommendations that

corporate counsel may take as they initiate, conduct, and conclude internal corporate investigations. Accordingly, [*82] the balance of this Conclusion is devoted to practical steps that corporate counsel should consider during the investigation process. Implementing these measures will help counsel not only fulfill its role as advocate to a corporate client, but also take advantage of the legal privileges that inhere in its position as an attorney.

A. Internal Investigations Procedures

1. Initiating the Investigation

a. Early Lawyer Involvement

Management should promptly notify the board of directors of any improprieties, so that counsel can be engaged from the outset of the investigation. If management conducts the preliminary investigation, without the involvement of counsel, it may not receive the benefits of the attorney-client privilege or work product doctrine. n194 The corporation may want to consider engaging outside counsel, in order to underscore the legal nature of the investigation.

b. Corporation Should Make Explicit Request for Legal Advice

Senior officers of the corporation should make an explicit request for counsel to provide legal, rather than business, advice. Specifically, the request should refer to a legal examination, rather than a purely factual inquiry, meaning the corporation intends the investigation to culminate in legal advice, either in the form of a recommendation for the future, or analysis of past conduct or activities. If outside counsel is hired, such a request should be included in the retention letter; if in-house counsel is involved, a memorandum to the same effect should be sent to all the necessary parties.

2. Counsel's Responsibilities

a. Document the Confidentiality of Communications

Counsel must ensure that the confidentiality of the communications with the client is well documented, because the party asserting a claim of privilege bears the burden of proof to establish the necessary elements in support of the privilege. n195 Moreover, because confidentiality and waiver concerns can arise due to the number of agents of the [*83] corporation and counsel involved in an investigation, counsel must assume primary responsibility for maintaining confidentiality and documenting those efforts. Memoranda or notes of interviews should indicate who was present and all documents generated should be labeled privileged and confidential.

b. Restrict the Internal Flow of Information

Counsel can demonstrate intended confidentiality of communications in several ways: (1) restricting dissemination within the corporation; (2) delivering reports from non-lawyers directly to counsel, rather than using intermediaries; and (3) maintaining files and documentation apart from general corporate files.

c. Get Information From Highest Possible Sources

In light of the limited reach of Upjohn, information should be obtained from the highest possible management source that is available. Although Upjohn rejected the notion that only upper management (i.e., the "control group") can receive the protections of the attorney-client privilege, Upjohn did not, and could not, govern state court decisions, many of which continue to apply the control group principles when deciding attorney-client issues. As a result, some state courts will only extend the protections of the attorney-client privilege to upper-echelon ("control group") management, and any confidential communications from lower-level employees will not be protected. Thus, counsel should seek to obtain information from the highest possible sources within the organization, and follow up with lower-level employees only if absolutely necessary.

d. Label Documents Judiciously

Where third parties have gathered information, counsel should clearly and explicitly (by requests, acknowledgement of receipt, etc.) indicate that the material is being gathered for the purposes of rendering legal advice "in anticipation of litigation." It is to be noted that excessive marking of documents may weaken the privilege for the sensitive documents that need the protection most. Therefore, to the extent possible, counsel should only mark as confidential, privileged, or legal in nature, those documents that actually deserve such a designation.

e. Interpose Legal Conclusions

Counsel should strive to include mental impressions, legal theories or potential strategies in all notes or memoranda of interviews with [*84] others, in order to afford those documents the extensive protection of opinion work product.

f. Treat Former Employee Contacts as Confidential

When communicating with former employees, counsel should maintain his/her notes in a manner that is designed to maximize the protections of the work product doctrine and advise the former employee of the confidential nature of the investigation, in order to discourage disclosure of the information to others.

3. Concluding the Investigation

a. Decision Whether to Release Report to Government

Counsel must carefully evaluate the impact on attorney-client privilege and work product protection before disclosing the report, or the results of the investigation, to a governmental agency, underwriter's counsel, accountants, or the press.

b. Legal Conclusions to the Board

Counsel should include express legal conclusions, opinions, and recommendations in the report to the board of directors. n196

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Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewPatent LawRemediesCollateral AssessmentsAttorney Fees

FOOTNOTES:

n1. In January 2001, Mr. Mulroy, University of Santa Clara, California (B.A. 1968), Loyola University School of Law (J.D. 1972), left the partnership of Jenner & Block to found Mulroy Scandaglia Marrinson Ryan, a Chicago-based litigation boutique specializing in complex commercial litigation. Mr. Mulroy is a fellow of the American College of Trial Lawyers, has lectured on trial practice at Northwestern, Loyola, and DePaul Schools of Law, and has written extensively on trial issues such as expert witnesses, evidence, simulated juries and cross-examination. Mr. Mu<tild n>oz, Stanford University (B.A. 1992), University of Iowa College of Law (J.D. 1999), is an associate with Mulroy Scandaglia Marrinson Ryan, and concentrates in commercial litigation and appeals. Mr. Mu<tild n>oz served as law clerk to the Hon. Robert W. Pratt, U.S. District Court, Southern District of Iowa, from 1999-2001. The authors wish to acknowledge W. Joseph Thesing, Jr., who co-authored an

earlier version of this article, Confidentiality Concerns in Internal Corporate Investigations, *25 Tort & Ins. L. J. 48 (1989).*

n2. See infra Part II.A.

n3. See infra Part II.B.

n4. See, e.g., *United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996),* cert. denied, *520 U.S. 1239 (1997);* see also *United States v. Olano, 62 F.3d 1180, 1205 (9th Cir. 1995),* cert. denied, *519 U.S. 931 (1996)* (commenting that the privilege operates to "withhold[] relevant information from the fact finder") (citation and internal quotations omitted); *Myers v. Uniroyal Chem. Co., Inc., No. CIV.A.916716, 1992 WL 97822, at 1* (E.D. Pa. May 5, 1992) ("Privileges in litigation are not favored.") (citing *Herbert v. Lando, 441 U.S. 153, 175 (1979)).* See generally Elizabeth G. Thornburg, Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege, *69 Notre Dame L. Rev. 157 (1993)* (critiquing theory behind attorney-client privilege).

n5. *Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).*

n6. *Id. at 389-90.*

n7. See *id. at 390.*

n8. See *id. at 391-92.*

n9. *United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).*

n10. *Id. at 358-59;* see also 8 J. Wigmore, Evidence 2292 (McNaughton rev. ed. 1961).

n11. See *United States v. Stern, 511 F.2d 1364, 1367 (2d Cir. 1975),* cert. denied, *423 U.S. 829 (1975).*

n12. See *In re Grand Jury Proceedings, 102 F.3d 748, 750 (4th Cir. 1996).*

n13. *Upjohn Co. v. United States, 449 U.S. 383 (1981).*

n14. *Id. at 386.*

n15. Id.

n16. Id.

n17. *Upjohn, 449 U.S. at 387.*

n18. Id.

n19. Id.

n20. Id.

n21. *Upjohn, 449 U.S. at 387.*

n22. Id.

n23. *Id. at 387-88.*

n24. *Id. at 388* (arguing that the materials were prepared in "anticipation of litigation").

n25. *Upjohn, 449 U.S. at 388.*

n26. *Id. at 391*.

n27. *Id. at 389, 397* (citing *Fed. R. Evid. 501*).

n28. See id.

n29. *Upjohn, 449 U.S. at 384.*

N30. See, e.g., *Baxter Travenol Labs., Inc. v. Lemay, 89 F.R.D. 410, 412-14 (S.D. Ohio 1981)* (privilege upheld where communications made outside scope of employee's duties); *Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674, 678 (S.D.N.Y. 1983)* (privilege upheld where communication made without expectation of confidentiality).

n31. See *Upjohn, 449 U.S. 383.*

n32. See *United States v. Zolin, 491 U.S. 554, 562 (1989)* ("Questions of privilege that arise in the course of the adjudication of federal rights are 'governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'") (citing *Fed. R. Evid. 501*); *In re Bieter*

Co., 16 F.3d 929, 935 (8th Cir. 1994) (applying "the federal common law of attorney client privilege" to civil RICO action).

n33. That Upjohn's federal common law holding on privilege is circumscribed by state law flows from *Federal Rule of Evidence 501*, the rule upon which the Upjohn holding was premised. Rule 501 provides that in civil actions and proceedings where state law supplies the substantive rule of decision (i.e., most diversity litigation) the privilege of a witness "shall be determined in accordance with State law." In all other cases (as happened in Upjohn where a federal tax provision was at issue), Rule 501 provides that the privilege of a witness "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See generally Sherman L. Cohn, The Organizational Client: Attorney-Client Privilege and the No-Contact Rule, *10 Geo. J. Legal Ethics 739, 755-60 (1997);* James Heckmann, Evidence-Upjohn v. United States -Corporate Attorney-Client Privilege, *7 J. Corp. L. 359, 370-71 (1982).*

n34. Brian E. Hamilton, Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege, *1997 Ann. Surv. Am. L. 629, 633-40 (1997)* (noting that the fourteen states adopting some version of Upjohn's expansive reading of the corporate attorney-client privilege are: Alabama (Ala. R. Evid. 502(a)(2)); Arizona (*Ariz. Rev. Stat. 12-2234* (West 2002)); Arkansas (*Courteau v. St. Paul Fire & Marine Ins. Co., 821 S.W.2d 45 (Ark. 1991));* California (*D.I. Chadbourne, Inc. v. Superior Court, 388 P.2d 700 (Cal. 1964)* (en banc)); Colorado (*Denver Post Corp. v. Univ. of Colo., 739 P.2d 874 (Colo. 1987));* Florida (*Southern 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)* (West 2002)); Mississippi (Miss. R. Evid. 502(a)(2)); Nevada (*Wardleigh v. Dist. Court, 891 P.2d 1180 (Nev. 1995));* Oregon (Or. Evid. Code R. 503(1)(d) (2002)); 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).* The eight states rejecting Upjohn and adopting the narrow control group standard for corporate attorney-client privilege are: Alaska (Alaska R. Evid. 503 (a)(2)); Hawaii (Haw. R. Evid. 503(a)(2)); Illinois (*Consolidated 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)); North Dakota (N.D. R. Evid. 502(a)(2)); Oklahoma (*Okla. Stat. Ann. tit. 12, 2502(A)(4)* (West 2002)); South Dakota (*S.D. Codified Laws 19-13-2(2)* (Michie 2002)). See Hamilton, supra, at 640.

n35. *Upjohn, 449 U.S. at 403* (Burger, C.J., concurring).

n36. Id.

n37. See *In re Coordinated Pretrial Proceedings In Petroleum Prod. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981),* cert. denied, *455 U.S. 990 (1982)* (The Upjohn "rationale applies to the ex-employees ... involved in this case. Former employees, as well as current employees, may possess the relevant information

needed by corporate counsel to advise the client"); *Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1493 (9th Cir. 1989); Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 (D. Mont. 1986)* (Upjohn indicates that "the attorney-client privilege may extend to [defendant's] former employees ... [with regard to their communications with] the company's counsel."); *United States v. King, 536 F. Supp. 253, 259 (C.D. Cal. 1982)* ("[An attorney-client] relationship existed even though [the witness] was not an employee of [the client] at the time of the conversation."), overruled on other grounds by *United States v. Zolin, 842 F.2d 1135 (9th Cir. 1988); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 41 (D. Mass. 1987)* ("In some circumstances, the communications between a former employee and a corporate party's counsel may be privileged.").

n38. See, e.g., *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 517-18 (N.D. Ill. 1990); Connolly Data Sys., Inc. v. Victor Techs., Inc., 114 F.R.D. 89, 93-94 (S.D. Cal. 1987).*

n39. See *United States v. McPartlin, 595 F.2d 1321, 1335-37 (7th Cir. 1979),* cert. denied, *444 U.S. 833 (1979)* (involving an investigator employed by co-defendant's counsel); *United States v. Cote, 456 F.2d 142, 143-44 (8th Cir. 1972)* (addressing whether the privilege prohibits disclosure of working papers and memoranda prepared by accountant employed by attorney for the purpose of rendering legal advice).

n40. See *In re Grand Jury Proceedings, 220 F.3d 568, 571 (7th Cir. 2000)* (preparation of tax return is an accounting service, not the provision of legal advice; but "information transmitted to an attorney or to the attorney's agent is privileged if it was not intended for subsequent appearance on a tax return and was given to the attorney for the sole purpose of seeking legal advice"); *United States v. Brown, 478 F.2d 1038, 1039-40 (7th Cir. 1973)* (accountant's notes of conversation with client and attorney not privileged because client retained accountant and instructed him to attend meeting); see also *United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984)* (no accountant-client privilege exists under federal law for accountants acting as agents of a corporation).

n41. *United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360 (D. Mass. 1950).*

n42. See *In re LTV Sec. Litig., 89 F.R.D. 595, 600 (N.D. Tex. 1981).*

n43. *Osterneck v. E. T. Barwick Indus., Inc., 82 F.R.D. 81, 85 (N.D. Ga. 1979);* see also *Securities & Exch. Comm'n v. Canadian Javelin Ltd., 451 F. Supp. 594, 596 (D.D.C. 1978),* vacated on other grounds by *No. 76-2070, 1978 WL 1139, at 1* (D.D.C. Jan. 13, 1978) (privilege did not attach to communications of special counsel who was appointed not to offer corporation advice, but to "monitor and report on" corporation's compliance with a court injunction).

n44. See, e.g., infra notes 50-53 and accompanying text.

n45. See, e.g., infra note 56 and accompanying text.

n46. Id.

n47. Id.

n48. See *In re Diasonics Sec. Litig., 110 F.R.D. 570, 573 (D. Colo. 1986).*

n49. See id. (noting that the attorney-client privilege applies only to communications requesting legal advice made to an attorney by a client requesting legal advice).

n50. See, e.g., *In re Feldberg, 862 F. 2d 622, 627 (7th Cir. 1988); In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984); In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984); In re Diasonics Sec. Litig., 110 F.R.D. at 573; North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 517 (M.D.N.C. 1986); Securities & Exch. Comm'n v. Gulf & W. Indus., Inc., 518 F. Supp. 675, 683 (D.D.C. 1981).*

n51. See *FTC v. TRW, Inc., 628 F.2d 207, 212-13 (D.C. Cir. 1980)* (credit reporting company and its counsel hired research group to put technical information concerning the company's computerized credit reporting system into a form that lawyers could understand; study held not privileged because its legal purpose was not clear).

n52. See *In Re Colton, 201 F. Supp. 13, 16 (S.D.N.Y. 1961).*

n53. See *J. P. Foley & Co., Inc. v. Vanderbilt, 65 F.R.D. 523, 526 (S.D.N.Y. 1974).*

n54. See *In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 805-06 (Fed. Cir. 2000)* (holding that "an invention record constitutes a privileged communication, as long as it is provided to an attorney for the purpose of securing primarily legal opinion, or legal services, or assistance in a legal proceeding") (citation and internal quotations omitted); see also *Sperry v. Florida, 373 U.S. 379, 383 (1963)* ("The preparation and prosecution of patent applications for others constitutes the practice of law."). But see *Spalding Sports, 203 F.3d at 806 n.3* (noting contrary lower court authority, including: *Jack Winter, Inc. v. Koratron Co., 50 F.R.D. 225, 228 (N.D. Cal. 1970); Howes v. Med. Components, Inc., No. CIV.A.84-4435, 1988 WL 15191, at 1* (E.D. Pa. Feb. 23, 1988); *Detection Sys., Inc. v. Pittway Corp., 96 F.R.D. 152, 155 (W.D.N.Y. 1982); Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 5 (N.D. Ill. 1980); Choat v. Rome Indus., Inc., 462 F. Supp. 728, 732 (N.D. Ga. 1978)).*

n55. *United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950).*

n56. See *Upjohn Co. v. United States, 449 U.S. 383, 389-91 (1981)* (the privilege rests on the need for counsel to "know all that relates to the client's reasons for seeking representation"; the privilege exists not just to protect the giving of legal advice, but "also the giving of information to the lawyer to enable him to give sound and informed advice"; the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant"); *United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996)* (Upjohn "makes clear that fact-finding which pertains to legal advice counts as 'professional legal services'") (citation omitted); In re Woolworth Corp. Sec. Class Action Litig., No. 94- *CIV.2217 (RO), 1996 WL 306576, at 1-2* (S.D.N.Y. June 7, 1996) (investigative notes and memoranda from law firm hired by company under investigation by the SEC held privileged under Upjohn); *United States v. Davis, 131 F.R.D. 391, 398 (S.D.N.Y. 1990),* reh'g granted on procedural matter, *131 F.R.D. 427* (S.D.N.Y. July 02, 1990) (the privilege "encompasses factual investigations by counsel"); see also *In re Allen, 106 F.3d 582, 603 (4th Cir. 1997)* (rejecting the legal theory that the attorney-client privilege did not apply simply because lawyer's assigned duties were investigative in nature, court found privilege applicable because investigation was "related to the rendition of legal services") (citation omitted).

n57. *Federal Trade Commission v. TRW, 628 F.2d at 212-13.*

n58. See id.; see also *Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987),* cert. denied, *484 U.S. 917 (1987)* (aggregate risk management documents, although based on privileged materials, were themselves not privileged because they were prepared mostly for business purposes); *United States v. Int'l Bus. Machs. Corp., 66 F.R.D. 206, 212-13 (S.D.N.Y. 1974)* (although the process of giving legal advice involves incorporating "relevant nonlegal considerations," no privilege will attach if a document was prepared for purposes of simultaneous review by legal and non-legal personnel; in such a case, "it cannot be said that the primary purpose of the document is to secure legal advice") (citation omitted).

n59. See generally *University of Pa. v. EEOC, 493 U.S. 182 (1990)* (acknowledging its authority to develop privilege rules under Rule 501, the court refused to create a new privilege against the disclosure of peer review materials).

n60. See generally Wright & Miller, Federal Practice & Procedure 5431, at 835 (Supp. 2002) (collecting cases).

n61. *Bredice v. Doctors Hosp. Inc., 50 F.R.D. 249 (D.D.C. 1970),* aff'd, *479 F.2d 920 (D.C. Cir. 1973)* (minutes of hospital staff meetings regarding procedures to improve patient care could be protected from discovery in a malpractice suit because of the important public interest in having hospitals critically evaluate the quality of the care they provide).

n62. *Reich v. Hercules, Inc., 857 F. Supp. 367, 371 (D.N.J. 1994).*

n63. See *Bredice, 50 F.R.D. at 249.*

n64. See, e.g., *Hoffman v. United Telecomms., Inc., 117 F.R.D. 440, 443 (D. Kan. 1987)* (statistical analysis regarding the compensation structure of defendant-employer's work force held privileged in a discrimination case). But see *Zapata v. IBP, Inc., No. CIV.A.93-2366-EEO, 1994 WL 649322* (D. Kan. Nov. 10, 1994) (offering a compelling argument that such material in the employment discrimination context should not be protected).

n65. See, e.g., *Roberts v. Carrier Corp., 107 F.R.D. 678, 684 (N.D. Ind. 1985)* (privilege protects "only those evaluations that the law requires one to make").

n66. See *Reichhold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522, 527 (N.D. Fla. 1994)* (landowner was entitled to qualified privilege for environmental reports prepared after the fact for "purpose of candid self-evaluation and analysis of cause and effect of past pollution").

n67. See *Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 425-26 (9th Cir. 1992)* (citing Note, The Privilege of Self-Critical Analysis, *96 Harv. L. Rev. 1083, 1086 (1983));* In re Salomon Inc. Sec. Litig., Nos. 91 CIV.5442 (RPP), 91 *CIV.5471 (RPP), 1992 WL 350762, at 4 (S.D.N.Y. 1992)* (adopting the privilege but refusing to apply it to management control studies and internal audit reports because such material is not of the type whose flow would be curtailed if discovery were allowed).

n68. *Dowling, 971 F.2d at 426.*

n69. *Upjohn Co. v. United States, 449 U.S. 383, 392 (1981).*

n70. See *Hardy v. New York News, Inc., 114 F.R.D. 633, 644-45 (S.D.N.Y. 1987).*

n71. See *Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991); In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel, 666 F. Supp. 1148, 1157 (N.D. Ill. 1987)* ("third party disclosures here further indicate that IH did not intend attorney-client communication ... to remain confidential"); 8 J. Wigmore, Evidence 2326, at 633 (McNaughton rev. ed. 1961).

n72. See *In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91, 99-100 (S.D.N.Y. 1993); Commonwealth of Va. v. Edwards, 370 S.E.2d 296, 301 (Va. 1988)* (when a party's conduct "touches a certain point of disclosure, fairness requires that [the] privilege shall cease whether [the party] intended that result or not").

n73. *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel, 666 F. Supp. at 1156-57.*

n74. See *In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982)* (sharing portions of internal company investigation with accountant to resolve audit issues and with underwriter in connection with public offering waived attorney-client privilege and thus investigative materials could be produced to government); see also *United States v. El Paso Co., 682 F.2d 530, 540 (5th Cir. 1982),* cert. denied, *466 U.S. 944 (1984)* (finding that disclosure of tax pool analysis and underlying documentation to outside accountants for tax audit purposes waives attorney-client privilege); *In re Horowitz, 482 F.2d 72, 80-82 (2d Cir. 1973),* cert. denied, *414 U.S. 867 (1973)* (holding that privilege was waived on disclosure to accountant).

n75. SEC v. Texas Int'l Airlines, Inc., [1979 Transfer Binder] *Fed. Sec. L. Rep. (CCH) P 96,945* (D.D.C. Aug. 03, 1979) (privilege waived on disclosure to investment banker to secure an independent, arm's-length opinion) (citation omitted).

n76. *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Wash., 103 F.R.D. 52, 67 (D.D.C. 1984).*

n77. See *Bowne of N.Y. City, Inc. v. AmBase Corp., 150 F.R.D. 465, 480 (S.D.N.Y. 1993)* ("Even if the disclosing party requires, as a condition of disclosure, that the recipient maintain the materials in confidence, this agreement does not prevent the disclosure from constituting a waiver of the privilege; it merely obligates the recipient to comply with the terms of any confidentiality agreement.") (citations omitted).

n78. See *Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 397 (N.D. Cal. 1991)* (concluding that "communications from counsel to a testifying expert are discoverable to the extent that they relate to matters about which the expert will testify").

n79. See *Sobol v. E.P. Dutton, Inc., 112 F.R.D. 99, 104 (S.D.N.Y. 1986).*

n80. See *In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 126 (3d Cir. 1986)* (requiring the party asserting the privilege to show that "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived") (citation omitted); *Sobol, 112 F.R.D. at 104* (disclosure to a former employee, for purpose of preparing common defense, does not waive privilege); *Schachar v. American Acad. of Ophthalmology, Inc., 106 F.R.D. 187, 191 (N.D. Ill. 1985).*

n81. *Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572, 579 (S.D.N.Y. 1960).*

n82. See, e.g., *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 567-68 (S.D.N.Y. 1986); Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broad. Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1161-62 (D.S.C. 1974).*

n83. See infra notes 84-112 and accompanying text; see also Brian M. Smith, Be Careful How You Use It

or You May Lose It: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits, *75 U. Det. Mercy L. Rev. 389, 402-10 (1998).*

n84. *Diversified Indus. v. Meredith, 572 F.2d 596 (8th Cir. 1977)* (en banc).

n85. *Id. at 610-11.*

n86. *Id. at 611.*

n87. See, e.g., *Byrnes v. IDS Realty Trust, 85 F.R.D. 679 (S.D.N.Y. 1980)* (applying Diversified's limited waiver approach); *In re Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368 (E.D. Wis. 1979)* (same).

n88. Cf. *In re Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251, 255 (6th Cir. 1996)* (owner and president of a laboratory waived attorney-client privilege as to several specific items of a marketing plan, but not as to the entire plan).

n89. See *Teachers Ins. & Annuity Ass'n. v. Shamrock Broad. Co., 521 F. Supp. 638, 642, 644-45 (S.D.N.Y. 1981)* (holding that "disclosure to the SEC should be deemed to be a complete waiver of the attorney-client privilege" in favor of a third party "unless the right to assert the privilege in subsequent proceedings is specifically reserved at the time the disclosure is made"; court found broad waiver because party, in response to subpoena, tendered documents to SEC without objection). But see *In re Subpoenas Duces Tecum, 738 F.2d, 1367, 1370 (D.C. Cir. 1984)* (privilege waived by disclosure to SEC, despite statement in transmittal letter that documents were confidential and that their submission to the SEC was not a waiver of any privilege).

n90. *United States v. Massachusetts Inst. of Tech., 129 F.3d 681 (1st Cir. 1997)* (court found that university's prior disclosure of its billing and other records to the auditing wing of the U.S. Department of Defense waived the privilege as to those documents in a subsequent request by the IRS).

n91. See *In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993)* (finding that plaintiffs in a civil suit were entitled to a legal memorandum submitted to the SEC by Steinhardt in an attempt to forestall enforcement proceedings; because Steinhardt had voluntarily disclosed the memo to the SEC, the privilege was waived as to

third party).

n92. See *Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991)* (voluntary disclosure of internal investigation report to the SEC and the Department of Justice during a bribery investigation waived privilege as to third party).

n93. See *In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988)* (disclosure of an internal report to the U.S. Attorney responding to allegations of fraud waived privilege and thus was discoverable by an indicted employee for use as a defense against charges arising out of same allegations).

n94. See *In re Subpoenas Duces Tecum, 738 F.2d 1367* (disclosure of final internal investigative report, underlying records, and lawyer notes to SEC waived privilege and thus could be made available to plaintiff-shareholders in a subsequent civil action); *In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982)* (disclosure of an internal investigative report to the SEC waived privilege and thus could be made available to the Grand Jury in a related matter); *Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981)* (disclosure of documents to the SEC by company waived privilege as to these documents and thus were discoverable by the Department of Energy in an unrelated investigation).

n95. See *Massachusetts Inst. of Tech., 129 F.3d 681; In re Steinhardt Partners, L.P., 9 F.3d 230; Westinghouse Elec. Corp., 951 F.2d 1414; In re Martin Marietta Corp., 856 F.2d 619; In re Subpoenas Duces Tecum, 738 F.2d 1367; In re Sealed Case, 676 F.2d 793; Permian Corp., 665 F.2d 1214.*

n96. *In re Sealed Case, 676 F.2d at 825.*

n97. *Id. at 801-02.*

n98. *Id. at 801-03.*

n99. *Id. at 804, 821.*

n100. *In re Sealed Case, 676 F.2d at 804.*

n101. *Id. at 817-22* (providing a discussion on the ground rules of the SEC's voluntary disclosure program, the express representation regarding the corporation's files, and the significance of the corporation's files for a fair evaluation).

n102. *Id. at 824.*

n103. *In re Martin Marietta Corp., 856 F.2d at 623-24.*

n104. *Id. at 622.*

n105. *Id. at 623.*

n106. As indicated by its title, this rule governs subpoenas of "Documentary Evidence and of Objects" and provides:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Fed. R. Crim. P. 17(c).

n107. *In re Martin Marietta Corp., 856 F.2d at 623-24.*

n108. *Id. at 624-27.*

n109. *Permian Corp., 665 F.2d at 1222;* see also *R. J. Hereley & Son Co. v. Stotler & Co., 87 F.R.D. 358, 359 (N.D. Ill. 1980)* (discussing how "it is well-settled that voluntary disclosure of a portion of a privileged communication constitutes a waiver with respect to the rest of the communication on the same subject") (citing *Securities & Exch. Comm'n v. Dresser Indus., Inc., 453 F. Supp. 573 (D.D.C. 1978)).*

n110. See *Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981)* (finding waiver "only as to communications about the matter actually disclosed"); *Schenet v. Anderson, 678 F. Supp. 1280, 1284 (E.D. Mich. 1988)* ("The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties."); *United States v. Lipshy, 492 F. Supp. 35, 43-44 (N.D. Tex. 1979); In re Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979)* (disclosure of independent counsel's report to the SEC, state grand jury, and IRS did not result in waiver of underlying documentation).

n111. *In re Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251, 255 (6th Cir. 1996).*

n112. *Id. at 255-56* (citing inter alia: *In re Sealed Case, 877 F.2d at 981* ("remanding district court decision finding company waived privilege on six documents by inadvertently disclosing one of the documents because lower court 'did not fully explain why the communications were related'"); *United States v. (Under Seal), 748 F.2d 871, 875 n.7 (4th Cir. 1984)* ("If any of the non-privileged documents contain client communications not directly related to the published data, those communications, if otherwise privileged, must be removed by the reviewing court before the document may be produced."); *United States v. Cote, 456 F.2d 142, 145 n.4 (8th Cir. 1972)* (requiring in camera review of documents to protect information not already published, for "too broad an application of the rule of waiver requiring unlimited disclosure ... might tend to destroy the salutary purpose of the privilege").

n113. See generally Charles W. Murdock, Corporate Governance - The Role of Special Litigation Committees, *68 Wash. L. Rev. 79, 86-88 (1993).*

n114. Id.

n115. See *In re Perrigo Co., 128 F.3d 430 (6th Cir. 1997)* (committee report ordered disclosed to derivative

plaintiffs but not to public); *In re Cont'l Illinois Sec. Litig., 732 F.2d 1302, 1314 (7th Cir. 1984)* (report ordered disclosed to a newspaper reporting on the litigation); *Joy v. North, 692 F.2d 880, 893-94 (2d Cir. 1982),* cert. denied, *460 U.S. 1051 (1983)* (holding report and supporting documentation must be disclosed to shareholders). See generally Jerold S. Solovy & Barry Levenstam, Special Litigation Committees, 9 A.L.I.-A.B.A. Course Materials J. 5 (Apr. 1985).

n116. See *Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1175 n.1 (7th Cir. 1995).*

n117. See, e.g., Soloman v. Kimberly-Clark Corp., No. 98 C 7598, *1999 WL 89570, at 2* (N.D. Ill. Feb. 12, 1999) (assertion of advice of counsel defense results in waiver of the attorney-client privilege and attorney work product protection) (citing cases); *Dawson v. New York Life Ins. Co., 901 F. Supp. 1362, 1369-70 (N.D. Ill. 1995)* (assertion of advice of counsel defense to claim to violation of FLSA resulted in waiver of privilege as to certain discovery).

n118. See *Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975).*

n119. *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994).*

n120. See, e.g., *McGrath v. Nassau County Health Care Corp., 204 F.R.D. 240, 245-46 (E.D.N.Y. 2001).*

n121. *42 U.S.C. 2000*(e) et seq.

n122. See *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998).* This defense, available to employers in the employment context, is sometimes referred to as the "Ellerth/Faragher affirmative defense." See, e.g., *Todd v. Ortho Biotech, Inc., 175 F.3d 595, 598 (8th Cir. 1999).*

n123. *Brownell v. Roadway Package Sys., Inc., 185 F.R.D. 19, 25 (N.D.N.Y. 1999).*

n124. *McGrath, 204 F.R.D. at 248* (outside counsel's internal investigative report into allegations of sexual harassment supported employer's affirmative defense that it exercised reasonable care to prevent and correct sexual harassment; such reliance waived attorney-client privilege and report ordered disclosed to plaintiff).

n125. See *Worthington v. Endee, 177 F.R.D. 113, 118 (N.D.N.Y. 1998).*

n126. *In re Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986);* see also *In re Grand Jury Subpoenas Duces Tecum, 773 F.2d 204, 206 (8th Cir. 1985).*

n127. *In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir 1985).*

n128. *In re Grand Jury Subpoena Duces Tecum Dated Sept. 18, 1983, 731 F.2d 1032, 1039 (2d Cir. 1984).*

n129. *In re Sealed Case, 754 F.2d at 399;* see also *In re Antitrust Grand Jury, 805 F.2d 155* (requiring a showing of probable cause).

n130. *In re Sealed Case, 754 F.2d at 402; United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984).*

n131. *Hickman v. Taylor, 329 U.S. 495 (1947).*

n132. *Fed. R. Civ. P. 26(b)(3).*

n133. Id.

n134. See *United States v. Nobles, 422 U.S. 225, 236 (1975); Fed. R. Crim. P. 16(b)(2).*

n135. *Fed. R. Civ. P. 26(b)(3).*

n136. See *Fed. R. Civ. P. 26(b)(3)* advisory committee's note (stating that "No change is made in the existing doctrine, noted in the Hickman case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.").

n137. *United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998)* (citing *Hickman, 329 U.S. at 510-11);* see also *In re Foster, 188 F.3d 1259, 1272 (10th Cir. 1999).*

n138. *Hickman, 329 U.S. at 393-94.*

n139. See, e.g., *In re Murphy, 560 F.2d 326, 335 (8th Cir. 1977); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 484-85 & n.15 (4th Cir. 1973); Panter v. Marshall Field & Co., 80 F.R.D. 718, 724 (N.D. Ill. 1978); Eagle-Picher Indus., Inc. v. United States, 11 Cl. Ct., 452, 457 (1987).* In some jurisdictions, this is still an outstanding issue. See *In re Grand Jury Proceedings, 604 F.2d 798, 803-04 (3d Cir. 1979)* (while observing that work product doctrine should only apply to closely related subsequent litigation, the court declined to expressly so hold); see also *In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994)* (recognizing two approaches-i.e., applying the doctrine to subsequent related or unrelated litigation-and refusing to choose between the two).

n140. See *In re Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 65 (7th Cir. 1980).*

n141. See, e.g., *Broadnax v. ABF Freight Sys., Inc., 180 F.R.D. 343, 346 (N.D. Ill. 1998)* (expressing the work product doctrine in terms of "causation": "production of the materials must be caused by the anticipation of litigation. If materials are produced in the ordinary and regular course of a discovery opponent's business, and not to prepare for litigation, they are outside the scope of the work product doctrine.") (internal citations omitted).

n142. 8 C. Wright & A. Miller, Federal Practice and Procedure 2024, at 198-99 (1970) (footnotes omitted).

n143. *Logan v. Commercial Union Ins. Co., 96 F.3d 971, 976-77 (7th Cir. 1996)* (internal citations, quotation marks, and ellipses omitted).

n144. See *Logan, 96 F.3d at 977* (investigative materials prepared "in the ordinary course of business as a precaution for the 'remote prospect of litigation'" are not protected, while "materials prepared because [of] 'some articulable claim, likely to lead to litigation'" are protected) (citation omitted); see also *Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987),* cert. denied, *484 U.S. 917 (1987)* (risk management documents and the aggregate case reserve information contained therein were not prepared for the purposes of litigation; such documents were "business planning documents," and did "not enhance[] the defense of any particular lawsuit"); *Disidore v. Mail Contractors of Am., Inc., 196 F.R.D. 410, 414 (D. Kan. 2000)* (although insurance company hired attorney to conduct claims investigation, it failed to prove that investigative materials were generated in anticipation of a lawsuit).

n145. Garrett v. Metro. Life Ins. Co., No. 95 CIV.2406, 1996 WL 325725, at 3 (S.D.N.Y. June 12, 1996); see also *In re Grand Jury Subpoena, 599 F.2d 504, 511 & n.5 (2d Cir. 1979)* (investigation of possible illegal foreign payments); *In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979)* (same); *In re LTV Sec. Litig., 89 F.R.D. 595, 612 (N.D. Tex. 1981)* (investigation in response to an SEC subpoena); *United States v. Lipshy, 492 F. Supp. 35, 44-45 (N.D. Tex. 1979)* (in-house investigation of political payments); cf. *Upjohn Co. v. United States, 449 U.S. 383, 399 (1981)* (government conceded applicability of the work product doctrine to documents prepared in the course of an internal corporate investigation). But see *Litton Sys., Inc. v. AT&T Co., 27 Fed. R. Serv. 2d (Callaghan) 819 (S.D.N.Y. 1979)* (court held that interview memoranda from in-house counsel's investigation of suspected bribes and unfounded "finder's fees" in the corporation's sales department only presented a "'remote possibility' of litigation" and therefore no work product immunity attached).

n146. *In re Grand Jury Investigation, 599 F.2d at 1229.*

n147. Id.

n148. See *Diversified Indus. v. Meredith, 572 F.2d 596, 604 (8th Cir. 1978)* ("Law Firm's work was not done in preparation for any trial, and we do not think that the work was done in 'anticipation of litigation,' as that term is used in Rule 26(b)(3), although, of course, all parties concerned must have been aware that the conduct of employees of Diversified in years past might ultimately result in litigation of some sort in the future."); see also *In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 465-67 (S.D.N.Y. 1996)* (notes and memoranda of interviews conducted by outside counsel during a much publicized SEC investigation were not created "principally" for litigation, but as a business and public relations strategy).

n149. See *United States v. Nobles, 422 U.S. at 239 n.13; Fed. R. Civ. P. 26(b)(3)* advisory committee's note; *In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982)* (protecting as privileged communications between auditors and attorneys).

n150. *Fed. R. Civ. P. 26(b)(3)* advisory committee's note to 1970 amendments.

n151. See, e.g., *In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992)* (work-product immunity does not protect information concerning analyses prepared by employees at the direction of corporation counsel, although it protects communications to counsel about those analyses); *Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367, 372 (N.D. Ill. 1972)* (in order to be work-product, materials must have been authored after consultation with attorney); see also *United States v. Lockheed Martin Corp., 995 F. Supp. 1460 (M.D. Fla. 1998)* (materials relating to internal audit performed by in-house auditor after issues arose concerning accounting on government contract were not protected as work product).

n152. See *APL Corp. v. Aetna Cas. & Surety Co., 91 F.R.D. 10 (D. Md. 1980)* (to the extent documents are assembled by or for a party or his representatives into a meaningful product, the contents of that assemblage is work-product sheltered from disclosure).

n153. See *Fed. R. Civ. P. 26(b)(3).*

n154. See *Upjohn Co. v. United States, 449 U.S. 383, 399-402 (1981); Hickman v. Taylor, 329 U.S. 495, 511-13 (1947); In re Grand Jury Subpoena, 599 F.2d 504, 512-13 (2d Cir. 1979).*

n155. See *Upjohn, 449 U.S. at 401.*

n156. See, e.g., *In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982)* (witness' present lack of recollection sufficient to establish substantial need); *United States Amerada Hess Corp., 619 F.2d 980, 988 (3d Cir. 1980)* (avoidance of time and effort held sufficient to justify disclosure of a list of interviewees during internal investigation); *In re Grand Jury Subpoena, 599 F.2d 504, 512 (2d Cir. 1979)* (government's desire to examine questionnaires and interview memoranda in order to decide whether to offer immunity did not constitute sufficient need); *Panter v. Marshall Field & Co., 80 F.R.D. 718, 725 (N.D. Ill. 1978)* (death of witness held sufficient to require immunity did not constitute sufficient need); *Panter, 80 F.R.D. at 725* (death of witness held sufficient to require production of work product); *In re Grand Jury Proceedings,*

73 F.R.D. 647, 653-54 (M.D. Fla. 1977) (citing grand jury's authority and need to investigate, court held that materials prepared in anticipation of prior litigation must be produced in response to grand jury subpoena).

n157. See supra note 156.

n158. *Upjohn, 449 U.S. at 401.*

n159. *Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir. 1999); Williamson v. Moore, 221 F.3d 1177, 1182 (11th Cir. 2000); Baker v. Gen. Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000); Sporck v. Peil, 759 F.2d 312, 316* (3d Cir.), cert. denied, *474 U.S. 903 (1985); In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F. 2d 1235, 1240 (5th Cir. 1982); In re Sealed Case, 676 F.2d 793, 809-10 (D.C. Cir. 1982);* see also *In re Grand Jury Proceedings, 412 F. Supp. 943, 949 (E.D. Pa. 1976)* (opinion work product unqualifiedly and absolutely protected from disclosure).

n160. *GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979)* (citing 8 C. Wright & A. Miller, Federal Practice & Procedure 2024, at 198-99 (1970)); see also *Minnesota Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co., 183 F.R.D. 627, 631 (N.D. Ill. 1999)* ("A waiver only occurs, however, if the disclosure to a third party is inconsistent with the maintenance of secrecy from the disclosing party's adversary.") (citation and internal quotations omitted).

n161. *GAF Corp., 85 F.R.D. at 52;* see also *Behnia v. Shapiro, 176 F.R.D. 277, 279 (N.D. Ill. 1997).*

n162. *United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980);* see also *In re Sealed Case, 676 F.2d at 809* ("The work product privilege protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share. And because it looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work product privilege is not automatically waived by any disclosure to a third party.").

n163. *American Tel. & Tel. Co., 642 F.2d at 1299.*

n164. See *Castle v. Sangamo Weston, Inc., 744 F.2d 1464, 1466 (11th Cir. 1984);* In re Circle K Corp.,

Nos. 96 CIV.5801 (JFK), 96 *CIV.6479 (JFK), 1997 WL 31197, at 10* (S.D.N.Y. Jan. 28, 1997).

n165. *Permian Corp. v. United States, 665 F.2d 1214, 1217-20 (D.C. Cir. 1981).*

n166. *Id. at 1214.*

n167. *In re Subpoenas Duces Tecum, 738 F.2d 1367, 1372-73 (D.C. Cir. 1984)* ("There is no question that the SEC was an adversary to Tesoro. This was not a partnership between allies. Tesoro was not simply assisting the SEC in doing its job. Rather, Tesoro independently and voluntarily chose to participate in a thorough disclosure program, in return for which it received the quid pro quo of lenient punishment for any wrongdoings exposed in the process. That decision was obviously motivated by self-interest." Id. at 1372.).

n168. See *James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 146 (D. Del. 1982)* ("The binder at issue contains various documents selected and arranged by plaintiff's counsel and given to various witnesses prior to their depositions. Without reviewing those binders defendants' counsel cannot know or inquire into the extent to which the witnesses testimony has been shaded by counsel's presentation of the factual background... . Plaintiff's counsel made a decision to educate their witnesses by supplying them with the binders, and the Raytheon defendants are entitled to know the content of that education.").

n169. See *United States v. Nobles, 422 U.S. 225, 236-40 (1970); Coleco Indus., Inc. v. Universal City Studios, 110 F.R.D. 688 (S.D.N.Y. 1986).*

n170. As the court in Martin Marietta Corp. observed, broad, subject-matter waiver does not extend to materials protected by opinion work product. *Martin Marietta Corp., 856 F.2d 619, 625-26 (4th Cir. 1988);* see also *Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1422-23 (11th Cir. 1994)* (same).

n171. See *In re Sealed Case, 676 F.2d at 818* (broad subject matter waiver found where "acceptable tactics ... degenerated into 'sharp practices' inimical to a healthy adversary system"); see also *Gen. Foods Corp. v. Nestle Co., 218 U.S. P.Q. 812, 815 (D.N.J. 1982).*

n172. See *In re Antitrust Grand Jury, 805 F.2d 155, 162-64 (6th Cir. 1986); In re Sealed Case, 676 F.2d at*

811-13; In re John Doe Corp., 675 F.2d 482, 492 (2d Cir. 1982).

n173. See *In re Antitrust Grand Jury, 805 F.2d at 164; In re Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir. 1980).*

n174. See *In re Antitrust Grand Jury, 805 F.2d at 164; In re Special Sept. 1978 Grand Jury (II), 640 F.2d at 62-63.*

n175. See *In re Antitrust Grand Jury, 805 F.2d at 164; In re Special Sept. 1978 Grand Jury (II), 640 F.2d at 63.*

n176. See *United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).*

n177. Id.

n178. *Id. at 1298-99* (noting that the purpose of the work product doctrine is to "protect material from an opposing party in litigation, not necessarily from the rest of the world generally").

n179. Id.

n180. See *In re Sealed Case, 676 F.2d 793, 808-09, 812 n.72 (D.C. Cir. 1982).*

n181. *In re Martin Marietta Corp., 856 F.2d 619, 625-26 (4th Cir. 1988).*

n182. *Carter-Wallace, Inc. v. Hartz Mountain Indus., 553 F. Supp. 45, 50-51 (S.D. N.Y. 1982).*

n183. *Id. at 51.*

n184. *Connolly Data Sys., Inc. v. Victor Techs., Inc., 114 F.R.D. 89 (S.D. Cal. 1987).*

n185. *Id. at 95.*

n186. Had federal law applied to the attorney-client dispute, *In re Coordinated Pretrial Proceedings, 658 F.2d 1355 (9th Cir. 1981)* would have rendered the communications privileged.

n187. See *Upjohn Co. v. United States, 449 U.S. 383, 395 n.5 (1981)* (responses to questionnaires and notes of interviews not disclosed to anyone except general counsel and outside counsel).

n188. See generally *Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).*

n189. See Model Code of Prof'l Responsibility EC 5-18 (1980) (lawyer's allegiance to corporate client is to the entity rather than stockholder, director, officer, employee, representative, etc.); cf. Model Rules of Prof'l Conduct R. 1.13(a) (2002) (lawyer represents organization acting through its duly authorized constituents); Model Rules of Prof'l Conduct R. 1.13(a) cmt. n.1 (2002) ("An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.").

n190. See, e.g., *W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976)* (court disapproved of counsel's lack of candor in interviewing employee without informing him that corporation had him as a defendant in a lawsuit filed the same day as him that corporation had named him as a defendant in a lawsuit filed the same day as the interview).

n191. See *United States v. Keplinger, 776 F.2d 678, 699-701 (7th Cir. 1985)*, cert. denied, *476 U.S. 1183 (1986).*

n192. See Model Rules of Prof'l Conduct R. 1.13 cmt. n.7 (2002).

n193. See *In re Gopman, 531 F.2d 262 (5th Cir. 1976); In re Grand Jury Investigation No. 83-30557, 575 F. Supp. 777 (N.D. Ga. 1983); United States v. RMI Co., 467 F. Supp. 915 (M.D. Pa. 1979);* see also Block & Remz, After Upjohn: The Uncertain Confidentiality of Corporate Investigative Files, reprinted in Corporate Disclosure and Attorney-Client Privilege (ABA-PLI) 75 n.39 (1984) (suggesting that Miranda-like warnings be given to employees interviewed during an internal corporate investigation).

n194. See Block & Barton, Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel, *35 Bus. Law. 5, 9 (1979)* (advising early briefing of board of directors and prompt retention of counsel when management receives evidence of impropriety).

n195. See *United States v. Kelly, 569 F.2d 928, 938* (5th Cir.), cert. denied, *439 U.S. 829 (1978); In re LTV Sec. Litig., 89 F.R.D. 595, 600 (N.D. Tex. 1981).*

n196. See Block & Barton, supra note 194, at 11.

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By in-house counsel, for in-house counsel.SM

Privilege and Privacy When Dealing in an International Context

Presented by:
Elaine Metlin, Partner
Dickstein Shapiro LLP

Moderator:
Rick Duda, Litigation Counsel
Corn Products International, Inc.

Why should U.S. lawyers care?

- U.S. lawyers increasingly dealing with issues in or touching on non-U.S. forums due to:
  - Global nature of business today
  - Increased mobility and technology
  - Trend of globalization of law firms continues to grow
- Greater cooperation between U.S. and foreign government agencies in investigating and regulating companies.
- This is uncertain terrain—there are few clear guidelines governing international legal ethics.

Multifaceted Analytical Framework

- U.S. Model and State Rules of Professional Conduct.
- U.S. case law.
- Code of Conduct for European Lawyers ("CCBE Code") and UIA principles.
- E.U. case law and E.U. member countries' case law.
- The European Commission Directive on Data Protection and Article 29 Working Party on Data Protection
- E.U. member countries' respective data protection laws, privacy laws, and blocking statutes.
- Multinational treaties such as The Hague Evidence Convention, or similar bilateral agreements.

Hypothetical Part 1: You Get the Call

Relevant Authority in the E.C.

- Case 155/79 *Australian Mining and Smelting (AM&S) v. Commission,* 1982 ECR 1575.
  - The European Court of Justice held that the attorney-client privilege ("legal professional privilege") applies only when:
  - the communication is made for the purpose of the client's defense
  - the lawyer is independent
  - the lawyer is licensed in the E.U.
  - In-house counsel are not "independent" and are not covered by legal professional privilege.

Relevant Authority in the E.C. (cont.)

- *John Deere & Co. v. N.V. Cofabel*, Commission Decision (85/79/EEC) 14 December 1984 O.J.L. 35
- In a dawn raid, the European Commission seized documents from a U.S. company's offices in Europe, including communications with in-house counsel.
- The European Commission relied upon the communications with in-house counsel to find that the company knew that its cross-border trading policies were illegal and in violation of E.U. competition laws.

Relevant Authority in the E.C. (cont.)

- *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission of European Communities, (Joined Cases T-125/03 and T-253/03 (2007).*
- Confirmed the AM&S standard of legal professional privilege.
- Held that in-house counsel are not "independent" within the standard, even if they are members of a Bar or Law Society that requires independent legal advice.
- Legal professional privilege does cover internal documents drafted solely to seek advice from external lawyers.

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Summary

- In dealing with the EC and possibly other national competition authorities for violations of EU competition law, internal communications between in-house counsel and European company are *not* privileged.
- Similarly, the EC does not regard communications between U.S. outside counsel and European company as privileged.
- Communication between outside E.U. counsel and European company *is* privileged – but must be for the purposes of legal defense.

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Opinion of Advocate General Kokott, Akzo Nobel Chemical Ltd. and Akcros Chemicals Ltd. v. European Commission, Case C-550/07 P, (Apr. 29, 2010)

On appeal to the Court of Justice, the Advocate General:

- confirmed lower court's holding and recommended that the appeal be dismissed.
- opined that in-house lawyers, even if members of a Bar or Law Society requiring independence, are incapable of giving unbiased advice to their employers
- The Advocate General's opinions guide the Court of Justice in pending cases and while not binding, are followed in vast majority of cases.
- Decision is expected later this year.

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Other Privilege Considerations

- Notwithstanding Akzo and EU law, internal communications between in-house counsel and the Company are deemed to be privileged in many countries. For example, nearly all Latin American countries share the U.S. practice; Scotland, Bangladesh and Bermuda do as well.
- Whether or not in-house counsel's communications are privileged can depend on whether the issue is a purely domestic one or if it crosses borders. Counsel must not rule out international considerations even if initially an issue seems purely domestic.
- In addition, the privilege issue is not resolved in a number of countries. For example, China does not have well established attorney client principles, When dealing in In these and similar countries, individual analysis of privilege issues must take place prior to an incident.

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Interviewing Employees as Part of the Internal Investigation in the EC

- CCBE has a *non-waivable* conflicts rule that a "lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of conflict, between the interests of those clients." CCBE Code Rule 3.2.1
- Compare to ABA Model Rule 1.13 (a) which states that company counsel represents the organization (counsel is engaged to represent an organization "through its duly authorized constituents"); and
- Model Rule 1.7(a) which states that a lawyer "shall not represent a client if the representation of that client will be directly adverse to another client."

Other Ethical Considerations for the U.S. Lawyer

- ABA Model Rule requires "competent representation."
- Affirmative duty to know the foreign law if working in a foreign jurisdiction.
  - *See e.g. In re Roel*, 3 N.Y.2d 224 (1957) ("When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter and may not claim that they are not required to know the law of the foreign State.")

Hypothetical Part 2: The U.S. Case is Filed

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Protecting Information Disclosed in EC Proceedings from Discovery In US Proceedings

- U.S. litigants may argue successfully that privilege is waived as to documents created in EC proceedings if those documents are:
  - Voluntarily submitted;
  - To third parties (such as the Competition Commission).
  - 8th Circuit recognizes a general exception to waiver rule for materials voluntarily submitted to government regulators. *See Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1978).
- No waiver for compelled submissions.

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Treatment of Foreign Privileges in U.S. Courts

- U.S. courts will look at the nature of the protection afforded by the foreign rule to determine whether the non-U.S. privilege rises to the level of a U.S. evidentiary privilege, and will also take comity into consideration when dealing with:
  - Professional secrecy laws
  - Data protection laws
  - Blocking statutes

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Blocking Statutes – A "Paper Tiger"?

- French blocking statute, enacted in 1980, imposes fines and criminal penalties for requesting or providing information in answer to a U.S. discovery request. Prior to 2007 it had had never been enforced and was considered a hollow threat by US courts.
- In Dec. 2007, the French Supreme Court enforced the blocking statute for the first time, fining a French lawyer 10,000 euro for making a phone call seeking information in response to a U.S. discovery request.
- Regardless, U.S. courts thus far have not really changed their view. *See Global Power Equip. Group., Inc.*, No. 06-11045, 2009 WL 3464212 (Bkrtcy. D. Del., Oct. 28, 2009).

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Treatment of U.S. Privileges in EC

- Note that U.S. courts will extend attorney-client privilege where U.S. attorney gives advice on US law to European company in U.S. proceedings, even if these conversations would not be privileged in the EC.

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Hypothetical Part 3: The Discovery Phase in the U.S. Litigation

By in-house counsel, for in-house counsel.SM

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Document Discovery

- Which jurisdiction's discovery rules apply?
- Discovery of documents (paper and electronic) physically located in foreign jurisdictions.
- U.S. courts may require production even if non-U.S. privileges are raised.
- Counsel faced with two bad options—risk sanctions for non-compliance in US court or risk civil/criminal penalties in foreign jurisdiction for violating foreign law.

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Document Discovery and Data Protection Laws

- Preservation of Data. Although sending a hold notice is not "processing" under the Directive, any action by "data controllers" to *comply* with a hold notice *is* processing, and violates the Directive unless it follows certain rules.
- Working Party opines that data controller should comply with established retention policy, and only suspend if the data is relevant and to be used in specific or imminent litigation. Culling and redacting to be done by the data controller or "trusted third party" in E.U.; requires notice to all the data subjects with opportunity to object or amend. Recommends using the Hague Convention.
- Sedona Conference response to Working Party wants "best practice" protocols and model forms. Hague and redacting are time-consuming and costly; but initial culling must be done in E.U.

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Deposition Discovery

- Taking of depositions in foreign jurisdictions
  - Hague Convention procedures vs. FRCP
- Different considerations than with documents, because done on foreign soil, there is a greater infringement of sovereign rights.
- It is an ethical violation to engage in "under the table" depositions in countries where private depositions are not permitted.
  - ABA Model Rule 8.4(c) makes it "professional misconduct" for lawyers to engage in "conduct involving dishonesty, fraud, deceit or misrepresentation."

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Takeaways

- Communications must flow through EU outside counsel.
- Limit what you commit to writing.
- Treat all materials you prepare as *potentially* discoverable in foreign proceeding.
- When in doubt, follow the most restrictive ethics rules.
- There are no easy answers.

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*By in-house counsel, for in-house counsel.*SM

SIDLEY AUSTIN LLP

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APRIL 9, 2010

WHITE COLLAR/INTERNAL INVESTIGATIONS UPDATE

The White Collar and Internal Investigations Practices of Sidley Austin LLP

Sidley's White Collar group is recognized for its significant experience in all aspects of corporate criminal defense and enforcement-related litigation — from internal investigations, to representing clients in grand jury investigations, to managing parallel criminal and civil proceedings, to trial, to extraditions and counseling on foreign criminal investigations and to advising on voluntary disclosure and compliance issues. Sidley lawyers have extensive experience in conducting internal investigations for major U.S. corporations, both in the United States and abroad, including in China, Korea, Hungary, Lithuania, Bulgaria, Thailand, Poland, Italy, Philippines, India, Venezuela and Brazil. Sidley's team includes many former federal prosecutors and SEC enforcement lawyers. Sidley lawyers have conducted investigations involving the Foreign Corrupt Practices Act, healthcare fraud, FDA violations, executive improprieties, insider trading, market manipulation, accounting fraud, defense procurement/government contracting fraud, environmental violations and many others. When conducting investigations, Sidley lawyers often advise companies on corporate governance issues and compliance programs. The team has the ability to call on other Sidley lawyers with regulatory experience in virtually every substantive area of law.

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The Seventh Circuit Holds Sidley Internal Investigation Privileged and Protected from Disclosure in Discovery

On March 30, 2010, the Seventh Circuit Court of Appeals issued an important ruling protecting attorney-led internal investigations from discovery on grounds of the attorney-client privilege and work product doctrine. In that case, *Sandra T.E., et al. v. South Berwyn School District 100 and Sidley Austin LLP,* No. 08-3344, the Seventh Circuit held that the interview notes and memoranda of Sidley Austin attorneys that were created as part of their internal investigation on behalf of the South Berwyn School Board were protected from disclosure in discovery in related civil litigation brought against the School District.

Sidley had been retained by the School Board to conduct an internal investigation after an elementary school music teacher in the School District was charged with sexually molesting numerous students over a period of years. Victims of this abuse alleged that the School District had known of allegations of abuse long before the criminal charges had been filed and had failed to take appropriate responsive action. The allegations produced understandable public outrage and demands for action within the School District. The School Board responded by hiring Sidley's Scott Lassar, former United States Attorney for the Northern District of Illinois, and Michael Doss to head up an investigation into these allegations, provide legal advice, and analyze the effectiveness of the School District's existing compliance procedures.

Over the coming weeks, Sidley attorneys conducted numerous interviews of current and former School District teachers and administrators as well as certain third-party witnesses. As the Seventh Circuit noted, these interviews were not recorded, and instead the Sidley attorneys prepared handwritten notes during the interviews and drafted memoranda summarizing the interviews. Sidley later delivered its findings and legal advice to the School Board in an oral report and a written executive summary.

These handwritten notes and legal memoranda were later sought in discovery in the civil litigation instituted against the School District on behalf of the victims of the abuse. The district court granted plaintiffs' motion to compel production of these materials, which were in Sidley Austin's possession, holding that Sidley had been hired to provide "investigative services," not legal services, and thus the interview notes and

memoranda and related Sidley reports to the School Board were not protected from disclosure by the attorney-client privilege. Sidley appealed.

The Seventh Circuit reversed the district court in a unanimous decision. The Court held that Sidley's investigation fell squarely under the Supreme Court's landmark *Upjohn* decision, *Upjohn Co. v. United States,* 449 U.S. 383, 394-99 (1981), which explained that factual investigations performed by attorneys working as attorneys "fall comfortably within the protection of the attorney-client privilege." Following *Upjohn,* the Seventh Circuit recognized that when, like here, "an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client communications in the course of the investigation are fully protected by the attorney-client privilege." The Seventh Circuit further found that Sidley interviews of non-client witnesses were protected from disclosure by the work product doctrine which "applies to attorney-led investigations" such as was conducted here by Sidley, where the prospect of litigation was present.

The Seventh Circuit rejected the district court's finding that Sidley was hired to provide only investigative, not legal, services. In this regard, the Seventh Circuit stressed that Sidley's engagement letter with the School Board spelled out that Sidley would conduct an investigation in order to provide legal advice and services. The Seventh Circuit further found that the conduct of Sidley attorneys during the investigation confirmed that they "were acting in their capacity as attorneys," focusing on the facts that no third parties were present during the interviews, that witnesses were given "*Upjohn* warnings" emphasizing that Sidley represented the School Board which controlled whether the interviews remained privileged, that the report to the School Board was conducted in confidence, and that the relevant documents were marked as both "Privileged" and "Work Product."

The Seventh Circuit's decision thus reflects a broad and important affirmation of principles of *Upjohn,* protecting attorney-led internal investigations from future disclosure so long as appropriate investigation protocols are followed and the attorney-client relationship is properly documented by engagement letters and otherwise.

RELATED COMPANY COMMON INTEREST AGREEMENT

This Common Interest Agreement (the "Agreement") is made by and between the undersigned Parties and counsel ("Counsel") on behalf of themselves and their respective clients (each a "Party" and collectively the "Parties").

1. **The Parties and the Matter**. The Parties hereto are ABC, Inc., DEF, Inc. and GHI, Inc. The Parties have consistent and overlapping interests with regard to _____ (the "Matter"). ABC and DEF are presently wholly owned subsidiaries of GHI. The undersigned in-house and outside counsel (collectively, "Counsel") presently represent or expect to represent the Parties in the Matter.

2. **Common Interests**. In connection with the Matter and any subsequent or related matter, the Parties and Counsel have concluded there is a mutuality of interest in a legal analysis of this matter. This mutuality of interest includes at least the following: _____. The Parties and Counsel wish to continue to pursue separate but common interests and avoid any claim or suggestion of waiver of the privileges enjoyed by the Parties. The Parties therefore acknowledge and agree that their interests will be best served if Counsel can exchange information subject to the continued protection of the attorney/client privilege, and other privileges or immunities that may apply under relevant law.

3. **Sharing of Common Interest Materials**. The Parties agree to cooperate with one another reasonably in the legal analysis of the Parties' common interests, as permitted by law pursuant to the joint defense or common interest doctrine. While each Party retains the right to determine which information in its possession it shall disclose to the other Party, the Parties and Counsel contemplate that, to further their common interests and in order that the Parties may exchange privileged information, any and all of the following, whether disclosed orally or in documents, shall be covered by this Agreement: (a) factual analysis; (b) mental impressions; (c) legal memoranda; (d) witness interviews and statements; (e) summaries; (f) transcripts; (g) reports and expert opinion; and (h) any other information which would otherwise be protected

from disclosure to third parties under any theories ("Common Interest Materials"). This list is not intended to be all inclusive; it represents examples of mutual efforts. Additional items of mutual interest may be generated. The Parties would not disclose such common interest materials but for their mutual and common interests.

4. **Preservation of Privileges**. The Parties and Counsel agree that the disclosure of the Common Interest Materials is not intended to waive any applicable privilege or protection. The Parties and Counsel agree that the Common Interest Materials will be protected from disclosure by the attorney/client privilege, or other privileges or immunities that may apply under relevant law.

5. **No Disclosure to Third Parties**. No information obtained as a result of this Agreement by a Party or Counsel shall be disclosed to any third party (except representatives (as defined below) of the Party and other attorneys within the same law firm as Counsel) without the express consent of the Party who first made the information available under this Agreement. Each Party agrees that Common Interest Materials received pursuant to this Agreement shall not be provided to any person not involved in making decisions regarding the matter or regarding any subsequent or related proceeding.

6. **Limited Use of Common Interest Materials**. The Common Interest Materials and information derived therefrom shall be used by the recipient Party solely for purposes of evaluating and assisting in the legal analysis of this issue or of any subsequent or related proceeding arising out of the same set of facts. Nothing in this Agreement restricts in anyway the use by a Party of information or statements obtained other than pursuant to this Agreement. Any documents shared by Counsel or any Party in connection with the common interest effort shall be returned upon request to the Counsel providing them and no copy shall be retained.

7. **Notice of Discovery Demands**. In the event the Party receives a request, including a subpoena, for the production of documents, which may include Common Interest Materials that the Party received pursuant to this Agreement, the recipient Party shall promptly notify the Party who provided the Common Interest Material called for by the request and shall give such Party

copies of any writings or documents, including subpoenas, summons and the like, which relate to the attempt by the third party to obtain the information. Each Party to this Agreement shall use reasonable efforts to litigate any challenge to the assertion of the attorney/client privilege, or other privileges that exist or may exist as a result of this Agreement or the Parties' respective individual privileges.

8. **No Waivers**. This Agreement shall not create any agency or similar relationship among the Parties. No Party shall have authority to waive any applicable privilege or doctrine on behalf of any other Party; nor shall any waiver of an applicable privilege or doctrine by the conduct of any Party be construed to apply to any other Party. No Party will enter into a settlement with a third party that would require or result in the disclosure of Common Interest Material provided by the other Party.

9. **Withdrawal**. Any Party to this Agreement may withdraw upon prior written notice to the other Parties, in which this Agreement prospectively shall no longer apply to the withdrawing party; however, this Agreement shall continue to protect all Common Interest Materials disclosed by or to the withdrawing Party prior to that Party's withdrawal. Each Party to this Agreement has an affirmative duty to withdraw when, in good faith, it determines that it no longer has a commonality of interests, and to give prompt written notice of such withdrawal to the other Parties and their Counsel. The withdrawing Party shall continue to be bound by this Agreement with regard to any common interest materials provided, disclosed, received, learned or obtained from the Party prior to withdrawal.

10. **Potential Conflicts and Objections Waived.** Each Party acknowledges and understands that it is possible that another Party may in the future become a witness against it or hold a position adverse to it. Each Party further acknowledges and understands that the attorneys representing the other Parties at that time will have the right and may have the obligation to take actions against the interests of other Parties, such as cross-examining them at trial or other proceedings using non-privileged information obtained through communications not protected by this Agreement.

By signing below, each Party knowingly and intelligently waives any objection that it may have, and consents, to the continued representation by Counsel of GHI in any subsequent dispute between or involving the Parties. By signing this Agreement, each Party also confirms that Counsel has explained the contents of this Agreement to the Party and that such Party agrees to abide by the Agreement. Further, and in the event that they cease to be wholly owned subsidiaries of GHI, ABC and DEF knowingly and voluntarily waive the right to object to the continued retention by Counsel of GHI or to seek the counsel's disqualification, on the ground that: (a) the counsel had access to the Joint Information pursuant to this Agreement; (b) the counsel has a conflict of interest by reason of participation in common interest efforts under this Agreement; or (c) the counsel was prevented or precluded from rendering zealous legal representation to his or her client by reason of participation in common interest efforts under this Agreement. *See United States v. Henk*e, 222 F.3d 633 (9th Cir. 2000).

11. **Additional Parties**. Upon agreement of the Parties, additional individuals or entities may be permitted to join the Agreement at future time.

12. **Successor Counsel**. This Agreement shall remain in effect and be binding upon successor Counsel in accordance with its terms and may be terminated by successor Counsel only in accordance with its terms.

13. **Enforcement**. The Parties agree that injunctive relief is the appropriate means to enforce this Agreement and stipulate that a violation of the Agreement would constitute irreparable harm.

14. **Effective Date**. This Agreement may be executed in counterparts, each of which shall constitute an integrated and enforceable whole. This Agreement memorializes and supersedes the prior oral understanding among Counsel regarding defense materials and applies to all communications and other exchanges of information (whether written or oral) among Counsel related to this action and any subsequent or related proceeding prior to and subsequent to the execution of this Agreement.

15. **Modifications**. This Agreement cannot be modified except in writing signed by all Counsel.

16. **Authority**. This Agreement is signed by officers of the respective Parties, who represent that they are attorneys in fact with authority to bind their respective clients to the terms of this Agreement.

ACCEPTED AND AGREED:

Securities and Exchange Commission
Division of Enforcement

Enforcement Manual

Office of Chief Counsel

October 6, 2008

Enforcement Manual
Table of Contents

1. Introduction

1.1 Purpose and Scope

The Enforcement Manual ("Manual") is an electronic document designed to be a reference for the staff in the U.S. Securities and Exchange Commission's ("SEC") Division of Enforcement ("Division" or "Enforcement") in the investigation of potential violations of the federal securities laws. It contains various general policies and procedures and is intended to provide guidance only to the staff of the Division. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

1.2 Origin

The Manual was prepared under the general supervision of the Division of Enforcement's Office of Chief Counsel ("OCC") in consultation with the Securities and Exchange Commission's Office of the General Counsel ("OGC"), Office of the Inspector General ("OIG") and Office of the Chairman. OCC coordinates periodic revision of the Manual. Although the Manual is intended to be comprehensive, decisions about specific investigations, cases, and charges are made according to the specific facts and circumstances at hand.

1.3 Public Disclosure

The Manual is United States Government property. It is to be used in conjunction with official duties. All materials contained in the Manual are subject to the provisions of Title 5, U.S.C. Section 552(a)(2), with the exception of those materials excluded under 17 C.F.R. Section 200.80. Accordingly, this Manual is available for public inspection on line at www.sec.gov.

1.4 Fundamental Considerations

1.4.1 Mission Statement

The Division's mission is to protect investors and the markets by investigating potential violations of the federal securities laws and litigating the SEC's enforcement actions. Values integral to that mission are:

- Integrity: acting honestly, forthrightly, and impartially in every aspect of our work.

- Fairness: assuring that everyone receives equal and respectful treatment, without regard to wealth, social standing, publicity, politics, or personal characteristics.

4. Privileges and Protections

4.1 Assertion of Privileges

4.1.1 Attorney-Client Privilege

Basics:

- The attorney-client privilege protects from disclosure confidential communications between attorney and client made when the client is seeking legal advice. The purpose of the privilege is to encourage free and candid communication between attorney and client.

- Elements necessary to establish the attorney-client privilege:
  - communication;
  - made in confidence;
  - to an attorney;
  - by a client;
  - for the purpose of seeking or obtaining primarily legal advice; and
  - not waived

Considerations:

- Circumstances when the attorney-client privilege is usually unavailable include:

  - When the privilege has been waived. The privilege belongs solely to the client and may only be waived by that client. A client waives the privilege by knowingly sharing the substance of a privileged communication between the client and the attorney with parties outside the privileged relationship. With respect to corporations, management has the authority to waive the privilege.

  - When the party asserting the privilege asserts a defense of advice-of-counsel. If a party asserts an advice-of-counsel defense, the party must waive the privilege, including testifying and/or producing documents, to the extent necessary to enable the staff to evaluate the validity of the defense. To assert a valid advice-of-counsel defense, courts have held that the defendant must establish that he or she (1) made complete disclosure to counsel; (2) requested counsel's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice.

- Information that typically does not involve a confidential communication and therefore is not privileged include:

    - Identity of the client.
    - Existence of the attorney-client relationship.
    - General reason why the attorney was retained.
    - Fee arrangement between attorney and client.
    - Billing statements.

- Crime-fraud exception to attorney-client privilege: This is a rare exception. Most courts require the party wishing to invoke the crime-fraud exception to demonstrate that there is a factual basis for a showing of probable cause to believe that a crime or fraud has been committed and the communications in question were in furtherance of the crime or fraud. This burden is normally not met by showing that the communications in question might provide evidence of a crime or fraud but rather that the communication itself was in furtherance of the crime or fraud and was intended to facilitate or conceal the crime or fraud.

- Corporations asserting the attorney-client privilege: The attorney-client privilege can be asserted by a corporation to protect communications between corporate employees and in-house counsel. Courts have held that to assert the attorney-client privilege, a corporation must show that the communication came from a person who was employed with the corporation at the time of the communication, the employee was seeking legal advice from an attorney, and the communication was made within the scope of the employee's duties.

- Questions to consider asking to test the assertion of the attorney-client privilege include:

    - who prepared the document
    - who sent the document
    - to whom was the document sent
    - what was the date of the communication
    - what was the date on the document, or if none, the date the document was prepared, sent and/or received
    - who are the attorney and client involved
    - what was the nature of the document (*i.e.*, memorandum, letter, telegram, etc., and generic subject matter)
    - who are parties indicated on the document through carbon copy notations or

otherwise who were to receive the document, and all parties that in fact received or saw the document
- who was present during the communication
- who are the parties to whom the substance of the communication was conveyed
- would all of the communication, if disclosed to the staff, reveal or tend to reveal a communication from a client (made with the intention of confidentiality) to his/her attorney in connection with clients seeking legal services or legal advice at a time when the attorney was retained by that client
- would any segregable part of that communication not reveal or tend not to reveal such a confidential communication
- did a retention agreement between the attorney and client exist and if so, what is the date of such agreement
- during what period of time did the attorney-client relationship exist
- was a legal fee charged the client by the attorney in connection with the matter involving the communication; if so, how much, and how, when and by whom was it paid; if no fee was charged, was one discussed
- what was the general nature of legal services rendered, and during what time period
- did the communication primarily involve a business dealing between the attorney and client
- did the communication involve the client's seeking business advice
- was the communication a grant of authority or instruction for the attorney to act upon.

4.1.1.1 Multiple Representations

Basics:

It is not unusual for counsel to represent more than one party (employees of the same company, for example).[7] Representing more than one party in an investigation does not necessarily present a conflict of interest, although it may heighten the potential for a conflict of interest.

Considerations:

When an attorney represents multiple parties, staff in testimony typically informs the party of what is contained in Form 1662, which states that:

> "You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be

[7] Counsel is not precluded from representing more than one witness in the same investigation absent a showing that such representation will obstruct or impede the investigation. *See SEC v. Csapo*, 533 F.2d 7 (D.D.C. 1976); *see also SEC v. Higashi*, 359 F.2d 550 (9th Cir. 1966).

adverse to another's. If you are represented by counsel who also represents other persons involved in the investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours."

4.1.2 Attorney Work Product Doctrine

Basics:

- A party or the representing attorney may refuse to provide information on the basis that the information requested is protected by the attorney work product doctrine. If the documents or information requested were prepared in anticipation of litigation or for trial, or directly related to preparation for trial, then the work product doctrine generally applies and the party seeking discovery has the burden of proving substantial need and undue hardship. For material to be prepared in "anticipation of litigation," the prospect of litigation must be identifiable, although litigation need not have already commenced.

- Elements of the doctrine as set forth in Federal Rule of Civil Procedure 26(b)(3) are the following:

    - documents and tangible things
    - prepared in anticipation of litigation or for trial
    - by or for another party or by or for that party's representative, including attorney, consultant, surety, indemnitor, insurer, or agent
    - for which there is substantial need for the information and the information cannot be obtained elsewhere without undue hardship

Considerations:

- Voluntary disclosure of work product to the SEC generally constitutes a waiver.

- When a party asserts an advice-of-counsel defense, it must waive the attorney work product privilege to the extent necessary to enable the staff to evaluate the defense.

4.1.3 The Fifth Amendment Privilege Against Self-Incrimination

Basics:

- A witness testifying before the SEC may assert his or her Fifth Amendment privilege against self-incrimination.

- If a previous grant of immunity, or the expiration of the time limits for criminal prosecution prescribed by the statute of limitations, eliminates the danger of self-incrimination, the witness may not invoke the privilege.

Considerations:

- Staff typically will require testimony by or a declaration from the witness to assert the witness's Fifth Amendment privilege. Staff typically will not accept a letter from defense counsel as an alternative to testimony or a declaration.
    - Reasons for requiring a witness to appear in person to assert the Fifth Amendment privilege include, but are not limited to, obtaining a clear and specific privilege assertion on the record, allowing the staff to probe the scope of the privilege assertion, and allowing the staff to determine whether there are grounds to challenge the assertion.
    - A witness may not make a "blanket" assertion of the Fifth Amendment privilege.
    - In some cases, allowing assertion of the privilege by declaration may be more appropriate, for example, when time is of the essence.
- The Fifth Amendment privilege against self-incrimination protects individuals and sole proprietorships, but does not protect a collective entity, such as a corporation, or papers held by an individual in a representative capacity for a collective entity.
- Under the required records doctrine, the Fifth Amendment privilege against self-incrimination does not apply to records required to be kept by an individual under government regulation, such as tax returns.
- During litigation, the SEC can assert that an adverse inference should be drawn against a defendant who has asserted the Fifth Amendment privilege.

4.2 Inadvertent Production of Privileged or Non-Responsive Documents

Basics:

On September 19, 2008, the President signed S. 2450 into law, a bill adding new Evidence Rule 502 to the Federal Rules of Evidence. The new rule will apply in all proceedings commenced after the date of enactment and, insofar as is just and practicable, in all proceedings pending on such date of enactment. Under new Rule 502(b), when inadvertent disclosure is made to a federal agency, it does not operate as a waiver in a federal or state proceeding if a) the disclosure is inadvertent; b) the holder of the privilege took reasonable steps to prevent disclosure; and c) the holder promptly took reasonable steps to rectify the error.

If assigned staff receives inadvertently produced documents, assigned staff should promptly contact a supervisor at the Associate Director/Regional Office Head level or above and/or an Ethics liaison. Generally, staff will notify the party through his or her counsel of its receipt of inadvertently produced documents. Assigned staff should not

return a document to the party without prior consultation with his or her supervisor(s) and/or the Ethics Liaison.

Considerations:

- In determining how to respond after receiving a document that has been inadvertently produced, staff should consider when he or she was made aware of the production: prior to review of documents, upon review of documents, or after the review has been completed. In addition, staff should consider whether the documents are clearly privileged, possibly privileged, or simply nonresponsive.
- When assigned staff, in consultation with a supervisor and/or the Ethics liaison, determines that documents should be returned to the party, staff should require that the party create a privilege log.
- If assigned staff, along with his or her supervisors and/or the Ethics Liaison, determines that the staff has a legally sound and defensible basis for keeping the document, staff typically informs the party that staff possesses the document and intends to use it. Staff typically also informs the party whether and to whom staff has provided copies of the document outside the SEC (e.g., a judge or expert).
- If a document is not privileged, but is non-responsive, staff should consider whether the information may be useful as a basis for an inquiry or investigation, In addition, staff may want to alert other regulators or law enforcement authorities if staff discovers evidence of non-securities-related violations.

Further Information:

Assigned staff should refer any questions about this issue to their supervisors and to the Office of Chief Counsel.

4.2.1 Purposeful Production With No Privilege Review

Basics:

In some rare instances, a party may seek to produce documents and other responsive material to the staff before they have reviewed the material for privileged documents, and the party may seek to preserve any claims of privilege on these materials. In those circumstances, staff can choose to accept such a production in their case if they feel that it is to their benefit. Whether or not the staff chooses to accept such a production, the primary responsibility for identifying any privileged materials resides with the party, and acceptance is not an agreement to shift such responsibility to the staff. Further, the party must agree not to argue that the staff's investigation has been tainted by the staff's receipt, review, or examination of any material later determined to be privileged.

Considerations:

- In determining to accept such a production, staff should consider whether the acceptance will help to advance the staff's case by allowing the party to be able to provide the SEC with the requested production in a more expedited manner.

- If staff chooses to accept such a production, staff should clarify for the party that the staff will begin to look at the production immediately upon receipt, and that assigned staff will follow our regular procedures for handling inadvertent productions of privileged documents. For instance, assigned staff and their supervisors may decide that Enforcement has a legally sound and defensible basis for keeping a document that the party later claims as privileged. If this happens, staff should inform the party that Enforcement believes they have a basis for keeping the document.

- If a document is identified during the review as privileged or potentially privileged, and the party requests its return, staff should request that the party create a privilege log.

Further Information:

Assigned staff should refer any questions about this issue to their supervisors and to the Office of Chief Counsel.

4.3. Waiver of Privilege

Basics:

The staff must respect legitimate assertions of the attorney-client privilege and attorney work product protection, unless a party voluntarily chooses to waive privilege. As a matter of public policy, the SEC wants to encourage individuals, corporate officers and employees to consult counsel about potential violations of the securities laws.

A key objective in the staff's investigations is to obtain relevant information, and parties are, in fact, required to provide relevant information in response to SEC subpoenas. However, both entities and individuals may provide significant cooperation in investigations by *voluntarily* disclosing relevant information. That voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation, as long as all relevant facts are disclosed.

The distinction between privileged communications or documents and unprivileged facts is often demonstrated in the course of a corporation's internal investigation regarding the conduct at issue in the staff's investigation. In corporate internal investigations, employees and other witnesses associated with a corporation are often interviewed by attorneys. If the interviews are conducted by attorneys, certain memoranda or notes generated in connection with the interview may be subject, at least in part, to the attorney-client or work product privileges. However, the underlying factual information disclosed by the witnesses during the interviews is not privileged.

The staff should not ask a party to waive the attorney-client or work product privileges and is directed not to do so. All decisions regarding a potential waiver of privilege are to be reviewed with the Assistant supervising the matter and that review may involve more senior members of management as deemed necessary. The Enforcement Division's central concern is whether the party has disclosed all relevant facts within the party's knowledge that are responsive to the staff's information requests, and not whether a party has elected to assert or waive a privilege. As discussed below, if a party seeks cooperation credit for timely disclosure of relevant facts, the party must disclose all such facts within the party's knowledge. On request, and to the extent possible, the staff should continue to work with parties to explore alternative means of obtaining factual information when it appears that disclosure of responsive documents or other evidence may otherwise result in waiver of applicable privileges.

A party remains free to disclose privileged communications or documents if the party voluntarily chooses to do so. In this regard, the SEC does not view a party's waiver of privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the staff. In the event a party voluntarily waives privilege, the staff cannot assure the party that, as a legal matter, the information provided to the staff during the course of the staff's investigation will not be subject to disclosure pursuant to subpoena or other legal process.

Considerations:

- The SEC encourages and rewards cooperation by parties in connection with staff's investigations. One important measure of cooperation is whether the party has timely disclosed facts relevant to the investigation. Other measures of cooperation include, for example, voluntary production of relevant factual information the staff did not directly request and otherwise might not have uncovered; requesting that corporate employees cooperate with the staff and making all reasonable efforts to secure such cooperation; making witnesses available for interviews when it might otherwise be difficult or impossible for the staff to interview the witnesses; and assisting in the interpretation of complex business records. The SEC's policy with respect to cooperation is set forth in the Seaboard 21(a) Report, Sec. Rel. No. 44969 n.3 (Oct. 23, 2001), which outlines other numerous factors that may be considered in assessing whether to award credit for cooperation.

- Waiver of a privilege is not a pre-requisite to obtaining credit for cooperation. A party's decision to assert a legitimate privilege will not negatively affect their claim to credit for cooperation. The appropriate inquiry in this regard is whether, notwithstanding a legitimate claim of privilege, the party has disclosed all relevant underlying facts within its knowledge.

- By timely disclosing the relevant underlying facts, a party may demonstrate cooperation for which the staff may give credit, while simultaneously asserting privilege. The timely disclosure of relevant facts is considered along with all other cooperative efforts and circumstances in determining whether and the extent to which the party should be awarded credit for cooperation. *See id.*

Exceptions re Assertion of Privileges:

- In order to rely on advice-of-counsel as a defense, a party must waive the attorney-client privilege and work product protection to the extent necessary to enable the staff to evaluate the defense. Staff at the Assistant Director level or higher should attempt to explore the possibility of an advice-of-counsel defense with a party's counsel at an early stage in the investigation. It is important to obtain all relevant documents and testimony at the earliest possible date.

- Staff should consider whether there may be other circumstances that negate assertions of privilege, such as the crime-fraud exception and prior non-privileged disclosure. These and other such circumstances should be considered in analyzing the legitimacy of a party's assertion of privilege.

Further Information:

- For more information on the attorney-client and work product privileges, and exceptions thereto, please consult Sections 4.1.1 (Attorney-Client Privilege) and 4.1.2 (Attorney Work Product Doctrine) of the Manual.
- For information on the inadvertent production of privileged materials, please consult Section 4.2 of the Manual.
- For information on the production of privileged materials pursuant to a Confidentiality Agreement, please consult Section 4.3.1 of the Manual.

4.3.1 Confidentiality Agreements

Basics:

A confidentiality agreement is an agreement between the staff of the Division of Enforcement and, typically, a company subject to investigation pursuant to which the company agrees to produce materials that it considers to be privileged (such as reports of an internal investigations, interview memoranda, and investigative working papers). For its part, the staff agrees not to assert that the entity has waived any privileges or attorney work-product protection by producing the documents. The staff also agrees to maintain the confidentiality of the materials, except to the extent that the staff determines that disclosure is required by law or that disclosure would be in furtherance of the SEC's discharge of its duties and responsibilities. The basis for the agreement is the interest of

the staff in determining whether violations of the federal securities laws have occurred, and the company's interest in investigating and analyzing the circumstances and people involved in the events at issue.

Considerations:

- The Division typically uses a Model Confidentiality Agreement (below), and the staff should not agree to modifications to the Model Confidentiality Agreement without first consulting with the Office of Chief Counsel and/or the Head of the Trial Unit. The agreement must be signed by a supervisor at or above the level of an Assistant Director.
- While obtaining materials that are otherwise potentially subject to privilege or the protections of the attorney work-product doctrine can be of substantial assistance in conducting an investigation, the staff should exercise judgment when deciding whether to enter into a confidentiality agreement with a company under investigation. Considerations include the following:
    - Some courts have held that companies that produce otherwise privileged materials to the SEC or the U.S. Department of Justice, even pursuant to a confidentiality agreement, waived privilege in doing so.
    - Some companies have important pertinent operations in one or more foreign jurisdictions, which may have data privacy and other laws that will restrict the staff's ability to obtain evidence. The company itself may have access to the persons in such jurisdictions (especially if they are still employees) and to other sources of evidence (such as documents and e-mails). In such instances, the company may be able to convey important information to the staff by producing interview memoranda and through reports of findings derived from otherwise restricted sources.

Model Confidentiality Agreement:

[date]

[SEC address]

Re: In the Matter of **[investigation name and number]**

Dear Mr./Ms. **[name]**:

The **[name]** Committee of **[company]** commenced a **[review or investigation]** of **[issue]** on or about **[date]**. The **[name]** Committee has prepared a report, interview memoranda and investigative working papers in connection with this **[review or investigation]**. In light of the interest of the Staff of the U.S. Securities and Exchange Commission (the "Staff") in determining whether there have been any violations of the federal securities laws, and the **[name]** Committee's interests in investigating and analyzing the circumstances and people involved in the events at issue, the **[name]** Committee will provide to the Staff copies of the report, interview memoranda and investigative working papers **[, in addition to oral briefings]** ("Confidential Materials").

Please be advised that by producing the Confidential Materials pursuant to this agreement, the **[name]** Committee does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege applicable as to third parties. The **[name]** Committee believes that the Confidential Materials are protected by, at a minimum, the attorney work product doctrine and the attorney-client privilege. The **[name]** Committee believes that the Confidential Materials warrant protection from disclosure.

The Staff will maintain the confidentiality of the Confidential Materials pursuant to this agreement and will not disclose them to any third party, except to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities.

The Staff will not assert that the **[name]** Committee's production of the Confidential Materials to the Commission constitutes a waiver of the protection of the attorney work product doctrine, the attorney-client privilege, or any other privilege applicable as to any third party. The Staff agrees that production of the Confidential Materials provides the Staff with no additional grounds to subpoena testimony, documents or other privileged materials from the **[name]** Committee, although any such grounds that may exist apart from such production shall remain unaffected by this agreement.

The Staff's agreement to the terms of this letter is signified by your signature on the line provided below.

Sincerely,

_____
Chair of the **[name]** Committee of
[company]

AGREED AND ACCEPTED:
United States Securities and Exchange Commission

By: _____
Division of Enforcement

4.4 Compliance with the Privacy Act

Basics:

- The Privacy Act of 1974, 5 U.S.C. Section 552a, establishes requirements for the solicitation and maintenance by agencies of personal information regarding members of the public.

- When obtaining information from the public, the statute requires the staff to provide notice with respect to the authority for the solicitation and whether disclosure is voluntary or mandatory; the principal purposes for seeking the information; the effect of refusing to provide the information; and the "routine uses" of the information. The statute prohibits any disclosure of personal information unless the disclosure is within one of the statute's exemptions (including the exemption for "routine uses"). In addition, the statute requires that agencies have the ability to account for disclosures.

Considerations:

The Privacy Notice requirement is generally met by providing a copy of Form 1661 or Form 1662 to the person or entity from whom information is sought. The forms contain the list of uses that may be made of personal information. Generally, disclosures in aid of the staff's investigations will be covered by one or more of the routine uses.

10. A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.

Comment 10.a. Potential waiver of confidentiality and privilege in production and the use of "clawback" agreements and procedures.

Because of the large volumes typically involved when electronically stored information is produced, parties should consider entering into agreements among themselves, including nonwaiver agreements, which outline the procedures to be followed to protect against any waiver of privileges or work product protection due to the inadvertent production of documents and data. Notably, the validity and impact of such nonwaiver agreements as to nonparties may vary greatly among jurisdictions. Similarly, the ethical obligations of counsel may vary. These nonwaiver agreements typically provide for the sequestering, return and/or destruction of the inadvertently produced information. Such agreement may include "clawback" arrangements that allow the producing party to "claw back" or "undo" the production. (As noted below, a "clawback" agreement is substantively different from a "quick peek" agreement. *See* Comment 10.d).

Counsel should discuss the need for such a provision at the outset of litigation and should approach the court for entry of an appropriate nonwaiver order. Under the 2006 Amendments, the discussions should take place at the Rule 26(f) conference and counsel can use Form 35 for inclusion in the Rule 16(b) Scheduling Order.

If an order is entered by a court endorsing the approach selected, the order should provide that the inadvertent disclosure of a privileged or work product document does not constitute a waiver of privilege, that the privileged document should be returned (or certification that it has been deleted), and that any notes or copies discussing the privileged or work product information will be destroyed or deleted.

The 2006 Amendments to the Federal Rules provide for a procedure whereby a claim of inadvertent production of privileged information or work product material can be made and the receiving party is obligated to sequester, destroy, or return the allegedly privileged information, or sequester it pending a court hearing. Fed. R. Civ. P. 26(b)(5). It is important to note that Rule 26(b)(5)(B) only provides the procedure for dealing with claims of inadvertent production and does not provide guidance regarding the substantive privilege law, including whether the inadvertent production results in waiver.

RESOURCES AND AUTHORITIES

Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information,* Guideline 4(D) (Aug. 2006) (parties should discuss procedures to be used if privileged electronically stored information is inadvertently disclosed); Guideline 8 (setting forth recommended factors for a court to use in determining if a party has waived the privilege because of an inadvertent disclosure).

ABA Civil Discovery Standard (1999)(rev. Aug. 2004) Standard 32(a), (c) and (e), *available at* http://www.abanet.org/litigaton/discoverystandards/2004civildiscoverystandards.pdf.

Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2016.3 (2d ed. 2006).

John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and The New Federal Rules of Civil Procedure,* 2006 Fed. Cts. L. Rev. 6 (2006).

Joseph L. Paller Jr., *Gentlemen Do No Read Each Other's Mail: A Lawyer's Duties Upon Receipt of Inadvertently Disclosed Confidential Information,* 21 Lab. Law. 247 (Winter/Spring 2006).

Denis R. Kike, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality In Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information,* 12 Rich. J.L. & Tech. 15 (2005).

John K. Villa, *The Inadvertent Disclosure of Privileged Material: What is the Effect on the Privilege and the Duty of Receiving Counsel?* 22 No. 9 ACC Docket 108 (Oct. 2004).

Jonathan M. Redgrave & Kristin M. Nimsger, *Electronic Discovery and Inadvertent Productions of Privileged Documents,* 49 Fed. Law. 37 (July 2002).

In re Qwest Communications Int'l, Inc. Sec. Litig., 450 F.3d 1179, 1200 (10th Cir. 2006) (refusing mandamus request regarding the order compelling disclosure in discovery of information furnished to government because of waiver of privilege; refusing to recognize "selective" waiver concept).

Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228, 239-41 (D. Md. 2005) (arguing that risks of inadvertent waiver can be mitigated through use of scheduling orders, protective orders or discovery management orders agreed to by the parties and determined reasonable by the courts that protect produced documents from waiver; court further notes that such agreements will not excuse parties from making reasonable pre-production efforts to protect privileged material and recommends parties assume complete pre-production privilege review as required unless such review can be shown with particularity to be unduly burdensome or expensive).

Comment 10.b. Protection of confidentiality and privilege regarding direct access to electronically stored information or systems

Special issues may arise with any request to secure direct access to electronically stored information or to computer devices or systems on which it resides. Protective orders should be in place to guard against any release of proprietary, confidential, or personal electronically stored information accessible to the adversary or its expert.

Similar concerns exist regarding the potential disclosure of attorney-client privileged or work product information that may occur during such an inspection. There is no guarantee that a nonwaiver order in one jurisdiction will be fully honored in another if protected information is disclosed. Accordingly, even with a protective order in place, court-ordered inspections of computer systems should be used sparingly. Further, such orders should be narrowly tailored to the circumstances and accompanied by a sufficient protective order.

The 2006 Amendments to Rule 34(a) clarify that the right to "test or sample," as well as the right to "inspect," extends to both electronically stored information and the system on which it is stored. The Committee Note makes it clear, however, that this change is "not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. The Note further states that the inspection or testing "may raise issues of confidentiality or privacy" and mandates that "[c]ourts should guard against undue intrusiveness resulting from inspecting or testing such systems." Fed. R. Civ. P. 34 Committee Note (2006).

The 2006 amendments also permit, but do not require or provide for a court to order, that a party may make available business records in the form of electronically stored information to enable an opponent to derive an interrogatory answer in lieu of the party answering. Fed. R. Civ. P. 33(d). The Committee Note restricts this option to situations in which the burden of deriving an answer is substantially the same for either party. The party electing to respond by referencing electronically stored information must do so in a way that allows the interrogating party to locate and identify the information as "readily as can the party served." The Note goes on to say that in some circumstances the ability to satisfy these circumstances may require the responding party to provide technical support, information on application software, or other assistance. In fact, the Note specifically cautions that if necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory, the party electing to reference electronically stored information "may be required to provide direct access to its electronic information system." Fed. R. Civ. P. 33(d) Committee Note (2006).

Because of the risk of unintended costs and opening IT infrastructures to opposing parties, parties and counsel should carefully consider if and when they will elect to refer to a production of electronically stored information in a Rule 33(d) election rather than providing a substantive response to the interrogatory. Indeed, the Committee Note to the Rule acknowledges that because of "the responding party's need to protect sensitive interests of confidentiality or privacy," the party may choose to derive the answer itself rather than invoke Rule 33(d).

RESOURCES AND AUTHORITIES

In re Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (granting mandamus to prevent implementation of district court order allowing inspection of databases as an abuse of discretion).

Comment 10.c. Use of special masters and court-appointed experts to preserve privilege

In certain circumstances, a court may find it beneficial to appoint a "neutral" person (e.g., a special master or court-appointed expert) who can help mediate or manage electronic discovery issues. The December 1, 2003 amendment to Rule 53 (Special Masters) clarifies that special masters are available to federal courts to address electronic discovery issues in appropriate cases where the matters cannot be addressed effectively and timely by an available district or magistrate judge. *See* Fed. R. Civ. P. 53(a)(1)(C).

Using a court-appointed "neutral" person to mediate electronic discovery issues may prove beneficial for a number of reasons. First, using such a person to mediate disputes and, if necessary, conduct initial inspections of any disputed documents, generally eliminates any privilege-waiver concerns regarding such inspections. Second, the "neutral" person may be able to speed the resolution of disputes by fashioning fair and reasonable discovery plans based upon specialized knowledge of electronic discovery and/or technical issues in light of specific facts in the case. *See id.*

Special care should be used in crafting the appointment order (and any protective order) to tailor the scope of the appointment and to protect against the disclosure or loss of any privileges or protections. It should also be noted that such appointments likely will remain the exception, and not the rule, as most parties should be able to address electronic discovery issues through cooperative efforts in the disclosure and discovery process, and any remaining disputes often can be decided by an available district court or magistrate judge of the district.

RESOURCES AND AUTHORITIES

Shira A. Scheindlin and Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 New York State Bar J. 18 (Jan. 2004).

Playboy Enters., Inc. v. Welles, 60 F. Supp. 2d 1050, 1055 (S.D. Cal. 1999) (use of computer specialist was appropriate to review hard drive for relevant data, and no view of privileged material by specialist would constitute waiver of privilege).

Comment 10.d. Protection of confidentiality and privilege regarding "quick peek" agreements

Given the enormous volume of electronic documents generated and retained in today's business environment, and in light of the demands of litigation, there is an increasing interest in production under a "quick peek" agreement to protect against waiver of confidentiality and privilege.

In a "quick peek" production, documents and electronically stored information are produced to the opposing party before being reviewed for privilege, confidentiality, or privacy. Such a production requires stringent guidelines and restrictions to prevent the waiver of confidentiality and privilege. Under a "quick peek" agreement, if the requesting party selects a document that appears to be privileged, the producing party can identify the document as privileged and withdraw it from production without having waived any privilege.

A "quick peek" procedure or order should not be lightly entered and requires the voluntary consent of the producing party. While providing the advantage of reducing the costs of preproduction reviews for privilege and confidentiality (and maybe even responsiveness), there are potential risks and problems that should be carefully considered.

First, the voluntary production of privileged and confidential materials to one's adversary, even in a restricted setting, is inconsistent with the tenets of privilege law that, while varying among jurisdictions, usually require the producing party to meticulously guard against the loss of secrecy for such materials. The fact that an adversary sees the voluntarily produced document in any circumstance arguably serves as a waiver or loss of privilege or protection.

Second, despite the strongest possible language in any "quick peek" order to protect against waiver of privileges, there is currently no effective way to extend the scope of the order to restrict persons who are non-parties to the agreement from seeking the production of privileged materials that have been produced under such an order. For example, parties in mass tort and product liability cases, who are subject to multiple suits by different counsel in different states, face the risk that their "quick peek" agreement entered in one action may not protect the party from waiver arguments in other actions, even if they have a strong protective order in the first action. Given the differences in privilege laws among jurisdictions, this uncertainty presents a serious and legitimate impediment to any widespread acceptance of a "quick peek." While the proposed Rule of Evidence 502 being discussed by the Advisory Committee may eventually result in a uniform federal and state approach to issues relating to such agreements on waiver, this is not the current situation.

Third, counsel have an ethical duty to guard zealously the confidences and secrets of their clients. It is possible that questions could arise as to whether voluntarily entering into a "quick peek" production could constitute a violation of Model Rule of Prof'l. Conduct R. 1.1 (2002)(requiring a lawyer to use diligence and care in representation) or Model Rule of Prof'l. Conduct R.1.6 (2002) (protection of client secrets and confidences) if the manner of the production results in later waivers of privileges and protections. While this may seem unlikely, it has already arisen in the context of inadvertent productions. D.C. Bar Ethics Opinion 256 (1995) (examining whether actions of producing counsel violated standard).

Fourth, the genie cannot be put back in the lamp. The disclosure of privileged communications and work product to an adversary can adversely affect the client's interest, notwithstanding non-waiver provisions.

Fifth, there are a host of issues regarding the possible privacy rights of employees and nonparties that may be implicated in a voluntary "quick peek" production. Careful consideration should be given to a company's privacy commitments to employees and customers, its contractual privacy agreements with nonparties, and judicial process exceptions within the applicable privacy laws or regulations before a party enters into a "quick peek" agreement.

Accordingly, given the possible loss of privilege and property rights that could accompany a waiver determination, courts should not compel use of a "quick peek" procedure over the objection of a producing party. Even when large volumes of electronic documents are involved, parties are well-advised to search for privileged documents.

In those very limited instances in which a "quick peek" order may be practicable and in the parties' interests (as reflected by voluntary consent), the court should enter an order that: (1) indicates that the court is compelling the manner of production; (2) states such production does not result in an express or implied waiver of any privilege or protection for the produced documents or any other documents; (3) directs that the reviewing party cannot discuss the contents of the documents or take any notes during the review process; (4) permits the reviewing party to select those documents that it believes are relevant to the case; and (5) orders that for each selected document, the producing party either (a) produces the selected document, (b) places the selected document on a privilege log, or (c) places the selected document on a non responsive log (i.e., regardless of the privileged status, the document is not relevant to the litigation.).

RESOURCES AND AUTHORITIES

Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information,* Guideline 4(D) (Aug. 2006) (advocating agreement for process to be used if privileged electronically stored information is inadvertently disclosed); Guideline 8 (setting forth recommended factors for a court to use in determining if a party has waived the privilege because of an inadvertent disclosure).

Report of the Advisory Committee on Evidence Rules, Proposed Rule 502(b) (June 30, 2006) *available at* http://www.aspenlawschoo.com/books/mueller_evidence/updates/excerp_ev_report_pub.pdf.

Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2016.3 (2d ed. 2006).

Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502,* 58 S.C. L. Rev. 211 (2006).

John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure,* 2006 Fed. Cts. L. Rev. 6 (2006).

Shira A. Scheindlin and Jonathan M. Redgrave, *Discovery of Electronic Information, in 2 Bus. & Commercial Litig. in Fed. Courts,* Ch 22 (Robert L. Haig ed. 2005 & Supp. 2006).

ABA Civil Discovery Standards (1999) (rev. Aug. 2004), Standard 32(d)(ii) and (f), *available at* http://www.abanet.org/litigaton/discoverystandards/2004civildiscoverystandards.pdf..

Transamerica Computer v. IBM, 573 F.2d 646, 651 (9th Cir. 1978) (finding no waiver of privilege when IBM produced privileged information without intending to waive privilege under "accelerated discovery proceedings [which] [i]imposed such incredible burdens on IBM" that they were "in a very practical way" compelled to produce privileged documents).

Hopson v. The Mayor and City Council of Baltimore, 232 F.R.D. 238 (D. Md. 2005) (reviewing the law of privilege waiver and the effect of clawback agreements, and formulating an order most likely to withstand anticipated challenges).

Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ. A. 99-3564, 2002 WL 246439, at *7 (E.D. La. Feb. 19, 2002) (noting that court cannot compel the disclosure of privileged communications in clawback arrangement).

Comment 10.e. Privacy, trade secret, and other confidentiality concerns

Electronic information systems contain significant amounts of information that may be subject to trade secret, confidentiality, or privacy considerations. Examples of such information include proprietary business information such as formularies, business methods, sales strategies, marketing and forecasting projections, and customer and employee personal data (e.g., social security and credit card numbers, employee and patient health data, and customer financial records).

Privacy rights related to personal data may extend to customers, employees, and non-parties. Although the identification and protection of privacy rights are not directly addressed in the 2006 amendments, ample protection for such information during discovery is available through a Rule 26(c) protective order or by party agreement. In negotiating protections for such information, a party should consider the scope of the applicable privacy rights, as defined in the operative contract or rule of law, including whether such scope includes a judicial process exception. When potential discovery of documents or electronically stored information located outside of the United States is involved, the parties should pay specific attention to the foreign privacy or blocking statutes, for example, the Data Protection Act enacted by the European Union.

See also Comment 10b, *supra*, dealing with the confidentiality, privacy and privilege issues implicated under amended Rules 33(d) and 34(a) of the Federal Rules when direct access to business records are made available voluntarily or when a court is requested to order testing, sampling or inspection of electronically stored information or the information systems on which it resides.

RESOURCES AND AUTHORITIES

The Sedona Guidelines on Confidentiality and Public Access (2007), available at http://www.thesedonaconference.org.

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MARINA STENGART, Plaintiff-Respondent, v. LOVING CARE AGENCY, INC., STEVE VELLA, ROBERT CREAMER, LORENA LOCKEY, ROBERT FUSCO, and LCA HOLDINGS, INC., Defendants-Appellants.

A-16 September Term 2009

SUPREME COURT OF NEW JERSEY

201 N.J. 300; ***990 A.2d 650***; ***2010 N.J. LEXIS 241***; ***30 I.E.R. Cas. (BNA) 873***; ***108 Fair Empl. Prac. Cas. (BNA) 1558***; ***93 Empl. Prac. Dec. (CCH) P43,853***

December 2, 2009, Argued
March 30, 2010, Decided

PRIOR HISTORY: [***1]

On appeal from the Superior Court, Appellate Division, whose opinion is reported at *408 N.J. Super. 54, 973 A.2d 390 (2009)*.

Stengart v. Loving Care Agency, Inc., 408 N.J. Super. 54, 973 A.2d 390, 2009 N.J. Super. LEXIS 143 (App.Div., 2009)

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Stengart v. Loving Care Agency, Inc. (A-16-09)

Argued December 2, 2009 -- Decided March 30, 2010

RABNER, C.J., writing for a unanimous Court.

This case presents novel questions about the extent to which an employee can expect privacy and confidentiality in e-mails with her attorney, which she sent and received through her personal, password-protected, web-based e-mail account using an employer-issued computer.

This appeal arises out of an employment discrimination lawsuit that plaintiff Marina Stengart filed against her former employer, defendant Loving Care Agency, Inc. Stengart had been provided a laptop computer to conduct company business. From the laptop, she could send e-mails using her company e-mail account; she could also access the Internet through Loving Care's server. [***2] Unbeknownst to Stengart, browser software automatically saved a copy of each web page she viewed on the computer's hard drive in a "cache" folder of temporary Internet files. In December 2007, Stengart used her laptop to access a personal, password-protected e-mail account on Yahoo's website, through which she communicated with her attorney about her situation at work. She never saved her Yahoo ID or password on the company laptop. Not long after, Stengart left her employment with Loving Care and returned the laptop. In February 2008, she filed the pending complaint.

In anticipation of discovery, Loving Care hired experts to create a forensic image of the laptop's hard drive, including temporary Internet files. Those files contained the contents of seven or eight e-mails Stengart had exchanged with her lawyer via her Yahoo account. At the bottom of the e-mails sent by Stengart's lawyer, a

legend warns readers that the information "is intended only for the personal and confidential use of the designated recipient" of the e-mail, which may be a "privileged and confidential" attorney-client communication.

Attorneys from the law firm (the "Firm") representing Loving Care reviewed the e-mails [***3] and used the information in discovery. Stengart's lawyer demanded that the e-mails be identified and returned. The Firm disclosed the e-mails but argued that Stengart had no reasonable expectation of privacy in files on a company-owned computer in light of the company's policy on electronic communications (Policy). The Policy states that Loving Care may review, access, and disclose "all matters on the company's media systems and services at any time." It also states that e-mails, Internet communications and computer files are the company's business records and "are not to be considered private or personal" to employees. It goes on to state that "occasional personal use is permitted." The Policy specifically prohibits "certain uses of the e-mail system," such as discriminatory or harassing messages.

Stengart's attorney requested the return of the e-mails and disqualification of the Firm. The trial court denied the application, concluding that in light of the Policy, Stengart waived the attorney-client privilege by sending e-mails on a company computer. The Appellate Division reversed, finding that the e-mails were protected by the attorney-client privilege and that, given the Policy's [***4] language, an employee could "retain an expectation of privacy" in personal e-mails sent on a company computer. *Stengart v. Loving Care Agency, Inc., 408 N.J. Super. 54, 973 A.2d 390 (App. Div. 2009)*. The panel also found that Loving Care's counsel had violated *RPC 4.4(b)* by failing to alert Stengart's attorneys that it possessed the privileged e-mails before reading them. The panel remanded for a hearing to determine whether disqualification of the Firm or some other sanction was appropriate. The Court granted Loving Care's motion for leave to appeal and ordered a stay pending the outcome of this appeal. *200 N.J. 204, 976 A.2d 382 (2009)*.

HELD: Under the circumstances, Stengart could reasonably expect that e-mail communications with her lawyer through her personal, password-protected, web-based e-mail account would remain private, and that sending and receiving them using a company laptop did not eliminate the attorney-client privilege that protected them. By reading e-mails that were at least arguably privileged and failing to promptly notify Stengart about them, Loving Care's counsel violated *RPC 4.4(b)*.

1. To determine the reasonableness of Stengart's expectation of privacy, the Court first examines the meaning [***5] and scope of the Policy. It does not give express notice to employees that messages exchanged on a personal, password-protected, web-based e-mail account are subject to monitoring if company equipment is used. Although the Policy states that Loving Care may review matters on "the company's media systems and services," those terms are not defined. The prohibition of certain uses of "the e-mail system" appears to refer to company e-mail accounts, not personal accounts. The Policy does not warn employees that the contents of personal, web-based e-mails are stored on a hard drive and can be forensically retrieved and read. It also creates ambiguity by declaring that e-mails "are not to be considered private or personal," while also permitting "occasional personal use" of e-mail. (pp. 12-14)

2. The attorney-client privilege encourages free and full disclosure of information from the client to the attorney. To be protected, a communication must initially be expressed by a client in connection with receiving legal advice, with the expectation that its contents remain confidential. The e-mails between Stengart and her lawyer contain a standard warning that their contents are personal and confidential [***6] and may constitute attorney-client communications. The subject matter of those messages appears to relate to Stengart's anticipated lawsuit against Loving Care. (pp. 14-15)

3. In this case, the source of the reasonable-expectation-of-privacy standard is the common law tort of "intrusion on seclusion." Under the *Restatement (Second) of Torts*, a person who "intentionally intrudes" upon the "seclusion of another or his private affairs" is liable for invasion of privacy "if the intrusion would be highly offensive to a reasonable person." Reasonableness has both subjective and objective components. Whether an employee has a reasonable expectation of privacy in a particular work setting must be addressed on a case-by-case basis. (pp. 15-17)

4. No reported New Jersey decision offers direct guidance for this case. A Massachusetts decision, *National Economic Research Associates v. Evans*, is most

analogous to the facts here. In *Evans*, an employee used a company laptop to communicate with his attorney through his personal, password-protected Yahoo account. The e-mails were automatically stored in a temporary Internet file on the laptop's hard drive and were later retrieved by a forensic expert. [***7] A company manual permitted personal use of e-mail, to "be kept to a minimum," but warned that computer resources were the "property of the Company" and that e-mails were "not confidential" and could be read "during routine checks." The court denied the company's request to use the e-mails. The court reasoned that, while the manual warned that e-mails sent on the network could be read, it did not expressly state that the company would monitor the content of e-mail communications made from an employee's personal e-mail account when they were viewed on a company-issued computer. Also, the company did not warn employees that the content of such e-mails is stored on the hard drive and capable of being read by the company. The court found that the employee had a reasonable expectation of privacy in e-mails with his attorney. (pp. 17-19)

5. In *In re Asia Global Crossing, Ltd.*, a federal bankruptcy court considered whether a trustee could force the production of e-mails sent by company employees to their personal attorneys on the *company's* e-mail system. The court developed a four-part test to measure an employee's expectation of privacy in his e-mail: (1) does company policy ban personal or [***8] other use, (2) does the company monitor the use of the employee's e-mail, (3) do third parties have a right of access to the e-mails, and (4) did the company notify the employee, or was the employee aware, of the use and monitoring policies? Because the evidence was "equivocal" about the existence of a corporate policy banning personal use of e-mail and allowing monitoring, the court could not conclude that the employees' use of the company e-mail system eliminated any applicable attorney-client privilege. In applying the *Asia Global* factors, the fact-specific nature of the inquiry affects the outcome. According to some courts, employees have a lesser expectation of privacy when they communicate with an attorney using a company e-mail account as compared to a personal, web-based account. Some courts have found that the existence of a clear policy banning personal e-mails can diminish the reasonableness of a claim to privacy in e-mail messages with the employee's attorney. (pp. 20-23)

6. Under all of the circumstances, Stengart could reasonably expect that e-mails exchanged with her attorney on her personal, password-protected, web-based e-mail account, accessed on a company laptop, [***9] would remain private. By using a personal e-mail account and not saving the password, Stengart had a subjective expectation of privacy. Her expectation was also objectively reasonable in light of the ambiguous language of the Policy and the attorney-client nature of the communications. (p.23-25)

7. In concluding that the attorney-client privilege protects the e-mails, the Court rejects the claim that the attorney-client privilege either did not attach or was waived. The Policy did not give Stengart, or a reasonable person in her position, cause to anticipate that Loving Care would be watching over her shoulder as she opened e-mails from her lawyer on her personal, password-protected Yahoo account. Similarly, Stengart did not waive the privilege under *N.J.R.E. 530*. She took reasonable steps to keep the messages confidential and did not know that Loving Care could read communications sent on her Yahoo account. (pp. 25-27)

8. Employers can adopt and enforce lawful policies relating to computer use to protect the assets and productivity of a business, but they have no basis to read the *contents* of personal, privileged, attorney-client communications. A policy that provided unambiguous notice [***10] that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system, would not be enforceable. (pp. 28-29)

9. The Firm's review and use of the privileged e-mails violated *RPC 4.4(b)*. That *Rule* provides that a "lawyer who receives a document," which includes an e-mail, and who "has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document" and promptly notify and return the document to the sender. Stengart did not leave the e-mails behind; the Firm retained a forensic expert to retrieve e-mails that were automatically saved on the hard drive. To be clear, the Firm did not maliciously seek out attorney-client documents or rummage through personal files. The record does not suggest any bad faith in the way the Firm interpreted the Policy. Instead, while legitimately attempting to preserve evidence, the Firm

erred in not setting aside arguably privileged messages once it realized they were attorney-client communications, and failing to notify its adversary or seek court [***11] permission before reading further. (pp. 29-30)

10. The matter is remanded to the trial court to decide whether disqualification of the Firm, screening of attorneys, the imposition of costs, or some other remedy is appropriate. In so doing, the court should evaluate the seriousness of the breach in light of the nature of the e-mails, the manner in which they were reviewed and used, and other considerations noted by the Appellate Division. The court should also weigh the need to maintain the highest standards of the profession against a client's right to freely choose his counsel. (pp. 30-32)

The judgment of the Appellate Division is AFFIRMED AS MODIFIED and the matter is REMANDED to the trial court to determine what, if any, sanctions should be imposed on counsel for Loving Care.

COUNSEL: *Peter G. Verniero* argued the cause for appellants (*Sills Cummis & Gross and Porzio Bromberg & Newman*, attorneys; *Mr. Verniero* and *James M. Hirschhorn*, of counsel; *Mr. Verniero, Mr. Hirschhorn, Lynne Anne Anderson*, and *Jerrold J. Wohlgemuth*, on the briefs).

Peter J. Frazza argued the cause for respondent (*Budd Larner*, attorneys; *Mr. Frazza* and *David J. Novack*, of counsel; *Mr. Frazza, Donald P. Jacobs*, and *Allen L. Harris*, [***12] on the briefs).

Marvin M. Goldstein submitted a brief on behalf of amicus curiae Employers Association of New Jersey (*Proskauer Rose*, attorneys; *Mr. Goldstein, Mark A. Saloman*, and *John J. Sarno*, of counsel and on the brief).

Jeffrey S. Mandel submitted a brief on behalf of amicus curiae Association of Criminal Defense Lawyers of New Jersey (*PinilisHalpern*, attorneys).

Richard E. Yaskin submitted a brief on behalf of amicus curiae National Employment Lawyers Association of New Jersey (*Mr. Yaskin and Resnick, Nirenberg & Cash*, attorneys; *Mr. Yaskin* and *Jonathan I. Nirenberg*, on the brief).

Allen A. Etish, President, submitted a brief on behalf of amicus curiae New Jersey State Bar Association (*Mr. Etish, Stryker, Tams & Dill, Gibbons, and Scarinci Hollenbeck*, attorneys; *Mr. Etish, Douglas S. Brierley, Fruqan Mouzon*, and *Thomas Hoff Prol*, on the brief).

JUDGES: JUSTICES LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO, and HOENS join in CHIEF JUSTICE RABNER's opinion.

OPINION BY: RABNER

OPINION

[*307] [**654] CHIEF JUSTICE RABNER delivered the opinion of the Court.

In the past twenty years, businesses and private citizens alike have embraced the use of computers, electronic communication devices, the Internet, and e-mail. As those [***13] and other forms of technology [**655] evolve, the line separating business from personal activities can easily blur.

In the modern workplace, for example, occasional, personal use of the Internet is commonplace. Yet that simple act can raise complex issues about an employer's monitoring of the workplace and an employee's reasonable expectation of privacy.

This case presents novel questions about the extent to which an employee can expect privacy and confidentiality in personal e-mails with her attorney, which she accessed on a computer belonging to her employer. Marina Stengart used her company-issued laptop to exchange e-mails with her lawyer through her personal, password-protected, web-based e-mail account. She later filed an employment discrimination lawsuit against her employer, Loving Care Agency, Inc. (Loving Care), and others.

In anticipation of discovery, Loving Care hired a computer forensic expert to recover all files stored on the laptop including the e-mails, which had been automatically saved on the hard drive. Loving Care's attorneys reviewed the e-mails and used information culled from them in the course of discovery. In response, Stengart's lawyer demanded that communications [***14] between him and Stengart, which he considered privileged, be identified and returned. Opposing counsel disclosed the documents but maintained that the company had the right to review them. Stengart then sought relief in court.

[*308] The trial court ruled that, in light of the company's written policy on electronic communications, Stengart waived the attorney-client privilege by sending e-mails on a company computer. The Appellate Division reversed and found that Loving Care's counsel had violated *RPC 4.4(b)* by reading and using the privileged documents.

We hold that, under the circumstances, Stengart could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them. By reading e-mails that were at least arguably privileged and failing to notify Stengart promptly about them, Loving Care's counsel breached *RPC 4.4(b)*. We therefore modify and affirm the judgment of the Appellate Division and remand to the trial court to determine what, if any, sanctions should be imposed on counsel for Loving Care.

I.

This appeal arises [***15] out of a lawsuit that plaintiff-respondent Marina Stengart filed against her former employer, defendant-appellant Loving Care, its owner, and certain board members and officers of the company. She alleges, among other things, constructive discharge because of a hostile work environment, retaliation, and harassment based on gender, religion, and national origin, in violation of the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-1 to - 49*. Loving Care denies the allegations and suggests they are an attempt to escape certain restrictive covenants that are the subject of a separate lawsuit.

Loving Care provides home-care nursing and health services. Stengart began working for Loving Care in 1994 and, over time, was promoted to Executive Director of Nursing. The company provided her with a laptop computer to conduct company business. From that laptop, Stengart could send e-mails using her company e-mail address; she could also access the Internet and visit websites through Loving Care's server. Unbeknownst to Stengart, certain browser software in place automatically [**656] made a copy [*309] of each web page she viewed, which was then saved on the computer's hard drive in a "cache" folder of temporary [***16] Internet files. Unless deleted and overwritten with new data, those temporary Internet files remained on the hard drive.

On several days in December 2007, Stengart used her laptop to access a personal, password-protected e-mail account on Yahoo's website, through which she communicated with her attorney about her situation at work. She never saved her Yahoo ID or password on the company laptop.

Not long after, Stengart left her employment with Loving Care and returned the laptop. On February 7, 2008, she filed the pending complaint.

In an effort to preserve electronic evidence for discovery, in or around April 2008, Loving Care hired experts to create a forensic image of the laptop's hard drive. Among the items retrieved were temporary Internet files containing the contents of seven or eight e-mails Stengart had exchanged with her lawyer via her Yahoo account. [1] Stengart's lawyers represented at oral argument that one e-mail was simply a communication he sent to her, to which she did not respond.

1 The record does not specify how many of the e-mails were sent or received during work hours. Loving Care asserts that the e-mails in question were exchanged during work hours through the company's [***17] server. However, counsel for Stengart represented at oral argument that four of the e-mails were transmitted or accessed during non-work hours -- three on a weekend and one on a holiday. It is unclear, and ultimately not relevant, whether Stengart was at the office when she sent or reviewed them.

A legend appears at the bottom of the e-mails that Stengart's lawyer sent. It warns readers that

> THE INFORMATION CONTAINED IN THIS EMAIL COMMUNICATION IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENT NAMED ABOVE. This message may be an Attorney-Client communication, and as such is privileged and confidential. If the reader of [2] this message is not the intended recipient, you are hereby notified that [*310] you have received this communication in error, and that your review, dissemination, distribution, or copying of the message is strictly prohibited. If you have received

> this transmission in error, please destroy this transmission and notify us immediately by telephone and/or reply email.

> 2 In the forensically retrieved version of the e-mails submitted to this Court under seal, the legend is reprinted only up until the location of the footnote in the above text. The [***18] retrieved messages also list Stengart's lawyer's full name more than a dozen times and his e-mail address -- comprised of the lawyer's first initial, full last name, and the law firm's name -- more than three dozen times. Counsel for Loving Care submitted certifications in which they explain that they were aware the e-mails were between Stengart and her lawyer but believed the communications were not protected by the attorney-client privilege for reasons discussed below.

At least two attorneys from the law firm representing Loving Care, Sills Cummis (the "Firm"), reviewed the e-mail communications between Stengart and her attorney. The Firm did not advise opposing counsel about the e-mails until months later. In its October 21, 2008 reply to Stengart's first set of interrogatories, the Firm stated that it had obtained certain information from "e-mail correspondence" -- between Stengart and her lawyer -- from Stengart's "office computer on December 12, 2007 at 2:25 p.m." In response, Stengart's [**657] attorney sent a letter demanding that the Firm identify and return all "attorney-client privileged communications" in its possession. The Firm identified and disclosed the e-mails but asserted [***19] that Stengart had no reasonable expectation of privacy in files on a company-owned computer in light of the company's policy on electronic communications.

Loving Care and its counsel relied on an Administrative and Office Staff Employee Handbook that they maintain contains the company's Electronic Communication policy (Policy). The record contains various versions of an electronic communications policy, and Stengart contends that none applied to her as a senior company official. Loving Care disagrees. We need not resolve that dispute and assume the Policy applies in addressing the issues on appeal.

The proffered Policy states, in relevant part:

> [*311] The company reserves and will exercise the right to review, audit, intercept, access, and disclose all matters on the company's media systems and services at any time, with or without notice.
>
> . . . .
>
> E-mail and voice mail messages, internet use and communication and computer files are considered part of the company's business and client records. Such communications are not to be considered private or personal to any individual employee.
>
> The principal purpose of electronic mail (*e-mail*) is for company business communications. Occasional personal use [***20] is permitted; however, the system should not be used to solicit for outside business ventures, charitable organizations, or for any political or religious purpose, unless authorized by the Director of Human Resources.

The Policy also specifically prohibits "[c]ertain uses of the e-mail system" including sending inappropriate sexual, discriminatory, or harassing messages, chain letters, "[m]essages in violation of government laws," or messages relating to job searches, business activities unrelated to Loving Care, or political activities. The Policy concludes with the following warning: "Abuse of the electronic communications system may result in disciplinary action up to and including separation of employment."

Stengart's attorney applied for an order to show cause seeking return of the e-mails and other relief. The trial court converted the application to a motion, which it later denied in a written opinion. The trial court concluded that the Firm did not breach the attorney-client privilege because the company's Policy placed Stengart on sufficient notice that her e-mails would be considered company property. Stengart's request to disqualify the Firm was therefore denied.

The Appellate [***21] Division granted Stengart's

motion for leave to appeal. The panel reversed the trial court order and directed the Firm to turn over all copies of the e-mails and delete any record of them. *Stengart v. Loving Care Agency, Inc., 408 N.J. Super. 54, 973 A.2d 390 (App. Div. 2009)*. Assuming that the Policy applied to Stengart, the panel found that "[a]n objective reader could reasonably conclude . . . that not all personal emails are necessarily company property." *Id. at 64, 973 A.2d 390*. In other words, an employee could "retain an expectation of privacy" in personal e-mails [*312] sent on a company computer given the language of the Policy. *Id. at 65, 973 A.2d 390*.

The panel balanced Loving Care's right to enforce reasonable rules for the workplace against the public policies underlying the attorney-client privilege. *Id. at 66, 973 A.2d 390*. The court rejected the notion [**658] that "ownership of the computer [is] the sole determinative fact" at issue and instead explained that there must be a nexus between company policies and the employer's legitimate business interests. *Id. at 68-69, 973 A.2d 390*. The panel concluded that society's important interest in shielding communications with an attorney from disclosure outweighed the company's interest in upholding the Policy. [***22] *Id. at 74-75, 973 A.2d 390*. As a result, the panel found that the e-mails were protected by the attorney-client privilege and should be returned. *Id. at 75, 973 A.2d 390*.

The Appellate Division also concluded that the Firm breached its obligations under *RPC 4.4(b)* by failing to alert Stengart's attorneys that it possessed the e-mails before reading them. The panel remanded for a hearing to determine whether disqualification of the Firm or some other sanction was appropriate.

We granted Loving Care's motion for leave to appeal and ordered a stay pending the outcome of this appeal.

II.

Loving Care argues that its employees have no expectation of privacy in their use of company computers based on the company's Policy. In its briefs before this Court, the company also asserts that by accessing e-mails on a personal account through Loving Care's computer and server, Stengart either prevented any attorney-client privilege from attaching or waived the privilege by voluntarily subjecting her e-mails to company scrutiny. Finally, Loving Care maintains that its counsel did not violate *RPC 4.4(b)* because the e-mails were left behind on Stengart's company computer -- not "inadvertently sent," as per the *Rule* -- and the [*313] Firm [***23] acted in the good faith belief that any privilege had been waived.

Stengart argues that she intended the e-mails with her lawyer to be confidential and that the Policy, even if it applied to her, failed to provide adequate warning that Loving Care would save on a hard drive, or monitor the contents of, e-mails sent from a personal account. Stengart also maintains that the communications with her lawyer were privileged. When the Firm encountered the arguably protected e-mails, Stengart contends it should have immediately returned them or sought judicial review as to whether the attorney-client privilege applied.

We granted amicus curiae status to the following organizations: the Employers Association of New Jersey (EANJ), the National Employment Lawyers Association of New Jersey (NELA-NJ), the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ), and the New Jersey State Bar Association (NJSBA).

EANJ calls for reversal of the Appellate Division decision. It notes the dramatic, recent increase in the use of non-business-related e-mails at work and submits that, by allowing occasional personal use of company property as a courtesy to employees, companies do not create a reasonable [***24] expectation of privacy in the use of their computer systems. EANJ also contends that the Appellate Division's analysis -- particularly, its focus on whether workplace policies in the area of electronic communications further legitimate business interests -- will unfairly burden employers and undermine their ability to protect corporate assets.

NELA-NJ and ACDL-NJ support the Appellate Division's ruling. NELA-NJ submits that an employee has a substantive right to privacy in her password-protected e-mails, even if accessed from an employer-owned computer, and that an employer's invasion of that privacy right must be narrowly tailored to the employer's [**659] legitimate business interests. ACDL-NJ adds that the need to shield private communications from disclosure is amplified when the attorney-client privilege is at stake.

[*314] NJSBA expresses concern about preserving the attorney-client privilege in the "increasingly technology-laden world" in which attorneys practice. NJSBA cautions against allowing inadvertent or casual

waivers of the privilege. To analyze the competing interests presented in cases like this, NJSBA suggests various factors that courts should consider in deciding whether the privilege [***25] has been waived.

III.

Our analysis draws on two principal areas: the adequacy of the notice provided by the Policy and the important public policy concerns raised by the attorney-client privilege. Both inform the reasonableness of an employee's expectation of privacy in this matter. We address each area in turn.

A.

We start by examining the meaning and scope of the Policy itself. The Policy specifically reserves to Loving Care the right to review and access "all matters on the company's media systems and services at any time." In addition, e-mail messages are plainly "considered part of the company's business . . . records."

It is not clear from that language whether the use of personal, password-protected, web-based e-mail accounts via company equipment is covered. The Policy uses general language to refer to its "media systems and services" but does not define those terms. Elsewhere, the Policy prohibits certain uses of "the e-mail system," which appears to be a reference to company e-mail accounts. The Policy does not address personal accounts at all. In other words, employees do not have express notice that messages sent or received on a personal, web-based e-mail account are subject [***26] to monitoring if company equipment is used to access the account.

[*315] The Policy also does not warn employees that the contents of such e-mails are stored on a hard drive and can be forensically retrieved and read by Loving Care.

The Policy goes on to declare that e-mails "are not to be considered private or personal to any individual employee." In the very next point, the Policy acknowledges that "[o]ccasional personal use [of e-mail] is permitted." As written, the Policy creates ambiguity about whether personal e-mail use is company or private property.

The scope of the written Policy, therefore, is not entirely clear.

B.

The policies underlying the attorney-client privilege further animate this discussion. The venerable privilege is enshrined in history and practice. *Fellerman v. Bradley, 99 N.J. 493, 498, 493 A.2d 1239 (1985)* ("[T]he attorney-client privilege is recognized as one of 'the oldest of the privileges for confidential communications.'") (quoting 8 J. Wigmore, *Evidence* § 2290, at 542 (McNaughton rev. 1961)). Its primary rationale is to encourage "free and full disclosure of information from the client to the attorney." *Ibid.* That, in turn, benefits the public, which "is well served by sound [***27] legal counsel" based on full, candid, and confidential exchanges. *Id. at 502, 493 A.2d 1239*.

The privilege is codified at *N.J.S.A. 2A:84A-20*, and it appears in the *Rules of Evidence* as *N.J.R.E. 504*. Under the *Rule*, "[f]or a communication to be privileged it must initially be expressed by an individual in his capacity as a client in [**660] conjunction with seeking or receiving legal advice from the attorney in his capacity as such, with the expectation that its content remain confidential." *Fellerman, supra, 99 N.J. at 499, 493 A.2d 1239* (citing *N.J.S.A. 2A:84A-20(1)* and *(3)*).

E-mail exchanges are covered by the privilege like any other form of communication. *See Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 553, 818 A.2d 455 (App. Div. 2003)* [*316] (finding e-mail from client to attorney "obviously protected by the attorney-client privilege as a communication with counsel in the course of a professional relationship and in confidence").

The e-mail communications between Stengart and her lawyers contain a standard warning that their contents are personal and confidential and may constitute attorney-client communications. The subject matter of those messages appears to relate to Stengart's working conditions and anticipated lawsuit [***28] against Loving Care.

IV.

Under the particular circumstances presented, how should a court evaluate whether Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney?

A.

Preliminarily, we note that the reasonable-expectation-of-privacy standard used by the parties derives from the common law and the Search and Seizure Clauses of both the *Fourth Amendment* and *Article I, paragraph 7 of the New Jersey Constitution.* The latter sources do not apply in this case, which involves conduct by private parties only. [3]

3 In addition, a right to privacy can be found in *Article I, paragraph 1 of the New Jersey Constitution. Hennessey v. Coastal Eagle Point Co., 129 N.J. 81, 95-96, 609 A.2d 11 (1992)*.

The common law source is the tort of "intrusion on seclusion," which can be found in the *Restatement (Second) of Torts § 652B* (1977). That section provides that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Restatement, supra, § 652B.* A high threshold must be cleared [***29] to assert a [*317] cause of action based on that tort. *Hennessey, supra, 129 N.J. at 116, 609 A.2d 11* (Pollock, J., concurring). A plaintiff must establish that the intrusion "would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object." *Restatement, supra, § 652B cmt. d*.

As is true in *Fourth Amendment* cases, the reasonableness of a claim for intrusion on seclusion has both a subjective and objective component. *See State v. Sloane, 193 N.J. 423, 434, 939 A.2d 796 (2008)* (analyzing *Fourth Amendment*); *In re Asia Global Crossing, Ltd., 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005)* (analyzing common law tort). Moreover, whether an employee has a reasonable expectation of privacy in her particular work setting "must be addressed on a case-by-case basis." *O'Connor v. Ortega, 480 U.S. 709, 718, 107 S. Ct. 1492, 1498, 94 L. Ed. 2d 714, 723 (1987)* (plurality opinion) (reviewing public sector employment).

B.

A number of courts have tested an employee's claim of privacy in files stored on [**661] company computers by evaluating the reasonableness of the employee's expectation. No reported decisions in New Jersey offer direct guidance for the facts of this case. [4] In one [***30] matter, *State v. M.A., 402 N.J. Super. 353, 954 A.2d 503 (App. Div. 2008)*, the Appellate Division found that the defendant had no reasonable expectation of privacy in personal information he stored on a workplace computer under a separate password. *Id. at 369, 954 A.2d 503*. The defendant had been advised that all computers were company property. *Id. at 359, 954 A.2d 503*. His former employer consented to a search by the State Police, who, in turn, retrieved information tied to the theft of company funds. *Id. at 361-62, 954 A.2d 503*. The court reviewed the search in the context of the *Fourth Amendment* and found no basis for the [*318] defendant's privacy claim in the contents of a company computer that he used to commit a crime. *Id. at 365-69, 954 A.2d 503*.

4 Under our rules, unpublished opinions do not constitute precedent and "are not to be cited by any court." *R. 1:36-3*. As a result, we do not address any unpublished decisions raised by the parties.

Doe v. XYC Corp., 382 N.J. Super. 122, 887 A.2d 1156 (App. Div. 2005), likewise did not involve attorney-client e-mails. In *XYC Corp.*, the Appellate Division found no legitimate expectation of privacy in an employee's use of a company computer to access websites containing adult and child pornography. *Id. at 139, 887 A.2d 1156*. In its analysis, [***31] the court referenced a policy authorizing the company to monitor employee website activity and e-mails, which were deemed company property. *Id. at 131, 138-39, 887 A.2d 1156*.

Certain decisions from outside New Jersey, which the parties also rely on, are more instructive. Among them, *National Economic Research Associates v. Evans, Mass. L. Rptr. No. 15, at 337 (Mass. Super. Ct. Sept. 25, 2006)[21 Mass. L. Rep. 337]*, is most analogous to the facts here. In *Evans*, an employee used a company laptop to send and receive attorney-client communications by e-mail. In doing so, he used his personal, password-protected Yahoo account and not the company's e-mail address. *Ibid.* The e-mails were automatically stored in a temporary Internet file on the computer's hard drive and were later retrieved by a computer forensic expert. *Ibid.* The expert recovered various attorney-client e-mails; at the instruction of the company's lawyer, those e-mails were not reviewed

pending guidance from the court. *Ibid.*

A company manual governed the laptop's use. The manual permitted personal use of e-mail, to "be kept to a minimum," but warned that computer resources were the "property of the Company" and that e-mails were "not confidential" and could [***32] be read "during routine checks." *Id. at 338*.

The court denied the company's application to allow disclosure of the e-mails that its expert possessed. *Id. at 337*. The court reasoned,

> Based on the warnings furnished in the Manual, Evans [(the employee)] could not reasonably expect to communicate in confidence with his private attorney if Evans [*319] e-mailed his attorney using his NERA [(company)] e-mail address through the NERA Intranet, because the Manual plainly warned Evans that e-mails on the network could be read by NERA network administrators. The Manual, however, did not expressly declare that it would monitor the *content* of Internet communications. . . . Most importantly, the Manual did not expressly declare, or even implicitly suggest, that NERA would monitor the content [**662] of e-mail communications made from an employee's personal e-mail account via the Internet whenever those communications were viewed on a NERA-issued computer. Nor did NERA warn its employees that the content of such Internet e-mail communications is stored on the hard disk of a NERA-issued computer and therefore capable of being read by NERA.
>
> [*Id. at 338-39*.]

As a result, the court found the employee's expectation of [***33] privacy in e-mails with his attorney to be reasonable. *Id. at 339*.

In *Asia Global, supra*, the Bankruptcy Court for the Southern District of New York considered whether a bankruptcy trustee could force the production of e-mails sent by company employees to their personal attorneys on the *company's* e-mail system. *322 B.R. at 251-52*. The court developed a four-part test to "measure the employee's expectation of privacy in his computer files and e-mail":

> (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?
>
> [*Id. at 257*.]

Because the evidence was "equivocal" about the existence of a corporate policy banning personal use of e-mail and allowing monitoring, the court could not conclude that the employees' use of the company e-mail system eliminated any applicable attorney-client privilege. *Id. at 259-61*.

Both *Evans* and *Asia Global* referenced a formal ethics opinion by the American Bar Association that noted [***34] "lawyers have a reasonable expectation of privacy when communicating by e-mail maintained by an [online service provider]." *See id. at 256* (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 413 (1999)); *Evans, supra, 21 Mass. L. Rptr. No. 15, at 339 (same)*.

[*320] Other courts have measured the factors outlined in *Asia Global* among other considerations. In reviewing those cases, we are mindful of the fact-specific nature of the inquiry involved and the multitude of different facts that can affect the outcome in a given case. No one factor alone is necessarily dispositive.

According to some courts, employees appear to have a lesser expectation of privacy when they communicate with an attorney using a company e-mail system as compared to a personal, web-based account like the one used here. *See, e.g., Smyth v. Pillsbury Co., 914 F. Supp. 97, 100-01 (E.D. Pa. 1996)* (finding no reasonable expectation of privacy in unprofessional e-mails sent to supervisor through internal corporate e-mail system); *Scott v. Beth Israel Med. Ctr., Inc., 17 Misc. 3d 934, 847 N.Y.S.2d 436, 441-43 (N.Y. Sup. Ct. 2007)* (finding no expectation of confidentiality when company e-mail used to send attorney-client messages). [***35] *But see Convertino v. U.S. Dep't of Justice, 674 F.Supp.2d 97,*

*2009 U.S. Dist. LEXIS 115050, *33-34 (D.D.C. Dec. 10, 2009)* (finding reasonable expectation of privacy in attorney-client e-mails sent via employer's e-mail system). As a result, courts might treat e-mails transmitted via an employer's e-mail account differently than they would web-based e-mails sent on the same company computer.

Courts have also found that the existence of a clear company policy banning personal e-mails can also diminish the reasonableness of an employee's claim to privacy in e-mail messages with his or her attorney. *Compare Scott, supra, 847* [**663] *N.Y.S.2d at 441* (finding e-mails sent to attorney not privileged and noting that company's e-mail policy prohibiting personal use was "critical to the outcome"), *with Asia Global, supra, 322 B.R. at 259-61* (declining to find e-mails to attorney were not privileged in light of unclear evidence as to existence of company policy banning personal e-mail use). We recognize that a zero-tolerance policy can be unworkable and unwelcome in today's dynamic and mobile workforce and do not seek to encourage that approach in any way.

The location of the company's computer may also [***36] be a relevant consideration. In *Curto v. Medical World Communications, Inc.*, [*321] 99 *Fed. Empl. Prac. Cas.* (BNA) 298 (E.D.N.Y. May 15, 2006), for example, an employee working from a home office sent e-mails to her attorney on a company laptop via her personal AOL account. *Id.* at 301. Those messages did not go through the company's servers but were nonetheless retrievable. *Ibid.* Notwithstanding a company policy banning personal use, the trial court found that the e-mails were privileged. *Id.* at 305.

We realize that different concerns are implicated in cases that address the reasonableness of a privacy claim under the *Fourth Amendment*. *See, e.g., O'Connor, supra, 480 U.S. at 714-19, 107 S. Ct. at 1496-98, 94 L. Ed. 2d at 721-24* (discussing whether public hospital's search of employee workplace violated employee's expectation of privacy under *Fourth Amendment*); *United States v. Simons, 206 F.3d 392, 397-98 (4th Cir. 2000)* (involving search warrants for work computer of CIA employee, which revealed more than fifty pornographic images of minors); *M.A., supra, 402 N.J. Super. at 366-69, 954 A.2d 503* (involving *Fourth Amendment* analysis of State Police search of employee's computer, resulting in theft charges). [***37] This case, however, involves no governmental action. Stengart's relationship with her private employer does not raise the specter of any government official unreasonably invading her rights.

V.

A.

Applying the above considerations to the facts before us, we find that Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney on Loving Care's laptop.

Stengart plainly took steps to protect the privacy of those e-mails and shield them from her employer. She used a personal, password-protected e-mail account instead of her company e-mail address and did not save the account's password on her computer. In other words, she had a subjective expectation of privacy in [*322] messages to and from her lawyer discussing the subject of a future lawsuit.

In light of the language of the Policy and the attorney-client nature of the communications, her expectation of privacy was also objectively reasonable. As noted earlier, the Policy does not address the use of personal, web-based e-mail accounts accessed through company equipment. It does not address personal accounts at all. Nor does it warn employees that the contents of e-mails sent via personal accounts can be forensically [***38] retrieved and read by the company. Indeed, in acknowledging that occasional personal use of e-mail is permitted, the Policy created doubt about whether those e-mails are company or private property.

Moreover, the e-mails are not illegal or inappropriate material stored on Loving Care's equipment, which might harm the company in some way. *See Muick v. Glenacre Elecs., 280 F.3d 741, 742-43 (7th* [**664] *Cir. 2002)*; *Smyth, supra, 914 F. Supp. at 98, 101*; *XYC Corp., supra, 382 N.J. Super. at 136-40, 887 A.2d 1156*. They are conversations between a lawyer and client about confidential legal matters, which are historically cloaked in privacy. Our system strives to keep private the very type of conversations that took place here in order to foster probing and honest exchanges.

In addition, the e-mails bear a standard hallmark of attorney-client messages. They warn the reader directly that the e-mails are personal, confidential, and may be attorney-client communications. While a pro forma

warning at the end of an e-mail might not, on its own, protect a communication, *see Scott, supra, 847 N.Y.S.2d at 444*, other facts present here raise additional privacy concerns.

Under all of the circumstances, we find that Stengart [***39] could reasonably expect that e-mails she exchanged with her attorney on her personal, password-protected, web-based e-mail account, accessed on a company laptop, would remain private.

[*323] It follows that the attorney-client privilege protects those e-mails. *See Asia Global, supra, 322 B.R. at 258-59* (noting "close correlation between the objectively reasonable expectation of privacy and the objective reasonableness of the intent that a communication between a lawyer and a client was given in confidence"). In reaching that conclusion, we necessarily reject Loving Care's claim that the attorney-client privilege either did not attach or was waived. In its reply brief and at oral argument, Loving Care argued that the manner in which the e-mails were sent prevented the privilege from attaching. Specifically, Loving Care contends that Stengart effectively brought a third person into the conversation from the start -- watching over her shoulder -- and thereby forfeited any claim to confidentiality in her communications. We disagree.

Stengart has the right to prevent disclosures by third persons who learn of her communications "in a manner not reasonably to be anticipated." *See N.J.R.E. 504(1)(c)(ii)*. [***40] That is what occurred here. The Policy did not give Stengart, or a reasonable person in her position, cause to anticipate that Loving Care would be peering over her shoulder as she opened e-mails from her lawyer on her personal, password-protected Yahoo account. *See Evans, supra, 21 Mass. L. Rptr. No. 15, at 339*. The language of the Policy, the method of transmittal that Stengart selected, and the warning on the e-mails themselves all support that conclusion.

Loving Care also argued in earlier submissions that Stengart waived the attorney-client privilege. For similar reasons, we again disagree.

A person waives the privilege if she, "without coercion and with knowledge of [her] right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." *N.J.R.E. 530* (codifying *N.J.S.A. 2A:84A-29*). Because consent is not applicable here, we look to whether Stengart either knowingly disclosed the information contained in the e-mails or failed to "take reasonable steps to insure and maintain their [*324] confidentiality." [5] *Trilogy* [**665] *Commc'ns, supra, 279 N.J. Super. at 445-48, 652 A.2d 1273*.

5 Because Stengart's conduct satisfies both standards, we need not choose which [***41] one governs. *See Kinsella v. NYT Television, 370 N.J. Super. 311, 317-18, 851 A.2d 105 (App. Div. 2004)* (noting "different approaches to determining whether the inadvertent disclosure of privileged materials results in a waiver" without adopting global rule) (citing *Seacoast, supra, 358 N.J. Super. at 550-51, 818 A.2d 455* and *State v. J.G., 261 N.J. Super. 409, 419-20, 619 A.2d 232 (App. Div. 1993)*; *see also Trilogy Commc'ns, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 445-48, 652 A.2d 1273 (Law Div. 1994)* (finding attorney's "[i]nadvertent disclosure through mere negligence should not be deemed to abrogate the attorney-client privilege").

As discussed previously, Stengart took reasonable steps to keep discussions with her attorney confidential: she elected not to use the company e-mail system and relied on a personal, password-protected, web-based account instead. She also did not save the password on her laptop or share it in some other way with Loving Care.

As to whether Stengart knowingly disclosed the e-mails, she certified that she is unsophisticated in the use of computers and did not know that Loving Care could read communications sent on her Yahoo account. Use of a company laptop alone does not establish that knowledge. Nor [***42] does the Policy fill in that gap. Under the circumstances, we do not find either a knowing or reckless waiver.

B.

Our conclusion that Stengart had an expectation of privacy in e-mails with her lawyer does not mean that employers cannot monitor or regulate the use of workplace computers. Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline

employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of [*325] public policy. *See Hennessey, supra, 129 N.J. at 99-100, 609 A.2d 11*; *Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 290-92, 491 A.2d 1257 (1985)*; *Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72-73, 417 A.2d 505 (1980)*. For example, an employee who spends long stretches of the workday getting personal, confidential legal advice from a private lawyer may be disciplined for violating a policy permitting only occasional personal use of the Internet. But employers have no need or basis to read the specific *contents* of personal, privileged, attorney-client communications in [***43] order to enforce corporate policy. Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual -- that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system -- would not be enforceable.

VI.

We next examine whether the Firm's review and use of the privileged e-mails violated *RPC 4.4(b)*. The *Rule* provides that "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." According to the ABA Model Rules on which *RPC 4.4(b)* is patterned, the term "'document' includes e-mail or other electronic modes of transmission subject to being read or put into readable form." *Model Rules of Prof'l Conduct R.* 4.4 cmt. 2 (2004).

Loving Care contends that the *Rule* does not apply because Stengart left [**666] the e-mails [***44] behind on her laptop and did not send them inadvertently. In actuality, the Firm retained a computer forensic expert to retrieve e-mails that were automatically saved on the laptop's hard drive in a "cache" folder of temporary [*326] Internet files. Without Stengart's knowledge, browser software made copies of each webpage she viewed. Under those circumstances, it is difficult to think of the e-mails as items that were simply left behind. We find that the Firm's review of privileged e-mails between Stengart and her lawyer, and use of the contents of at least one e-mail in responding to interrogatories, fell within the ambit of *RPC 4.4(b)* and violated that rule.

To be clear, the Firm did not hack into plaintiff's personal account or maliciously seek out attorney-client documents in a clandestine way. Nor did it rummage through an employee's personal files out of idle curiosity. Instead, it legitimately attempted to preserve evidence to defend a civil lawsuit. Its error was in not setting aside the arguably privileged messages once it realized they were attorney-client communications, and failing either to notify its adversary or seek court permission before reading further. There is nothing [***45] in the record before us to suggest any bad faith on the Firm's part in reading the Policy as it did. Nonetheless, the Firm should have promptly notified opposing counsel when it discovered the nature of the e-mails. [6]

> 6 The Firm argues that its position was vindicated by the trial court's ruling that the e-mails were not protected by the attorney-client privilege. That argument lacks merit. Stengart still had the right to appeal the trial court's ruling, as she did.

The Appellate Division remanded to the trial court to determine the appropriate remedy. It explained that a hearing was needed in that regard to consider

> the content of the emails, whether the information contained in the emails would have inevitably been divulged in discovery that would have occurred absent [the Firm's] knowledge of the emails' content, and the nature of the issues that have been or may in the future be pled in either this or the related Chancery action.
>
> [*Stengart, supra, 408 N.J. Super. at 76-77, 973 A.2d 390*.]

We agree. The forensically retrieved version of the e-mails submitted to the Court is not easy to read or fully understand in isolation, and no record has yet been developed about the e-mails' full use. For the same [***46] reason, we cannot determine how confidential [*327] or critical the messages are. In deciding what sanctions to impose, the trial court should evaluate the seriousness of the breach in light of the specific nature of the e-mails, the manner in which they were identified,

reviewed, disseminated, and used, and other considerations noted by the Appellate Division. As to plaintiff's request for disqualification, the court should also "balance competing interests, weighing the 'need to maintain the highest standards of the profession' against 'a client's right freely to choose his counsel.'" *Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218, 536 A.2d 243 (1988)* (quoting *Gov't of India v. Cook Indus., Inc., 569 F.2d 737, 739 (2d Cir. 1978))*.

We leave to the trial court to decide whether disqualification of the Firm, screening of attorneys, the imposition of costs, or some other remedy is appropriate. Under the circumstances, we do not believe a remand to the Chancery judge is required; the matter may proceed before the Law Division judge assigned to the case.

[**667] VII.

For the reasons set forth above, we modify and affirm the judgment of the Appellate Division and remand to the trial court for further proceedings.

JUSTICES [***47] LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO, and HOENS join in CHIEF JUSTICE RABNER's opinion.

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Petitioners, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D051364 (San Diego County Super. Ct. Nos. JCCP4221, JCCP4224, JCCP4226, JCCP4228)
AQUILA MERCHANT SERVICES, INC., et al., Real Parties in Interest.	

Cotchett, Pitre & McCarthy, Joseph W. Cotchett, Nancy L. Fineman, Steven N. Williams and Nanci E. Nishimura for Petitioners.

No appearance for Respondent.

Quinn Emanuel Urquhart Oliver & Hedges, A. William Urquhart, Kathleen M. Sullivan, Kristen Bird and Roxanna A. Manuel; Fulbright & Jaworski, Peter H. Mason and Joshua D. Lichtman for Real Party in Interest Coral Energy Resources.

Pillsbury, Winthrop, Shaw, Pittman, Douglas T. Tribble and Michael J. Kass for Real Parties in Interest Dynegy Inc., West Coast Power and Dynegy Marketing and Trade.

Hall, Estill, Hardwick, Gable, Golden & Nelson, Graydon Dean Luthey, Jr., and Sarah Jane Gillett; English & Gloven and Donald A. English for Real Parties in Interest The Williams Companies, Inc. and Williams Gas Marketing, Inc., formerly known as Williams Energy Marketing and Trading Co.

Hogan & Hartson and David R. Singer for AEP Energy Services, Inc., as Amicus Curiae on behalf of Real Parties in Interest Coral Energy Resources, Duke Energy Corporation, Duke Energy Trading and Marketing, Dynegy Power Companies, Inc., The Williams Companies, Inc., and Williams Energy Marketing and Trading Co.

Evidence Code section 912, subdivision (a), provides that the attorney-client privilege is waived when "without coercion" a holder of the privilege has either disclosed or consented to the disclosure of a significant part of an otherwise privileged communication. In this writ proceeding we consider whether disclosure of privileged communications is free of coercion when, as a matter of policy, the federal government advised corporations under criminal and regulatory investigation that they might avoid indictment or regulatory sanctions if they fully cooperated in the government's

investigation and among other matters waived the attorney-client and attorney work product privileges.

Although no California cases have considered this issue directly, the cases which have discussed waiver of the privileges have found that the holder of a privilege need only take "reasonable steps" to protect privileged communications. No case has required that the holder of a privilege take extraordinary or heroic measures to preserve the confidentiality of such communications. Here, the threat of regulatory action and indictment posed the risk of significant costs and consequences to the corporations such that they could cooperate with the Department of Justice's investigation without waiving the privilege.

Accordingly, we find no abuse of discretion in the trial court's order denying plaintiff's motion to compel disclosure of privileged documents which the defendants produced during the course of the federal government's regulatory and criminal investigations.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs[1] in this coordinated antitrust case allege the defendants,[2] a group of energy suppliers, unlawfully inflated the retail price of natural gas in California between

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1 The plaintiffs and petitioners are The Regents of the University of California; the City of Los Angeles, Department of Water and Power; City and County of San Francisco; County of Santa Clara; County of San Diego; School Project for Utility Rate Reform; Nurseryman's Exchange, Inc.; County of Alameda; Sacramento Municipal Utility District; ABAG Publicly Owned Energy Resources; City of San Diego, County of San Mateo; Owens-Brockway Glass Container, Inc.; Tamco; California Steel Industries, Inc.;

1999 and 2002. In the course of discovery, the plaintiffs asked the defendants to produce attorney-client communications and attorney work product which the defendants had previously disclosed to participants in a federal Corporate Fraud Task Force. The task force, which had been investigating the defendants' conduct, was composed of the United States Department of Justice (DOJ), the Federal Energy Regulatory Commission (FERC), the Commodity Futures Trading Commission (CFTC) and the Securities & Exchange (SEC). In particular, the defendants produced to the federal agencies the results of investigations their respective outside counsel had conducted with respect to the defendants' compliance with federal regulations and antitrust law.

At the time the federal agencies obtained the privileged communications from the defendants, the DOJ had adopted a policy under which, in determining whether it would indict a corporation, the department would consider the corporation's cooperation with the government. Under the department's policy, one important indicia of a corporation's cooperation was the corporation's willingness to waive the attorney-client and attorney work product privileges when responding to the government's subpoenas and requests for documents.

Hanson Permanente Cement, Inc.; Vista Metals Corp.; Pabco Building Products; Basalite Concrete Products; and the Board of Trustees of the California State University.

2 The defendants and real parties in interest are Aquila Merchant Services, Inc.; Coral Energy Resources; Duke Energy Corporation; Duke Energy Trading and Marketing; Dynegy Power Marketing and Trade; West Coast Power; The Williams Companies, Inc.; and Williams Marketing and Trading Co.

All of the defendants received subpoenas or requests for documents from one or more of the federal agencies. After consulting counsel, each of the defendants waived the attorney-client and work product privileges. With one exception, each of the defendants obtained an agreement from the government under which the government agreed that disclosure of information to the government was not a waiver of the attorney-client and work product privileges. None of the defendants was indicted. However, the government reached plea agreements with employees of the defendants, and the factual basis for the employees' pleas was established in part based on facts disclosed in privileged documents, including in particular compliance reviews conducted by the defendants' counsel.

The plaintiffs in this action moved to compel production of the privileged documents. The plaintiffs argued that the defendants made a business decision to produce the documents to the respective federal agencies and therefore waived the privilege. The plaintiffs argued that having decided to waive the privilege with respect to one party's demand, the defendants could no longer assert the privileges in response to lawful demands from other parties. (See *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1240-1241 (*McKesson*).)

In response to the plaintiffs' motion, the defendants argued their cooperation with the federal agencies was coerced within the meaning of Evidence Code[3] section 912,

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3 All further statutory references are to the Evidence Code unless otherwise specified.

subdivision (a), and that in providing the department with privileged documents they did not waive the privileges.

The trial court denied the plaintiffs' motion. It found that the defendants' cooperation with the federal agencies did not waive the privileges.

The plaintiffs have challenged the trial court's order denying their motion to compel by way of a petition for a writ of mandate. Because the precise issue the plaintiffs have raised has not been previously considered by a court of record in this state, is of some public importance, and, in the absence of our consideration of the petition on the merits, is likely to escape review, we issued an order to show cause. (See *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1439; *Roden v. AmerisourceBergen Corp.* (2005) 130 Cal.App.4th 211, 218.)

As we explain more fully below, we deny the petition.

I

As defendants note, on the basis of uncontradicted declarations[4] the defendants submitted in opposition to the motion to compel, the trial court found each defendant produced privileged documents to the government because each defendant believed there would be severe regulatory or criminal consequences if it was labeled as uncooperative by the government. We review that finding of fact for substantial evidence. (See *CenterPoint Energy, Inc. v. Superior Court* (2007) 157 Cal.App.4th 1101, 1119.) We

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4 We note the trial court allowed plaintiffs to conduct discovery with respect to the assertions made in the declarations submitted by defendants. Plaintiffs elected not to take any discovery and did not present any evidence contradicting defendants' declarations.

review the legal conclusions to be drawn from that finding de novo. (*Ibid.*; see also *McKesson, supra,* 115 Cal.App.4th at pp. 1235-1236.)

II

Section 912, subdivision (a), states in pertinent part: "(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, *without coercion*, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (Italics added.)

The term "coercion" is not defined in section 912. However, a related provision, section 919, provides: "(a) Evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if:

"(1) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or

"(2) The presiding officer did not exclude the privileged information as required by Section 916.

"(b) If a person authorized to claim the privilege claimed it, whether in the same or a prior proceeding, but nevertheless disclosure erroneously was required by the presiding officer to be made, neither the failure to refuse to disclose nor the failure to seek review

of the order of the presiding officer requiring disclosure indicates consent to the disclosure or constitutes a waiver and, under these circumstances, the disclosure is one made under coercion."

Although its function is different than the attorney-client privilege, in this context the attorney work product privilege is subject to the same waiver principles applied to the attorney work product privilege. "Waiver of work product protection, though not expressly defined by statute, is generally found under the same set of circumstances as waiver of the attorney-client privilege—by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection. [Citations.] Waiver also occurs by an attorney's 'voluntary disclosure or consent to disclosure of the writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing.'" (*McKesson, supra*, 115 Cal.App.4th at p. 1239; but see *Transamerica Computer v. Intern. Business Machines* (9th Cir. 1978) 573 F.2d 646, 650, fn. 5 (*Transamerica Computer*).) Thus disclosure to a third party will waive the work product privilege unless the disclosure was coerced.

Dictionaries define "coerce" broadly as "[t]o force to act or think in a given manner; to compel by pressure or threat" (American Heritage Dict. of the English Language, 1971, p. 258) or "[c]onduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it." (Black's Law Dict. (8th ed. 2004) p. 275.) In the trial court the defendants relied upon the impact of coercion in other legal contexts. For instance, a line of federal and state cases have found the Fifth Amendment is not waived when an employee is threatened with discharge if he

or she asserts the privilege against self-incrimination in responding to an employer's investigation of alleged wrongdoing. (See *Garrity v. New Jersey* (1967) 385 U.S. 493, 500 [87 S.Ct. 616]; *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 829; *TRW, Inc. v. Superior Court.* (1994) 25 Cal.App.4th 1834, 1853.) In *Lefkowitz v. Turley* (1973) 414 U.S. 70, 82-83 [94 S.Ct. 316], the court extended the coercion theory to contractors who were threatened with the loss of the ability to compete for municipal contracts unless they agreed to waive their Fifth Amendment privilege. The court stated: "A waiver secured under threat of substantial economic sanction cannot be termed voluntary." (*Ibid*.)

The defendants also rely on cases that have discussed the circumstances under which *Miranda* rights may be validly waived (see *People v. Whitson* (1998) 17 Cal.4th 229, 247) and cases which discuss the elements of extortion. (See *People v. Goodman* (1958) 159 Cal.App.2d 54, 61.) As the defendants point out, these cases support the principle that an act may be volitional, but, because of the surrounding circumstances, involuntary.

The analogies the defendants point to are helpful, but not dispositive. While somewhat related, the constitutional privilege against self-incrimination serves interests distinctly different from the interests embodied in the attorney-client and work product privileges. The law of extortion also serves obviously distinct interests. In particular, we note that unlike the constitutional right against self-incrimination, the common law and statutory privileges are to be narrowly construed because they serve narrower interests. (Compare *Lybarger v. City of Los Angeles, supra,* 40 Cal.3d at p. 831, fn. 1 [privilege

against self-incrimination broad]; *People v. Sinohui* (2002) 28 Cal.4th 205, 212 [evidentiary privileges narrow]; *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 396-397 [same].)[5] Thus, in considering what level of compulsion will permit the holder of a privilege to disclose privileged information without waiving either the attorney-client or work product privileges, we have looked for authorities which have more directly discussed those privileges. Although there is not a great deal of case law in the area, our own research has disclosed federal authorities and at least one relatively recent California case which have considered whether particular disclosures of privileged information were voluntary.

We begin with two trade cases. In *United States v. Insurance Board*, Trade Cas. P67,873 (N.D.Ohio 1954) and *United States v. New Wrinkle, Inc.*, Trade Cas. P67,883 (S.D.Ohio 1954) the federal government requested access to the defendants' corporate files and records of defendants. Given those circumstances, the federal district courts held that the defendants' disclosure of privileged documents was not voluntary. In *United States v. New Wrinkle, Inc.,* the court stated: "If Government agents come into a place of business and ask or demand to see files and records, and in a spirit of cooperation, the

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5 "There can be no 'presumption against waiver' of the attorney-client privilege in view of the statement of policy adopted by the Fourth Circuit in *N.L.R.B. v. Harvey, supra*, 349 F.2d at 907: 'the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." (*Duplan Corp. v. Deering Milliken, Inc.* (DCSC 1975) 397 F.Supp. 1146, 1162.)

files and records are turned over to the agents by the business, it does not, in the opinion of this Court, constitute a voluntary turning over of records which can be claimed by the Government as a waiver. There is at least an implied coercion in a request or demand made by Government agents."

The court in *Duplan Corp. v. Deering Milliken, Inc., supra,* 397 F.Supp. at page 1163, relied upon *United States v. New Wrinkle* in considering the impact of its *in-camera* review of documents which one party claimed were privileged. The court held that the privilege would not be waived "where the voluntary waiver of some communications was made upon *the suggestion* of the court during the course of the in-camera proceedings." (Italics added.)

In *Transamerica Computer, supra,* 573 F.2d at pages 650-652, the Court of Appeals found coercion in an accelerated discovery order which caused the defendant, IBM, to inadvertently disclose privileged documents. "We have already described at length the extraordinary logistical difficulties with which IBM was confronted in its efforts to comply, as it eventually did, with the demanding timetable Judge Neville had established for the document inspection program. We believe that there is merit in IBM's argument that that timetable deprived IBM of the opportunity to claim the privilege inasmuch as it was statistically inevitable that, despite the extraordinary precautions undertaken by IBM, some privileged documents would escape detection by the IBM reviewers." (*Id*. at p. 652.) In finding that under those circumstances no waiver occurred, the court stated: "Waiver cannot be directly compelled [and] neither can it be indirectly compelled." (*Ibid*.) Importantly for our purposes, the court approved a trial

court order under which any inadvertent disclosure during discovery would not waive the privilege so long as IBM took reasonable steps to prevent disclosure. (*Ibid*.)

The court applied the "reasonable steps" standard suggested in *Transamerica Computer* in *U.S. v. De la Jara* (9th Cir. 1992) 973 F.2d 746, 750 (*de la Jara*.) In D*e la Jara* the government executed a search warrant at the defendant's place of business and discovered some privileged documents. Over the defendant's objection, the government entered one of the privilege documents at trial. The court found that the defendant had not acted reasonably to protect the confidentiality of the document. "In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered. [Citations.] We have previously held that the attorney-client privilege may be waived by implication, even when the disclosure of the privileged material was 'inadvertent' or involuntary. [Citation.] When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege. [Citation.] Conversely, we will deem the privilege to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter.

"De la Jara did nothing to recover the letter or protect its confidentiality during the six month interlude between its seizure and introduction into evidence. By immediately attempting to recover the letter, appellant could have minimized the damage caused by the breach of confidentiality. As a result of his failure to act, however, he allowed 'the mantle of confidentiality which once protected the document[ ]' to be 'irretrievably breached,' thereby waiving his privilege." (*De la Jara, supra,* 973 F.2d at pp. 749-750.)

More recently, the court in *Hynix Semiconductor, Inc. v. Rambus, Inc.* 2008 U.S. DIST LEXIS 11764 (ND Cal., Feb. 2, 2008, No. CV-00-20905 RMW) reached a similar conclusion with respect to documents it ordered disclosed in discovery subject to the defendant's right to assert the privilege at the time of trial: "The circumstances surrounding a disclosure of allegedly privileged documents determine whether the disclosure waived the attorney-client or work products privileges. [Citation.] In general, a disclosure compelled by a court order like the piercing orders in this case does not waive the attorney-client and work product privileges. [Citations.] The caveat to this general principle is that the party claiming privilege must take efforts 'reasonably designed' to protect the privilege. [Citation.]

"Rambus has strenuously objected every time it has been ordered to produce allegedly privileged documents. Furthermore, this court's most recent production order expressly recognized that Rambus could reassert any claim of privilege in the form of an evidentiary objection at trial. The court imagines such assurances prevented Rambus from further complicating these proceedings by appealing the court's production order. It would be perverse now for the court to hold that reliance on the court's order was not 'reasonably designed' to protect the asserted privileges. While a 'strenuous or Herculean efforts' rule may have required Rambus to file a peremptory motion in limine in those instances, the law only requires 'reasonable efforts.' [Citation.] Requiring more than what Rambus did to avoid production would suggest that Rambus should have expanded and intensified this already over-litigated dispute despite everyone's knowledge that

Rambus objects to production of the documents. The Ninth Circuit's rule in *de la Jara* requires reasonable efforts, and those were taken in this court." (*Ibid*.)

At least one California case appears to have confronted the related issues of inadvertent disclosure and coercion and reached a result consistent with the federal authorities we have discussed. In *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, a discrimination case in which the plaintiff alleged he was laid off because of his age, the defendant's attorney had prepared a document which listed employees proposed for termination, including their birth dates. The document was inadvertently produced during discovery and the plaintiff attempted to introduce it at trial. The trial court excluded the document and on appeal the plaintiff argued that the disclosure, albeit inadvertent, was not coerced. The Court of Appeal rejected the plaintiff's argument. "O'Mary forgets that discovery *is* coercion. The force of law is being brought upon a person to turn over certain documents. Inadvertent disclosure during discovery by no stretch of the imagination shows *consent* to the disclosure: It merely demonstrates that the poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something. O'Mary invites us to adopt a 'gotcha' theory of waiver, in which an underling's slip-up in a document production becomes the equivalent of actual consent. We decline. The substance of an inadvertent disclosure under such circumstances demonstrates that there was no *voluntary* release." (*Id*. at p. 577.)

In light of the foregoing authorities, it is clear that when privileged documents have been disclosed either in response to the request of a government agency or inadvertently in the course of civil discovery, no waiver of the privilege will occur if the holder of the privilege has taken reasonable steps under the circumstances to prevent disclosure. The law does not require that the holder of the privilege take "strenuous or Herculean efforts" to resist disclosure. This standard is consistent with section 919, subdivision (b), which by its terms does not require that the holder of a privilege suffer a contempt finding in order to preserve the privilege or to appeal an order directing disclosure.[6]

III

Turning to the circumstances presented here, we agree with the trial court that the disclosures the defendants made to the government agencies did not waive their attorney-client and attorney work product privileges. The means of coercion the government used here were, as a practical matter, more powerful than a court order. A court order can be challenged, without penalty, by way of extraordinary writ or appeal. In contrast here, the defendants here had no means of asserting the privileges without incurring the severe consequences threatened by the government agencies. Moreover, contrary to the plaintiffs' argument, the nature and fact or those penalties cannot be seriously doubted. In particular, the policy of the DOJ was well publicized, and counsel for each of the

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6 We reject plaintiffs' contention that section 919 sets forth the exclusive circumstances under which coercion arises. The terms of the statute are in no sense exclusive but rather exemplary.

defendants was aware of the policy at the time counsel advised each of the defendants to comply with the government's requests.[7] (See *United States v. Stein* (2006) 435 F. Supp.2d 330, 337-338.)

We are not the first court to conclude that the DOJ's policy had coercive impacts. In *United States v. Stein, supra,* 435 F. Supp.2d at page 364, criminal defendants argued that the indictments against them should be dismissed because under the DOJ's policy, corporations were not only encouraged to waive available privileges, they were also discouraged from paying the attorney fees of individual officers and employees. The defendants argued that this unfairly interfered with their right to counsel. The trial court agreed with the defendants and restricted the DOJ's ability to apply its policy to the corporation that employed the defendants. In describing the impact the policy was likely to have on corporations, the court stated: "Few if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals in the face of the language of the Thompson Memorandum itself. It would be irresponsible to take the chance that prosecutors might view it as 'protecting . . . culpable employees and agents.' As KPMG's new chief legal officer, former U.S. District Judge Sven Erik Holmes, testified, he thought it indispensable (as would any defense lawyer) 'to be able to say at the right time with the right audience, we're in full compliance with the Thompson Memorandum.'" (*Id*. at p. 364.)

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7 We hasten to note the DOJ has more recently amended its policy and significantly limited the circumstances under which disclosure of privileged materials will be requested from corporate defendants.

In sum, because of the dramatic impact failure to cooperate might have on the corporations and the absence of any cost-free redress, the trial court here correctly found that the defendants' cooperation with the government did not waive the attorney-client and attorney work product privileges. Under the circumstances existing at the time the cooperation took place, it would not have been reasonable for the defendants to resist or otherwise challenge the government's requests.

The coercion exerted by the federal government's polices takes this case well outside of the holdings in *McKesson, supra,* 115 Cal.App.4th at page1239, and the federal cases relied upon by plaintiffs. (See e.g. *In re Qwest Communications Intern. Inc.* (10th Cir. 2006) 450 F.3d 1179, 1199; *In re Steinhardt Partners, L.P.* (2d Cir. 1993) 9 F.3d 230, 234; *SEC v. Forma* (SDNY 1987) 117 FRD 516; *In re John Doe Corp.* (2d Cir. 1982) 675 F.2d 482; *Teachers Ins. and Annuity Assoc. of America v. Shamrock Broadcasting Co.* (SDNY 1981) 521 F.Supp. 638.) As the trial court noted, *McKesson* and the federal cases did not consider or discuss a claim that disclosure of privileged documents was coerced.

Petition denied. Defendants and Real Parties in Interest to recover their costs.

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BENKE, J.

WE CONCUR:

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McCONNELL, P. J.

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HUFFMAN, J.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 26, 2010 Decided June 29, 2010

No. 09-5171

UNITED STATES OF AMERICA,
APPELLANT

v.

DELOITTE LLP,
APPELLEE

DOW CHEMICAL COMPANY,
INTERVENOR

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-mc-00411-RJL)

Judith A. Hagley, Attorney, U.S. Department of Justice, argued the cause for appellant. With her on the briefs were *Gilbert S. Rothenberg*, Deputy Assistant Attorney General, and *Robert W. Metzler*, Attorney. *Andrew Weiner*, Attorney, and *R. Craig Lawrence*, Assistant U.S. Attorney, entered appearances.

Hartman E. Blanchard, Jr. argued the cause for intervenor Dow Chemical Company on behalf of appellee. With him on the brief were *Christopher P. Murphy* and *John B. Magee.* *Michael D. Warden* entered an appearance.

Before: SENTELLE, *Chief Judge*, and BROWN and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

SENTELLE, *Chief Judge*: The United States appeals from a district court order denying its motion to compel Dow Chemical Company's independent auditor, Deloitte & Touche USA, LLP,[1] to produce three documents in connection with ongoing tax litigation between Dow and the government. The district court ruled that all three documents were protected from discovery under the work-product doctrine. On appeal, the government contends that one of the documents is not work product because it was prepared by Deloitte during the audit process. In addition, while it concedes that the other two documents are work product, it argues that Dow waived work-product protection when it disclosed them to Deloitte. We vacate the district court's decision that the document prepared by Deloitte is work product and remand for *in camera* review to determine whether it is entirely work product. With respect to the other two documents, we affirm the district court's decision that Dow did not waive work-product protection when it disclosed them to Deloitte.

I. Background

This discovery dispute arises from ongoing tax litigation in the U.S. District Court for the Middle District of Louisiana. The litigation concerns the tax treatment of two partnerships owned by Dow Chemical Company and two of its wholly-owned subsidiaries. The first of these partnerships was Chemtech Royalty Associates, L.P. (Chemtech I); it was succeeded by Chemtech II, L.P. (Chemtech II). In 2005, Dow filed a civil suit

[1]Deloitte & Touche USA, LLP is now known as Deloitte LLP.

challenging IRS adjustments to partnership returns filed by Chemtech I and Chemtech II. *Chemtech Royalty Assocs., L.P. v. United States*, No. 05-944 (M.D. La. filed July 13, 2005). During discovery, the government subpoenaed documents from Dow's independent auditor, Deloitte & Touche USA, LLP. Since the subpoena sought production in Washington, D.C., it issued from the U.S. District Court for the District of Columbia. Deloitte produced a number of documents, but refused to produce three documents Dow identified as attorney work product. In response, the government filed a motion to compel production.

The three disputed documents are described in Dow's privilege log and in a declaration by William Curry, Dow's Director of Taxes. The first document is a 1993 draft memorandum prepared by Deloitte that summarizes a meeting between Dow employees, Dow's outside counsel, and Deloitte employees about the possibility of litigation over the Chemtech I partnership, and the necessity of accounting for such a possibility in an ongoing audit. This meeting took place after Dow informed Deloitte about the likelihood of litigation over the Chemtech I transaction. The second is a 1998 memorandum and flow chart prepared by two Dow employees—an accountant and an in-house attorney. The third is a 2005 tax opinion prepared by Dow's outside counsel. Curry's declaration explains that the second and third documents were disclosed to Deloitte so that it could "review the adequacy of Dow's contingency reserves for the Chemtech transactions." According to Curry, Deloitte "compelled Dow's production of these documents by informing the company that access to these documents was required in order to provide Dow with an unqualified audit opinion for its public financial statements." The privilege log describes the subject matter of these documents as "[t]ax issues related to the Chemtech partnership" and states that each one is a "[d]ocument prepared in

anticipation of litigation." We will refer to the first document, which was prepared by Deloitte, as the "Deloitte Memorandum," and the second and third documents, which were created by Dow, as the "Dow Documents."

The district court denied the government's motion to compel without reviewing the disputed documents *in camera*. *United States v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39, 40-41 (D.D.C. 2009). It concluded that the Deloitte Memorandum was work product because it was "prepared because of the prospect of litigation with the IRS over the tax treatment of Chemtech." *Id.* at 40 n.1. The court further concluded that, although the document was created by Deloitte, it was nonetheless Dow's work product because "its contents record the thoughts of Dow's counsel regarding the prospect of litigation." *Id.* In addition, the court rejected the government's contention that Dow had waived work-product protection for the three documents. The court acknowledged that disclosing work product to a third party can waive protection if that disclosure is "inconsistent with the maintenance of secrecy from the disclosing party's adversary," *id.* at 41 (quoting *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001)), but concluded that Dow's disclosure to Deloitte was not inconsistent with maintaining secrecy because (1) Deloitte was not a potential adversary and (2) nothing suggested that it was unreasonable for Dow to expect Deloitte to maintain confidentiality, *id.* The government appeals this ruling, and Dow has intervened to assert work-product protection. Since the government's motion to compel was the sole issue before the district court, its disposition of that motion was an appealable final judgment. *In re Multi-Piece Rim Prods. Liab. Litig.*, 653 F.2d 671, 676 (D.C. Cir. 1981).

II. Analysis

The government contends that the Deloitte Memorandum is not attorney work product. Alternatively, it argues that even if the Deloitte Memorandum is work product, Dow waived work-product protection when it orally disclosed the information recorded therein to Deloitte. Turning to the Dow Documents, the government concedes they are attorney work product, but argues that Dow waived work-product protection when it gave them to Deloitte. We generally review the district court's discovery orders for abuse of discretion. *United States v. Williams Cos.*, 562 F.3d 387, 396 (D.C. Cir. 2009). If the district court applied an incorrect legal standard, however, we review *de novo*. *In re Sealed Case*, 146 F.3d 881, 883-84 (D.C. Cir. 1998).

A. *The Work-Product Doctrine*

The Supreme Court established the work-product doctrine in *Hickman v. Taylor*, 329 U.S. 495 (1947), which held that an attorney's notes recording his interviews with witnesses to the litigation-prompting incident were protected from discovery. *Id.* at 509-10. The Court recognized that to prepare for litigation, an attorney must "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 511. This preparation "is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.* The Court reasoned that giving opposing counsel access to such work product would cause significant problems:

> [M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate,

> would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. Consequently, the Court concluded that attorney work product is protected from discovery unless "the one who would invade that privacy" carries the burden of "establish[ing] adequate reasons to justify production through a subpoena or court order." *Id.* at 512.

The work-product doctrine announced in *Hickman* was subsequently partially codified in Federal Rule of Civil Procedure 26(b)(3), which states:

> (A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

FED. R. CIV. P. 26(b)(3)(A). Rule 26(b)(3) allows a court to order disclosure when the requesting party can show a "substantial need" for the material and an inability to procure equivalent information "without undue hardship." FED. R. CIV. P. 26(b)(3)(A)(ii). When a court orders disclosure under this exception, however, it must still "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." FED. R. CIV. P. 26(b)(3)(B). This type of work product, which is often described as opinion work product, "is virtually undiscoverable." *Dir., Office of Thrift Supervision v.*

Vinson & Elkins, LLP, 124 F.3d 1304, 1307 (D.C. Cir. 1997).

B. *The Deloitte Memorandum*

The government makes two categorical arguments that the Deloitte Memorandum cannot be work product. First, it argues that the Deloitte Memorandum cannot be work product because it was created by Deloitte, not Dow or its representative. Second, it argues that the Deloitte Memorandum cannot be work product because it was generated as part of the routine audit process, not in anticipation of litigation. If either argument is correct, the Deloitte Memorandum cannot be work product, regardless of its contents. We reject both arguments, but nevertheless conclude that the district court lacked sufficient information to determine that the entire Deloitte Memorandum is work product.

1

The government first contends that Dow cannot claim work-product protection for the Deloitte Memorandum because it was prepared by Deloitte. Rule 26(b)(3) only protects "documents and tangible things that are prepared . . . by or for another party or its representative." FED. R. CIV. P. 26(b)(3)(A). Given this language, the government argues that the Deloitte Memorandum is not work product because Deloitte is not Dow's representative. It relies principally on *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), in which the Supreme Court refused to recognize an accountant work-product privilege. In *Arthur Young*, the Court contrasted the role of an attorney with that of an accountant, explaining that an attorney is "a loyal representative whose duty it is to present the client's case in the most favorable possible light," whereas an independent certified public accountant has a "*public* responsibility" and "owes ultimate allegiance to the corporation's creditors and

stockholders, as well as to the investing public." *Id.* at 817-18. In the government's view, *Arthur Young* demonstrates that Deloitte cannot be Dow's representative, which in turn means that the Deloitte Memorandum cannot be work product under the plain language of Rule 26(b)(3). Dow counters that the "representative" for purposes of Rule 26(b)(3) is its counsel, whose thoughts and opinions are recorded in the document. In addition, it argues that the Deloitte Memorandum is work product because it contains the same type of opinion work product that is found in the Dow Documents, which the government concedes are work product.

Even if the government is correct in asserting that the Deloitte Memorandum falls outside the definition given by Rule 26(b)(3), this does not conclusively establish that it is not work product. The government mistakenly assumes that Rule 26(b)(3) provides an exhaustive definition of what constitutes work product. On the contrary, Rule 26(b)(3) only partially codifies the work-product doctrine announced in *Hickman*. Rule 26(b)(3) addresses only "documents and tangible things," but *Hickman*'s definition of work product extends to "intangible" things. 329 U.S. at 511. Moreover, in *Hickman*, the Court explained that the attorney's "mental impressions" were protected from discovery, so that he could not be forced to "repeat or write out" that information in discovery. *Id*. at 512-13. Thus *Hickman* provides work-product protection for intangible work product independent of Rule 26(b)(3). *Accord In re Seagate Tech., LLC*, 497 F.3d 1360, 1376 (Fed. Cir. 2007); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003); *United States v. 266 Tonawanda Trail*, 95 F.3d 422, 428 n.10 (6th Cir. 1996).

The government focuses on Deloitte's role in creating the document and on its relationship to Dow. Under *Hickman*, however, the question is not who created the document or how

they are related to the party asserting work-product protection, but whether the document contains work product—the thoughts and opinions of counsel developed in anticipation of litigation. The district court found that the memorandum records those thoughts, even though Deloitte and not Dow or its attorney committed them to paper. The work product privilege does not depend on whether the thoughts and opinions were communicated orally or in writing, but on whether they were prepared in anticipation of litigation. Thus Deloitte's preparation of the document does not exclude the possibility that it contains Dow's work product.

The government next contends that the Deloitte Memorandum cannot be work product because it was generated during an annual audit, not prepared in anticipation of litigation. The courts are not unanimous on the proper test for determining whether a document was prepared "in anticipation of litigation." Under the test adopted by most circuits, the question is whether the document was created "because of" the anticipated litigation. *See, e.g.*, *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 622 (7th Cir. 2010); *In re Prof'ls Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004); *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002); *Maine v. U.S. Dep't of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 305 (3d Cir. 1999); *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992). The Fifth Circuit, however, requires that anticipation of litigation be the "primary motivating purpose" behind the document's creation. *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982).

Like most circuits, we apply the "because of" test, asking "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *In re Sealed Case*, 146 F.3d at 884 (quotation omitted). In addition, while this standard addresses a "document," it applies equally to work product in other forms. Thus for the Deloitte Memorandum, the question is whether it records information prepared by Dow or its representatives because of the prospect of litigation.

In the government's view, the Deloitte Memorandum was prepared not "because of the prospect of litigation," but as part of the routine audit process. The government asserts that a document's *function*, not its *content*, determines whether it is work product. For this proposition the government relies on *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124 (D.C. Cir. 1987). In *Delaney*, a law firm sought to obtain under the Freedom of Information Act memoranda and supporting documents relating to the government's legal analysis of an Internal Revenue Service program concerning the use of statistical sampling in auditing large accounts. In that case it was the IRS that asserted work-product protection. The court held that the documents were work product because they "advise[d] the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome." *Id.* at 127. In its reasoning, the court noted that a previous work-product decision had identified "the function of the documents as the critical issue." *Id.* at 127 (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980)). The government seizes on this language, arguing that the Deloitte Memorandum is not work product because its function was to facilitate Deloitte's audit, not to prepare Dow for litigation.

We think the government misreads *Delaney*. While *Delaney* used the term "function," it was not considering any distinction between function and content in determining whether a document constituted work product. On the contrary, the court evaluated the function of the IRS documents at issue *by examining their contents*. It contrasted the documents at issue in the *Coastal States* case, which were like "an agency manual, fleshing out the meaning of the statute it was authorized to enforce," with the documents at issue in *Delaney*, which were memoranda describing potential legal challenges, possible defenses, and likely outcomes. *Id. Delaney* does not support the proposition that we should look solely to a document's function divorced from its contents in determining its status as work product.

The government also relies on two decisions holding that a corporation's tax accrual workpapers were not prepared in anticipation of litigation. In *El Paso*, the Fifth Circuit applied the "primary motivating purpose" standard and concluded that El Paso's tax accrual workpapers were not work product because the company's primary motivation in creating them was "to bring its financial books into conformity with generally accepted auditing principles" as required by federal securities laws. 682 F.2d at 543. The court reasoned that the "primary motivating force . . . [was] not to ready El Paso for litigation over its tax returns," but "to anticipate, for financial reporting purposes, what the impact of litigation might be on the company's tax liability." *Id.*

In *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009) (en banc), the First Circuit likewise held that a corporation's tax accrual workpapers were not prepared in anticipation of litigation. Applying the "because of" test, the court concluded that the workpapers were "tax documents and not case preparation materials" that were "prepared in the ordinary

course of business" and that their only purpose was "to support a financial statement and the independent audit of it." *Id.* at 28, 30. It found no evidence that the workpapers were prepared for "potential use in litigation" or that they "would in fact serve any useful purpose for Textron in conducting litigation if it arose." *Id.* at 30.

The government argues that *El Paso* and *Textron* demonstrate that when a document is created as part of an independent audit, as the Deloitte Memorandum was, its sole function is to facilitate that audit, which means it was not prepared in anticipation of litigation. Neither case convinces us. *El Paso* was decided under the "primary motivating purpose" test, which is more demanding than the "because of" test we employ. Under the more lenient "because of" test, material generated in anticipation of litigation may also be used for ordinary business purposes without losing its protected status. For example, in *Adlman*, the Second Circuit considered whether a document containing legal analysis about possible future litigation qualified as work product when it was procured to assist the parties in deciding whether to go through with a proposed merger. The court held that

> a document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation. Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3).

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134 F.3d at 1195. Under this same reasoning, material developed in anticipation of litigation can be incorporated into a document produced during an audit without ceasing to be work product. *Textron*, which did apply the "because of" standard, is distinguishable because it turned on the court's examination of the particular documents at issue. While the court concluded that those documents were not work product, it did not exclude the possibility that other documents prepared during the audit process might warrant work-product protection. Moreover, Judge Torruella's dissenting opinion in *Textron* makes a strong argument that while the court said it was applying the "because of" test, it actually asked whether the documents were "prepared for use in possible litigation," a much more exacting standard. 577 F.3d at 32.

In short, a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation.

3

Rejecting the government's categorical arguments establishes only that the Deloitte Memorandum may be protected work product under the law; we must now determine whether it is. On examination of the record, we conclude that the district court did not have a sufficient evidentiary foundation for its holding that the memorandum was purely work product. According to the record, the document was created during Deloitte's preparation of an audit report which in Deloitte's view required consideration of potential litigation. The meeting generating the document included both Deloitte and Dow employees, as well as Dow's outside counsel. The document itself was prepared by a third party. While none of this negates the possibility of work-product privilege, it could make it likely

that the document includes other information that is not work product. According to Dow's privilege log and the Curry declaration, the memorandum does contain thoughts and analyses by legal counsel, but this does not rule out or even render unlikely the possibility that it also includes other facts, other thoughts, other analyses by non-attorneys which may not be so intertwined with the legal analysis as to warrant protection under the work-product doctrine. We will therefore remand this question to the district court for the purpose of independently assessing whether the document was entirely work product, or whether a partial or redacted version of the document could have been disclosed. Accordingly, we vacate the district court's decision that the Deloitte Memorandum was work product and remand so that the district court can examine the document *in camera* to determine whether it is entirely work product. *See In re Sealed Case*, 146 F.3d at 886-88 (remanding for *in camera* review to determine whether documents were prepared in anticipation of litigation); *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994) (same).

C. *The Dow Documents*

Although the government concedes that the Dow Documents are work product, it contends that Dow waived work-product protection by disclosing them to Deloitte. To the best of our knowledge, no circuit has addressed whether disclosing work product to an independent auditor constitutes waiver. Among the district courts that have addressed this issue, most have found no waiver. *E.g.*, *Regions Fin. Corp. v. United States*, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *8 (N.D. Ala. May 8, 2008) (slip op.); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW, 2006 WL 2850049, at *1 (N.D. Cal. Oct. 5, 2006) (unpublished decision); *Am. S.S. Owners Mut. Prot. & Indem.*

Ass'n v. Alcoa S.S. Co., No. 04-Civ-4309, 2006 WL 278131, at *2 (S.D.N.Y. Feb. 2, 2006) (unpublished decision); *Frank Betz Assocs., Inc. v. Jim Walter Homes, Inc.*, 226 F.R.D. 533, 535 (D.S.C. 2005); *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 447-49 (S.D.N.Y. 2004); *In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003); *Gutter v. E.I. Dupont de Nemours & Co.*, No. 95-CV-2152, 1998 WL 2017926, at *5 (S.D. Fla. May 18, 1998) (unpublished decision); *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260, 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993) (unpublished decision). At least two courts have found waiver. *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 115-17 (S.D.N.Y. 2002); *In re Diasonics Sec. Litig.*, No. C-83-4584-RFP, 1986 WL 53402, at *1 (N.D. Cal. June 15, 1986) (unpublished decision).

While voluntary disclosure waives the attorney-client privilege, it does not necessarily waive work-product protection. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (*AT&T*). As we explained in *AT&T*, the attorney-client privilege and the work-product doctrine serve different purposes: the former protects the attorney-client relationship by safeguarding confidential communications, whereas the latter promotes the adversary process by insulating an attorney's litigation preparation from discovery. *Id.* Voluntary disclosure waives the attorney-client privilege because it is inconsistent with the confidential attorney-client relationship. *Id.* Voluntary disclosure does not necessarily waive work-product protection, however, because it does not necessarily undercut the adversary process. *Id.* Nevertheless, disclosing work product to a third party can waive protection if "such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001) (quoting *AT&T*, 642 F.2d at 1299). Under this standard, the

voluntary disclosure of attorney work product to an adversary or a conduit to an adversary waives work-product protection for that material.

Applying this standard, the government contends that Dow has waived work-product protection for the Dow Documents because Deloitte is (1) a potential adversary and (2) a conduit to other adversaries. We reject both contentions and conclude that Dow has not waived the protection.

1

The government contends that Deloitte is a potential adversary of Dow because disputes sometimes arise between independent auditors and their clients and because independent auditors have the power to issue opinions that adversely affect their clients. Neither argument demonstrates that Deloitte is a potential adversary for purposes of waiver analysis. First, as an independent auditor, Deloitte cannot be Dow's adversary. Even the threat of litigation between an independent auditor and its client can compromise the auditor's independence and necessitate withdrawal. *See* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (AICPA), AICPA PROFESSIONAL STANDARDS, CODE OF PROFESSIONAL CONDUCT § 101.08 (2005) (hereinafter AICPA CODE OF PROFESSIONAL CONDUCT) (discussing the effect of actual and threatened litigation on auditor independence). Further, Deloitte's power to issue an adverse opinion, while significant, does not make it the sort of litigation adversary contemplated by the waiver standard. Similarly, "any tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine." *Merrill Lynch*, 229 F.R.D. at 448. Second, the possibility of a future dispute between Deloitte and

Dow does not render Deloitte a potential adversary for the present purpose. If it did, any voluntary disclosure would constitute waiver. Yet the work-product doctrine allows disclosures as long as they do not undercut the adversary process. *See AT&T*, 642 F.2d at 1299.

Here, the question is not whether Deloitte could be Dow's adversary in any conceivable future litigation, but whether Deloitte could be Dow's adversary in the sort of litigation the Dow Documents address. We conclude that the answer must be no. In preparing the Dow Documents, Dow anticipated a dispute with the IRS, not a dispute with Deloitte. The documents, which concern the tax implications of the Chemtech partnerships, would not likely be relevant in any dispute Dow might have with Deloitte. Thus Deloitte cannot be considered a potential adversary with respect to the Dow Documents.

The government argues that *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997), supports its argument that an independent auditor is a potential adversary. In that case, a defense contractor (MIT) under IRS investigation claimed work-product protection for expense reports it had disclosed to the Defense Contract Audit Agency, a branch of the Department of Defense. The First Circuit held that MIT had waived the protection by disclosing its expense reports to a potential adversary. *Id.* at 687. The court's reasoning is clear: MIT disclosed the expense reports to the auditing arm of the Defense Department, the most likely adversary in any dispute over expense reports. In doing so, it disclosed its work product not to an independent auditor, but to an auditor affiliated with a potential adversary. Dow's disclosure to its independent auditor, which is not a potential adversary in tax litigation over the Chemtech partnerships, is wholly different.

The government also asserts that Deloitte is a conduit to Dow's adversaries. It claims the district court failed to address this question, but this ignores the district court's explicit statement that "no evidence suggests that it was unreasonable for Dow to expect Deloitte USA to maintain confidentiality." *Deloitte*, 623 F. Supp. 2d at 41. Like the district court, we conclude that Deloitte is not a conduit to Dow's adversaries.

Our prior decisions applying the "maintenance of secrecy" standard, while fact-intensive, have generally made two discrete inquiries in assessing whether disclosure constitutes waiver. First, we have considered whether the disclosing party has engaged in self-interested selective disclosure by revealing its work product to some adversaries but not to others. *Williams*, 562 F.3d at 394; *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984). Such conduct militates in favor of waiver, for it is "inconsistent and unfair to allow [parties] to select according to their own self-interest to which adversaries they will allow access to the materials." *In re Subpoenas*, 738 F.2d at 1372.

Second, we have examined whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential. *Williams*, 562 F.3d at 394; *In re Subpoenas*, 738 F.2d at 1372-74. A reasonable expectation of confidentiality may derive from common litigation interests between the disclosing party and the recipient. *In re Subpoenas*, 738 F.2d at 1372. As we explained in *AT&T*, "[t]he existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege." 642 F.2d at 1299. This is true because when common litigation interests are present, "the transferee is not at all likely to disclose the work product

material to the adversary." *Id.* Alternately, a reasonable expectation of confidentiality may be rooted in a confidentiality agreement or similar arrangement between the disclosing party and the recipient. Nevertheless, a confidentiality agreement must be relatively strong and sufficiently unqualified to avoid waiver. In *Williams*, for example, we concluded that the government's assurance that it would maintain confidentiality "to the extent possible" was not sufficiently strong or sufficiently unqualified to prevent the government from disclosing the information to a criminal defendant under *Brady v. Maryland*, 373 U.S. 83 (1963). 562 F.3d at 395-96. Likewise, we have determined that a mere promise to give the disclosing party notice before releasing documents does not support a reasonable expectation of confidentiality. *In re Subpoenas*, 738 F.2d at 1373.

The selective disclosure inquiry is straightforward. Selective disclosure involves disclosing work product to at least one adversary. As we have explained, Deloitte is not an adversary, so Dow's disclosure to Deloitte was not selective disclosure. The "reasonable expectation of confidentiality" inquiry is more complicated. As to common interests, Dow and Deloitte do not have common litigation interests in the Dow Documents—Dow has a litigation interest in the documents because of its interest in the Chemtech partnerships, but Deloitte has no similar interest in the documents. Absent common interests, the question is whether a confidentiality agreement or similar assurance gave Dow a reasonable expectation that Deloitte would keep its work product confidential.

We conclude that Dow had a reasonable expectation of confidentiality because Deloitte, as an independent auditor, has an obligation to refrain from disclosing confidential client information. Rule 301 of the American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct

provides: "A member in public practice shall not disclose any confidential client information without the specific consent of the client." AICPA CODE OF PROFESSIONAL CONDUCT § 301.01. William Curry's declaration explains that "Dow furnished these documents to D&T [Deloitte] with the expectation that D&T would retain the confidentiality of the two documents." Given the obligation imposed by Rule 301, we think this expectation was reasonable.

The government responds that this is a "qualified assurance" that does not suffice to prevent waiver because Rule 301 also explains that it "shall not be construed . . . to affect in any way the member's obligation to comply with a validly issued and enforceable subpoena or summons." *Id.* But an assertion of work-product protection challenges the enforceability of a subpoena with respect to those materials. Thus Deloitte could refuse to produce the documents, thereby allowing Dow to intervene and assert work-product protection, without violating its obligation to comply with enforceable subpoenas. Indeed, this is exactly what Deloitte did. Accordingly, this caveat does not significantly diminish the reasonableness of Dow's expectation of confidentiality.

The government also attempts to bolster its waiver argument by identifying instances in which an independent auditor might disclose information obtained from a company whose finances it audits. For example, it asserts that Deloitte could make Dow disclose its confidential tax analysis in footnotes to its public financial statements. Likewise, Deloitte could testify about confidential information obtained from Dow in proceedings brought by the SEC or private parties. Or Deloitte might report illegal acts it detects during its audit in accordance with § 10A of the Securities and Exchange Act, 15 U.S.C. § 78j-1. Finally, the government returns to *Arthur Young*, arguing that as an independent auditor, Deloitte is a

"public watchdog" whose ultimate allegiance is to Dow's creditors, stockholders, and the investing public—all potential adversaries of Dow. In sum, the government contends that Dow could not reasonably expect confidentiality from Deloitte after giving it the Dow Documents, given the myriad ways Deloitte could reveal that information.

Of course Deloitte might disclose some information relevant to Dow's finances. But the government has neither pointed to any regulatory provision nor posited any specific circumstance under which Deloitte would be required to disclose attorney work product like that contained in the Dow Documents. An independent auditor can fulfill its duties and render an opinion concerning a company's public financial statements without revealing every piece of information it reviews during the audit process. In short, Deloitte's independent auditor obligations do not make it a conduit to Dow's adversaries.

Likewise, the government's reliance on *Arthur Young* is misplaced. In *Arthur Young*, the Court considered whether *accountant* work-product should be granted the same protection *attorney* work product receives. The government quotes the Court's statement that "[t]o insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations." *Arthur Young*, 465 U.S. at 818. All well and good. In this case, however, the government attempts to discover not an independent auditor's "interpretations of the client's financial statements," which *Arthur Young* would permit, but an attorney's thoughts and opinions developed in anticipation of litigation, which the work-product doctrine forbids.

Furthermore, we are mindful that independent auditors have significant leverage over the companies whose finances they audit. An auditor can essentially compel disclosure by refusing to provide an unqualified opinion otherwise. Finding waiver based on such disclosures could well encourage the sort of "[i]nefficiency, unfairness and sharp practices" that *Hickman* sought to avoid. For example, it might discourage companies from seeking legal advice and candidly disclosing that information to independent auditors. Moreover, the government has not proffered any good reason for wanting the Dow Documents other than its desire to know what Dow's counsel thought about the Chemtech partnerships. Granting discovery under these circumstances would undercut the adversary process and let the government litigate "on wits borrowed from the adversary," *Hickman*, 329 U.S. at 516 (Jackson, J., concurring). We conclude that the district court applied the correct legal standard and acted within its discretion in determining that Dow had not waived work-product protection. Consequently, we affirm the district court's decision denying the government's motion to compel with respect to the Dow Documents.

* * *

For the reasons set forth above, we vacate in part, affirm in part, and remand for further proceedings consistent with this opinion.

So ordered.

United States Court of Appeals
For the First Circuit

No. 07-2631

UNITED STATES OF AMERICA,

Petitioner, Appellant,

v.

TEXTRON INC. AND SUBSIDIARIES,

Respondent, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ernest C. Torres, Senior U.S. District Judge]

Before

Lynch, Chief Judge,
Torruella, Boudin, Lipez and Howard,
Circuit Judges.

Judith A. Hagley, Tax Division, Department of Justice, with whom David I. Pincus, Robert W. Metzler, Attorneys, Tax Division, Department of Justice, John A. DiCicco, Acting Assistant Attorney General, Gilbert S. Rothenberg, Acting Deputy Assistant Attorney General, and Robert Clark Corrente, United States Attorney, were on supplemental brief for appellant.

John A. Tarantino with whom Patricia K. Rocha, Adler Pollock & Sheehan P.C., Arthur L. Bailey, J. Walker Johnson and Steptoe & Johnson LLP were on supplemental brief for appellee.

Professor Claudine V. Pease-Wingenter, Phoenix School of Law, on brief in support of appellee Textron Inc., Amicus Curiae.

David M. Brodsky, Robert J. Malionek, Adam J. Goldberg, Latham & Watkins LLP, Robin S. Conrad, Amar D. Sarwal, National Chamber Litigation Center, Inc., Susan Hackett, Senior Vice President and General Counsel, Association of Corporate Counsel, on brief in support of Textron Inc., Amici Curiae.

OPINION EN BANC

August 13, 2009

BOUDIN, Circuit Judge. The question for the en banc court is whether the attorney work product doctrine shields from an IRS summons "tax accrual work papers" prepared by lawyers and others in Textron's Tax Department to support Textron's calculation of tax reserves for its audited corporate financial statements. Textron is a major aerospace and defense conglomerate, with well over a hundred subsidiaries, whose consolidated tax return is audited by the IRS on a regular basis. To understand the dispute, some background is required concerning financial statements, contingent tax reserves and tax audit work papers.

As a publicly traded corporation, Textron is required by federal securities law to have public financial statements certified by an independent auditor. See 15 U.S.C. §§ 78l, 78m (2006); 17 C.F.R. § 210 et seq. (2009). To prepare such financial statements, Textron must calculate reserves to be entered on the company books to account for contingent tax liabilities. Such liabilities, which affect the portrayal of assets and earnings, include estimates of potential liability if the IRS decides to challenge debatable positions taken by the taxpayer in its return.

The calculation of such reserves entails preparing work papers describing Textron's potential liabilities for further taxes; these underpin the tax reserve entries in its financial statement and explain the figures chosen to the independent auditor who certifies that statement as correct. By examining the work

papers the accountant discharges its own duty to determine "the adequacy and reasonableness of the corporation's reserve account for contingent tax liabilities." United States v. Arthur Young & Co., 465 U.S. 805, 812 (1983) (rejecting claim of accountant work product privilege protecting such work papers).[1] The work papers are thus one step in a process whose outcome is a certified financial statement for the company.

In Textron's case, its Tax Department lists items in the tax return that, if identified and challenged by the IRS, could result in additional taxes being assessed. The final spreadsheets list each debatable item, including in each instance the dollar amount subject to possible dispute and a percentage estimate of the IRS' chances of success. Multiplying the amount by the percentage fixes the reserve entered on the books for that item. The spreadsheets reflecting these calculations may be supported by backup emails or notes.

A company's published financial statements do not normally identify the specific tax items on the return that may be debatable but incorporate or reflect only the total reserve figure. As the Supreme Court explained in Arthur Young, tax accrual work

[1]The procedural requirement that auditors examine tax accrual work papers is based on a combination of Statement on Auditing Standards No. 96, Audit Documentation (2002), superseded by Auditing Standards No. 3, Audit Documentation (2004); Statement on Auditing Standards No. 326, Evidential Matter (1980); and Auditing Interpretation No. 9326, Evidential Matter: Auditing Interpretations of Section 326 (2003).

papers provide a resource for the IRS, if the IRS can get access to them, by "pinpoint[ing] the 'soft spots' on a corporation's tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes" and providing "an item-by-item analysis of the corporation's potential exposure to additional liability." 465 U.S. at 813.

The IRS does not automatically request tax accrual work papers from taxpayers; rather, in the wake of Enron and other corporate scandals, the IRS began to seek companies' tax accrual work papers only where it concluded that the taxpayer had engaged in certain listed transactions "that [are] the same as or substantially similar to one of the types of transactions that the [IRS] has determined to be a tax avoidance transaction." 26 C.F.R. § 1.6011-4(b)(2) (2009). Only a limited number of transactions are so designated.[2]

The present case began with a 2003 IRS audit of Textron's corporate income tax liability for the years 1998-2001. In reviewing Textron's 2001 return, the IRS determined that a Textron subsidiary--Textron Financial Corp. ("Textron Financial")--had engaged in nine listed transactions. In each of the nine

[2]A current list of such transaction types, amounting to less than three dozen, appears at Internal Revenue Service, Recognized Abusive and Listed Transactions - LMSB Tier I Issues, http://www.irs.gov/businesses/corporations/article/0,,id=120633,00.html (visited July 7, 2009).

instances, Textron Financial had purchased equipment from a foreign utility or transit operator and leased it back to the seller on the same day. Although such transactions can be legitimate, the IRS determined that they were sale-in, lease-out ("SILO") transactions, which are listed as a potential tax shelter subject to abuse by taxpayers.

SILOs allow tax-exempt or tax-indifferent organizations--for example, a tax-exempt charity or a city-owned transit authority--to transfer depreciation and interest deductions, from which they cannot benefit, to other taxpayers who use them to shelter income from tax. Where the only motive of a sale and lease back is tax avoidance, it can be disregarded by the IRS and taxes assessed on the wrongly sheltered income.[3]

Textron had shown the spreadsheets to its outside accountant, Ernst & Young, but refused to show them to the IRS. The IRS issued an administrative summons pursuant to 26 U.S.C. § 7602 (2006), which allows the IRS, in determining the accuracy of any return, to "examine any books, papers, records, or other data which may be relevant or material to such inquiry." Id. § 7602(a)(1). According to IRS policy, where the taxpayer claims

[3]See AWG Leasing Trust v. United States, 592 F. Supp. 2d 953, 958 (N.D. Ohio 2008) (upholding denial of depreciation and interest deductions for SILO transaction); I.R.S. Notice 2005-13, 2005-9 I.R.B. 630 (Feb. 11, 2005); Shvedov, Tax Implications of SILOs, QTEs, and Other Leasing Transactions with Tax-Exempt Entities 10-12, CRS Report for Congress (Nov. 30, 2004).

benefits from only a single listed transaction, the IRS seeks only the workpapers for that transaction; but where (as in Textron's case) the taxpayer claims benefits from multiple listed transactions, the IRS seeks all of the workpapers for the tax year in question. I.R.S. Announcement 2002-63, 2002-27 I.R.B. 72 (July 8, 2002). The summons also sought related work papers created by Ernst & Young in determining the adequacy of Textron's reserves that Textron might possess or could obtain. Textron again refused.

The IRS brought an enforcement action in federal district court in Rhode Island. See 26 U.S.C. § 7604(a) (2006). Textron challenged the summons as lacking legitimate purpose and also asserted, as bars to the demand, the attorney-client and tax practitioner privileges and the qualified privilege available for litigation materials under the work product doctrine. The IRS contested all of the privilege claims. Both the IRS and Textron filed affidavits and, in addition, the district court heard witnesses from both sides.[4]

[4]Textron's evidence came from Norman Richter, chief tax counsel and manager of Textron's Tax Department; Roxanne Cassidy, director of tax reporting; Edward Andrews, director of tax audits; Debra Raymond, vice president, taxes, of Textron Financial; and Mark Weston, a partner in Ernst & Young. IRS evidence was provided by Internal Revenue Agent Edward Vasconcellos; Professor Douglas Carmichael, former chief auditor of the regulatory body for auditors of public companies (the Public Company Accounting Oversight Board); and Gary Kane, an IRS expert on tax accrual work papers.

Textron agreed that it usually settled disputes with the IRS through negotiation or concession or at worst through the formal IRS administrative process; but it testified that sometimes it had litigated disputed tax issues in federal court. Its evidence also showed that the estimates for tax reserves and the supporting work papers were generated within its Tax Department but that tax lawyers in that department were centrally involved in their preparation and that Textron Financial also used an outside counsel to advise it on tax reserve requirements.

Textron described generically the contents of the work papers in question: these included (1) summary spreadsheets showing for each disputable item the amount in controversy, estimated probability of a successful challenge by the IRS, and resulting reserve amounts; and (2) back up e-mail and notes. In some instances the spreadsheet entries estimated the probability of IRS success at 100 percent. Textron said that the spreadsheets had been shown to and discussed with its independent auditor but physically retained by Textron.

Neither side disputed that the immediate purpose of the work papers was to establish and support the tax reserve figures for the audited financial statements. Textron's evidence was to the effect that litigation over specific items was always a possibility; the IRS did not deny that in certain cases litigation could result although it said that this was often unlikely.

Whether Textron's evidence is materially different than that of the IRS remains to be considered.

Ultimately, the district court denied the petition for enforcement. United States v. Textron Inc., 507 F. Supp. 2d 138, 150, 155 (D.R.I. 2007). The court agreed with the IRS that the agency had a legitimate purpose for seeking the work papers. Id. at 145. It also ruled that insofar as the Textron-prepared work papers might otherwise be protected by attorney-client privilege, or the counterpart tax practitioner privilege for non-lawyers engaged in tax practice, see 26 U.S.C. § 7525 (2006), those privileges had been waived when Textron disclosed the work papers' content to Ernst & Young. Id. at 152.

However, the district court concluded that the papers were protected by the work product privilege, which derived from Hickman v. Taylor, 329 U.S. 495 (1947), and is now embodied in Rule 26(b)(3) of the Federal Rules of Civil Procedure. This privilege, the district court held, had not been waived by disclosure of the work papers to the accountant. Textron, 507 F. Supp. 2d at 152-53. The district court's decision that the work papers were protected work product involved both a description of factual premises and a legal interpretation of applicable doctrine.

The district court first said (paraphrasing a Textron witness) the work papers were prepared to assure that Textron was "adequately reserved with respect to any potential disputes or

litigation" over its returns; the court also said that, by fair inference, the work papers served "to satisfy an independent auditor that Textron's reserve for contingent liabilities satisfied the requirements of generally accepted accounting principles (GAAP) so that a 'clean' opinion would be given" for Textron financial statements. Textron, 507 F. Supp. 2d at 143.

Then, in its discussion of legal doctrine, the district court stated:

> As the IRS correctly observes, the work product privilege does not apply to "'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" Maine, 298 F.3d at 70 (quoting [United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998)]). However, it is clear that the opinions of Textron's counsel and accountants regarding items that might be challenged by the IRS, their estimated hazards of litigation percentages and their calculation of tax reserve amounts would not have been prepared at all "but for" the fact that Textron anticipated the possibility of litigation with the IRS. . . . Thus, while it may be accurate to say that the workpapers helped Textron determine what amount should be reserved to cover any potential tax liabilities and that the workpapers were useful in obtaining a "clean" opinion from E & Y regarding the adequacy of the reserve amount, there would have been no need to create a reserve in the first place, if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding.

Textron, 507 F. Supp. 2d at 150.

The court concluded that the work papers were therefore prepared "because of" the prospect of litigation, Textron, 507 F. Supp. 2d at 150, a phrase used in Maine v. United States Dep't of Interior, 298 F.3d 60, 68 (1st Cir. 2002). The court rejected the IRS' reliance on a Fifth Circuit decision rejecting work product protection for tax accrual work papers on the ground that the Fifth Circuit followed a different "primary purpose" test for work protect. Textron, 507 F. Supp. 2d at 150 (discussing United States v. El Paso Co., 682 F.2d 530, 543 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984)).

On appeal, a divided panel upheld the district court's decision. The en banc court then granted the government's petition for rehearing en banc, vacated the panel decision, and obtained additional briefs from the parties and interested amici. We now conclude that under our own prior Maine precedent--which we reaffirm en banc--the Textron work papers were independently required by statutory and audit requirements and that the work product privilege does not apply.

The case presents two difficulties. One, which can readily be dispelled, stems from the mutability of language used in the governing rules and a confusion between issues of fact and issues of legal characterization. The other problem is more basic: how far work product protection extends turns on a balancing of policy concerns rather than application of abstract logic; here,

two circuits have addressed tax accrual work papers in the work product context, but, apart from whatever light is cast by Arthur Young, the Supreme Court has not ruled on the issue before us, namely, one in which a document is not in any way prepared "for" litigation but relates to a subject that might or might not occasion litigation.

In origin, the work product privilege derives from the Supreme Court's decision in Hickman v. Taylor, 329 U.S. at 510-11, and focused at the outset on the materials that lawyers typically prepare for the purpose of litigating cases. Hickman v. Taylor concerned ongoing litigation in which one side filed interrogatories seeking from opposing counsel memoranda recording witness interviews that the latter had conducted after receiving notice of possible claims. Often such material and other items designed for use at trial (e.g., draft briefs, outlines of cross examination) are not obtained from or shared with clients and are unprotected by the traditional attorney-client privilege.

Hickman v. Taylor addressed "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen." 329 U.S. at 497. The Court cited a privilege in English courts protecting

> [a]ll documents which are called into existence for the purpose--but not necessarily the sole

> purpose--of assisting the deponent or his legal advisers in any actual or anticipated litigation . . . . Reports . . . if made in the ordinary course of routine, are not privileged . . . .

Id. at 510 n. 9.

This history led the Court to practical considerations:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways--aptly though roughly termed . . . as the "work product of the lawyer."

Id. at 511.

On this basis the Court declared that the interrogatories, which sought witness interviews conducted by opponent counsel in preparation for litigation, were protected by a qualified privilege. See id. at 511-12. When in 1970 the Supreme Court through the rule-making process codified the work product privilege in Rule 26(b)(3), it described the privilege as extending to documents and other tangible things that "are prepared in anticipation of litigation or for trial." This phrase, as illuminated by Hickman v. Taylor's reasoning, is the one to be applied in this case.

Turning back to the present case, the IRS is unquestionably right that the immediate motive of Textron in preparing the tax accrual work papers was to fix the amount of the

tax reserve on Textron's books and to obtain a clean financial opinion from its auditor. And Textron may be correct that unless the IRS might dispute an item in the return, no reserve for that item might be necessary, so perhaps some of the items might be litigated. But in saying that Textron wanted to be "adequately reserved," the district judge did not say that the work papers were prepared for use in possible litigation--only that the reserves would cover liabilities that might be determined in litigation. If the judge had made a "for use" finding--which he did not--that finding would have been clearly erroneous.

That the purpose of the work papers was to make book entries, prepare financial statements and obtain a clean audit cannot be disputed. This was the testimony of IRS expert and former Chief Auditor of the Public Company Accounting Oversight Board Douglas Carmichael:

> Q. . . . Would you please explain what tax accrual workpapers are?
>
> A. . . . Tax accrual workpapers really include all the support for the tax assets and liabilities shown in the financial statements . . . .
>
> A. Well, from the company's perspective, they're created because, for example, for a public company, the key officers of the company sign a certification saying that those financial statements are fairly presented, and they need support for that.
>
> From the auditor's perspective, it's the same thing, the auditor needs to record in the workpapers what the auditor did to comply with

> generally accepted auditing standards. So the workpapers are the principal support for the auditor's opinion.
>
> Q. And why do public companies prepare financial statements?
>
> A. Usually, to meet requirements for raising capital. If they're a public company, they need to file annual financial statements on a form 10K with the SEC and quarterly information on a 10Q.

The Textron witnesses, while using the word "litigation" as often as possible in their testimony, said the same thing. Textron's testimony differed from that of the IRS expert only in its further assertion that, without the possibility of litigation, no tax reserves or audit papers would have been necessary. For example, Roxanne Cassidy, Textron's director of tax reporting, testified as follows:

> Q. . . . [W]hat was Textron's purpose in preparing those tax reserve papers?
>
> A. The purpose primarily was to determine whether Textron was adequately reserved with respect to any potential disputes or litigations that would happen in the future. We would need to ensure that we were adequately reserved in the current year on Textron's financial statements.
>
> . . .
>
> Q. And as a publicly traded company, is Textron required to file its financial statements with the Securities and Exchange Commission?
>
> A. Yes.

> Q. And do those financial statements include tax reserves?
>
> A. Yes. . . .
>
> . . .
>
> Q. And in having its tax reserves audited by an independent auditor, must Textron be able to support the determinations it has made regarding the adequacy of its tax reserves with some type of evidence?
>
> A. Yes, the support needs to be to the satisfaction of the auditors.

As the IRS expert stated, even if litigation were "remote," the company would still have to prepare work papers to support its judgment. Textron's own witness acknowledged that it would "have to include in its . . . tax accrual work papers any new transactions that the company entered into that year that there might be some tax exposure on" regardless of whether it anticipated likely litigation. Judged by Textron's own experience, most--certainly those with high percentage estimates of IRS success--would never be litigated.

To complete the story, we note <u>one</u> suggestion by one Textron witness that, if litigation did occur, the work papers could be useful to Textron in that litigation.[5] This assertion was not

[5]Textron Vice President of Taxes Norman Richter said that Textron would still prepare tax accrual workpapers absent GAAP requirements "[b]ecause it guides us--it's--the analysis is still--it would guide us in making litigation and settlement decisions later in the process." This assertion was not contained in Richter's affidavit, which instead said that Textron prepared the work papers "to comply with GAAP" as required for reporting taxes

supported by any detailed explanation, was not adopted by the district judge and is more than dubious: the main aim of audit work papers is to estimate the amount potentially in dispute and the percentage chance of winning or losing. Even an academic supporter of Textron's legal position conceded that "it is doubtful that tax accrual workpapers, which typically just identify and quantify vulnerable return positions, would be useful in the litigation anticipated with respect to those positions." Pease-Wingenter, The Application of the Attorney-Client Privilege to Tax Accrual Workpapers: The Real Legacy of United States v. Textron, 8 Houston Bus. & Tax L.J. 337, 346 (2008).

Any experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials. Whether work product protection should apply to such documents is a legal question informed by the language of rules and Supreme Court doctrine, direct precedent, and policy judgments. The first of these sources--Supreme Court doctrine and the wording of the rules--is helpful to the IRS; direct circuit precedent and the underlying policy of the doctrine and other prudential considerations are more helpful still. Legal commentators can be found on each side; the most persuasive of them favors the IRS.[6]

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to the SEC, and was not supported by detail or explanation in the record.

[6]See Ventry, Protecting Abusive Tax Avoidance, 120 Tax Notes 857, 870-83 (2008); Johnson, The Work Product Doctrine and Tax

From the outset, the focus of work product protection has been on materials prepared for use in litigation, whether the litigation was underway or merely anticipated. Thus, Hickman v. Taylor addressed "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen." 329 U.S. at 497 (emphasis added). Similarly, the English privilege, invoked by Hickman v. Taylor, privileged "documents which are called into existence for the purpose--but not necessarily the sole purpose--of assisting the deponent or his legal advisers in any actual or anticipated litigation." Id. at 510 n. 9 (emphasis added) (internal quotation marks omitted).

The phrase used in the codified rule--"prepared in anticipation of litigation or for trial" did not, in the reference to anticipation, mean prepared for some purpose other than litigation: it meant only that the work might be done for litigation but in advance of its institution. The English precedent, doubtless the source of the language in Rule 26, specified the purpose "of assisting the deponent or his legal advisers in any actual or anticipated litigation . . . ." The Advisory Committee's Note cited

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Accrual Workpapers, 124 Tax Notes 155, 160-68 (2009). The Pease-Wingenter article, supra, identifies many weaknesses in the Textron argument, id. at 343-48, although Pease now says her own ultimate view favors Textron.

with approval a decision denying work product protection to a driver's accident report, made pursuant to Interstate Commerce Commission rules, even though it might well have become the subject of litigation. Fed. R. Civ. P. 26 advisory committee's note (1970).[7]

It is not enough to trigger work product protection that the subject matter of a document relates to a subject that might conceivably be litigated. Rather, as the Supreme Court explained, "the literal language of [Rule 26(b)(3)] protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." Federal Trade Commission v. Grolier Inc., 462 U.S. 19, 25 (1983) (emphasis added). This distinction is well established in the case law. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138 (1975).[8]

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[7]Goosman v. A. Duie Pyle, Inc., 320 F.2d 45 (4th Cir. 1963). In Goosman, the Fourth Circuit denied work product protection to reports a truck driver made to the lessee and owner of the truck following an accident. The court explained that the reports "were made in the ordinary course of business under ICC regulations and do not represent the lawyer's work product within the holding in Hickman v. Taylor." Id. at 52. See also, e.g., Calabro v. Stone, 225 F.R.D. 96, 99 (E.D.N.Y. 2004); In re Raytheon Securities Litigation, 218 F.R.D. 354, 359 (D. Mass. 2003).

[8]Accord United States v. Roxworthy, 457 F.3d 590, 595 (6th Cir. 2006) ("Nevertheless, the key issue in determining whether a document should be withheld is the function that the document serves."); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 858 (D.C. Cir. 1980) (same); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) ("The Ninth Circuit test focuses on the function of a document as part of the deliberative process rather than on the contents of the document.").

Nor is it enough that the materials were prepared by lawyers or represent legal thinking. Much corporate material prepared in law offices or reviewed by lawyers falls in that vast category. It is only work done in anticipation of or for trial that is protected. Even if prepared by lawyers and reflecting legal thinking, "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." Fed. R. Civ. P. 26 advisory committee's note (1970). Accord Hickman v. Taylor, 329 U.S. at 510 n. 9 (quoting English precedent that "[r]eports . . . if made in the ordinary course of routine, are not privileged").

Every lawyer who tries cases knows the touch and feel of materials prepared for a current or possible (i.e., "in anticipation of") law suit. They are the very materials catalogued in Hickman v. Taylor and the English precedent with which the decision began. No one with experience of law suits would talk about tax accrual work papers in those terms. A set of tax reserve figures, calculated for purposes of accurately stating a company's financial figures, has in ordinary parlance only that purpose: to support a financial statement and the independent audit of it.

Focusing next on direct precedent, work product protection for tax audit work papers has been squarely addressed only in two circuits: this one and the Fifth. In Maine, we said that work

product protection does not extend to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." Maine, 298 F.3d at 70 (quoting United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998)) (internal quotation marks omitted). Maine applies straightforwardly to Textron's tax audit work papers--which were prepared in the ordinary course of business--and it supports the IRS position.

Similarly, the Fifth Circuit in El Paso denied protection for the work papers because the court recognized that the company in question was conducting the relevant analysis because of a need to "bring its financial books into conformity with generally accepted auditing principles." 682 F.2d at 543. The Fifth Circuit, which employs a "primary purpose" test, found that the work papers' "sole function" was to back up financial statements. Id. at 543-44. Here, too, the only purpose of Textron's papers was to prepare financial statements.

Other circuits have not passed on tax audit work papers and some might take a different view. But many of the debatable cases affording work product protection involve documents unquestionably prepared for potential use in litigation if and when it should arise.[9] There is no evidence in this case that the work

[9] See, e.g., Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) (protection for "attorneys' assessment of . . . legal vulnerabilities in order to make sure it

papers were prepared for such a use or would in fact serve any useful purpose for Textron in conducting litigation if it arose.

Finally, the underlying prudential considerations squarely support the IRS' position in this case, and such considerations have special force because Hickman v. Taylor was the child of such considerations, as the quotations above make clear. The privilege aimed centrally at protecting the litigation process, Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980), specifically, work done by counsel to help him or her in litigating a case. It is not a privilege designed to help the lawyer prepare corporate documents or other materials prepared in the ordinary course of business. Where the rationale for a rule stops, so ordinarily does the rule.

Nor is there present here the concern that Hickman v. Taylor stressed about discouraging sound preparation for a law suit. That danger may exist in other kinds of cases, but it cannot be present where, as here, there is in substance a legal obligation to prepare such papers: the tax audit work papers not only have a different purpose but have to be prepared by exchange-listed companies to comply with the securities laws and accounting principles for certified financial statements. Arthur Young made

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does not miss anything in crafting its legal case"); see also In re Sealed Case, 146 F.3d 881, 885 (D.C. Cir. 1998) (protection for documents to "protect the client from future litigation about a particular transaction").

this point in refusing to create an accountant's work product privilege for tax audit papers:

> [T]he auditor is ethically and professionally obligated to ascertain for himself as far as possible whether the corporation's contingent tax liabilities have been accurately stated. . . . Responsible corporate management would not risk a qualified evaluation of a corporate taxpayer's financial posture to afford cover for questionable positions reflected in a prior tax return.

465 U.S. at 818-19; see also Johnson, supra, at 160-61.

Textron apparently thinks it is "unfair" for the government to have access to its spreadsheets, but tax collection is not a game. Underpaying taxes threatens the essential public interest in revenue collection. If a blueprint to Textron's possible improper deductions can be found in Textron's files, it is properly available to the government unless privileged. Virtually all discovery against a party aims at securing information that may assist an opponent in uncovering the truth. Unprivileged IRS information is equally subject to discovery.[10]

The practical problems confronting the IRS in discovering under-reporting of corporate taxes, which is likely endemic, are serious. Textron's return is massive--constituting more than 4,000 pages--and the IRS requested the work papers only after finding a

[10]See Abel Inv. Co. v. United States, 53 F.R.D. 485, 488 (D. Neb. 1971) (holding that IRS documents created during an audit were not protected work product, despite containing attorneys' mental impression and legal theories, because an IRS audit is not litigation).

specific type of transaction that had been shown to be abused by taxpayers. It is because the collection of revenues is essential to government that administrative discovery, along with many other comparatively unusual tools, are furnished to the IRS.

As Bentham explained, all privileges limit access to the truth in aid of other objectives, 8 Wigmore, Evidence § 2291 (McNaughton Rev. 1961), but virtually all privileges are restricted--either (as here) by definition or (in many cases) through explicit exceptions--by countervailing limitations. The Fifth Amendment privilege against self-incrimination is qualified, among other doctrines, by the required records exception, see Grosso v. United States, 390 U.S. 62, 67-68 (1968), and the attorney client privilege, along with other limitations, by the crime-fraud exception, see Clark v. United States, 289 U.S. 1, 15 (1933).

To sum up, the work product privilege is aimed at protecting work done for litigation, not in preparing financial statements. Textron's work papers were prepared to support financial filings and gain auditor approval; the compulsion of the securities laws and auditing requirements assure that they will be carefully prepared, in their present form, even though not protected; and IRS access serves the legitimate, and important, function of detecting and disallowing abusive tax shelters.

The judgment of the district court is vacated and the case is remanded for further proceedings consistent with this decision.

It is so ordered.

Dissent follows.

TORRUELLA, Circuit Judge, with whom LIPEZ, Circuit Judge, joins, Dissenting. To assist the IRS in its quest to compel taxpayers to reveal their own assessments of their tax returns, the majority abandons our "because of" test, which asks whether "'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.'" Maine v. United States Dep't of the Interior, 298 F.3d 60, 68 (1st Cir. 2002) (emphasis in original) (quoting United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998)). The majority purports to follow this test, but never even cites it. Rather, in its place, the majority imposes a "prepared for" test, asking if the documents were "prepared for use in possible litigation." Maj. Op. at 13. This test is an even narrower variant of the widely rejected "primary motivating purpose" test used in the Fifth Circuit and specifically repudiated by this court. In adopting its test, the majority ignores a tome of precedents from the circuit courts and contravenes much of the principles underlying the work-product doctrine. It also brushes aside the actual text of Rule 26(b)(3), which "[n]owhere . . . state[s] that a document must have been prepared to aid in the conduct of litigation in order to constitute work product." Adlman, 134 F.3d at 1198. Further, the majority misrepresents and ignores the findings of the district court. All while purporting to do just the opposite of what it actually does.

I. The Majority Quietly Rejects Circuit Precedent

The majority claims allegiance to our prior decision in Maine, 298 F.3d at 70. Specifically, the majority seizes upon a single line from that decision: "the 'because of' standard does not protect from disclosure 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" Id. (quoting Adlman, 134 F.3d at 1202). This qualification is important to be sure, and I will address it infra, Section III.B.2. But I must start by addressing the rest of the Maine decision, which the majority is careful to ignore.

In that decision, Maine sought documents prepared by the Department of the Interior regarding its decision, made during pending related litigation, to classify salmon as a protected species. Id. at 64. The district court found some of these administrative documents unprotected as the Department had not shown that litigation preparation was "'the primary motivating factor for the preparation of the documents.'" Id. at 66-67. This formulation of the test for "anticipation of litigation" was based on the Fifth Circuit rule that the work-product doctrine did not protect documents that were "not primarily motivated to assist in future litigation." United States v. El Paso, 682 F.2d 530, 542-43 (5th Cir. 1982) (emphasis added) (citing United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981)). On appeal in Maine, we specifically

repudiated this test and adopted the broader "because of" test, which had been thoughtfully and carefully explained by Judge Leval in the Second Circuit decision in Adlman, 134 F.3d at 1202-03. See Maine, 298 F.3d at 68 ("In light of the decisions of the Supreme Court, we therefore agree with the formulation of the work-product rule adopted in Adlman and by five other courts of appeals.").

In the present case, the majority purports to follow Maine, but really conducts a new analysis of the history of the work-product doctrine and concludes that documents must be "'prepared for any litigation or trial.'" Maj. Op. at 18 (emphasis in original) (quoting FTC v. Grolier Inc., 462 U.S. 19, 25 (1983)). Similarly, at another point, the majority suggests that documents must be "for use" in litigation in order to be protected. Id. at 13. Grolier did not establish such a test and the majority can point to no court that has so ruled.[11] Rather, the majority of

[11]To support its conclusion, the majority commits a plain logical error. The majority states that work-product protection must not be judged solely on its subject matter, but rather whether the documents's purpose is for use in litigation. In support of this proposition, the majority cites a number of cases that propound the uncontroversial proposition that a document must be judged according to its purpose, not solely its content. Maj. Op. at 18 n.8. But those cases do not establish the majority's rule that the documents' purpose must be limited to use in litigation. Rather, one of the cases the majority cites adopts the test that the document must have been created "because of" litigation, which, as Adlman describes, is antithetical to the majority's new requirement. United States v. Roxworthy, 457 F.3d 590, 593-94 (6th Cir. 2006) (adopting Adlman's "because of" test). Another of the majority's citations is from the D.C. Circuit, which has also since adopted the "because of" test. Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 587 n.42 (D.C. Cir. 1987).

circuit courts, led by the Second Circuit's decision in Adlman, have rejected such a rule.

Adlman's articulation of the "because of" test is fatal to the majority's position. In that case, Judge Leval discussed the application of the work-product doctrine "to a litigation analysis prepared by a party or its representative in order to inform a business decision which turns on the party's assessment of the likely outcome of litigation expected to result from the transaction." Adlman, 134 F.3d at 1197. In other words, Adlman asked whether the work-product doctrine applies where a dual purpose exists for preparing the legal analysis, that is, where the dual purpose of anticipating litigation and a business purpose co-exist. To answer that question, the Adlman court examined and rejected the "primary purpose" test adopted by the Fifth Circuit in El Paso, 682 F.2d at 542-43, which only grants work-product immunity to workpapers prepared "primarily motivated to assist in future litigation over the return," id. at 543:

> [Protection] is less clear, however, as to documents which, although prepared because of expected litigation, are intended to inform a business decision influenced by the prospects of the litigation. The formulation applied by

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The final decision cited by the majority, from the Northern District of California, deals with the deliberative process privilege, not the work-product doctrine. Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993). In any event, the Ninth Circuit also applies the "because of" test. In re Grand Jury Subpoena, 357 F.3d 900, 907-08 (9th Cir. 2004) (praising and following Adlman).

> some courts in determining whether documents are protected by work-product privilege is whether they are prepared "primarily or exclusively to assist in litigation" -- a formulation that would potentially exclude documents containing analysis of expected litigation, if their primary, ultimate, or exclusive purpose is to assist in making the business decision. Others ask whether the documents were prepared "because of" existing or expected litigation -- a formulation that would include such documents, despite the fact that their purpose is not to "assist in" litigation. Because we believe that protection of documents of this type is more consistent with both the literal terms and the purposes of the Rule, we adopt the latter formulation.

Adlman, 134 F.3d at 1197-98, quoted in part in Maine, 298 F.3d at 68. And if it needs to be spelled out any more clearly, Adlman makes it explicitly clear that the broader "because of" formulation is not limited to documents prepared for use in litigation:

> We believe that a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product, much less primarily or exclusively to aid in litigation. Preparing a document "in anticipation of litigation" is sufficient.
>
> The text of Rule 26(b)(3) does not limit its protection to materials prepared to assist at trial. To the contrary, the text of the Rule clearly sweeps more broadly. It expressly states that work-product privilege applies not only to documents "prepared . . . for trial" but also to those prepared "in anticipation of litigation." If the drafters of the Rule intended to limit its protection to documents made to assist in preparation for litigation,

> this would have been adequately conveyed by the phrase "prepared . . . for trial." The fact that documents prepared "in anticipation of litigation" were also included confirms that the drafters considered this to be a different, and broader category. Nothing in the Rule states or suggests that documents prepared "in anticipation of litigation" with the purpose of assisting in the making of a business decision do not fall within its scope.

Id. at 1198-99 (emphasis and alterations in original). Rather than confront this language, the majority resorts to simplistic generalizations. Using its novel "prepared for" test, the majority unhelpfully explains that "[e]very lawyer who tries cases knows the touch and feel of materials prepared for a current or possible . . . law suit." Maj. Op. at 19. Once the majority ignores decades of controlling precedent, the matter becomes so clear that "[n]o one with experience of law suits" could disagree. Id.

I need say little else; the majority's new "prepared for" rule is blatantly contrary to Adlman, a leading case interpreting the work-product doctrine that we specifically adopted in Maine. The majority's opinion is simply stunning in its failure to even acknowledge this language and its suggestion that it is respecting rather than overruling Maine.

II. The Majority's Announces a Bad Rule

The majority acts as if it is left to this court to draw a line from Hickman to the present case. In so doing, the majority ignores a host of cases which grapple with tough work product questions that go beyond the stuff that "[e]very lawyer who tries

cases" would know is work product. Lower courts deserve more guidance than a simple reassurance that a bare majority of the en banc court knows work product when it sees it.[12] Of course, since this is an en banc proceeding, the majority is free to create a new rule for the circuit -- though it would be better if it admitted that it was doing so. But our new circuit rule is not even a good rule.

First, as Judge Leval observed in Adlman, a "prepared for" requirement is not consistent with the plain language of Federal Rule of Civil Procedure 26, which provides protection for documents "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3)(A) (emphasis added); see also Adlman, 134 F.3d at 1198-99. There is no reason to believe that "anticipation of litigation" was meant as a synonym for "for trial." Claudine Pease-Wingenter, Prophetic or Misguided? The Fifth Circuit's (Increasingly) Unpopular Approach to the Work Product Doctrine, 29 Rev. Litig. (forthcoming

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[12]This test is reminiscent of Justice Stewart's famously unhelpful test for identifying obscenity:

> [C]riminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

2009) (analyzing and rejecting many of the arguments advanced by the majority in favor of a narrow construction of the phrase "anticipation of litigation"). Since the terms are not synonymous, the term "anticipation of litigation" should not be read out of the rule by requiring a showing that documents be prepared for trial. See Carcieri v. Salazar, 129 S. Ct. 1058, 1066 (2009) (discussing the basic principle that statutes should be construed to give effect to each word).

Second, though the majority goes into some depth describing the foundational case of Hickman v. Taylor, 329 U.S. 495 (1947), it misses the fundamental concern of that decision with protecting an attorney's "privacy, free from unnecessary intrusion by opposing parties and their counsel." Id. at 510. Without such privacy, litigants would seek unfair advantage by free-riding off another's work, thus reducing lawyers' ability to write down their thoughts:

> Were the attorney's work accessible to an adversary, the Hickman court cautioned, "much of what is now put down in writing would remain unwritten" for fear that the attorney's work would redound to the benefit of the opposing party. Legal advice might be marred by "inefficiency, unfairness and sharp practices," and the "effect on the legal profession would be demoralizing." Neither the interests of clients nor the cause of justice would be served, the court observed, if work product were freely discoverable.

Adlman, 134 F.3d at 1197 (quoting Hickman, 329 U.S. at 511) (citations omitted). The majority posits that these rationales do

not apply to documents containing a lawyer's legal analysis of a potential litigation, if that analysis was prepared for a business purpose. Maj. Op. at 21. This is both unpersuasive and directly contrary to the policy analysis in Adlman, which we adopted in Maine. Adlman identified an example of a protected document:

> A business entity prepares financial statements to assist its executives, stockholders, prospective investors, business partners, and others in evaluating future courses of action. Financial statements include reserves for projected litigation. The company's independent auditor requests a memorandum prepared by the company's attorneys estimating the likelihood of success in litigation and an accompanying analysis of the company's legal strategies and options to assist it in estimating what should be reserved for litigation losses.

Id. at 1200. Discussing this example, the court concluded that in this scenario "the company involved would require legal analysis that falls squarely within Hickman's area of primary concern -- analysis that candidly discusses the attorney's litigation strategies, appraisal of likelihood of success, and perhaps the feasibility of reasonable settlement." Id. Further, there is "no basis for adopting a test under which an attorney's assessment of the likely outcome of litigation is freely available to his litigation adversary merely because the document was created for a business purpose rather than for litigation assistance." Id. In other words,

> [i]n addition to the plain language of the Rule, the policies underlying the work-product

> doctrine suggest strongly that work-product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision. Framing the inquiry as whether the primary or exclusive purpose of the document was to assist in litigation threatens to deny protection to documents that implicate key concerns underlying the work-product doctrine.

Id. at 1199; see also Roxworthy, 457 F.3d at 595 (stating "the IRS would appear to obtain an unfair advantage by gaining access to KPMG's detailed legal analysis of the strengths and weaknesses of [the taxpayer's] position. This factor weighs in favor of recognizing the documents as privileged.").

The majority offers no response to this sound policy analysis and no reason to doubt that inefficiency and "sharp practices" will result from its new rule allowing discovery of such dual purpose documents, which contain confidential assessments of litigation strategies and chances. Instead of addressing these concerns, the majority's policy analysis relies instead on case-specific rationales -- namely the need to assist the IRS in its difficult task of reviewing Textron's complex return. See Maj. Op. at 22-23. Such outcome determinative reasoning is plainly unacceptable. Thus, properly framed, it is clear that the rationales underlying the work-product doctrine apply to documents

prepared in anticipation of litigation, even if they are not also for use at trial.[13]

And these policy rationales are squarely implicated in this case. First, Textron's litigation hazard percentages contain exactly the sort of mental impressions about the case that Hickman sought to protect. In fact, these percentages contain counsel's ultimate impression of the value of the case. Revealing such impressions would have clear free-riding consequences. With this information, the IRS will be able to immediately identify weak spots and know exactly how much Textron should be willing to spend to settle each item. Indeed, the IRS explicitly admits that this is its purpose in seeking the documents.

Second, as argued to us by amici, the Chamber of Commerce of the United States and the Association of Corporate Counsel, if attorneys who identify good faith questions and uncertainties in their clients' tax returns know that putting such information in writing will result in discovery by the IRS, they will be more likely to avoid putting it in writing, thus diminishing the quality of representation. The majority dismisses such concerns, concluding

[13]Perhaps because of these very same concerns about privacy and fairness, the IRS itself argued for the protection of its documents prepared for the dual purposes of helping the IRS understand the litigation risks that might result if the IRS made the administrative decision to adopt a new program. Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124 (D.C. Cir. 1987). This point was also noted by the Adlman court when it observed that "the IRS successfully argued against the very position it here advocates." Adlman, 134 F.3d at 1201.

that tax accrual workpapers are required by law. Maj. Op. at 21. But the majority fails to cite the record for this conclusion, likely because the majority is simply wrong. As the majority opinion earlier admits, Maj Op. at 2-3, the law only requires that Textron prepare audited financial statements reporting total reserves based on contingent tax liabilities. Accounting standards require some evidential support before such statements can be certified, but do not explicitly require the form and detail of the documents prepared here by Textron's attorneys with respect to each potentially challenged tax item. See also Michelle M. Henkel, Textron: The Debate Continues as to Whether Auditor Transparency Waives the Work Product Privilege, 50 Tax Management Memorandum 251, 260 (2009) (distinguishing auditor's workpapers and corporate workpapers and explaining that the latter are not mandatory but serve to evaluate a company's litigation risks). Rather, all that must be actually reported is the final tax reserve liability amount. Thus, as amicii worry, the majority's new rule will have ramifications that will affect the form and detail of documents attorneys prepare when working to convince auditors of the soundness of a corporation's reserves.

These concerns are even more clearly implicated in this case because the majority's decision will remove protection for Textron's "backup materials" as well as its actual workpapers. The district court found that these materials included "notes and

memoranda written by Textron's in-house tax attorneys reflecting their opinions as to which items should be included on the spreadsheet and the hazard of litigation percentage that should apply to each item." United States v. Textron Inc., 507 F. Supp. 2d 138, 143 (D.R.I. 2007). Thus, these documents thus go beyond the numbers used to compute a total reserve. Rather, they explain the legal rationale underpinning Textron's views of its litigation chances. The majority fails to acknowledge this subtlety, explain why it views such documents as required by regulatory rules, or explain why such mental impressions should go unprotected. Exposing such documentation to discovery is a significant expansion of the IRS's power and will likely reveal information far beyond the basic numbers that the IRS could discover through production of Textron's auditor's workpapers.

But more important are the ramifications beyond this case and beyond even the case of tax accrual workpapers in general. The scope of the work-product doctrine should not depend on what party is asserting it. Rather, the rule announced in this case will, if applied fairly, have wide ramifications that the majority fails to address.

For example, as the IRS explicitly conceded at oral argument, under the majority's rule one party in a litigation will be able to discover an opposing party's analysis of the business risks of the instant litigation, including the amount of money set

aside in a litigation reserve fund, created in accordance with similar requirements as Textron's tax reserve fund. Though this consequence was a major concern of the argument in this case, the majority does not even consider this "sharp practice," which its new rule will surely permit.

And there are plenty more examples. Under the majority's rule, there is no protection for the kind of documents at issue in Adlman, namely "documents analyzing anticipated litigation, but prepared to assist in a business decision rather than to assist in the conduct of the litigation." 134 F.3d at 1201-02. Nearly every major business decision by a public company has a legal dimension that will require such analysis. Corporate attorneys preparing such analyses should now be aware that their work product is not protected in this circuit.

III. The Workpapers Are Protected Under the Right Test

Applying the "because of" test thoughtfully adopted in Adlman and Maine, the majority should have concluded that Textron's workpapers are protected by the work-product doctrine. The proper starting point in reaching this legal conclusion should be the factual findings of the district court, which held an evidentiary hearing to understand the nature of the documents sought here by the IRS.

A. Factual findings

After considering affidavits and testimony, the district court found that the tax accrual workpapers are:

> 1. A spreadsheet that contains:
> (a) lists of items on Textron's tax returns, which, in the opinion of Textron's counsel, involve issues on which the tax laws are unclear, and, therefore, may be challenged by the IRS;
> (b) estimates by Textron's counsel expressing, in percentage terms, their judgments regarding Textron's chances of prevailing in any litigation over those issues (the "hazards of litigation percentages"); and
> (c) the dollar amounts reserved to reflect the possibility that Textron might not prevail in such litigation (the "tax reserve amounts").

Textron, 507 F. Supp. 2d at 142-143 (emphasis added). These workpapers do not contain any facts about the transactions that concerned the IRS. Id. at 143.

The district court also found, "[a]s stated by Norman Richter, Vice President of Taxes at Textron and Roxanne Cassidy, Director, Tax Reporting at Textron, Textron's ultimate purpose in preparing the tax accrual workpapers was to ensure that Textron was 'adequately reserved with respect to any potential disputes or litigation that would happen in the future.'" Id. at 143. Further, "there would have been no need to create a reserve in the first place, if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding." Id. at 150.

In addition to recognizing these litigation purposes, the district court also recognized the dual purposes driving the creation of these documents and found that the workpapers' creation "also was prompted, in part" by the need to satisfy Textron's auditors and get a "clean" opinion letter. Id. at 143. The district court later clarified:

> Thus, while it may be accurate to say that the workpapers helped Textron determine what amount should be reserved to cover any potential tax liabilities and that the workpapers were useful in obtaining a "clean" opinion from [the auditor] regarding the adequacy of the reserve amount, there would have been no need to create a reserve in the first place, if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding.

Id. at 150. Relatedly, the district court found that anticipation of litigation was the "but for" cause of the documents' creation. Id. Thus, the district court clearly found two purposes leading to the creation of the workpapers.

The majority makes no effort to reject these factual findings, but simply recharacterizes the facts as suits its purposes. For example, the majority declares, without reference to the district court's more nuanced findings, that the "the IRS is unquestionably right that the immediate motive of Textron in preparing the tax accrual work papers was to fix the amount of the tax reserve on Textron's books and to obtain a clean financial opinion from its auditor." Maj. Op. at 12-13. At another point,

the majority boldly pronounces, "the only purpose of Textron's papers was to prepare financial statements." Id. at 20. Of course, as explained above, the district court's factual findings about Textron's "ultimate purpose" were directly contrary to these pronouncements. Discarding a district court's factual finding on causation without any demonstration of clear error is not within this court's proper appellate function. See Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); see also Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573, 576 (1st Cir. 1980) (noting that clear error review applies even when "much of the evidence is documentary and the challenged findings are factual inferences drawn from undisputed facts").

Instead, the majority exalts in the fact that the district court made no finding that the documents were "for use in possible litigation." Maj. Op. at 13. That proposition is true. But, as described above, "for use" (i.e. "prepared for") is not and has never been the law of this circuit.

The majority does suggest that the documents business purpose "cannot be disputed." Id. This is also uncontroversial. The district court found both a litigation and a business purpose. But, in straining to ignore the documents' litigation purposes, the

majority proceeds to rely heavily on the IRS's expert. In so doing, the majority makes no effort to explain why the district court should have been required to adopt the view that the workpapers existed only for a non-litigation purpose. The majority claims that Textron's witnesses agreed with the IRS expert, but the majority fails to reconcile this proclamation with the competing view of Textron's witnesses, which the district court explicitly relied upon in its factual findings regarding Textron's "ultimate purpose." Textron, 507 F. Supp. 2d at 143. This is another corruption of the proper role of an appellate court. See Anderson v. Bessemer City, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

The majority does suggest that the district court's findings regarding the cause of the workpapers' creation was only stated in its legal analysis section. Maj. Op. at 9. But the actual purpose of the documents' creators, or, in the words of the district court, "but-for" causation, is a factual issue, and the majority makes no effort to explain why such issue should be reviewed as a legal conclusion.

The majority also proclaims, without record support, that "[a]ny experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials." Maj. Op. at 16. As described above, this conclusion reverses,

without any finding of clear error, the district court's factual findings. Further, this language dangerously suggests that this court can, from its general knowledge, offer an expert opinion as to how such documents are always seen by "experienced litigators." Another of the many errors of this approach is revealed by reference to undisputed record testimony. Namely, the majority's assumption that tax accrual workpapers are a uniform class from corporation to corporation is simply wrong. When the district court carefully and specifically defined what documents were actually at issue in this case, it explained that "there is no immutable definition of the term 'tax accrual papers,'" and that their content varies from case to case, Textron, 507 F. Supp. 2d at 142, a conclusion that is consonant with the testimony of the government's expert. Id. at 142 n.2. Thus, even were it not our rule that we defer to the district court's factfinding, such a rule would make good sense in handling the wide range of workpapers likely to confront district courts in the future as the IRS increasingly seeks their discovery.

Even if we looked at the purpose of tax accrual workpapers as a general matter, the district court's conclusion that Textron's anticipation of litigation drove its reporting obligations is not so outrageous as to leave us with a firm conviction of error. Rather, other courts reviewing similar kinds of documents have reached similar conclusions. Regions Fin. Corp. & Subsidiaries v. United States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *6 (N.D.

Ala. May 8, 2008) (concluding, in examining another company's workpapers that "[w]ere it not for anticipated litigation, Regions would not have to worry about contingent liabilities and would have no need to elicit opinions regarding the likely results of litigation"); Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1191, 1205 (Mass. 2009) (affirming a finding of work-product protection for a business memorandum analyzing the "pros and cons of the various planning opportunities and the attendant litigation risks" since the author "had 'the prospect of litigation in mind when it directed the preparation of the memorandum'" and would not have been prepared irrespective of that litigation (quoting Adlman, 134 F.3d at 1204)).

B. Analysis

This court should accept the district court's factual conclusion that Textron created these documents for the purpose of assessing its chances of prevailing in potential litigation over its tax return in order to assess risks and reserve funds. Under these facts, work-product protection should apply.

1. The "because of" test

First, the majority does not develop any analysis contesting the proposition that disputes with the IRS in an audit can constitute litigation, within the meaning of Fed. R. Civ. P. 26(b)(3)(A). Indeed, such a conclusion is clear. For these purposes, the touchstone of "litigation" is that it is adversarial.

See Restatement (Third) of the Law Governing Lawyers § 87 cmt. h (2000). Though the initial stages of a tax audit may not be adversarial, the disputes themselves are essentially adversarial; the subject of these disputes will become the subject of litigation unless the dispute is resolved.

Applying the "because of" test as articulated in Adlman and Maine, the workpapers are protected. Under these precedents, a document is protected if, "'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.'" Maine, 298 F.3d at 68 (emphasis in original) (quoting Adlman, 134 F.3d at 1202). The "because of" test "really turns on whether [the document] would have been prepared irrespective of the expected litigation with the IRS." Adlman, 134 F.3d at 1204. As the district court found, the driving force behind the preparation of the documents was the need to reserve money in anticipation of disputes with the IRS. Textron, 507 F. Supp. 2d at 143. Though other business needs also contributed to Textron's need to create the documents, those needs depended on Textron's anticipating litigation with the IRS. In other words, without the anticipation of litigation, there would be no need to estimate a reserve to fund payment of tax disputes. Id. at 150. In this way, the dual purposes leading to the documents' creation were intertwined, and work-product protection should apply. See In re

Grand Jury Subpoena, 357 F.3d at 910 ("The documents are entitled to work product protection because, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole."); see also Andrew Golodny, Note: Lawyers versus Auditors: Disclosure to Auditors and Potential Waiver of Work-Product Privilege in United States v. Textron, 61 Tax Law. 621, 629 (2008) ("As a commentator noted, 'in the case of tax contingency reserves, the prospect of future litigation and the business need for the documents are so intertwined that the prospect of future litigation itself creates the business need for the document.'" (quoting Terrence G. Perris, Court Applies Work Product Privilege to Tax Accrual Workpapers, 80 Prac. Tax. Strategies 4 (2008))).

The majority simply refuses to accept the district court's finding that the documents would not exist but for Textron's need to anticipate litigation. This rejection is essential to the majority's erroneous conclusion. Accepting the district court's findings regarding purpose compels a finding of work-product protection, since the precedents are clear that under the "because of" test, dual purpose documents are protected. In fact, that is one of the very reasons some courts have adopted the test. 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure, § 2024 (2d ed. 2009) ("'Dual purpose'

documents created because of the prospect of litigation are protected even though they were also prepared for a business purpose."); see also Roxworthy, 457 F.3d at 598-99 ("[D]ocuments do not lose their work product privilege 'merely because [they were] created in order to assist with a business decision,' unless the documents 'would have been created in essentially similar form irrespective of the litigation.'" (quoting Adlman, 134 F.3d at 1202)); In re Grand Jury Subpoena, 357 F.3d at 907 (adopting Wright and Miller's "because of" test in order to handle "dual purpose" documents); Maine, 298 F.3d at 68 (adopting Adlman after recounting the distinction between the "because of" test and the "primary purpose" test in their handling of dual purpose documents); Adlman, 134 F.3d at 1197-98, 1202 ("Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision."); In re Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 61 (7th Cir. 1980) ("We conclude that the materials . . . were indeed prepared in anticipation of litigation, even though they were prepared as well for the filing of the Board of Elections reports.").

2. The exception to the "because of" test

The majority reads too much into one sentence from Maine and Adlman. Specifically, it is true that "the 'because of' standard does not protect from disclosure 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" Maine, 298 F.3d at 70 (quoting Adlman, 134 F.3d at 1202). This proviso relates to the advisory notes to the rule, which excludes from protection "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes." Fed. R. Civ. P. 26 advisory committee's note (1970). Understood in light of the fact that the "because of" test unequivocally protects "dual purpose" documents, this proviso does not strip protection for dual purpose documents that have one business or regulatory purpose. Rather, the best reading of the advisory committee's note is simply that preparation for business or for public requirements is preparation for a nonlitigation purpose insufficient in itself to warrant protection. The note states that there is no protection for documents created for business, regulatory, or "other nonlitigation purposes." This language suggests the note is considering business and regulatory purposes as nonlitigation purposes, but does not suggest that the presence of such a purpose should somehow override a litigation purpose, should one exist. Thus, correctly formulated,

this exception should be understood as simply clarifying the rule that dual purpose documents are protected, though "there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation." Wright & Miller, supra, § 2024 (emphasis added); see also Roxworthy, 457 F.3d at 599 ("[A] document can be created for both use in the ordinary course of business and in anticipation of litigation without losing its work-product privilege."). Under the majority's interpretation, the exception swallows the rule protecting dual purpose documents.

So understood, the exception does not control this case. After citing this exception, the district court concluded that the documents were not created irrespective of litigation because Textron would not have prepared the documents but for the anticipation of litigation. Textron, 507 F. Supp. 2d at 150. The majority makes no effort to label this finding clearly erroneous. To the contrary, the finding is correct. The tax accrual workpapers identify specific tax line items, and then anticipate the likelihood that litigation over those items will result in Textron having to pay the IRS more money. That Textron will not ultimately litigate each position does not change the fact that when it prepared the documents, Textron was acting to anticipate and analyze the consequences of possible litigation, just like the memorandum example in Adlman, 134 F.3d at 1200. The documents would not be the same at all had Textron not anticipated litigation. So, under the

"because of" test, as applied in Adlman and the many circuit courts that have followed it, these documents were not prepared "irrespective" of the prospect of litigation. They should be protected.

3. Arthur Young and El Paso do not control

Neither the Supreme Court's decision in United States v. Arthur Young & Co., 465 U.S. 805 (1984), nor the Fifth Circuit's decision in El Paso, 682 F.2d at 530, support a different result.

In Arthur Young, the Court declined to recognize an accountant's work-product doctrine, thus holding that tax accrual workpapers created by an independent auditor were not protected. Arthur Young, 465 U.S. at 815-21. But unlike the Court in Arthur Young, we are not now confronted with the question of whether to recognize a new privilege. Here, the doctrinal decision we face is how to apply existing work-product doctrine to the present facts, in other words whether the "because of" test protects dual purpose documents, as the Maine and Adlman courts so held. This question was not at all presented in Arthur Young.

On the other hand, El Paso is clearly factually on point -- there the Fifth circuit rejected work-product protection for similar tax accrual workpapers. El Paso, 682 F.2d at 542. But, as explained above, that court applied a different definition of the work-product doctrine, asking whether the "primary motivating purpose behind the creation of the document was to aid in possible

future litigation." Id. at 542-44 (concluding that the document should not be protected as it "carries much more the aura of daily business than it does of courtroom combat"). Finding Textron's workpapers protected would not create a circuit split, but be merely an application of a widely acknowledged existing difference between our law and the law of the Fifth Circuit. It is precisely in these "dual purpose" situations that the "because of" test used in this circuit is meant to distinguish itself from the "primary purpose" test used in the Fifth Circuit. Maine, 298 F.3d at 68 (citing Adlman for the proposition that the primary purpose test "is at odds with the text and the policies of Rule 26 because nothing in it suggests that documents prepared for dual purposes of litigation and business or agency decisions do not fall within its scope"). Thus, unlike the Fifth Circuit, we need not assess whether the tax accrual workpapers carry more of one "aura" than another.

IV. Conclusion

The majority's decision may please the IRS and some tax scholars who understandably see discovery of tax accrual workpapers as an important tool in combating fraud. But this decision will be viewed as a dangerous aberration in the law of a well-established and important evidentiary doctrine. Whatever else one may think about this case, the majority's assertion that it is following Maine is plainly erroneous. Rather, the majority's "prepared for" test

is directly contrary to Adlman, a decision we explicitly adopted in Maine.

In straining to craft a rule favorable to the IRS as a matter of tax law, the majority has thrown the law of work-product protection into disarray. Circuits have already split interpreting the meaning of "anticipation of litigation," between the "primary purpose" and "because of" tests. Now this court has proceeded to further the split by purporting to apply the "because of" test while rejecting that test's protection for dual purpose documents. In reality, the majority applied a new test that requires that documents be actually "prepared for" use in litigation. The time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country.

The correct test is that spelled out in Adlman, and adopted by most circuit courts. Applying that test to the facts actually found by the district court, these tax accrual workpapers should be protected. For these reasons, I respectfully dissent.

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This home page contains links to a host of useful resources, including the following articles/documents:

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- Pragmatic Practices for Protecting Privilege
- Attorney Client Privilege Infopak
- ACC's Amicus Briefs in the Textron v US and Guillard v AIG cases

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"Trust Us: Taint Teams and the Governments Peek At Your Company's Privileged Documents:
http://www.acc.com/legalresources/resource.cfm?show=928506

Thirteen Steps to Cope with Corporate Privilege Erosion:
http://www.acc.com/legalresources/resource.cfm?show=14443

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ACC Webcasts/Program Materials on privilege issues:

Privilege & Privacy When Dealing in an International Context:
http://www.acc.com/education/webcasts/privilegenprivacyinaninternationalcontext.cfm

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