Key Attorney-Client Privilege Issues: Recent Caselaw

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A. Choice of Law

State and federal courts sitting in diversity apply choice of laws analysis in determining which privilege law applies.

- **[Privilege Point, 11/12/14]**

  Courts Apply Privilege Choice of Law Principles: Part II

  November 12, 2014

  Federal courts sitting in diversity should rely on their host jurisdiction's choice of law rules in selecting the proper privilege law. However, most federal courts inexplicably short-circuit this process -- automatically applying the host jurisdiction's privilege law rather than its choice of law principles. See, e.g., Camico Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP, Civ. A. No. 11 4753, 2013 U.S. Dist. LEXIS 10832 (E.D. Pa. Jan. 28, 2013). Courts undertaking the proper analysis sometimes reach surprising results. In Skepnek v. Roper & Twardowsky, LLC, the court handling a diversity case properly looked to Kansas choice of law rules -- almost apologetically explaining that Kansas follows the "older, minority approach" of the Restatement (First) of Conflict of Laws (1934). Case No. 11-CV-4102-DDC-JPO, 2014 U.S. Dist. LEXIS 122918, at *10 (D. Kan. Sept. 4, 2014). That approach "provides that '[t]he law of the forum determines the admissibility of a particular piece of evidence.'" Id. at *11 (quoting Restatement § 597). The court therefore applied Kansas privilege law principles to emails among "New Jersey clients communicating with their New Jersey law firm about a New Jersey lawsuit." Id. at *11-12. Not surprisingly, the court acknowledged that those New Jersey clients "may find it unusual that Kansas state law determines whether their e-mails are privileged." Id. at *12.

  This type of counterintuitive result usually makes little difference, but in some cases Illinois state courts have relied on this analysis to apply that state's narrow "control group" privilege standard to communications that deserved privilege protection under the more corporate-friendly Upjohn standard of when and where the communications took place.

B. What Is Not Privileged

- In re Syngenta AG MIR 162 Corn Litig., MDL No. 2591, Case No. 14-md-2591-JWL, 2017 U.S. Dist. LEXIS 92606 (D. Kansas June 13, 2017) ("Caselaw provides a wealth of guidance as to what is -- and is not -- protected by the attorney-client privilege. First, it is important to note that 'personal, confidential, [or] private information' is not necessarily privileged. 'As this Court has held repeatedly, "'confidential"' does not equate to 'non-discoverable' or privileged.' Second, it is clear that '[u]nderlying facts are not protected by the privilege.' "'Similarly, neither the acts or services performed by an attorney during the course of his representation, nor the scope of representation, are within the attorney-client privilege because they are not 'communications.'" Nor are 'general topics of attorney-client discussions' or ultimate "'legal conclusions"' of counsel protected. Thus, for example, this court has held that the subject matters of an in-house attorney's discussions with company executives are not privileged. Fourth, where a communication contains both legal advice and business advice, attorney-client protection only applies if the legal advice predominates over the business advice; the privilege does not apply where legal advice is merely incidental to business advice. Fifth, '[d]rafts of documents to be submitted to third parties, although prepared by counsel, are not generally privileged. Submission of the document to the third party removes any cloak of privilege.' On the other hand, drafts of memoranda prepared for a client are protected. Sixth, the attorney-client privilege does not attach to simple editing or 'word-smithing' by counsel." (emphases added)).

- **[Privilege Point, 11/11/15]**

  Can the Privilege Ever Protect Historical Documents?

  November 11, 2015

  The attorney-client privilege normally does not protect pre-existing historical documents, even if clients convey those to their lawyers. In the work product context, lawyers' selection of certain intrinsically unprotected historical documents can deserve opinion work product protection — but few courts have recognized a parallel protection for clients' selection of historical documents they consider important. This is one of the most mysterious gaps in privilege jurisprudence.

  In GE v. United States, the government challenged GE's privilege assertion for "attachments to otherwise privileged email communications between [GE] attorneys and GE personnel." No. 3:14-cv-00190 (JAM), 2015 U.S. Dist. LEXIS 122562, at *4 (D. Conn. Sept. 15, 2015). The court refreshingly acknowledged that an intrinsically unprotected historical document the client sends a lawyer could "reveal that it was communicated in confidence to an attorney in connection with the seeking or receipt of legal advice." Id. at *5. The court even offered an example: an executive's sending to "the company's counsel a news article about alleged bid-rigging activities within the company's industry" — explaining that "the fact that the news article is a quintessentially public document would not defeat a claim of privilege." Id. at *5-6. Perhaps not surprisingly, the court cited no case law for this proposition.

  Lawyers' selection of intrinsically unprotected documents can deserve opinion work product protection only if the adversary also has the documents. Although the GE court did not address this issue, presumably privilege protection would apply to clients' selection only if those intrinsically unprotected historical documents were otherwise produced to the adversary (not in conjunction with the privileged communication). Otherwise, clients could withhold responsive intrinsically unprotected historical documents just by giving them to their lawyers.

- **[Privilege Point, 5/6/15]**

  Do Lawyers' Memos to the File Deserve Privilege Protection?

  May 6, 2015

  Not surprisingly, many lawyers think the attorney-client privilege (if not the whole world) revolves around them. Actually, the privilege primarily protects clients' communications to lawyers, not vice versa. And because the privilege normally protects only client-lawyer communications, lawyers face an uphill climb when seeking privilege protection for documents they have not sent to their clients.

  In Broadrock Gas Services, LLC v. AIG Specialty Insurance Co., No. 14 cv. 3927 (AJN) (MHD), 2015 U.S. Dist. LEXIS 26462 (S.D.N.Y. Mar. 2, 2015), defendant claimed privilege protection for a K&L Gates lawyer's memorandum to the file analyzing insurance coverage issues. In an opinion by Judge Dolinger, the court first noted that there was "no evidence in our record" that (1) K&L Gates sent the memo to the client; (2) K&L "used [it] to advise the client"; or (3) the memo "described or embodied the substance of any communication between the client and the attorney." Id. at *7. The court rejected defendant's privilege claim — emphasizing that the privilege "is limited to communications between client and attorney" or others facilitating the attorney-client relationship. Id. The court also quoted an earlier Southern District of New York decision holding that the privilege did not protect "'documents embodying uncommunicated thoughts of counsel, as in the form of notes or memoranda to the file.'" Id. at *7-8 (quoting Bodega Invs., LLC v. United States, No. 08 Civ. 4065 (RMB)(MHD), 2009 U.S. Dist. LEXIS 48513, at *27 n.5 (S.D.N.Y. May 14, 2009)).

  In assessing privilege protection, lawyers should recognize their secondary role — and not assume that their uncommunicated documents automatically deserve privilege protection.

C. Primary Purpose Test

Second Circuit's articulation of a "solely for the obtaining or providing legal advice" standard.

- **[Privilege Point, 1/13/16]**

  Second Circuit Offers Bad News, Good News and No News

  January 13, 2016

  When the Second Circuit speaks, people listen. That court recently dealt with privilege and work product issues.

  In Schaeffler v. United States, 806 F.3d 34 (2d Cir. 2015), the Second Circuit reversed a district court's holding that (1) a taxpayer waived his privilege protection by disclosing protected legal advice to his lenders, and (2) the work product doctrine did not protect documents the taxpayer prepared in anticipation of IRS litigation. First, the Second Circuit offered bad news on the privilege front -- explaining that for privilege to apply "the purpose of the communications must be solely for the obtaining or providing of legal advice." Id. at 40 (emphasis added) This is a narrower approach than the majority "primary purpose" standard, and much narrower than the D.C. Circuit's one "significant" purpose standard. See In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758-59 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 1163 (2015). Second, in discussing the common interest doctrine, the Second Circuit offered good news -- acknowledging that the taxpayer and his lenders shared a common legal interest rather than just a common financial interest. Schaeffler, 806 F.3d at 42. Third, the Second Circuit also offered good news on the work product front -- essentially rejecting the district court's "construct of a hypothetical scenario" in which the taxpayer and his lenders faced the same business issues without a litigation threat. Id. at 44. The court explained that the enormous financial stakes and business complexity meant that the lower court's hypothetical was "at odds with reality." Id. This meant that the taxpayer by definition would not have created his documents in the same form absent an IRS litigation threat. Fourth, the Second Circuit offered no news on a key issue -- whether the common interest doctrine can apply in the absence of anticipated litigation. The court acknowledged that "[p]arties may share a 'common legal interest' even if they are not parties in ongoing litigation," but did not take a position either way on the doctrine's applicability in a purely transactional setting. Id. at 40 (citation omitted).

  The Second Circuit's off-handed description of the privilege standard may not represent a legal shift, so overall the Schaeffler decision represents primarily good news -- on the common interest and work product fronts.

D.C. Circuit's and Southern District of New York's adoption of a "one significant purpose" rather than a "primary purpose" standard.

- **[Privilege Point, 2/4/15]**

  Game Changer? The S.D.N.Y. Endorses a Company-Friendly Privilege Standard

  February 4, 2015

  In In re General Motors LLC Ignition Switch Litigation, No. 14-MD-2543 (JMF), 2015 U.S. Dist. LEXIS 5199, at *220 (S.D.N.Y. Jan. 15, 2015), Judge Furman upheld General Motors' claim of privilege and work product protection for "notes and memoranda relating to the witness interviews" Jenner & Block conducted while investigating GM's ignition switch issue. The opinion naturally has received extensive media coverage, given the high profile. But many reports do not focus on the court's groundbreaking adoption of a company-friendly privilege standard.

  Most courts provide privilege protection only to communications whose "primary purpose" relates to legal rather than business advice. Last year, the D.C. Circuit rejected that rule, and extended privilege protection to investigation-related documents if "legal advice was one of the significant purposes." In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758-59 (D.C. Cir. 2014) (emphasis added) (also known as the Barko decision). Although acknowledging that the D.C. Circuit's decision did not bind it, the General Motors court adopted that standard. This appears to represent the first time another court has adopted the D.C. Circuit's favorable privilege standard. Most significantly, the court held that "the D.C. Circuit's holding is consistent with - if not compelled by - the Supreme Court's logic" in the seminal Upjohn decision. Gen. Motors, 2015 U.S. Dist. LEXIS 5199, at *240 (citing Upjohn v. United States, 449 U.S. 383, 394 (1981)).

  The General Motors court's rejection of the "primary purpose" test and powerful endorsement of a "one of the significant purposes" standard could extend privilege protection in other contexts, such as with compliance-related communications.

- **[Privilege Point, 12/24/14]**

  It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part II

  December 24, 2014

  Last week's Privilege Point described a federal court's unforgiving approach to a company's effort to retrieve one purportedly privileged document out of 30,000 produced.

  One week later, another court took a similarly narrow view of a defendant's privilege claim in Kleen Products LLC v. International Paper, Case No. 10 C 5711, 2014 U.S. Dist. LEXIS 163987 (N.D. Ill. Nov. 12, 2014). Among other things, the court applied the following principles to communications to and from co-defendant RockTenn's General Counsel (who also served as that company's Chief Administrative Officer and Senior Vice President and Secretary): (1) "'[w]here a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, it is not primarily legal in nature and is therefore not privileged,'" Id. at *12 (quoting a 2013 Northern District of Illinois decision); (2) "although [the General Counsel] is copied on three out of the four emails contained within [one email] chain, he offered no legal advice in response," Id. at *14; (3) "[i]t is improper to infer as a blanket matter that any email asking for 'comments' that copies in-house counsel along with several other high level managers automatically is a request for 'legal review.'" Id. at *18-19.

  Companies' lawyers should train their clients' employees to articulate the basis for privilege in the body of their communications to and from the lawyers. The lawyers should also familiarize themselves with the privilege standards applied by the court in which they find themselves litigating.

- **[Privilege Point, 7/16/14]**

  District of Columbia Circuit Court Dramatically Expands Privilege Protection for Internal Corporate Investigations: Part II

  July 16, 2014

  Last week's Privilege Point described the legal standard and some of the factual bases for the District of Columbia District Court's denial of privilege protection for Kellogg Brown & Root's (KBR) internal corporate investigation. This week's privilege point tells the good news -- when about three months later, the D.C. Circuit Court of Appeals issued a writ of mandamus reversing the District Court's holding. In re Kellogg Brown & Root, Inc., No. 14-5055, 2014 U.S. App. LEXIS 12115 (D.C. Cir. June 27, 2014).

  The District of Columbia federal appellate court first rejected the district court's legal standard, holding that the privilege could protect a company's investigation if its need for legal advice was **one** of the "primary" or "significant" motivating purposes – even if not the only purpose, or the primary purpose. Id. at *13-14. The appeals court also explicitly addressed several factual indicia the district court relied on, holding that (1) KBR's requirement under government regulations to investigate alleged fraud did not preclude KBR's argument that **another** "significant purpose[]" was seeking legal advice; (2) non-lawyers could conduct privileged employee interviews while "serving as agents of attorneys"; (3) the absence of Upjohn warnings did not prevent privilege protection, because "nothing in Upjohn requires a company to use magic words"; and (4) although the employees' confidentiality agreements did not "expressly" mention KBR's need for legal advice, employees knew the law department was conducting a "sensitive" investigation and were warned not to discuss their interviews without KBR's General Counsel's authorization. Id. at *8-10.

  The appeals court's legal standard represents a much more privilege-friendly approach than most courts apply. The standard permits companies to claim privilege protection even for investigations they must undertake pursuant to external requirements -- rather than having to initiate parallel or successive investigations to gain the protection. And the court's analysis of the factual issues provides a much more lenient standard for claiming privilege than most courts would apply.

- **[Privilege Point, 7/9/14]**

  District of Columbia Circuit Court Dramatically Expands Privilege Protection for Internal Corporate Investigations: Part I

  July 9, 2014

  After a decade or more of generally bad news for corporations seeking privilege protection for their internal corporate investigations, the District of Columbia Circuit has issued an opinion containing good news on all fronts.

  In March 2014, the District of Columbia District Court denied attorney-client privilege and work product doctrine protection for documents Kellogg Brown & Root (KBR) (and affiliates) created during an internal corporate investigation. United States ex rel. Barko v. Halliburton Co., Case No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 36490 (D.D.C. Mar. 6, 2014). Five days later, the court denied a stay. United States ex rel. Barko v. Halliburton Co, Case No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 30866 (D.D.C. Mar. 11, 2014). The District Court used a narrow version of the "primary purpose" test for privilege protection -- holding that "[t]he party invoking the privilege must show the 'communication would not have been made "but for" the fact that the legal advice was sought.'" Halliburton, 2014 U.S. Dist. LEXIS 36490, at *7-8 (citation omitted). In applying this standard, the District Court pointed to a number of facts, including (1) the investigation "resulted from the Defendants [sic] need to comply with government regulations"; (2) non-lawyers conducted the interviews; (3) those non-lawyers did not give Upjohn warnings informing the interviewed employees "that the purpose of the interview was to assist KBR in obtaining legal advice"; and (4) the interviewed employees signed confidentiality agreements that did not mention the investigation's legal purpose. Id. at *9-10. In most courts, these factors would probably have doomed KBR's privilege claim even under a more favorable "primary purpose" test.

II. CORPORATE PRIVILEGE: BASIC STANDARDS

A. Identifying the "Client"

Need to properly identify the "client" who controls the privilege.

- **[Privilege Point, 12/9/15]**

  Who Controls an Audit Committee's Privilege and Work Product Protection if the Company Declares Bankruptcy?

  December 9, 2015

  Many courts recognize that a corporation's constituent (such as an audit committee or a group of independent directors) can own the privilege and work product protection covering the constituent's internal corporate investigation. Under this approach, the company's bankruptcy trustee cannot access or waive that privilege or work product protection. See, e.g., Ex parte Smith, 942 So. 2d 356 (Ala. 2006) (denying a bankruptcy trustee's attempt to access pre-bankruptcy communications between the company's independent directors and its Skadden Arps lawyers).

  In Krys v. Paul, Weiss, Rifkind, Wharton, & Garrison LLP (In re China Medical Technologies, Inc.), 539 B.R. 643 (S.D.N.Y. 2015), Judge Abrams dealt with privilege and work product protection covering an internal corporate investigation conducted by China Medical's Audit Committee lawyers at Paul Weiss. The court acknowledged "that the Audit Committee was 'independent' in some sense" -- "[i]t could retain counsel, and it legitimately expected that its communications with counsel would be protected against intrusion by management." Id. at 655. But the court held that the company's bankruptcy changed the analysis -- because depriving the bankruptcy liquidator of the privilege protection's ownership would "thwart the statutory obligation of a trustee in bankruptcy to maximize the value of the estate by conducting investigations into a corporation's pre-bankruptcy affairs." Id. at 654. The court thus held that the company's liquidator "now owns and can thus waive the Audit Committee's attorney-client privilege, regardless of the Committee's pre-bankruptcy independence." Id. at 658. In contrast, the court held that the liquidator could not unilaterally waive any work product protection -- because Paul Weiss either solely or jointly owned that separate protection. Id.

  Constituents of a company's board (such as an audit committee or group of independent directors) should bear in mind the possible post-bankruptcy ownership of their protected communications -- remembering that the answer might be different for privileged communications and work product.

- **[Privilege Point, 11/4/15]**

  Another Court Deals with Privileged Communications' Ownership after a Corporate Transaction

  November 4, 2015

  Most if not all courts recognize that selling a corporation's stock transfers ownership of the corporation's privileged communications. These can include even communications about the sale transaction. Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155 (Del. Ch. 2013). Asset sales present a more subtle analysis.

  In HunterHeart Inc. v. Bio-Reference Laboratories, Inc., Case No. 5:14-cv-04078-LHK, 2015 U.S. Dist. LEXIS 123921, at *2 (N.D. Cal. Sept. 16, 2015), Hunter Laboratories sold "the bulk of its assets" to defendant. The asset purchase agreement explicitly identified the transferred assets as including Hunter's "computer equipment," software, e-mail addresses and "other records, data and communications . . . in the cloud." Id. (internal citation omitted). Hunter's owner used the company email system both before and after the asset sale. Hunter's remaining business (now called HunterHeart) later sued defendant, and sought a protective order preventing defendant from using privileged communications on the servers and other systems the defendant had purchased. The court denied the protective order, finding that as for the pre-transaction privileged communications: (1) Hunter waived its privilege "when it agreed to hand over all of its servers, files and communications"; and, if not, (2) the "[privilege] passed from Hunter to [Defendant] by virtue of the [asset purchase agreement]'s transfer of the other company assets." Id. at *5, *6. The court then held that post-transaction communications never deserved privilege protection, because Hunter's owner who continued to use the email system "could not have expected these emails to remain confidential." Id. at *7.

  Many lawyers remember from law school that selling a company's stock transfers the privilege, but selling its assets does not. Courts increasingly apply what is called the "practical consequences test" when analyzing privilege ownership, under which selling assets can also convey privileged communications.

- **[Privilege Point, 7/4/12]**

  Court Applies Standard Joint Representation Principle

  July 4, 2012

  In most situations, any jointly represented client can access the files of the lawyer who represents the joint clients. This basic principle can have a dramatic effect if the jointly represented clients become adversaries.

  In In re Equaphor Inc., Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129 (Bankr. E.D. Va. May 11, 2012), the court dealt with files that a law firm created during its joint representation of Equaphor and three individual co-defendants in a derivative action. When Equaphor later declared bankruptcy, the bankruptcy trustee moved to compel the law firm to turn over its litigation files. The individual clients resisted the turnover – emphasizing that Equaphor had been only a "nominal defendant" in the derivative action. Id. at *9. The court rejected this argument, noting that "while [Equaphor] may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm," and that "there is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files." Id. at *9-10, *10.

  As in many other contexts, a corporate client's bankruptcy can put the client in the hands of someone whose interests are dramatically different from those of the pre-bankruptcy corporation.

B. Control Group, Upjohn and Bevill

- **[Privilege Point, 5/24/17]**

  Court Affirms the Comforting Bevill Backstop

  May 24, 2017

  Lawyers representing corporations should in nearly every circumstance provide an Upjohn warning to avoid accidentally creating attorney-client relationships with company employees. Upjohn v. United States, 449 US 383 (1981). Fortunately, lawyers who do not provide such warnings (or who cannot prove that they did so) can usually also rely on what is called the Bevill doctrine. In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986).

  In United States v. Blumberg, Crim. A. No. 14-458 (JLL), 2017 U.S. Dist. LEXIS 47298 (D.N.J. Mar. 27, 2017), defendant Blumberg claimed that the Bracewell law firm represented both his employer and him individually – meaning that he co-owned the privilege protecting his communications with Bracewell lawyers. The court noted competing affidavits about whether Bracewell lawyers gave an Upjohn warning. The court therefore applied "the five-factor Bevill analysis." Id. at *12. The Bevill doctrine requires employees seeking to claim personal privilege protection for communications with the company's lawyer to prove on a communication-by-communication basis that: (1) they sought legal advice from the lawyer; (2) if so, they "'made it clear that they were seeking legal advice in their individual rather than in their representative capacities'"; (3) the company lawyer agreed to provide such individual advice regardless of possible conflicts; (4) such communications were confidential; and (5) the communications' substance "'did not concern matters within the company or the general affairs of the company.'" Id. at *7 (citation omitted). In assessing the fifth factor, the court acknowledged Blumberg's claim that he and Bracewell lawyers discussed his "'potential for criminal exposure'" – and that the lawyers said he was a "'fact witness.'" Id. at *14 (internal citation omitted). The court concluded that this one possible exchange did not allow Blumberg to assert a blanket claim of "privilege over all statements made during the Bracewell meetings." Id. at *14-15. The court ultimately held that the company rather than Blumberg owned the privilege covering his communications with the Bracewell lawyers, and thus could waive it (presumably over his objection).

  Corporations' lawyers should carefully provide Upjohn warnings, but can also rely on the Bevill backstop.

- **[Privilege Point, 1/4/17]**

  Two Decisions Issued the Same Day Highlight Choice of Laws Issues: Part I

  January 4, 2017

  Every privilege analysis should start with determining the applicable law. In the corporate context, federal courts handling federal question cases and nearly every state follow the Upjohn standard. Upjohn v. United States, 449 U.S. 383 (1981). Under this standard, the privilege can protect a corporation's lawyer's communications with any corporate employee possessing information the lawyer needs. A handful of states continue to follow the pre-Upjohn "control group" standard – under which the privilege generally protects only communications with upper-level corporate management.

  In Harris Management, Inc. v. Coulombe, 2016 ME 166, ¶ 15, ---A.3d ---, Maine's highest court reaffirmed Maine's reliance on the old "control group" standard – extending privilege protection only to employees (usually officers) who direct the corporation's response to its lawyers' legal advice, and other individuals with authority to make corporate decisions. Although Maine corporations feel the main brunt of this narrow approach, corporations from Upjohn states might also lose their privilege if they are sued in Maine.

  In some cases, a choice of law analysis will result in application of the narrow "control group" corporate privilege standard. In other cases, courts applying other states' privilege law relieve corporations of that troublesome standard.

C. Communications Within Corporate Families

- Au New Haven, LLC v. YKK Corp., No. 15-CV-03411 (GHW) (SN), 2016 U.S. Dist. LEXIS 160602, at *19-20, *20-21, *21-22 (S.D.N.Y. Nov. 18, 2016) (holding that certain corporate affiliates must satisfy the common interest agreement to successfully assert privilege and avoid waiver for their communications with each other; "Plaintiffs argue that Document 3 should nevertheless be revealed because YKK Corporation and its wholly owned subsidiary YKK Corporation of America (YCA) do not share a common legal interest. Because Attorney John Castellano was Chief Legal Counsel of YCA, Plaintiffs contend that any communications he had with YKK Corporation and any communications incorporating his advice forwarded by employees of YKK Corporation would lose their privilege by virtue of having been disseminated to a third party. They further argue that the common interest rule does not apply because (1) only YKK Corporation, and not YCA, admitted that they were party to the License Agreement at issue in this case pursuant to plaintiffs' Requests for Admissions and (2) YCA and other YKK affiliates denied that they were jointly and severally liable for the actions of YKK Corporation. Defendants, for their part, counter that entities under common ownership sharing privileged information are always considered to be a single entity for the purpose of attorney-client privilege. Music Sales [Corp. v. Morris], 1999 U.S. Dist. LEXIS 16433, 1999 WL 974025, at *7 [(S.D.N.Y. Oct. 22, 1999)] (holding that corporations related through ownership or control need not prove common legal interest)."; "The Court does not adopt the per se standard that Defendants urge; in certain circumstances, commonly owned subsidiaries simply do not have the common purpose in litigation necessary for the invocation of the doctrine. . . . For example, in Gulf Lands Leasing v. Bombardier Capital, Inc., 215 F.R.D. 466 (S.D.N.Y. 2003), the court considered the case of two defendant subsidiaries that were wholly owned by the same corporation. Although the corporations shared a common commercial interest in the success of the litigation, they had two different agreements with the plaintiff, separate legal counsel, and showed no indicia of coordinating a legal strategy beyond occasional discussions between co-counsel. Id. at 473. On this record, the court found that communications between the two companies were not privileged. This approach, which considers the real relationship between companies and their counsel, is preferable considering the great diversity of legal and factual scenarios that corporate litigation presents." (footnote omitted); "Nevertheless, in this case, Defendants have amply proven that YKK Corporation and YCA may invoke the common interest doctrine to maintain their communications privileged." (emphases added)).

- Airport Fast Park-Austin, L.P. v. John Hancock Life Ins. Co., Case No. 1:15-cv-245, 2016 U.S. Dist. LEXIS 125931, at *4, *8-9, *9-10 (S.D. Ohio Sept. 15,

2016) (holding that affiliate corporations with common ownership could communicat within privilege protection; "In the corporate context, it is well-settled that the 'attorney-client privilege is not waived merely because the communications involved extend across corporate structures to encompass parent corporations, subsidiary corporations, and affiliated corporations.' Crabb v. KFC Nat. Management Co., No. 91-5474, 1992 U.S. App. LEXIS 38268, 1992 WL 1321, at *3 (6th Cir. 1992) (citing United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 616 (D.D.C. 1979)."; "The communications AFP seeks to protect from disclosure are privileged communications AFP sent to PCA, which is an affiliated entity by virtue of the entities' common ownership and the overlap in their operations, or that the affiliates' joint counsel exchanged with PCA employees. Cf. Ohio Valley Coal Co. v. Pleasant Ridge Synfuels, LLC, 54 F. App'x 610, 614 (6th Cir. 2002) (upholding a finding that companies were affiliates where one individual served as the CEO of one company and owned and controlled another company)."; "'Chavez Properties' is the name 'loosely use[d] to describe a family of affiliated entities,' including AFP and PCA. . . . The vast majority of Chavez Properties are single-asset entities that are limited liability companies which own parking real estate assets. . . . PCA is a management company which manages the vast majority of the affiliates of Chavez Properties. . . . Manuel Chavez, Robert Chavez and Martin Chavez are the common owners of both Austin Airport Fast Park, LLC, which is the managing partner of AFP, and of PCA, the entity which manages AFP's business. . . . AFP and PCA, though separate entities, share a common attorney and common legal interests. There is nothing in the documentation before the Court or about the parties' relationship that suggests AFP waived the confidentiality of its privileged communications when outside counsel for AFP communicated with employees of PCA on the JHLIC loan transaction or when AFP copied employees of PCA on emails it sent to the parties' joint counsel. Accordingly, the same result reached in Crabb [Crabb v. KFC Nat'l Mgmt. Co., No. 91-5474, 1992 U.S. App. LEXIS 38268 (6th Cir. Jan. 6, 1992)] and Roberts [Roberts v. Carrier Corp., 107 F.R.D. 678 (N.D. Ind. 1985)] is warranted under the facts of this case." (emphases added)).

- **[Privilege Point, 5/18/2016]**

  Court Issues a Surprising Common Interest Doctrine Decision

  May 18, 2016

  The common interest doctrine can sometimes allow separately represented clients to avoid the normal waiver implications of disclosing privileged communications to each other. However, courts take widely varying views of the doctrine's reach, and reject its applicability in about half of the reported cases — after the participants have already shared privileged communications, and therefore waived their respective privileges.

  In IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, plaintiff claimed that defendant's in-house lawyer (who jointly represented the defendant and its "direct subsidiary") waived privilege protection by sending an email to several of defendants employees — and one subsidiary employee. No. 16-cv-00146, 2016 U.S. Dist. LEXIS 42223, at *4 (W.D. La. Mar. 29, 2016). Defendant argued that such disclosure did not waive defendant's privilege, because the defendant shared a common interest with its own subsidiary. The court found the common interest doctrine inapplicable — because the subsidiary did not face any litigation threat. The court quoted plaintiff, which indicated that "it has no intention of ever making [the subsidiary] a party to this litigation." Id. at *5. Thus, the court held that defendant waived its privilege by disclosing the communication "to an employee of a non-party" — its own subsidiary. Id. Fortunately for defendant, the court also found the work product doctrine applicable, and held that disclosing the email to the subsidiary did not waive that separate protection.

  This is a remarkable decision. The common interest doctrine should never have become an issue, because the in-house lawyer jointly represented the parent and its subsidiary. And the court's apparent insistence that every common interest participant must itself anticipate litigation could reward some obvious mischief — plaintiffs could threaten a number of possible defendants, but later disclaim any intent to sue one of them. All in all, cases like this highlight the risk of relying on the common interest doctrine.

- **[Privilege Point, 8/5/15**

  Court Confirms that Corporations do not Waive Their Privilege by Communicating with Their Affiliates

  August 5, 2015

  The attorney-client privilege provides such a fragile protection that disclosure to nearly any third party waives the protection. Does that general rule apply to communications among corporate affiliates? Surprisingly few decisions have addressed this issue.

  In Cohen v. Trump, Civ. No. 13-CV-2519-GPC (WVG), 2015 U.S. Dist. LEXIS 74542 (S.D. Cal. June 9, 2015), the plaintiff claimed that a Trump entity waived its privilege by including in its communication an employee of another Trump entity. The court rejected plaintiff's waiver argument — confirming that "if a corporation with a legal interest in an attorney-client communication relays it to another related corporation, the attorney-client privilege is not thereby waived." Id. at *39. Interestingly, the court primarily relied on a 41-year-old District of South Carolina case. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1184-85 (D.S.C. 1974). The most recent case cited by the court was nearly 20 years old. Id. at *39-40. One might have expected the court to rely on more recent case law.

  Corporations should take comfort in this latest articulation of a principle that many lawyers think goes without saying.

- Nester v. Textron, Inc., No. A-13-CA-920-LY, 2015 U.S. Dist. LEXIS 28182 (W.D. Tex. March 9, 2015) ("The question governing 10 of the 13 withheld emails is whether Texas law allows attorney client privilege or 'Co-Client/Joint Client Common Interest Privileges' to attach to communications between the in-house counsel of a parent company and managing personnel of a separate corporate entity [described as an 'indirect subsidiary of Textron, Inc.]."; "So long as Mr. Rupp [Textron's in-house counsel] was authorized to represent both RJL [the indirect but ultimately wholly owned subsidiary] and Textron [Parent], it is black letter Texas law that both RJL and Textron's 'communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.'" (emphasis added)).

- **[Privilege Point, 12/10/14]**

  Courts Affirm Privilege Protection for Intra-Corporate Communications

  December 10, 2014

  In most states (Illinois being the main exception), attorney-client privilege protection extends to communications between a corporation's lawyers and (1) employees with facts the lawyers need, regardless of the employee's place in the hierarchy, and (2) employees with a "need to know" the lawyers' advice about those facts. Most courts also protect ancillary communications that support the corporation's request for and receipt of legal advice.

  In Moffatt v. Wazana Brothers International, the court confirmed that the privilege protects "communications relaying legal advice provided by corporate counsel among nonattorney corporate employees who share responsibility 'for the subject matter underlying the consultation.'" Civ. A. No. 14-1881, 2014 U.S. Dist. LEXIS 151326, at *4 (E.D. Pa. Oct. 24, 2014) (citation omitted). Corporations frequently rely on this principle when their adversaries challenge privilege protection for documents whose privilege log entries do not show a lawyer as either the author or a recipient. One week later, the District of Delaware similarly held that the privilege could continue to protect privileged documents "shared within the corporate family, such as those sent to or from" the corporate defendant's French parent -- "[t]o the extent that . . . such involvement was essential to and in furtherance of the communications with the attorneys involved." United States v. Veolia Env't N. Am. Operations, Inc., Civ. No. 13-mc-03-LPS, 2014 U.S. Dist. LEXIS 154717, at *22 (D. Del. Oct. 31, 2014).

  Although these justifiable principles provide some comfort, company employees should be warned against intra-corporate circulation of privileged communications beyond those with a "need to know."

- **[Privilege Point, 11/13/13]**

  North Carolina State Court Analyzes Privilege Protection for Communications Among Corporate Affiliates

  November 13, 2013

  One surprisingly open question in corporate privilege law involves the legal basis for corporations to claim privilege protection for their lawyers' communications with their corporate affiliates' employees. Various courts have found that: (1) a corporation's lawyer represents the whole corporate family as a single "client"; (2) the lawyer represents the affiliated corporations as "joint clients"; or (3) the privilege rests on a common legal interest among the corporate affiliates.

  In SCR-Tech LLC v. Evonik Energy Services LLC, 2013 NCBC 42 (N.C. Super. Ct. Aug. 13, 2013), a North Carolina court reviewed the very sparse case law on this issue. The court dealt with communications to and from plaintiff SCR-Tech: (1) when the company was partially owned by Ebinger; (2) when the company was then sold to, and wholly owned by, Catalytica, and (3) when the company later entered into a "common interest agreement" with Ebinger, because both faced similar litigation. The court applied a sort of sliding scale, considering both the percentage of ownership and any "shared legal interest." Id. ¶ 18. The court concluded that the privilege protected communications during all three situations, because (1) SCR-Tech's shared legal interest with Ebinger meant that the court did not have to determine whether Ebinger's 37.5% ownership (which gave it control) was "too limited" to assure privilege protection by itself; (2) Catalytica's 100% ownership of, and shared legal interest with, SCR-Tech assured privilege protection; (3) the "common interest" doctrine could protect communications between SCR-Tech and its former controlling shareholder Ebinger even in the absence of any corporate affiliation at that time. Id. ¶¶ 15, 19-26.

  The court's most significant contribution to the scant jurisprudence involves the recognition that the privilege can protect corporate affiliates' communications based on control rather than 100% ownership. In nearly every situation, corporate affiliates should be able to satisfy the "shared legal interest" part of the equation.

III. CORPORATE PRIVILEGE: EXPANSION

A. Employee-to-Employee Communications

- **[Privilege Point, 4/19/17]**

  Can the Attorney-Client Privilege Protect Corporate Executives' Notes of Their Conversations with a Lawyer?

  April 19, 2017

  The attorney-client privilege protects communications between lawyers and their clients, primarily motivated by the latter's need for legal advice. Some corporations' adversaries challenge privilege protection for withheld documents whose log entries do not include a lawyer author or recipient. Fortunately for corporations, courts universally protect such communications in which one corporate employee passes along a lawyer's advice to another employee who needs it.

  Fewer courts deal with corporate employees' contemporaneous notes prepared during their conversations with a company lawyer. In Bailey v. Oakwood Healthcare, Inc., Case No. 15-11799, 2017 U.S. Dist. LEXIS 13667 (E.D. Mich. Feb. 1, 2017), defendant claimed privilege protection for two handwritten pages of notes a human resources employee made during his conversation with an in-house lawyer. The court initially acknowledged that for privilege purposes "[n]otes on a privileged conversation that reflect the substance of that conversation can amount to 'communications.'" Id. at *2. The court then relied on the employee's affidavit and deposition testimony in concluding that his notes reflected his request for, and the in-house lawyer's providing of, legal advice.

  Thus, the privilege can protect (1) contemporaneous memorializations of privileged conversations, and (2) post-conversation communications relaying legal advice to employees who need it. In some limited circumstances, the privilege can even extend to (3) employees' communications compiling facts or composing questions that they will later present to their company's lawyer.

- **[Privilege Point, 6/8/16]**

  Can the Privilege Protect Emails that Lawyers Do Not Send or Receive?

  June 8, 2016

  Because privilege logs generally require withholding litigants to identify emails' senders and recipients, the absence of a lawyer's name often triggers discovery skirmishes. Not surprisingly, the withholding litigants' adversaries often argue that communications not involving a lawyer cannot possibly be privileged.

  In ChriMar Systems Inc. v. Cisco Systems Inc., the court held that the privilege and the work product doctrine protected emails that a patent inventor sent to himself — noting that the inventor and his lawyers "attest that the emails memorialize and reflect confidential communications made for the purpose of conveying legal advice." Case No. 13-cv-01300-JSW (MEJ), 2016 U.S. Dist. LEXIS 54375, at *19 (N.D. Cal. Apr. 21, 2016). About a week later, another court dealt with an email that was not sent by or received by a lawyer. In FPP, LLC v. Xaxis US, LLC, No. 14 CV 06172-LTS-AJP, 2016 U.S. Dist. LEXIS 57421 (S.D.N.Y. Apr. 29, 2016), defendant's senior vice president sent an email to several of his colleagues, and the company's outside counsel. The company's CFO responded to the email, but removed the outside counsel from the recipient list. District Judge Swain acknowledged that employee-to-employee communications can deserve privilege protection, but rejected the defendant's privilege claim for the CFO's response. The court noted that the CFO had deliberately "removed the attorney from the distribution list when she replied, and indicated in her declaration . . . that she had merely offered her comments for possible use by a business colleague in a future communication with the attorney." Id. at *5.

  Although email strings that do not include lawyers can sometimes deserve privilege protection, courts usually demand evidence that the emails relayed a lawyer's advice; memorialized a lawyer's advice; or (occasionally) involved clients formulating questions to pose to their lawyer.

- FTC v. Boehringer Ingelheim Pharms., Inc., 180 F. Supp. 3d 1, 34 (D.D.C. 2016) ("The FTC's focus on the sender and recipient of these documents is also misguided. It is true that '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.' . . . But the principle is more nuanced than the FTC admits. The same protections afforded to communications between counsel and client extend to communications between corporate employees who are working together to compile facts for in-house counsel to use in rendering legal advice to the company. . . . That is precisely what happened here, and it is not surprising that this occurred given the complexity of the factual analyses Persky [Defendant's Senior Vice President, General Counsel, and Secretary] requested." (emphasis added)).

- **[Privilege Points, 8/26/15]**

  The Privilege Can Protect Employee-to-Employee Communications

  August 26, 2015

  Because attorney-client privilege protection depends primarily on communications' content, privilege logs rarely play a dispositive role in courts' analyses. But sometimes the adversary will point to the "author" and "recipients" data in challenging a privilege claim — noting the absence of a lawyer's name.

  Courts universally acknowledge that employee-to-employee communications may deserve privilege protection. In Stryker Corp. v. Ridgeway, Case Nos. 1:13-CV-1066 & 1:14-CV-889, 2015 U.S. Dist. LEXIS 93741, at *9 (W.D. Mich. July 20, 2015), the court flatly rejected defendant's argument that "in and of itself" the lack of a lawyer's involvement in plaintiff's communications made privilege unavailable. The court explained that "[i]n the corporate context, the privilege applies to communications of any corporate employee on matters within the scope of the employee's corporate duties when the employee is aware that the information is being provided to enable the corporation to obtain legal advice." Id. On the same day, another court generally rejected a corporation's privilege claim, but acknowledged that the privilege can protect communications that "evidence . . . in-house counsel's advice or otherwise reflect counsel's involvement in decisions relating to legal matters, even if the communication is between two members of . . . management." Roberts Tech. Grp., Inc. v. Curwood, Inc., Civ. A. No. 14-5677, 2015 U.S. Dist. LEXIS 95779, at *4 (E.D. Pa. July 20, 2015) (emphasis added).

  Given the usually cryptic nature of privilege logs, some litigants understandably argue that the privilege cannot apply to employee-to-employee communications — but every court disagrees.

- **[Privilege Point, 12/10/14]**

  Courts Affirm Privilege Protection for Intra-Corporate Communications

  December 10, 2014

  In most states (Illinois being the main exception), attorney-client privilege protection extends to communications between a corporation's lawyers and (1) employees with facts the lawyers need, regardless of the employee's place in the hierarchy, and (2) employees with a "need to know" the lawyers' advice about those facts. Most courts also protect ancillary communications that support the corporation's request for and receipt of legal advice.

  In Moffatt v. Wazana Brothers International, the court confirmed that the privilege protects "communications relaying legal advice provided by corporate counsel among non-attorney corporate employees who share responsibility 'for the subject matter underlying the consultation.'" Civ. A. No. 14-1881, 2014 U.S. Dist. LEXIS 151326, at *4 (E.D. Pa. Oct. 24, 2014) (citation omitted). Corporations frequently rely on this principle when their adversaries challenge privilege protection for documents whose privilege log entries do not show a lawyer as either the author or a recipient. One week later, the District of Delaware similarly held that the privilege could continue to protect privileged documents "shared within the corporate family, such as those sent to or from" the corporate defendant's French parent "[t]o the extent that . . . such involvement was essential to and in futherance of the communications with the attorneys involved." United States v. Veolia Env't N. Am. Operations, Inc., Civ. No. 13-mc-03-LPS, 2014 U.S. Dist. LEXIS 154717, at *22 (D. Del. Oct. 31, 2014).

  Although these justifiable principles provide some comfort, company employees should be warned against intra-corporate circulation of privileged communications beyond those with a "need to know."

B. Former Employees

- **[Privilege Point, 12/7/16]**

  Court Nixes Privilege Protection for Former Employee Interviews – Is This a Big Deal?: Part I

  December 7, 2016

  In a 4-3 vote, the Washington Supreme Court held that an institution's lawyers' communications with former employees did not deserve privilege protection. Newman v. Highland Sch. Dist., No. 90194-5, 2016 Wash. LEXIS 1135 (Wash. Oct. 20, 2016). This decision places Washington in a distinct minority position – but is it a big deal?

  The Newman majority emphasized the predictability of a per se rule that "the privilege does not broadly shield counsel's postemployment communications with former employees." Id. at *3. A strong dissent relied on the Supreme Court's seminal decision in Upjohn Co. v. United States, 449 U.S. 383 (1981). As the dissent correctly explained, Upjohn rejected the earlier "control group" standard for corporate privilege protection – which looked at the employee's place in the corporate hierarchy. Instead, Upjohn focused on the employees' factual knowledge that the corporation's lawyer needs before advising his corporate client. Upjohn did not explicitly extend privilege protection to former employees with such knowledge, but the Newman dissent noted that those Upjohn employee interviews held to be within privilege protection included seven former employees.

  Nearly every court since Upjohn has adopted that decision's focus on employees' knowledge rather than their place in the corporate hierarchy — and extended privilege protection to former employees. See, e.g., Indergit v. Rite Aid Corp., No. 08 Civ. 9361 (JPO)(HBP), 2016 U.S. Dist. 150565, at *11 (S.D.N.Y. Oct. 31, 2016) (holding that a Rite Aid lawyer's conversation with former employees "concerning their conduct and duties while employed by Rite Aid would also be within the attorney-client privilege"). Newman has sparked many articles sounding the alarm about this erosion of corporate privilege protection.

- **[Privilege Points, 12/31/14]**

  Court Applies the Peralta Standard for Company Lawyers' Communications with Former Employees

  December 31, 2014

  Although the attorney-client privilege generally protects company lawyers' communications with former company employees, most courts follow the nuanced approach of Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999). Under that standard, the privilege can protect communications relating to the former employee's time at the company, but not since then.

  In Winthrop Resources Corp. v. CommScope, Inc., Civ. A. No. 5:11-CV-172, 2014 U.S. Dist. LEXIS 158413 (W.D.N.C. Nov. 7, 2014), the court addressed plaintiff's effort to compel deposition answers from defendant's former vice president and CIO Kap Kim. Applying the Peralta standard, the court upheld the magistrate judge's ruling that Kim must answer the following questions (among others): (1) "whether [defendant's] attorney Jeff Mayer had told, or if Kim had asked, Mayer's 'personal view on whether [plaintiff] Winthrop or [defendant] CommScope is correct in their interpretation of the lease language in the case,'" Id. at *12 (internal citation omitted); (2) "whether Kim had asked any lawyer to determine whether CommScope's or Winthrop's interpretation of the lease was correct," Id.; and (3) "the substance of conversations that occurred during a deposition break" — which the court held were "questions that directly relate[d] to deposition preparation" and thus "are squarely covered by the holding in Peralta." Id. at *10-11. Defendant also claimed work product protection for those communications, but the court held that the defendant waived that argument by not presenting it to the magistrate judge.

  Company lawyers dealing with former employees should remember the Peralta standard's limitations. They should also weigh both work product and privilege protection possibilities, considering that in the former employee context, the work product doctrine may provide more promising protection than the attorney-client privilege.

C. Functional Equivalent Standard

- CAC Atlantic LLC v. Hartford Fire Ins. Co., 16 Civ. 5454 (GHW) (JCF), 2017 U.S. Dist. LEXIS 11010 (S.D.N.Y. Jan. 19, 2017) (in an opinion by Magistrate Judge Francis, inexplicably citing Kovel in the context of a client rather than a lawyer agent; "The documents now at issue are all communications to or from Minogue ["a building consultant retained by Hartford prior to its disclaimer of coverage"], and since Minogue is not 'the client,' they are not privileged on their face. Nevertheless, there are two theories that might bring these communications within the privilege. First, an attorney may rely on a non-lawyer to facilitate communications with the client, including persons with expertise such as accountants used to convey technical information. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); Osorio, 75 N.Y.2d at 84, 550 N.Y.5.2d at 615. Here, however, Hartford has not demonstrated that Minogue was engaged simply to 'translate' information for purposes of providing legal advice."; "Second, even though Minogue is not itself a party, its communications with counsel and the defendant might be privileged if it were the functional equivalent of an employee of Hartford."; "Hartford has not established that Minogue served such an integral role in light of these factors that it must be treated as if it were an employee for purposes of the privilege." (emphases added)).

- **[Privilege Point, 3/23/16]**

  How Far Does the "Functional Equivalent" Standard Extend?

  March 23, 2016

  Many previous Privilege Points have addressed the corporate-friendly "functional equivalent" doctrine, under which non-employees who essentially act as employees are inside privilege protection. An equal number of Privilege Points have explained that disclosure even to friendly client consultant/agents normally waives privilege protection (although not work product protection). One might think that these two types of non-employees would be easy to distinguish, but some courts blur the line.

  In Fosbre v. Las Vegas Sands Corp., Case No. 2:10-cv-00765-APG-GWF c/w Case No. 2:10-cv-01210-APG-GWF, 2016 U.S. Dist. LEXIS 5422 (D. Nev. Jan. 14, 2016), the court addressed Sands' privilege claims for its communications with Goldman Sachs employees who helped it deal with the 2007-2008 financial crisis. After describing Goldman Sachs' relationship with Sands as "that of a financial advisor in developing its complex financial strategy," the court surprisingly found that "Goldman Sachs' personnel performing these duties were the functional equivalent of [Sands] employees." Id. at *19. The court required Sands to supplement its privilege log and demonstrate that the individual Goldman Sachs employees (among other things) "understood the communications were for purposes of obtaining legal advice and were intended to be confidential." Id. at *45.

  Most courts would not go this far — instead finding that disclosing of privileged communications to Goldman Sachs employees waived privilege protection. But corporations and their lawyers should consider claiming that friendly third parties such as financial advisors are inside privilege protection under an expansive "functional equivalent" doctrine.

- **[Privilege Point, 4/29/15]**

  Court Offers Good Privilege News for Draft Form 10-K Filings

  April 29, 2015

  Courts disagree about the attorney-client privilege protection's applicability to draft documents whose final version will be publicly disclosed. Public companies naturally worry about this issue's impact on their draft securities filings.

  In Smith v. Unilife Corp., Civ. A. No. 13-5101, 2015 U.S. Dist. LEXIS 18755 (E.D. Pa. Feb. 13, 2015), a whistleblower plaintiff alleged that Unilife's 2011 Form 10-K report contained false and misleading statements. He sought discovery of Unilife's draft 10-Ks and company lawyers' communications to and from nonlawyer consultants "concerning the [drafts'] contents, style and 'wordsmithing.'" Id. at *5. The court first found that the consultants were the "functional equivalent" of employees — refreshingly acknowledging that "[a] trial judge is not in a good position to second-guess a corporate decision to rely on an independent consultant or an employee to accomplish a specific task." Id. at *7-8. The court then held that the draft 10-Ks deserved privilege protection — citing an earlier decision protecting 10-Ks that contained "legal advice and communications between a law firm and its client . . . even though the final version of the Form 10-K was publicly filed, because the drafts contained information not included in the final version." Id. at *9-10 (citing In re U.S. Healthcare, Inc. Sec. Litig., Master File No. 88-0559, 1989 U.S. Dist. LEXIS 1043, at *12 (E.D. Pa. Feb. 8, 1989)).

  Although many decisions seem hostile to corporations' privilege claims, some courts' analyses provide good news.

- **[Privilege Point, 2/11/15]**

  A Southern District of New York Decision Adopts Narrow Views of Privilege Protection for Independent Contractors and Lawyer-Retained Consultants: Part I

  February 11, 2015

  Not all recent Southern District of New York decisions have favored privilege protection in the corporate setting. In Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-cv-585, 2014 U.S. Dist. LEXIS 175552 (S.D.N.Y. Dec. 19, 2014), the court dealt with two issues that frequently arise in the corporate context: (1) the "functional equivalent" doctrine, and (2) privilege protection for communications with outside consultants on whom lawyers rely in giving legal advice.

  The "functional equivalent" doctrine treats as corporate employees for privilege purposes non-employees who are the "functional equivalent" of full-time employees. In this era of outsourcing, one can easily imagine the disruption corporations would face if the privilege did not protect communications with, or in the presence of, temporary secretaries or long-time outsourced contractors who report every day to the company just as employees do. Since first articulated by the Eighth Circuit in In re Bieter, 16 F.3d 929, 933-34 (8th Cir. 1994), the "functional equivalent" doctrine has spread throughout the country, and only a few courts have questioned it. However, the Church & Dwight decision noted that the Second Circuit has not adopted the doctrine, and "[b]ecause the Second Circuit has recognized very limited exceptions to privilege waiver, the Court has doubts as to whether it would endorse such an approach." 2014 U.S. Dist. LEXIS 175552, at *6.

  Although the court justifiably concluded that the outside marketing consultant at issue would not have satisfied the generally accepted "functional equivalent" doctrine standard, its negative comments should worry those seeking privilege protection in the corporate setting.

- **[Privilege Point, 10/2/13]**

  Northern District of Illinois Questions the "Functional Equivalent" Doctrine

  October 2, 2013

  One of the notable recent privilege trends involves most courts' adoption of what is called the "functional equivalent" doctrine – which extends privilege protection to nonemployees who are the functional equivalent of corporate employees. The vast majority of courts recognize the functional equivalent doctrine, which greatly benefits corporations relying on temporary workers or outsourcing corporate functions such as tech support or even human resources support.

  However, a few courts take a narrower approach. In BSP Software, LLC v. Motio, Inc., No. 12 C 2100, 2013 U.S. Dist. LEXIS 95511, at *2 (N.D. Ill. July 9, 2013), the court addressed a functional equivalent argument by a company which did not have a formal board of directors, but which asserted privilege protection for communications to and from its "advisory board." The court rejected the company's privilege assertion, finding that the company waived its privilege protection by communicating with its advisory board. Ironically, the court expressed as its first worry the possibility that the functional equivalent doctrine would "increase the level of uncertainty" about the privilege's applicability. Id. at *7.

  Although rejecting the functional equivalent doctrine might avoid legal uncertainty, it creates enormous factual uncertainty. Anyone communicating with or in the presence of even a long-term temp could unknowingly abort or waive privilege protection.

- **[Privilege Point, 2/1/12]**

  Southern District of New York Applies the "Functional Equivalent" Doctrine

  February 1, 2012

  Under what is called the "functional equivalent" doctrine, the attorney-client privilege can protect communications to and from a non-employee considered to be the "functional equivalent" of an employee. This doctrine represents an enormously important expansion of the attorney-client privilege for companies which have reduced their employee head count, and rely on independent contractor/temporary workers.

  In Steinfeld v. IMS Health Inc., No. 10 Civ. 3301 (CS)(PED), 2011 U.S. Dist. LEXIS 142288, at *1 (S.D.N.Y. Dec. 9, 2011), Magistrate Judge Davison found that an "independent equity compensation consultant" did **not** meet the "functional equivalent" standard. The court examined six factors: (1) whether the company relied on the independent contractor "because its business is sporadic"; (2) whether the independent contractor appeared on behalf of the company, corresponded with third parties as a representative of the company, or was ever viewed by others as a company employee; (3) whether the independent contractor was "physically present" at the company, such as maintaining an office there, or spending "a substantial amount of his time" there; (4) whether the company "lacked the internal resources necessary for an [actual] employee to perform" the services; (5) whether the independent contractor "exercises any measure of independent decision-making authority" within the company; (6) whether the independent contractor "has ever sought out legal advice from [the company's] attorneys as part of his work with the [company]." Id. at *9-11. The court found that the company fell short in trying to establish several of these factors.

  While corporations should welcome the "functional equivalent" doctrine's expansion of the privilege, they should also fear the sometimes disastrous effects of failing to satisfy the doctrine's standards: (1) communications with an independent contractor generally do not deserve privilege protection; (2) the presence of an independent contractor during otherwise privileged communications usually aborts the privilege; and (3) sharing preexisting privileged communications with an independent contractor usually waives the privilege.

IV. CORPORATE PRIVILEGE: RISKS

A. Widespread Intra-Corporate Circulation

- In re Bard IVC Filters Prods. Liability Litig., MDL No. 15-2641 PHX DGC, 2016 U.S. Dist. LEXIS 97043 (D. Ariz. July 25, 2016) (holding that the attorney-client privilege could protect intra-corporate communications in which the sender sought feedback from both lawyers and non-lawyers in the same communications; "This category involves '[e]ntries describing a communication to non-lawyers and attorneys seeking simultaneous review and comment.' Doc. 1476-3 at 3. Three of the five examples do not require the Court's attention. Plaintiffs have withdrawn their challenge to Log 3, Control 809, Bard has produced Log 6, Control 251, and the Court determined above that Log 2, Control 816 is privileged."; " The redacted portions of Log 3, Control 2099 are privileged. The redacted portions appear in an email to Gina Dunsmuir, one of Bard's lawyers, and others, and seek comments on draft talking points to Bard's sales force. Communications with sales force, as noted above, can have significant legal implications, as illustrated by Plaintiffs' claim in this case that Bard's sales force made misrepresentations concerning its products. Because the communication solicits input from a lawyer on these issues, it falls within A.R.S. § 12-2234(B)."; "The Court denies Plaintiffs' motion to compel production of Category 6 documents." (emphasis added)).

- **[Privilege Point, 12/24/14]**

  It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part II

  December 24, 2014

  Last week's Privilege Point described a federal court's unforgiving approach to a company's effort to retrieve one purportedly privileged document out of 30,000 produced.

  One week later, another court took a similarly narrow view of a defendant's privilege claim in Kleen Products LLC v. International Paper, Case No. 10 C 5711, 2014 U.S. Dist. LEXIS 163987 (N.D. Ill. Nov. 12, 2014). Among other things, the court applied the following principles to communications to and from co-defendant RockTenn's General Counsel (who also served as that company's Chief Administrative Officer and Senior Vice President and Secretary): (1) "'[w]here a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, it is not primarily legal in nature and is therefore not privileged,'" Id. at *12 (quoting a 2013 Northern District of Illinois decision); (2) "although [the General Counsel] is copied on three out of the four emails contained within [one email] chain, he offered no legal advice in response," Id. at *14; (3) "[i]t is improper to infer as a blanket matter that any email asking for 'comments' that copies in-house counsel along with several other high level managers automatically is a request for 'legal review.'" Id. at *18-19.

  Companies' lawyers should train their clients' employees to articulate the basis for privilege in the body of their communications to and from the lawyers. The lawyers should also familiarize themselves with the privilege standards applied by the court in which they find themselves litigating.

- Williams v. Duke Energy Corp., Civ. A. 1:08-cv-00046, 2014 U.S. Dist. LEXIS 109835, at *8 (S.D. Ohio Aug. 8, 2014) ("Documents prepared and emailed for review by both legal and nonlegal employees are often held to be not privileged because the communications were not made for the primary purpose of seeking legal advice.").

- **[Privilege Point, 11/6/13]**

  Can the Privilege Protect Intra-Corporate Communications Sent Simultaneously to a Lawyer and a Non-Lawyer?

  November 6, 2013

  Some courts inexplicably hold that "when a communication is simultaneously emailed to a lawyer and a non-lawyer," the privilege cannot apply because the communication by definition is not primarily legal. United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., Case No. 6:09-cv-1002-Orl-31TBS, 2012 U.S. Dist. LEXIS 158944, at *11-12 (M.D. Fla. Nov. 6, 2012). This narrow approach seems out of step with common practice.

  Not all courts take such a restrictive approach. In Surfcast, Inc. v. Microsoft Corp., Microsoft sought plaintiff's internal communications, arguing that "the fact that [an] e-mail was directed to others in addition to [a lawyer] renders it unprivileged." No. 2:12-cv-333-JAW, 2013 U.S. Dist. LEXIS 111417, at *7 (D. Me. Aug. 7, 2013). The court disagreed, holding that "asking for legal advice in a covering e-mail when only one of the individuals to whom it was sent is an attorney demonstrates that [the sender] expected [the lawyer] to act as an attorney at the time." Id. at *6.

  Although corporations should welcome this type of analysis, the court also noted that (1) the lawyer was a direct recipient of the email rather than a copy recipient, and (2) the email "requested legal advice." Id. at *5. Corporations and their lawyers should train employees to take such steps.

- **[Privilege Point, 1/2/13]**

  Another Court Follows the Troubling Vioxx Approach

  January 2, 2013

  Previous Privilege Points have noted many courts' increasing insistence that a corporate litigant withholding privileged documents prove that every recipient of each document had a "need to know" the document's substance. Some courts take an even narrower view of the privilege in the corporate setting, usually relying on a 2007 decision in the multidistrict litigation against Merck. In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007).

  In United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, the court cited Vioxx and an earlier Middle District of Florida decision in holding that "when a communication is simultaneously emailed to a lawyer and a non-lawyer, the corporation 'cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes.'" Case No. 6:09-cv-1002-Orl-31TBS, 2012 U.S. Dist. LEXIS 158944, at *11-12 (M.D. Fla. Nov. 6, 2012) (citation omitted). Later in the opinion, the court seemed to back off a bit, noting that the simultaneous transmission of an email to a non-lawyer "weighs against a privilege finding." Id. at *23 n.5. However, throughout the opinion the court took a restrictive view of the privilege in the corporate setting. Distinguishing legal advice from "'compliance advice,'" the court rejected a corporate litigant's argument that the privilege protected compliance department employees' communications because "'the compliance department operates under the supervision and oversight of [the] legal department.'" Id. at *23 (internal citation omitted). The court's response to that position was blunt: "Halifax's organizational structure is of no consequence." Id.

  Although there may be essentially no way for most corporations' privilege to survive the nearly per se Vioxx approach, all corporations should try to restrict the internal distribution of emails to those with a "need to know."

- Hedden v. Kean Univ., 82 A.3d 238, 246 (N.J. Super. Ct. App. Div. 2013) (analyzing a situation in which a university coach disclosed a privileged draft letter to the NCAA during an investigation; "Contrary to the dissent's view, the fact that another University employee may have been copied on the email does not defeat its confidential nature because as a fellow employee with an interest in the matter, he shared Sharp's [Coach] interest in protecting the University from liability." (emphasis added)).

- United States v. Chevron Corp., No. C 94-1885 SBA, 1996 U.S. Dist. LEXIS 8646, at *6 (N.D. Cal. May 29, 1996) ("The attorney-client privilege does not attach, however, to documents which were prepared for simultaneous review by both legal and non-legal personnel within the corporation.").

B. Need to Know Standard

- **[Privilege Point, 4/12/17]**

  Illogical and Frightening "Need to Know" Doctrine

  April 12, 2017

  Corporations face two possible impediments when claiming privilege protection for purely internal communications. First, some courts see widespread intra-corporate circulation as tending to show that the communications primarily dealt with business rather than legal matters. This approach makes some sense, although a few courts take it to an unjustifiable extreme – applying a per se rule that the privilege cannot protect communications an employee sends both to a lawyer and to a non-lawyer requesting their input.

  Second, the more frightening doctrine involves the "need to know" standard. In Peerless Indemnity Insurance Co. v. Sushi Avenue, Inc., the court rejected plaintiff's privilege claim for several internal documents – because it had not established with evidence that the documents "were not disseminated beyond those persons who needed to know their contents." Civ. No. 15-4112 ADM/LIB, 2017 U.S. Dist. LEXIS 22436, at *10 (D. Minn. Feb. 15, 2017).

  Many courts follow this troubling waiver approach – which can force corporations to turn over to litigation adversaries purely internal communications simply because they were shared with a few employees who did not need them. Because this doctrine focuses mostly on lawyers' communication to their corporate clients' employees, we have the primary responsibility to limit internal circulation and re-circulation of our advice.

- In re Riddell Concussion Reduction Litig., Civ. No. 13-7585 (JBS/JS), 2016 U.S. Dist. LEXIS 168457, at *12-13 (D.N.J. Dec. 5, 2016) ("Many of the challenged documents involve communications between and amongst Riddell's employees that do not involve an attorney. The Court agrees with Riddell that simply sharing documents amongst corporate employees does not necessarily vitiate a privilege. These communications remain privileged if they assist the attorney to formulate and render legal advice. . . . However, the privilege is waived if the document is shared beyond persons with a 'need to know.'" (emphasis added) (citation omitted)).

- Thomas v. Kellogg Co., Case No. C13-5136-RBL, 2016 U.S. Dist. LEXIS 66881, at *5 (W.D. Wash. May 20, 2016) ("Documents disseminated beyond those with a 'need to know' for legal advice purposes are not privileged.").

Intra-corporate circulation to those beyond a "need to know" can cause a waiver.

- **[Privilege Point, 2/3/16]**

  What is the "Need to Know" Standard?

  February 3, 2016

  Under the majority Upjohn approach, the attorney-client privilege can protect lawyers' communications with any level of corporate client employee -- if the lawyers need the employees' factual information before giving their corporate clients legal advice. Upjohn Co. v. United States, 449 U.S. 383 (1981). Upjohn focuses on clients' communications of facts to lawyers, not lawyers' communications of legal advice to clients. The latter communications implicate the "need to know" standard. The Upjohn standard expands corporations' privilege protection, while the "need to know" standard constricts it.

  In EEOC v. Texas Roadhouse, Inc., the court articulated the unfortunate but widely accepted principle that privileged intra-corporate "[c]ommunications retain their privileged status if relayed to other employees or officers of the corporation who need to know the information. When the communications are repeated to employees who do not need the information to carry out their work or make decisions, the privilege is lost." Civ. A. No. 11-cv-11732-DJC, 2015 U.S. Dist. LEXIS 161929, at *5-6 (D. Mass. Dec. 2, 2015).

  At first blush, this "need to know" standard seems inconsistent with Upjohn. An example might explain the difference. A company's lawyer can have an Upjohn-protected interview with a company's employee who happened to see a visitor fall in the lobby. But that employee does not "need to know" the lawyer's legal advice about the company's possible liability or defenses. The "need to know" standard does not make much sense -- it can force a corporation to provide a litigation adversary purely internal privileged communications simply because a few extra employees (bound by their own confidentiality duty) happened to also receive those communications.

- Norton v. Town of Islip, No. CV 04-3079 (PKC) (SIL), 2015 U.S. Dist. LEXIS 125114, at *11, *11-12, *14 (E.D.N.Y. Sept. 18, 2015) (finding that a town did not assert privilege for documents to which town employees without a "need to know" and members of the public had access; holding that the Town had the duty to show that no one actually accessed the documents, and had fallen short of that burden; "One of the underlying issues here pertains to changes made to the certificate of occupancy ('C/O') for the property. Norton argues that the privilege was waived because the Memos were made accessible to Town employees who did not need to know the privileged contents regarding those changes, i.e., the autoworker in the Verschoth [Verschoth v. Time Warner, Inc., No. 00CIV1339, 2001 U.S. Dist. LEXIS 3174 (S.D.N.Y. Mar. 22, 2001)] example. Defendants argue without elaboration that 'Building Department or other property-related officials' have a need to know and thus may view privileged communications between the Town Attorney's Office and the Building Department without waiving the privilege, i.e., the engineer in the Verschoth example."; "Applying the standards above, Defendants have failed to carry their burden of establishing that the privileges have not been waived. All of the Memos were contained in the Building Department file and were apparently accessible by all Town employees within that department. . . . [I]if non-Building Division Town personnel wish to review a document, unspecified 'Building Division staff retrieve the document and provide a copy'). Defendants have presented no reason, however, why all or even most Building Department personnel have a need to know confidential legal communications in order to perform their jobs. As Defendants have failed to carry their burden, the Court finds that they have waived attorney-client privilege as to the Memos."; "The Memos were found in the paper files and Defendants have provided no evidence to counter the plain suggestion that the Memos resided in the paper files for some indeterminate time period for anyone in the public to see, if they asked for the file. Further and conspicuously absent from Defendants' submissions is any argument, let alone supporting evidence such as log books, that the paper files at issue were never checked out by a member of the public. Absent this type of evidence, Defendants have failed to meet their burden of establishing a lack of public access and the Court concludes that they have waived both work product and attorney-client privileges." (emphases added)).

- Int'l Cards Co., Ltd. v. MasterCard Int'l Inc., No. 13-CV-02576 (LGS) (SN), 2014 U.S. Dist. LEXIS 125370, at *5 (S.D.N.Y. Aug. 27, 2014) ("A corporate entity's attorney-client privilege can also be waived by disclosure of the communication to employees of the corporation who are not in a position to act or rely on the legal advice contained in the communication." (emphasis added)).

- ePlus, Inc. v. Lawson Software, Inc., 280 F.R.D. 247, 252-53, 253 & n.2 (E.D. Va. 2012) ("290 entries concern communications to ten or more non attorneys. Lawson does not deny this, but claims that it was required to widely disseminate information because of the injunction, which applied to a broad group of people. Communications within a corporation are only protected if the party claiming privilege can demonstrate that the persons to whom the communications were made had the 'need to know' the information communicated." (citation omitted); "Nor has Lawson established that the individuals in each of these entries are protected by the decision in Upjohn v. United States, 449 U.S. 383, 389 . . . (1981)."; "Here, Lawson has not argued that the individuals listed in any of the 290 entries had a need to know as defined by Deel [Deel v. Bank of Am., N.A., 227 F.R.D. 456 (W.D. Va. 2005)] or that they should enjoy the protection provided by Upjohn. It has not even established that the listed individuals are employees or that they needed to know the information communicated. Nor has Lawson asserted that the communications were made at the direction of supervisors. Quite simply, Lawson has not satisfied its burden to establish that a privilege applies. Thus, it has waived the privilege with respect to these entries."; "This is true also of the 39 entries in which Lawson identifies the recipient as an unidentified distribution list. Whether the persons on those lists have a 'need to know' the information communicated and whether those persons are employees who knew they were being communicated with by Lawson's counsel in its capacity as legal counsel is unclear. Lawson has waived its privilege with respect to these entries." (emphases added)).

C. Access Issues

- **[Privilege Point, 3/11/15]**

  Court Concludes That Access to Privileged Document by Employees Without a "Need to Know" Does Not Destroy Privilege Protection

  March 11, 2015

  Many courts hold that corporations might waive their privilege protection through purely internal circulation of privileged communications — beyond those employees with a "need to know." This does not make much sense, because it hands over to corporations' external adversaries internal corporate communications disclosed only to employees with a fiduciary, contractual, or other duty to keep them confidential.

  Although a few courts have extended this troublesome approach to situations in which other employees merely had access to privileged communications, other courts have drawn the line. In Garvey v. Hulu, LLC, Case No. 11-cv-03764-LB, 2015 U.S. Dist. LEXIS 7042, at *7 (N.D. Cal. Jan. 21, 2015), the court rejected plaintiffs' argument "that confidentiality was destroyed by the fact that [privileged communications are] generally accessible to Hulu employees beyond those immediately participating" in the pertinent legal issue. The court noted that the privileged communications were "not public" and that "[o]nly Hulu employees may access" them. Id. at *10. The court ultimately concluded that "[c]onfidentiality is not destroyed by the possibility of other Hulu employees, not directly participating in the [issue], could have accessed" the privileged documents — quoting an earlier Central District of Illinois decision explaining that "[m]aterial need not be 'kept under lock and key to remain confidential' for purposes of the attorney-client privilege" (quoting United States v. Dish Network, L.L.C., 283 F.R.D. 420, 425 (C.D. Ill. 2012)). Id. at *10-11.

  It is refreshing to see some courts' common-sense approach, but corporations should still take reasonable steps to limit privileged communications' internal circulation to employees with a "need to know" in order to perform their duties.

- **[Privilege Point, 9/11/13]**

  A Southern District of New York Judge Mentions the Danger of Granting Widespread "Access" to Privileged Communications in a Corporate Setting

  September 11, 2013

  Corporations face several risks to their privilege protection if employees widely circulate privileged communications, even within the corporation. As noted in earlier Privilege Points, most courts require corporations to prove that every recipient of such a privileged communication has a "need to know." And, in a troublesome doctrine highlighted in the Vioxx MDL litigation, some courts point to widespread intra-corporate distribution as demonstrating such communications' primarily business rather than legal nature.

  In Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 (AT) (JCF), 2013 U.S. Dist. LEXIS 85630 (S.D.N.Y. June 18, 2013), Judge James Francis held that an employment database prepared by defendant Goldman Sachs generally deserved privilege protection because Goldman Sachs' lawyers used the database to give legal advice. However, he also acknowledged that plaintiffs were entitled "to test whether managers have access" to portions of the database – describing such access as "a fact that could militate in favor of finding that these fields are maintained for business purposes and would not be privileged." Id. at *18.

  Such managers presumably have a "need to know" legal advice about employment issues. Thus, it is worrisome that a court would consider such managers' "access to" (not just use of) such a database to support the opposing party's argument that the database served primarily a business rather than a legal purpose.

D. Employees' Personal Privileged Communications on Employers' Servers

- Peerenboom v. Marvel Entertainment, LLC, 3435N 162152/15, 2017 N.Y. App. Div. LEXIS 1935 (N.Y. Sup. Ct. March 16, 2017) (holding that Marvel's CEO could not claim privilege protection but could claim work product protection for emails sent and received from his personal lawyer in a personal defamation case not involving Marvel or its parent Disney, for which he used his Marvel's server; "Application of the four factors set forth in In re Asia Global Crossing, Ltd. (322 BR 247, 257 [Bankr SD NY 2005]), which we endorse (see also e.g. Scott v Beth Israel Med. Ctr. Inc., 17 Misc 3d 934, 941, 847 N.Y.S.2d 436 [Sup Ct, NY County 2007]), indicates that Perlmutter lacked any reasonable expectation of privacy in his personal use of the email system of Marvel, his employer, and correspondingly lacked the reasonable assurance of confidentiality that is an essential element of the attorney-client privilege (See, Matter of Priest v Hennessy, 51 NY2d 62, 69, 409 N.E.2d 983, 431 N.Y.S.2d 511 [1980]). Among other factors, while Marvel's email policies during the relevant time periods permitted 'receiving e-mail from a family member, friend, or other non-business purpose entity . . . as a courtesy,' the company nonetheless asserted that it 'owned' all emails on its system, and that the emails were 'subject to all Company rules, policies, and conduct statements.' Marvel 'reserve[d] the right to audit networks and systems on a periodic basis to ensure [employees'] compliance' with its email policies. It also 'reserve[d] the right to access, review, copy and delete any messages or content,' and 'to disclose such messages to any party (inside or outside the Company).' Given, among other factors, Perlmutter's status as Marvel's Chair, he was, if not actually aware of Marvel's email policy, constructively on notice of its contents."; "Given the lack of evidence that Marvel viewed any of Perlmutter's personal emails, and the lack of evidence of any other actual disclosure to a third party, Perlmutter's use of Marvel's email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections." (emphases added)).

E. Drafts

- SCF Waxler Marine LLC v. M/V Artis T, Civ. A. Nos. 16-902, -959, -1022, -1060, -1134, & -1614, SECTION "A"(1), 2017 U.S. Dist. LEXIS 90256, at *25 (E.D. La. June 13, 2017) (holding that the attorney-client privilege protected preliminary drafts of an incident report, even though the final version was intended to be made public; "[T]he Court finds that the ultimate disclosure of the final draft of the NOBRA Pilot Incident Report does not result in a waiver of the privilege. . . . [T]he Court finds that the drafts and notes were never intended to be made public. They were conveyed in confidence in the course of obtaining and giving legal advice. While Leone and his counsel were obviously working towards a document that would be made public, they did not intend that their drafts and analysis would be subject to disclosure. . . . [T]he argument raised by Genesis [third party] here would result in disclosure of every draft of a pleading, brief, or affidavit that is exchanged between counsel and client merely because such drafts concern facts and the final draft is made public. At oral argument, counsel for Genesis seemed willing to live with this extraordinary result, but the Court finds that such a holding goes too far." (emphases added)).

- In re Syngenta AG Mir 162 Corn Litig., MDL No. 2591, Case No. 14-md-2591-JWL, 2017 U.S. Dist. LEXIS 92606, at *286 (D. Kan. June 13, 2017) ("'Drafts of documents to be submitted to third parties, although prepared by counsel, are not generally privileged. Submission of the document to the third party removes any cloak of privilege.' On the other hand, drafts of memoranda prepared for a client are protected." (emphasis added)).

- Medline Indus., Inc. v. C.R. Bard, Inc., No. 14 CV 3618, 2016 U.S. Dist. LEXIS 9767, at *8-9, *11-12, *12 (N.D. Ill. Jan. 26, 2016) (holding that the privilege protected an employee inventor's draft affidavit even though the final version was filed; also holding that a non-employee's draft affidavit was not protected by the privilege despite that person's claim that the lawyer also represented him; "In Spalding [In re Spalding Sports Worldwide, Inc., 203 F.3d 800 (Fed. Cir. 2000)], the Federal Circuit found that 'invention records' -- documents including information such as the names of inventors, descriptions of the invention, closest prior art, and dates of publication -- constitute privileged communications as long as they are provided to an attorney for purposes of securing legal services or assisting in a legal proceeding."; "[P]rivilege analysis in the context of patent suits no longer turns on whether a document is technical in nature or whether it was submitted, in its final form, to the USPTO. . . . Rather, privilege depends on whether 'the overall tenor of the document indicates that it is a request for legal advice or services.'" (citation omitted); "Based on the descriptions in Medline's privilege log and this court's in camera review, the court finds that drafts of the Tomes

declarations are privileged. Medline asserts that Tomes, an inventor of record and a Medline employee at the time the documents were created, worked closely with Burrus [lawyer] to write the drafts for ultimate submission to the USPTO. . . . And the draft documents appear to reflect 'communications involved in the strategizing process' during which the attorney 'attempts to shape the [patent] application for presentation to the patent office.'. . . In crafting the final declarations, Burrus and Tomes likely had to make judgment calls, both technical and legal, to persuade the USPTO to issue the patent." (emphases added)).

- EEOC v. Tex. Roadhouse, Inc., Civ. A. No. 11-cv-11732-DJC, 2015 U.S. Dist. LEXIS 161929, at *10 (D. Mass. Dec. 2, 2015) ("This is an email concerning changes that counsel was making to a document. The document has already been provided to the EEOC in discovery. The email and the document attached to the email, as it was undergoing review and was being edited by counsel, are privileged." (emphasis added)).

- Johnson v. Ford Motor Co., Case Nos. 3:13-cv-06529, -14207, & -20976, 2015 U.S. Dist. LEXIS 119886, at *155-56 (S.D. W. Va. Sept. 3, 2015) (holding that the attorney-client privilege protected communications in which a corporate employee sought an in-house lawyer's advice about how to respond to public inquiries; "Mr. Engle's [design analysis engineer for defendant] purpose in communicating with Mr. Logel [defendant's in-house lawyer] was to obtain legal advice about the wording of an investigation report Mr. Engle intended to supply to the Chicago Transit Authority. . . . Mr. Engle did not provide data to Mr. Logel for the purpose of drafting the investigation report; instead, he submitted the completed report to Mr. Logel to review with an eye toward 'possible legal and/or litigation ramifications of the statements made in [the] draft report and as to the general wording of the document, including whether any information should be omitted or included to comply with legal requirements or principles.' . . . In other words, Mr. Engle's communication with Mr. Logel was not a request for assistance in generating a public report; rather, it was a request to insure that the wording of a report that detailed a completed investigation did not expose the corporation to liability, or negatively affect its position in potential litigation. Being retained to provide legal guidance on how to reduce a client's risk of liability is different than being retained for the specific purpose of preparing a report intended for public dissemination. Certainly, Mr. Engle had reason to obtain legal advice on the wording of the report given his concern that the underlying incidents would lead to litigation. . . . Contrary to Plaintiffs' contention, there is nothing about this request for advice that suggests Mr. Engle's intention to have any of his communications with Mr. Logel published. . . . Accordingly, the Court finds that the e-mail exchange between Mr. Engle and Mr. Logel, and the draft showing the edits of Mr. Logel." (emphases added)).

- Barba v. Shire US, Inc., Case No. 13-21158-CIV-LENARD/GOODMAN, 2015 U.S. Dist. LEXIS 65859, at *11, *11-12 (S.D. Fla. May 20, 2015) (rejecting the Eastern District of Virginia's approach to draft documents expressed in FTC v. Reckitt Benckiser Pharms., Inc., No. 3:14mc5, Dkt. Nos. 42-43 (E.D. Va. Mar. 10, 2015); "Plaintiffs argue that the attached 'Citizens Petition' document is not privileged under the 'draft document' rule, which they say was applied in a similar case, FTC v. Reckitt Benckiser Pharms., Inc., No. 3:14mc5, Dkt. Nos. 42-43 (E.D. Va. Mar. 10, 2015). The Undersigned's review of that case however does not find support for Plaintiffs' position. In that case, a court in the Eastern District of Virginia stated the Fourth Circuit's view that 'the attorney-client privilege with respect to confidential communications does not apply to published documents and the underlying details and data if, at the time the communication was made, the client intended that the document was to be made public.' Id. at p. 15."; "While Plaintiffs may be entitled to the draft of a document that was ready to publish, it is clear from the email exchange that this document is attached to a document which was still under consideration and in the drafting process. The specific email that the document is attached to is from a non-attorney and addressed directly to two attorneys (one in-house counsel and one outside counsel) while copying two more (in-house counsel). Further, the communication in that email calls the attached document the 'latest version' and notes that the parties involved in the email will talk about the contents of the document at a later date. From the Undersigned's perspective, this is a clear indication that the document is not ready to publish and therefore is not subject to the 'draft document rule,' as Plaintiffs argue (if the Undersigned agreed that the rule was even applicable in this Circuit). Accordingly, CIT021317-324 should remain protected by privilege." (emphases added)).

- **[Privilege Point, 4/29/15]**

  Court Offers Good Privilege News for Draft Form 10-K Filings

  April 29, 2015

  Courts disagree about the attorney-client privilege protection's applicability to draft documents whose final version will be publicly disclosed. Public companies naturally worry about this issue's impact on their draft securities filings.

  In Smith v. Unilife Corp., Civ. A. No. 13-5101, 2015 U.S. Dist. LEXIS 18755 (E.D. Pa. Feb. 13, 2015), a whistleblower plaintiff alleged that Unilife's 2011 Form 10-K report contained false and misleading statements. He sought discovery of Unilife's draft 10-Ks and company lawyers' communications to and from non-lawyer consultants "concerning the [drafts'] contents, style and 'wordsmithing.'" Id. at *5. The court first found that the consultants were the "functional equivalent" of employees — refreshingly acknowledging that "[a] trial judge is not in a good position to second-guess a corporate decision to rely on an independent consultant or an employee to accomplish a specific task." Id. at *7-8. The court then held that the draft 10-Ks deserved privilege protection — citing an earlier decision protecting 10-Ks that contained "legal advice and communications between a law firm and its client . . . even though the final version of the Form 10-K was publicly filed, because the drafts contained information not included in the final version." Id. at *9-10 (citing In re U.S. Healthcare, Inc. Sec. Litig., Master File No. 88-0559, 1989 U.S. Dist. LEXIS 1043, at *12 (E.D. Pa. Feb. 8, 1989)).

  Although many decisions seem hostile to corporations' privilege claims, some courts' analyses provide good news.

- FTC v. Reckitt Benckiser Pharms., Inc., Misc. No. 3:14mc5, 2015 U.S. Dist. LEXIS 29203, at *16-17, *17-18 (E.D. Va. Mar. 10, 2015) (finding that the privilege did not protect drafts prepared with a lawyers assistance if the final version of the document was intended to be disclosed; "In conclusion, in the Fourth Circuit, the attorney-client privilege with respect to confidential communications does not apply to published documents and the underlying details and data if, at the time the communication was made, the client intended that the document was to be made public. Therefore, 'when the attorney has been authorized to perform services that demonstrate the client's intent to have his communications published . . . the client lose[s] the right to assert the privilege as to the subject matter of those communications.' United States v. (Under Seal), 748 F.2d [871,] 876 [(4th Cir. 1984)]."; "It is important to note, however, that the intended publication of a communication does not eviscerate the privilege for all of the material produced for, or in connection with, publication. Rather '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. (Under Seal), 749 F.2d at 875, n.7. In other words, although some documents may not be privileged in their entirety, other documents, such as attorney's notes, communications between the attorney and client containing relevant data, and other documents which might contain 'details underlying the data' might well be privileged. That determination would require an individualized inspection of the documents to ensure that only non-privileged content is disclosed." (emphasis added)).

- In re Pappas, Case No. 08-10949, 2009 Bankr. LEXIS 1394, at *1-2, *4 (Bankr. D. Del. June 3, 2009) ("I have determined that drafts of documents prepared for eventual release to third parties - such as loan documents, acceleration notices, and guarantee demands - are not protected by the attorney work product doctrine or the attorney-client privilege." (emphasis added)).

- Burton v. R.J. Reynolds Tobacco Co., 170 F.R.D. 481, 485), motion aff'd in part, denied in part, 177 F.R.D. 491 (D. Kan. 1997) ("When documents are prepared for dissemination to third parties, neither the document itself, nor preliminary drafts, are entitled to immunity. Documents which the client does not reasonably believe will remain confidential are not protected." (emphasis added)).

V. SOURCES OF PROOF

A. Client-to-Lawyer Communications

- In re Lidoderm Antitrust Litig., Case No. 14-md-02521-WHO, 2016 U.S. Dist. LEXIS 28969, at *57-59 (N.D. Cal. Mar. 7, 2016) (holding that documents about how a company could prevent generic pharmaceutical companies from entering a market were not subject to attorney-client privilege protection; "In general, it appears that defendants have taken an overly expansive view of which documents are privileged simply because Ms. Manogue and other attorneys (either at PWR, whose role is discussed more in-depth below, or at Teikoku) drafted them or were copied on them. Some of the documents submitted for in camera review are devoid of legal advice, but concern business matters. For example, Exhibit 3 . . . is a chain of emails attaching a draft of the Citizen Petition amendment. The emails concern the purpose of a Citizen Petition and the timing for filing, which read in context are business matters not legal advice or communications seeking legal advice. Exhibits 5, 6 & 7 consist of a cover email and identical 'Citizen Petition Timeline' slides. There is no legal advice contained or sought in the email or slides, and the slides themselves appear to be based on publicly available information, plus what may be an internal plan or suggestion on timing for an additional Citizen Petition amendment. These documents are devoid of legal advice. While they may have been prepared for a discussion between Endo, Teikoku, and PWR as to the timing of a Citizen Petition amendment or whether to file a new Citizen Petition, that does not make the contents of the emails and identical slides protectable as attorney-client information. Exhibit 8 . . . is a cover email from Caroline Manogue to board members and others at Endo attaching the response from the FDA denying the Citizen Petition. That email was forwarded by Endo's former CFO Levin to additional people at Endo seeking input on various business matters, and an email response to Levin from one of the subsequent recipients about expected financial reporting in response to the FDA's action. These documents are concerned with the business implications of the FDA's actions. Other than the first sentence at the top of the email chain (regarding a conversation with Manogue), there is no legal advice provided or sought. Other than that one sentence, this communication is not protected by the attorney-client privilege." (emphases added) (footnotes omitted)).

Lawyers' affidavits often fail to overcome a lack of contemporaneous privilege indicia.

- **[Privilege Point, 2/24/16]**

  How Do Courts Apply the "Primary Purpose" Privilege Standard?: Part I

  February 24, 2016

  In nearly every court, the attorney-client privilege protects intra-corporate communications only if their "primary purpose" was the corporation's need for legal advice. How do courts apply this standard? One might think that companies' lawyers can simply file affidavits confirming under oath that clients' communications to them sought legal advice, and that their communication to clients contained or reflected their legal advice.

  In FTC v. AbbVie, Inc., Civ. A. No. 14-5151, 2015 U.S. Dist. LEXIS 166723 (E.D. Pa. Dec. 14, 2015), the court dealt with three documents corporate employees sent to an in-house lawyer. The court rejected privilege protection for all the documents. For one, it explained that "[a]lthough [an in-house lawyer] claimed by sworn declaration that the email was a request for legal advice, AbbVie has not provided any supporting information that would allow the court to reach the same conclusion." Id.at *26. For the other two documents, the court similarly explained that "[b]y declaration, [the in-house lawyer] has claimed that the redacted portion contains a request for legal advice addressed to the legal department. We disagree." Id. at *31. In addition to the court's troubling conclusion that the in-house lawyer filed a false affidavit, the court's holding highlights the importance of corporate employees explicitly articulating their communications' legal purpose. Later affidavits failed to make up for the absence of such contemporaneous privilege indicia.

  Lawyers should not only train their clients on this issue, they should themselves remember this lesson when communicating to their clients. Next week's Privilege Point will address the same court's rejection of an outside lawyer's privilege claim for his report to a client.

Many courts deny privilege protection for client-to-lawyer communications after noting lawyers' lack of response to, or involvement in, clients' communications claimed to be privileged.

- FTC v. AbbVie, Inc., Civ. A. No. 14-5151, 2015 U.S. Dist. LEXIS 166723, at *38-39 (E.D. Pa. Dec. 14, 2015) ("These emails do not fall within the ambit of the attorney-client privilege. The only attorney recipient of these emails, in-house counsel Walt Linscott, is merely copied on the email thread and does not contribute to the discussion." (emphasis added)).

- Shipyard Assocs., L.P. v. City of Hoboken, Civ. A. No. 14-1145 (CCC), 2015 U.S. Dist. LEXIS 100927, at *23 (D.N.J. Aug. 3, 2015) ("[T]he Court has reviewed the samples submitted, and has upheld the privilege only when facially apparent from a review of the document." (emphasis added)).

- Roberts Tech. Grp., Inc. v. Curwood, Inc., Civ. A. No. 14-5677, 2015 U.S. Dist. LEXIS 95779, at *5 (E.D. Pa. July 20, 2015) ("[W]e cannot preclude production of internal communications between employees relating to collection activities and discussions with Plaintiff's business persons simply because counsel claims they relate to some unidentified legal advice not evident on the documents." (emphasis added)).

- Barba v. Shire US, Inc., Case No. 13-21158-CIV-LENARD/GOODMAN, 2015 U.S. Dist. LEXIS 65859, at *9 (S.D. Fla. May 20, 2015) ("In this string of emails, Shire asserts that a non-attorney employee solicits and receives legal advice from the Shire legal team. However, review of the document reveals no such advice was solicited, nor was any given. In fact, no attorneys are even carbon copied in the email chain for four out of the six emails. And in the emails in which counsel are copied, no communication is directed at them with regard to legal advice or concerns. Accordingly, Shire's assertion of privilege over large swaths of this email chain should be overruled." (emphasis added)).

- **[Privilege Point, 12/24/14]**

  It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part II

  December 24, 2014

  Last week's Privilege Point described a federal court's unforgiving approach to a company's effort to retrieve one purportedly privileged document out of 30,000 produced.

  One week later, another court took a similarly narrow view of a defendant's privilege claim in Kleen Products LLC v. International Paper, Case No. 10 C 5711, 2014 U.S. Dist. LEXIS 163987 (N.D. Ill. Nov. 12, 2014). Among other things, the court applied the following principles to communications to and from co-defendant RockTenn's General Counsel (who also served as that company's Chief Administrative Officer and Senior Vice President and Secretary): (1) "'[w]here a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, it is not primarily legal in nature and is therefore not privileged,'" Id. at *12 (quoting a 2013 Northern District of Illinois decision); (2) "although [the General Counsel] is copied on three out of the four emails contained within [one email] chain, he offered no legal advice in response," Id. at *14; (3) "[i]t is improper to infer as a blanket matter that any email asking for 'comments' that copies in-house counsel along with several other high level managers automatically is a request for 'legal review.'" Id. at *18-19.

  Companies' lawyers should train their clients' employees to articulate the basis for privilege in the body of their communications to and from the lawyers. The lawyers should also familiarize themselves with the privilege standards applied by the court in which they find themselves litigating.

- **[Privilege Point, 12/17/14]**

  It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part I

  December 17, 2014

  Although federal courts generally articulate the same basic attorney-client privilege principles, they can demonstrate enormous variation when applying those principles. In some situations, it might be nearly impossible for companies to successfully assert privilege protection.

  In United States ex rel. Schaengold v. Memorial Health, Inc., No. 4:11-cv-58, 2014 U.S. Dist. LEXIS 156595 (S.D. Ga. Nov. 5, 2014), defendants sought to retrieve one document (out of 30,000 documents produced) that they claimed to have inadvertently produced to the government. They described the document as a draft sent to the company's lawyer, portions of which the client deleted at the lawyer's request before disclosing the final version to third parties. The court found that the document did not deserve privilege protection, because the lawyer's supporting affidavit "fails to show who exactly sent the Draft Document, whether the primary purpose of the communication was for legal advice, or whether the communication was indeed confidential." Id. at *9. Turning to the inadvertent production issue, the court found defendants' "naked assertion of a privilege review" inadequate — because defendants did not describe "'when [the] review occurred, how much time [Prior Counsel] took to review the documents, what ['certain'] documents were reviewed, and other basic details of the review process.'" Id. at *17 (citation omitted; alterations in original).

- **[Privilege Point, 8/13/14]**

  Most Courts Focus on the Four Corners of Withheld Documents, Despite Barko: Part I

  August 13, 2014

  The widely publicized Barko decision (In re Kellogg Brown & Root, Inc., No. 14-5055, 2014 U.S. App. LEXIS 12115 (D.C. Cir. June 27, 2014)) has encouraged corporations hoping to extend privilege protection to their internal corporate investigations. As explained in a previous Privilege Point, perhaps the most important aspect of Barko was the D.C. Circuit's willingness to examine the context of withheld communications — rather than focusing just on the documents' four corners.

  However, many courts essentially limit their review to the withheld documents themselves in analyzing both privilege and work product claims. In Tecnomatic, S.P.A. v. Remy, Inc., the court examined withheld documents in camera, ultimately concluding that the attorney-client privilege protection applied — because "the communications withheld explicitly request, render, arrange for, or act in furtherance of rendering legal assistance." No. 1:11-cv-00991-SEB-MJD, 2014 U.S. Dist. LEXIS 75220, at *7 (S.D. Ind. June 3, 2014). Unfortunately, courts' assessment of withheld documents usually results in bad news. One week later, the Northern District of Illinois rejected a corporation's privilege claim for several emails, using phrases such as "[t]his email is not privileged as it does not ask for legal advice"; "the email does not seek legal advice and is not privileged"; and "[n]either the email nor the attached bill reveals any confidential communications or involves a request for legal advice." Lee v. Chi. Youth Ctrs., No. 12 C 9245, 2014 U.S. Dist. LEXIS 79868, at *24, *23, *26 (N.D. Ill. June 10, 2014). In an even more worrisome conclusion, the court rejected privilege claims for two emails a company employee sent the company's outside lawyer (1) asking for the lawyer's advice about "'the preferred language'" for finance committee minutes, and (2) inviting the lawyer "to make whatever changes she desires to [a] 'Reorganization Plan.'" Id. at *23, *25. The court held that the first email merely sought the outside lawyer's "editorial changes," and that the second email "does not seek legal advice and is not privileged." Id.

  Despite the promise of Barko, most courts examining a privilege claim focus almost exclusively on withheld documents' four corners. Clients seeking legal advice should therefore explicitly ask for it in the body of their communications. And lawyers providing legal advice should explain that they are doing so — especially if their legal advice takes the form of suggested language changes in client-prepared draft documents.

- **[Privilege Point, 7/23/14]**

  District of Columbia Circuit Court Dramatically Expands Privilege Protection for Internal Corporate Investigations: Part III

  July 23, 2014

  Last week's Privilege Point described the District of Columbia Circuit Court of Appeals' articulation of a privilege standard very favorable to companies conducting internal investigations. In In re Kellogg Brown & Root, Inc., No. 14-5055, 2014 U.S. App. LEXIS 12115 (D.C. Cir. June 27, 2014), the appeals court also found the privilege applicable despite involvement of non-lawyers in conducting interviews, and those interviewers' failure to give interviewed employees the classic Upjohn warnings or confidentiality agreements mentioning legal advice.

  Commentators applauding the D.C. Circuit's decision generally overlook an equally significant issue -- what the court did not say. The lower court's rejection of Kellogg Brown & Root's (KBR) privilege claim also rested on the absence of any request for or offering of legal advice in the investigation's email message traffic, and on the investigation report's failure to request legal advice or identify "possible legal issues for further review." United States ex rel. Barko v. Halliburton Co., Case No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 30866, at *6 (D.D.C. Mar. 11, 2014). The appeals court upheld KBR's privilege claim despite these factors -- thus implicitly rejecting many courts' increasingly common exclusive focus on withheld documents' four corners in rejecting privilege claims. See, e.g., A&R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co., Civ. No. 3:07CV929 (WWE), 2014 U.S. Dist. LEXIS 20859, at *8 n.1 (D. Conn. Feb. 19, 2014) (denying a privilege claim because "[t]here is no legal advice requested, explicitly or implicitly, in the cover letter"); Owens v. Stifel, Nicolaus & Co., Civ. A. No. 7:12-CV-144 (HL), 2013 U.S. Dist. LEXIS 171913, at *6 (M.D. Ga. Dec. 6, 2013) (denying a privilege claim because emails to and from an in-house lawyer "do not explicitly seek or contain legal advice"); Lolonga-Gedeon v. Child & Family Servs., No. 08-CV-00300A(F), 2012 U.S. Dist. LEXIS 67843, at *12-13 (W.D.N.Y. May 15, 2012) ("Nor is there any request within the text of the communication for legal advice or services and, as such, the communication is not protected by the attorney-client privilege.").

  In addition to articulating a company-friendly legal standard for judging corporate investigations' motivations when assessing privilege protection, the D.C. Circuit Court of Appeals looked beyond the investigation-generated documents' four corners. The court also examined the documents' context -- ultimately concluding that "there can be no serious dispute that one of the

significant purposes of the KBR internal investigation was to obtain or provide legal advice." In re Kellogg Brown & Root, 2014 U.S. App. LEXIS 12115, at *14.

Many courts look at the "four corners" of withheld documents to analyze privilege protection, and look for clients' explicit request for legal advice in client-to-lawyer communications.

- Hamdan v. Ind. Univ. Health N., LLC, No. 1:13-cv-00195-WTL-MJD, 2014 U.S. Dist. LEXIS 86097, at *9-10 (S.D. Ind. June 24, 2014) (emphasizing the four corners of documents prepared during an investigation of a discrimination claim; "The redacted emails are HR focused and document at-the-moment analysis of the Plaintiff's situation authored by Hospital employees such as the chief medical officer, chief nursing officer, and representatives from the department in which Plaintiff worked. None of the redacted emails are sent directly to an attorney (attorneys are included via CC), nor are any of the redacted emails addressed to an attorney in the text of the messages. There is no request for legal advice in any of the redacted emails, nor is there any indication in any of the emails that the author initiated or created the message for the purpose of seeking advice from the attorneys. In fact, the only explicit mention of the attorneys by an author of a redacted email occurs when the chief medical officer indicates that the attorneys were copied so that one of them might attend a previously scheduled meeting." (emphasis added).

- Wells Fargo & Co. v. United States, Case No. 09-CV-2764 (PJS/TNL), 2014 U.S. Dist. LEXIS 81430, at *8-9 (D. Minn. June 16, 2014) (concluding that a client employee's draft of a memorandum to a lawyer was not an implicit request for legal advice; "Even if Wells Fargo could show that all 21 of the documents were circulated to its in-house attorneys, the Court could not find that the documents were privileged, because Wells Fargo has failed to establish that the documents were circulated for the purpose of obtaining legal advice or services. Wells Fargo argues that the Court can infer that drafts of the memorandum sent to in-house counsel were implicit requests for legal advice or services regarding the memorandum. . . . But Wells Fargo offers no evidence to support these rather vague and abstract assertions By contrast, the government offers concrete evidence that Wells Fargo's in-house attorneys were involved in non-legal aspects of implementing the STARS transaction. . . . Under these circumstances, it is as likely that these attorneys were being asked to ensure the factual accuracy of the drafts as it is that these attorneys were being asked to provide legal advice." (emphasis added)).

- **[Privilege Point, 1/8/14]**

  Court Takes a Very Narrow View of Legal Advice in a Corporate Setting

  January 8, 2014

  Attorney-client privilege protection depends on content, and the key issue normally involves distinguishing between primarily legal and primarily business advice. Courts disagree about where to draw that line.

  In Koumoulis v. Independent Financial Marketing Group, Inc., No. 10-CV-0887 (PKC) (VMS), 2013 U.S. Dist. LEXIS 157299 (E.D.N.Y. Nov. 1, 2013), the court examined communications between a Duane Morris lawyer and her corporate client's human resources employees. The court rejected privilege claims for most of the lawyer's communications. For instance, the court noted that the Duane Morris lawyer "sometimes told Human Resources employees exactly what questions to ask during interviews and what statements to make during meetings," and that "her advice would advance business goals, such as improving business relationships." Id. at *45. The court also noted that Duane Morris' "advice rarely involved 'the interpretation and application of legal principles to guide future conduct or to assess past conduct,'. . . and rarely explicitly considered future litigation." Id. at *45-46.

  Not all courts would take this narrow view, but the decision provides a good lesson. Wise lawyers train their clients to explicitly explain in the four corners of their communications that they are seeking legal advice, that they are worried about litigation, etc. However, it is also important for lawyers to explicitly explain in their responses that they are providing legal advice (by mentioning legal principles, citing statutes or case law, etc.) and to mention litigation if the client reasonably anticipates it.

Many courts look at the "four corners" of withheld documents to analyze privilege protection.

- Koumoulis v. Indep. Fin. Mktg. Grp., Inc., 29 F. Supp. 3d 142, 147-48 (E.D.N.Y. 2014) (not for publication) (upholding a Magistrate Judge's opinion that neither the attorney-client privilege nor the work product doctrine protected communications between a Duane Morris lawyer and a corporate client's human resource executive; finding the attorney-client privilege inapplicable because the advice was primarily business-related and not legal; "This document contains an e-mail from Defendants' outside counsel, Ann Bradley, Esq. [Duane Morris lawyer], setting forth more than a full page of detailed, multi-part instructions on how to deal with Mr. Komoulis's personnel issues, including a recommendation that Defendants call Mr. Komoulis 'to express concern and disappointment, identify the fundamental problem and find out who he trusts to advise him,' and goes so far as to prescribe detailed instructions to be given to Plaintiff on how he should conduct himself with Defendants' customers. . . . This advice plainly is not legal advice, but rather human resources advice on personnel management and customer relations." (emphasis added)).

- Bernstein v. Mafcote, Inc., 43 F. Supp. 3d 109, 116-17 (D. Conn. 2014) ("First, the emails are not to or from an attorney. Second, the emails do not divulge the substance of any legal advice, or a substantive request for legal advice." (emphasis added)).

- Earthworks v. U.S. Dept. of the Interior, Civ. A. No. 09-1972 (HHK/JMF), 2013 U.S. Dist. LEXIS 49873, at *4-5, *5-6 (D.D.C. Apr. 2, 2013) (holding that a lawyer's draft of contemporaneous documents did not deserve privilege protection; "Whether or not a document styled a draft in a privilege log is privileged can be a multifaceted and fact-bound determination. The transmittal of a communication from a client to a lawyer with an express request for guidance presents the easy case: 'Here is the draft employment agreement I am going to ask my boss to sign. Let me know if it protects my legal rights.' In other circumstances, the absence of an explicit request for advice may not doom the claim of privilege, if the confidential nature of the communication can be discerned from what the lawyer has said or done. For example, a red lined edited draft of the agreement from the lawyer to the client may, in a certain context, itself permit the inference that the client sent the draft to the lawyer expecting the lawyer to provide confidential guidance as to contents of the documents. The process of the exchange may itself bespeak an intention by the client that her transmittal of the draft be a confidential request for guidance."; "On the other hand, and this is particularly true in a governmental situation, the lawyer may be the chief draftsperson of a particular document which she then sends to her co-workers for their views

and thoughts. While their responses may qualify as communications to a lawyer intended to be confidential, the lawyer's draft, transmitted to them, does not yield any confidential communication from them. In other words, from the lawyer's draft, we learn only that she wrote a draft and transmitted it to her clients. Thus, while there are circumstances where even a draft might yield a secret, client communication (e.g. the draft of a will that provides for an illegitimate child), the transmittal of drafts in this case does not. That the DOI lawyers and other employees were in the process of drafting new rules and regulations in response to an order in this case is hardly a secret. The privilege log itself indicates that such drafting was taking place." (emphases added)).

- Spread Enters., Inc. v. First Data Merch. Servs. Corp., No. CV 11 4743 (ADS) (ETB), 2013 U.S. Dist. LEXIS 22307, at *6-7, *7-8 (E.D.N.Y. Feb. 19, 2013) ("Nor is there any response from Cohen [in-house lawyer] at issue that could be construed as providing legal advice. In fact, Cohen's only response throughout the entire series of emails came almost one month after MacNaughton [executive for defendant] sent his original email and merely suggests that the parties involved 'recap the initial issue' and where First Data was in its response to it. . . . Again, however, nothing about this email appears to be of a legal nature."; ignoring the in-house lawyer's declaration; "Cohen asserts in his declaration that he was 'acting in his capacity as an attorney in the virtual discussion, as well as any other discussions (whether virtual, by telephone or in person) in which [he] participated' with respect to the MacNaughton email." (emphases added) (internal citation omitted)).

- Hedden v. Kean Univ., 82 A.3d 238, 245 (N.J. Super. Ct. App. Div. 2013) (analyzing a situation in which a university coach disclosed a privileged draft letter to the NCAA during an investigation; "[W]e agree with the motion judge that as an employee of the University and acting within the scope of her employment, Sharp's [Coach] purpose in sending the e-mail to Tripodi [University lawyer] was to solicit his legal advice as University general counsel and, thus, an attorney-client relationship was formed. It is undisputed that in the e-mail Sharp asks Tripodi to review a draft of a fundraising letter and there would be no plausible reason for the request other than to solicit legal advice from counsel since Tripodi had no other involvement in University fundraising activities. . . . Tripodi well understood the nature of the inquiry because he reviewed the letter and later 'conveyed [his] legal opinion regarding the letter.'" (emphasis added)).

- In re Plasma Derivative Protein Therapies Antitrust Litig., Nos. 09 C 7666 & 11 C 1468, 2012 U.S. Dist. LEXIS 159368, at *10-11 (N.D. Ill. Nov. 7, 2012) ("Baxter [defendant] has argued that the document is privileged, and to support its claim it has offered a declaration from Ms. Ladone [Baxter V.P.]

explaining that the attachment, written by her, was 'a draft set of key messages for an upcoming investor conference.'. . . Ms. Ladone states that she wrote the document 'in response to an earlier communication by Ms. Lichtenstein [Baxter's General Counsel at the time] requesting a legal review of Baxter's communications for the upcoming investor conference.'. . . She further states that she wrote the email and the attachment 'for the purpose of seeking legal advice from and discussing legal issues with senior in-house counsel about the messages we could convey to investors at the upcoming conference.'. . . But this purpose is not apparent from the face of the document or the email. On its face the document appears to be drafted and circulated for primarily a business purpose - namely, to get all the potential players on the same page as to how to respond to inquiries at the upcoming investor conference. There is nothing in the body of the email or the document - other than the inclusion of lawyers on the distribution list - to suggest that Ms. Ladone was soliciting legal advice. Ms. Ladone's self-serving declaration, drafted more than five years after the fact, is not enough to trigger a privilege that clearly did not exist when the document was created." (emphases added)).

- Travelers of N.J. v. Weisman, Dkt. No. A-4085-10T4, 2012 N.J. Super. Unpub. LEXIS 567, at *29 (N.J. Super. Ct. App. Div. Mar. 15, 2012) ("From our sampling of the file, it appears that MBUSA's [defendant] in-house attorneys rarely responded to these e-mails, if at all.").

B. Lawyer-to-Client Communications

- Royal Park Investments SA/NV v. Deutsche Bank National Trust Company, 14-CV-04394 (AJN) (BCM), 2016 U.S. Dist. LEXIS 66741 (S.D.N.Y. May 20, 2016) (after an in camera review, concluding that board minutes were not all privileged; giving plaintiff one week to establish privilege protection; "It is not apparent from the face of the board minutes at issue that these elements can be met. RPI argues that the redacted portions of the minutes 'reflect information and advice that RPI's management learned from its U.S.-based legal counsel,' including Robbins Geller itself. . . . Nothing in the text of the minutes, however, confirms this assertion. The speakers at the board meetings do not attribute either the facts or the opinions they articulate to litigation counsel. Nor can the Court simply conclude, in the absence of admissible evidence, that all of those facts and all of those opinions must have come from counsel, in confidence, in response to RPI's request for legal advice. To the contrary: At least some of the statements that RPI seeks to redact reveal that they are based on sources other than counsel." (emphasis added)).

Many courts deny privilege protection for client-to-lawyer communications after noting lawyers' lack of response to, or involvement in, clients' communications claimed to be privileged.

- FTC v. AbbVie, Inc., Civ. A. No. 14-5151, 2015 U.S. Dist. LEXIS 166723, at *38-39 (E.D. Pa. Dec. 14, 2015) ("These emails do not fall within the ambit of the attorney-client privilege. The only attorney recipient of these emails, in-house counsel Walt Linscott, is merely copied on the email thread and does not contribute to the discussion." (emphasis added)).

- Epic Sys. Corp. v. Tata Consultancy Servs. Ltd., No. 14-cv-748-wmc, 2015 U.S. Dist. LEXIS 166438, at *13 (W.D. Wis. Dec. 10, 2015) (analyzing privilege and work product issues in connection with internal corporate investigations conducted by Loeb & Loeb; finding the privilege inapplicable and concluding that the plaintiff could overcome any possible work product protection; finding that the privilege did not apply because (among other things) "the report contains no legal advice." (emphasis added)).

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Lawyers' affidavits often fail to overcome a lack of contemporaneous indicia of legal advice.

- Spread Enters., Inc. v. First Data Merch. Servs. Corp., No. CV 11 4743 (ADS) (ETB), 2013 U.S. Dist. LEXIS 22307, at *6-7, *7-8 (E.D.N.Y. Feb. 19, 2013) ("Nor is there any response from Cohen [in-house lawyer] at issue that could be construed as providing legal advice. In fact, Cohen's only response throughout the entire series of emails came almost one month after MacNaughton [executive for defendant] sent his original email and merely suggests that the parties involved 'recap the initial issue' and where First Data was in its response to it. . . . Again, however, nothing about this email appears to be of a legal nature."; ignoring the in-house lawyer's declaration; "Cohen asserts in his declaration that he was 'acting in his capacity as an attorney in the virtual discussion, as well as any other discussions (whether virtual, by telephone or in person) in which [he] participated' with respect to the MacNaughton email." (emphases added) (internal citation omitted)).

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VI. OUTSIDERS

A. Client Agents/Consultants

- Engurasoff v. Coca-Cola Refreshments USA, Inc., Case No. 14-md-02555-JSW (MEJ), 2017 U.S. Dist. LEXIS 67802, at *9, *9-10, *11-12 (N.D. Cal. May 3, 2017) (holding that defendant Coca-Cola's label designer was inside privilege protection; "Coca-Cola utilizes CMA Design, Turner Duckworth, and Christopher Weston to develop label designs. . . . It also utilizes Schawk and Finished Art to adapt label designs into final product labels and generate final label proofs. . . . 'Label content is subject to the approval of Coca-Cola's counsel. Accordingly, the Coca-Cola Legal Department provides input at multiple stages' of the label design and production process. . . . Coca-Cola attorneys may communicate legal advice regarding the labels to these third parties. . . . Coca-Cola attorneys also may communicate legal advice to Cornerstone [another label third-party entity] regarding licensing of music for commercials." (internal citation omitted); "Coca-Cola Design Director, Frederic Kahn, submitted a declaration describing Coca-Cola's use of outside agencies and the communication of legal advice to those outside agencies. . . . He also reviewed the disputed email chains, and confirmed that the redacted information constituted communications between Coca-Cola's counsel and the third party that was reasonably necessary to ensure counsel's recommendations could be reflected in the label design or proof."; "Coca-Cola has met its burden of demonstrating the third party agencies 'needed to know' the legal advice in order to accomplish the purpose for which Coca-Cola hired them; as such, there was no waiver of the attorney client privilege based on the disclosure to these third parties." (emphases added)).

- Mirra v. Mirra, Dkt. No. 1484CV03857BLS2, 2017 Mass. Super. LEXIS 54, at *2, *2-3, *3, *6 (Mass. Super. Ct. Apr. 26, 2017) (holding that brother and sister minority shareholders in a closely-held company waived their privilege protection by disclosing privileged communications to another brother, also a minority shareholder; "It is undisputed that Anthony [brother minority shareholder] never had any express attorney-client relationship with Posternak [lawyer for Anthony's brother and sister, also minority shareholders]. In 2010 Lenny, Sandra [both of whom were minority shareholders], and Anthony all met with Attorney Nicholas Nesgos of Posternak to discuss ongoing disputes with the majority shareholders in Mirra Co. (Defendants do not seek disclosure of anything said at that meeting.) Thereafter Lenny and Sandra hired Posternak to represent them. Anthony did not. He never signed an engagement letter with Posternak, never paid Posternak any money, never asked Posternak to represent him, and was

never told that Posternak or Attorney Negros was representing him."; "Plaintiffs insist that Anthony nonetheless had an implied attorney-client relationship with Posternak. In an interesting twist, Anthony does not join in that argument and does not oppose the motion to compel production emails he received or sent."; "Plaintiffs' claim that Anthony had an implied attorney-client relationship with Posternak fails to meet the first requirement, because Plaintiffs have not convincingly demonstrated that Anthony ever sought advice or assistance from Attorney Nesgos."; "Lenny and Sandra were free to take private email communications they were having with their lawyer and share them with Anthony. In so doing, however, they waived the attorney-client privilege." (emphases added)).

- **[Privilege Point, 2/15/17]**

  What Client Agents Deserve Privilege Protection?

  February 15, 2017

  Nearly every court considers client agents outside privilege protection unless those agents are necessary for facilitating privileged communications between clients and their lawyers. Some courts occasionally take a broader view – but without starting a trend.

  In In re Riddell Concussion Reduction Litigation, the court assessed privilege protection for defendant's communications with "a public relations firm that consults with clients on communication strategies." Civ. No. 13-7585 (JBS/JS), 2016 U.S. Dist. LEXIS 168457, at *21 (D.N.J. Dec. 5, 2016). Most courts find such agents outside privilege protection, but the Riddell court held that "it is unquestionably the case that communications between and amongst Riddell and [the PR agency] for the purpose of securing legal advice are privileged." Id. at *14-15. A few weeks later, Valenzuela v. Union Pacific Railroad Co. held that a company's "right-of-way agent" deserved privilege protection under both Arizona and California law. No. CV-15-01092-PHX-DGC, 2016 U.S. Dist. LEXIS 176640, at *20 (D. Ariz. Dec. 21, 2016). But between those two decisions, a New York court applied the majority rule – holding that the plaintiff's brother (who was also funding the plaintiff's litigation) was outside privilege protection, because the plaintiff "cannot show that [his brother/litigation funder] served to facilitate attorney-client communications or representation," or acted as an agent "whose services are necessary for the provision or receipt of legal services." Kagan v. Minkowitz, No. 500940/2016, 2016 N.Y. Misc. LEXIS 4577, at *6-7 (N.Y. Sup. Ct. Dec. 9, 2016).

  Many corporate executives mistakenly believe that they can share privileged communications with corporate agent/consultants without waiving the privilege. A handful of cases now and then provides a tempting sign that courts are becoming more forgiving, but the majority continues to find nearly all such agent/consultants outside privilege protection.

- CAC Atlantic LLC v. Hartford Fire Ins. Co., 16 Civ. 5454 (GHW) (JCF), 2017 U.S. Dist. LEXIS 11010 (S.D.N.Y. Jan. 19, 2017) (in an opinion by Magistrate Judge Francis, inexplicably citing Kovel in the context of a client rather than a lawyer agent; "The documents now at issue are all communications to or from Minogue ["a building consultant retained by Hartford prior to its disclaimer of coverage"], and since Minogue is not 'the client,' they are not privileged on their face. Nevertheless, there are two theories that might bring these communications within the privilege. First, an attorney may rely on a non-lawyer to facilitate communications with the client, including persons with expertise such as accountants used to convey technical information. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); Osorio, 75 N.Y.2d at 84, 550 N.Y.5.2d at 615. Here, however, Hartford has not demonstrated that Minogue was engaged simply to 'translate' information for purposes of providing legal advice."; "Second, even though Minogue is not itself a party, its communications with counsel and the defendant might be privileged if it were the functional equivalent of an employee of Hartford."; "Hartford has not established that Minogue served such an integral role in light of these factors that it must be treated as if it were an employee for purposes of the privilege." (emphases added)).

- **[Privilege Point, 11/23/16]**

  Plaintiff's Live-In Boyfriend was Outside Privilege Protection, but Inside Work Product Protection: Part I

  November 23, 2016

  Nearly every court finds that the only client agents/consultants inside privilege protection are those necessary for the communications between the client and her lawyer. But the work product doctrine casts a wider protective net.

  In Harrington v. Bergen County, A. No. 2:14-cv-05764-SRC-CLW, 2016 U.S. Dist. LEXIS 124727 (D.N.J. Sept. 13, 2016), a civil rights plaintiff suing her former employer claimed that her live-in boyfriend was inside privilege protection – so that his presence during her communications with her lawyer did not destroy the privilege. The court acknowledged that plaintiff had been involuntarily committed to a mental hospital at the pertinent time, and that her boyfriend "has provided meaningful assistance" to her. Id. at *11. But the court was "not convinced that disclosure to [her boyfriend] was necessary or essential for Plaintiff to obtain informed legal advice." Id. The court noted that the "Plaintiff offers no medical or other expert opinion" about her inability to communicate with her lawyer without her boyfriend present. Id. at *11-12. The court stripped away privilege protection from communications in her boyfriend's presence, or later shared with her boyfriend.

  Most clients (both individual and corporate) do not appreciate the miniscule range for their agents/consultants to be within privilege protection. Next week's Privilege Point will address the court's work product analysis.

- Johnson v. Zurich Am. Ins. Co., Case No. 14-cv-1095-MJR-SCW, 2016 U.S. Dist. LEXIS 10754m at *3-4 (S.D. Ill. Jan. 28, 2016) (holding that an insurance broker was inside the privilege protection; "The dispositive question was whether the broker, Hylant[, was] an agent of Triple Crown [defendant] -- and specifically Triple Crown's counsel -- for the purpose of providing legal advice. The Court agreed with Plaintiff's counsel that policies in question were ultimately purchased by Triple Crown drivers, who were the insured. Thus there could be no argument that the privilege attached due to an insured/insurer arrangement. Nevertheless the Court concluded that Hylant was Triple Crown's agent, and agent for Triple Crown's counsel Burns. . . . The Court determined that Hylant was acting at the behest of Triple Crown for the purpose of providing advice on the conversion from a worker's compensation to an occ/acc model. As Triple Crown's broker[,] Hylant provided advice to Triple Crown but ultimate decision making was in the hands of Triple Crown. Additionally, while not dispositive of the issue, evidence that Hylant was paid a retainer as an agent for Triple Crown, supports the conclusion that there was an agency relationship." (emphases added)).

- In re Queen's Univ., 820 F.3d 1287, 1295 (Fed. Cir. 2016) (holding that the attorney-client privilege covered nonlawyer patent agents' communications relating to patent prosecution, but not relating to infringement opinions or communications about the sale or purchase of a patent; "It is true . . . that courts have consistently refused to recognize as privileged communications with other non-attorney client advocates, such as accountants." (emphasis added)).

In most courts, the only lawyer agents/consultants inside the privilege are those acting as "translators" or "interpreters" so lawyers can understand their clients' communications or information.

- Walter v. Drake, Case No. 2:14-cv-1704, 2015 U.S. Dist. LEXIS 164179, at *6-7, *7 (S.D. Ohio Dec. 8, 2015) ("If Mr. Culley, even though he was legal counsel, involved the public relations firms not as part of his effort to provide legal advice to the [Ohio State] University, but as part of an effort to craft announcements which would be more palatable to the media or the public, he was not using the consultants in order to help him as a lawyer, but to help the University as a public institution anticipating a public relations campaign. Under that scenario, sharing otherwise privileged documents with the consultant is a waiver of the attorney-client privilege, a communications directly with the consultant are not privileged at all."; "On the current state of the record, it would be difficult for the Court to conclude that all of these communications were protected by the attorney-client privilege or that providing the public relations firms with otherwise privileged documents was not a waiver." (emphases added)).

In most courts, the only client agents/consultants inside the privilege are those necessary for the transmission of communications between the client and lawyer.

- **[Privilege Point, 12/2/15]**

  Decision Highlights a Key Difference Between Attorney-Client Privilege and Work Product Doctrine Protection

  December 2, 2015

  The attorney-client privilege provides absolute but fragile protection. In contrast, work product doctrine protection can be overcome — but offers more robust safety than the privilege. This distinction affects the impact of third parties' participation, and disclosure of protected communications or documents to third parties.

  In Wichansky v. Zowine, No. CV-13-01208-PHX-DGC, 2015 U.S. Dist. LEXIS 132711 (D. Ariz. Sept. 29, 2015), the court dealt with plaintiff's communications with his lawyer — in the plaintiff's father-in-law's presence. The court found that the father-in-law's participation rendered the privilege unavailable — holding that the father-in-law "was not necessary to Plaintiff's communications with his counsel and [therefore] does not fall within the privilege." Id. at *6. In addressing the work product doctrine, the court applied the universal rule that "unlike the more sensitive attorney-client privilege, waiver of work product protection does not occur simply because a document is shared with a third person." Id. at *10. Because the father-in-law's "interests are aligned with Plaintiff's," disclosing work product to the father-in-law did not waive that separate protection. Id. at *11. In fact, the court concluded that the plaintiff's father-in-law could himself prepare protected work product under Fed. R. Civ. P. Rule 26(b)(3)(A) — which can cover documents prepared in anticipation of litigation "for" a party (such as the plaintiff). Id. at *7.

  The attorney-client privilege and the work product doctrine apply in dramatically different ways in the context of friendly third parties — who are generally outside privilege protection but inside work product protection, and who, even themselves, can create protected work product. Corporate lawyers should remember these rules when considering their corporate clients' friendly third parties such as accountants, consultants, or other agents.

- **[Privilege Point, 9/16/15]**

  Courts Continue to Catalogue Client and Lawyer Agents Outside Privilege Protection

  September 16, 2015

  Under the majority view, the only client agents/consultants inside privilege protection are those essential for the client-lawyer communications. Although courts take a more varied view of lawyer agents/consultants, many courts hold that the only lawyer agents within privilege protection are those essentially translating or interpreting data so the lawyer can understand it.

  In Cardinal Aluminum Co. v. Continental Casualty Co., Case No. 3:14-CV-857-TBR-LLK, 2015 U.S. Dist. LEXIS 95361 (W.D. Ky. July 22, 2015), the court held that plaintiff's insurance broker was outside privilege protection — despite the plaintiff's CFO's affidavit that the plaintiff relied on the broker to submit an insurance claim, negotiate with the insurance company, and advise the plaintiff about the claims process. Among other things, the court noted that "Plaintiff did not argue that its broker acted to effectuate legal representation for Plaintiff." Id. at *8. About three weeks earlier, another court addressed a company's claim that the privilege covered communications between its lawyers and environmental engineering firm AGC. NL Indus., Inc. v. ACF Indus. LLC, No. 10CV89W, 2015 U.S. Dist. LEXIS 86677 (W.D.N.Y. July 2, 2015). Although acknowledging plaintiff's argument that AGC's "actions were done at the direction of counsel," the court found that AGC was outside privilege protection — noting that "[p]laintiff has not shown that AGC acted like an interpreter or translator of client communications." Id. at *12.

  One of the most dangerous client misperceptions is that the privilege can protect their communications with their agents/consultants. And one of the most dangerous lawyer misperceptions is that lawyers can automatically assume that their agents/consultants are within privilege protection.

- **[Privilege Point, 7/22/15]**

  Courts Assess Whether Client and Lawyer Agents are Inside or Outside Privilege Protection: Part II

  July 22, 2015

  Last week's Privilege Point discussed a court's consideration of privilege protection for communications with client and lawyer agents. Two weeks later, another court analyzed Debevoise & Plimpton's argument that the privilege protected its communications with a public relations firm it retained. Debevoise claimed that the public relations firm assisted it in representing its client non-party Syracuse University in connection with a former coach's wife's defamation action against ESPN. Fine v. ESPN, Inc., No. 5:12-CV-0836 (LEK/DEP), 2015 U.S. Dist. LEXIS 68704 (N.D.N.Y. May 28, 2015).

  The University relied on affidavits (including one from a Debevoise lawyer) in explaining that the public relations firm (1) "aided [Debevoise] attorneys in providing legal advice to the University on issues of communication and publicity"; (2) "'conferred frequently' with Debevoise"; and (3) "'prepar[ed] drafts of press releases and other materials which incorporated the lawyers' advice.'" Id. at *28-29 (internal citations and quotation marks omitted). The court rejected the privilege claim — noting that "[i]f public relations support is merely helpful, but not necessary to the provision of legal advice," the privilege does not apply. Id. at *32. The court also noted that the magistrate judge had reviewed the withheld communications in camera, and found that most of them "did not contain communications related to obtaining legal advice." Id. at *31. The court therefore held that Debevoise had lost the client's privilege by communicating with the public relations firm — even though Debevoise had retained the firm and supplied an affidavit supporting the privilege claim. The court also observed that the magistrate judge had earlier rejected the University's work product claim — finding that the University had conducted "for business purposes" its investigation into child molestation claims against the coach. Id. at *5.

  Even sophisticated clients and law firms can underestimate the privilege's narrowness and fragility. If lawyers find it necessary to work with agents, their communications should reflect why and how.

- **[Privilege Point, 7/15/15]**

  Courts Assess Whether Client and Lawyer Agents are Inside or Outside Privilege Protection: Part I

  July 15, 2015

  Lawyers and most clients understand that disclosing privileged communications to adversaries waives that delicate protection. But clients lose privilege protection far more frequently when they or their lawyers disclose privileged communications to friendly third parties — such as agents or consultants working with the clients or with the lawyers.

  In Malbco Holdings, LLC v. Patel, No. 6:14-cv-00947-PK, 2015 U.S. Dist. LEXIS 62501 (D. Ore. May 13, 2015), plaintiff argued that defendants forfeited their privilege protection by including their adult children in otherwise privileged communications with their lawyer. The court found that the children were inside the privilege, noting that Oregon's statutory privilege allowed "the inclusion of a client's family members on privileged communication regarding matters of joint concern." Id. at *6. The court then considered whether (1) defendants' "[accountant] was assisting [defendants' lawyer] in the rendition of his legal services," and thus inside the privilege, or (2) defendants' lawyer "was enlisted to advise [the accountant] in her work preparing gift tax returns" for the defendant, which would have placed the accountant outside the defendants' privilege. Id. at *8. The court ordered an in camera review of the withheld communications so it could determine the privilege's applicability.

  Clients and their lawyers involving any third parties in their communications should consider the waiver risks, and assure that the communications would support a valid privilege claim if courts review them in camera. Next week's Privilege Point will address another example.

- Salser v. Dyncorp Int'l, Inc., No 12-10960, 2014 U.S. Dist. LEXIS 172056, at *11 (E.D. Mich. Dec. 12, 2014) (finding a non-party therapist cannot create protected work product; "Ashley's [Decedent's wife] disclosure of information to her therapist about her attorney and about her case constitutes a waiver of the attorney-client privilege." (emphasis added)).

- Hostetler v. Dillard, Civ. A. No. 3:13-cv-351-DCB-MTP, 2014 U.S. Dist. LEXIS 167374, at *5, *7 (S.D. Miss. Dec. 3, 2014) (holding that the presence of a potential business partner destroyed privilege protection, because his presence did not further any communications between a lawyer and a client; "At the heart of this discovery dispute is a May 11, 2011, meeting between Dillard, his wife, Byron Seward, Garrard, and Trotter. Garrard and Trotter were acting as attorneys for the Dillard Defendants. They did not represent Seward, whom Dillard wished to conduct business with regarding Dillard's property. During this meeting, the attendees discussed the Dillard Defendants' options for leasing, or otherwise utilizing, their property."; "The Dillard Defendants, however, have failed to present any proof or make any argument demonstrating that the disclosures made to Seward were made in furtherance of the rendition of professional legal services to the Dillard Defendants. Having failed to provide any proof or argument on this point, the Dillard Defendants have not met their burden of proving that the above-listed documents are privileged." (emphases added)).

- Love v. Permanente Med. Grp., No. C-12-05679 DMR, 2014 U.S. Dist. LEXIS 22243, at *9-10 (N.D. Cal. Feb. 19, 2014) (finding that one outsider's presence at a meeting destroyed the privilege protection (although using the waiver terminology); "Nonetheless, the court finds that Defendants waived their assertion of attorney-client privilege over the redacted information when the information provided by Resnick was disclosed at the CPC meeting to individuals other than the CPC members. Namely, the disclosure of the information to Dawn Belardinelli, whom Defendants admit was present at the meeting to discuss matters unrelated to the advice provided by Resnick, constituted a waiver of the attorney-client privilege. Defendants have not shown that Belardinelli is connected to Plaintiff, the relevant departments and committees, or the events underlying this litigation, or that the advice provided by Resnick concerned matters within the scope of Belardinelli's duties. Nor have Defendants demonstrated that Belardinelli had any common legal interest with the members of the CPC such as to support an assertion of the common interest privilege. There is no indication in the minutes of the meeting that Belardinelli was not present at the meeting when the redacted information was transmitted to the meeting attendees. As such, Defendants waived any assertion of attorney-client privilege by disclosing the information to a third party without a common legal interest." (emphases added)).

- Jackson v. Deen, Case No. CV412-139, 2013 U.S. Dist. LEXIS 65814, at *43, *43-44, *44, *45, *46, *47, *48 (S.D. Ga. May 8, 2013) (in an employment discrimination case against celebrity Paula Deen and her brother "Bubba" Hiers, ultimately concluding that Deen's three outside consultants were outside the attorney-client privilege protection; "[T]he defendants rely on Paula Deen's affidavit. . . . She attests that Barry Weiner is her 'agent and business adviser.'. . . Lucie Salhany is 'a business consultant for' Paula Deen Enterprises, LLC (PDE)), . . . and she works 'with designated PDE personnel on staffing and salary issues, and the improvement of hiring practices,' plus marketing and public relations functions. . . . She is 'an integral person in a group dealing with issues that are completely intertwined with PDE's litigation and legal strategies.' . . . And Jeff Rose is affiliated with 'The Rose Group,' which is a 'brands relation agency.' . . . That group provides 'marketing and public relations services for PDE.' . . . Rose thus is an integral part of the Weiner-Salhany-Rose cluster that gathers 'to discuss litigation and legal strategies.' . . . Rose, then, 'must hear the advice of legal counsel regarding these matters.'"; "Those three contractors, Deen concludes, 'are indistinguishable from my employees because each, in their individual capacity, acts for me and my business entities and possesses the information needed by attorneys in rendering legal advice.'"; "Plaintiff insists that the documents Gerard copied to them are discoverable because Deen's affidavit at most speaks of her general reliance on them, while they themselves have not provided affidavits showing they possess sufficient, specific knowledge of this case to place them within that protection zone."; "It is true that there is no per se rule restricting a corporation's assertion of its attorney-client based privilege to employees, as it is common to seek legal assistance from third parties who are neither employees nor lawyers."; "Those third parties, however, must be nearly indispensable to that effort."; "Significant here is what the defendants do not say. They do not supply: (a) any affidavit from any of the agents showing what specific role they have played with respect to this case; and (b) what communications in fact were sent to them and for what purpose. There is a difference, for example, between helping to formulate and factually support a legal strategy versus damage control-based, publicity management -- a patently commercial endeavor."; "Deen's affidavit, meanwhile, speaks only in general terms. Nothing approaching the 'nearly indispensable role' is described."; "Waiver thus has occurred, so defendants must disclose all of Gerard's communications regarding Jackson's complaints, where these individuals were in the loop." (emphases added)).

- Caruso v. Grace, No. 11 Civ. 2353 (SAS) (KNF), 2012 U.S. Dist. LEXIS 89176, at *17 (S.D.N.Y. June 27, 2012) (holding that the presence of Nancy Grace's talent agency representative during otherwise privileged discussions between Nancy Grace and her lawyer meant that the privilege did not protect those communications; applying New York law in a diversity case without a

choice of laws analysis; finding that the talent agency employee was not a necessary client agent, was not the functional equivalent of an employee, and was not assisting the lawyer in providing legal advice; "Moreover, even if Grace's contention, that she and her attorney 'relied on [Perry's] counsel to guide them through the various particularities inherent to [syndication] deals,' was corroborated, which is not the case, it would not establish that Perry's 'counsel' enabled Shire to understand aspects of Grace's communications that he could not otherwise understand in rendering his legal advice." (emphasIs added)).

- Pastura v. CVS Caremark, Case No. 1:11-cv-400, 2012 U.S. Dist. LEXIS 72179, at *2, *3 (S.D. Ohio May 23, 2012) (analyzing the following scenario; "It is undisputed that plaintiff met with Randolph H. Freking, Esq., for an initial consultation regarding the instant lawsuit. Plaintiff's sister was present during the entirety of this consultation. During plaintiff's deposition, counsel for defendant asked plaintiff questions regarding the substance of his conversation with Mr. Freking. Plaintiff's counsel objected, asserting that the conversation was protected by the attorney-client privilege and instructed plaintiff not to respond. Defendant asserts that plaintiff waived the privilege by having his sister present during the conversation and, consequently, defendant is entitled to discover the substance of the conversation."; "Here, plaintiff's communication with Mr. Freking at the initial consultation is not protected by the attorney-client privilege because the communication was not 'made in confidence' by virtue of the presence of plaintiff's sister during the conference."; inexplicably not dealing with the possible work product protection. (emphases added)).

- **[Privilege Point, 10/27/10]**

  Judges Disagree About the Waiver Impact of Plaintiffs' Disclosure of Privileged Communications to Their Son

  October 27, 2010

  Most courts find that the only client agents or consultants within the attorney-client privilege are those necessary for the transmission of information between the client and the lawyer. However, courts sometimes disagree about whether a client agent's involvement meets the "necessary" standard.

  In July, well-respected Southern District of New York Magistrate Judge James Francis held that two individual plaintiffs waived their privilege by disclosing protected communications to their financial adviser, their accountant, and their own son. See Green v. Beer, No. 06 Civ. 4156 (KMW) (JCF), 2010 U.S. Dist. LEXIS 65974 (S.D.N.Y. July 2, 2010). Nearly two months later, in Green v. Beer, No. 06 Civ. 4156 (KMW) (JCF), 2010 U.S. Dist. LEXIS 87484 (S.D.N.Y. Aug. 24, 2010), Judge Kimba Wood agreed with Judge Francis's conclusion about the first two client agents – but disagreed about the son. Judge Wood pointed to the son's explanation that he was assisting his parents in sending and receiving e-mails – ultimately concluding that "the technical assistance provided by their son, in his capacity as their agent, should not constitute a waiver of the attorney-client privilege." Id. at *13-14. Judge Wood also noted the public policy involved, explaining that clients without technical expertise "should not be prevented from enjoying the advantages of email correspondence for fear that the necessary assistance of a third party – here, the Green Plaintiff's son – in sending or receiving such correspondence will lead to the forfeiture of the attorney-client privilege." Id. at *14.

  Although it is comforting to know that parents might not waive their privilege by having a child help with their e-mail, clients and lawyers should remember that Judge Wood agreed with Judge Francis's conclusion about the financial adviser and the accountant.

- United States v. Stewart, 287 F. Supp. 2d 461, 463, 464, 468, 469 (S.D.N.Y. 2003) (analyzing the following situation: "On June 23, 2002, Stewart composed an e-mail that contained her account of the facts relating to her sale of ImClone stock. She sent this e-mail to Andrew J. Nussbaum, an attorney at Wachtell, Lipton, Rosen & Katz, who was at the time one of the lawyers representing Stewart in her dealings with the government. The following day, Stewart accessed the e-mail from her own e-mail account and, without making any alterations to it, forwarded a copy to her daughter, Alexis Stewart."; concluding that the e-mail deserved privilege protection, but that Stewart waived that protection; "Stewart's June 23 e-mail to Nussbaum was clearly protected by her attorney-client privilege . . . . Defendant's arguments regarding Stewart's intent and the sanctity of the family notwithstanding, the law in this Circuit is clear: apart from a few recognized exceptions, disclosure to third parties of attorney-client privileged materials results in a waiver of that privilege. No exception is applicable in this case."; also finding that the e-mail deserved work product protection; "[A]lthough the e-mail to Stewart's daughter does not realistically risk revealing the thought processes of Stewart's attorneys, I conclude that it is protectable as preparation for litigation. The Government does not claim that it has substantial need for the statements in the e-mail. I must therefore determine whether Stewart waived the protection by forwarding the e-mail to her daughter."; finding that Stewart did not waive the work product protection; "By forwarding the e-mail to a family member, Stewart did not substantially increase the risk that the Government would gain access to materials prepared in anticipation of litigation. Martha Stewart stated in her affidavit that 'Alexis is the closest person in the world to me. She is a valued confidante and counselor to me. In sharing the e-mail with her, I knew that she would keep its content strictly confidential.' . . . Alexis Stewart stated that while she did not recall receiving the June 24 e-mail, she 'never would have disclosed its contents.' . . . The disclosure affected neither side's interests in this litigation: it did not evince an intent on Stewart's part to relinquish work product immunity for the document, and it did not prejudice the Government by offering Stewart some litigation-based advantage. Accordingly, I hold that Stewart did not waive work product protection over the June 23 and 24 e-mails." (emphases added)).

B. Lawyer Agents/Consultants

- Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc., No. 1:14-cv-00006-RLM-SLC, 2017 U.S. Dist. LEXIS 57370 (N.D. Ind. April 14, 2017) (holding that environmental consultants hired by defendant's law firm were outside privilege protection; "Hartford Iron claims that all of the withheld emails are protected by the attorney-client privilege, asserting that the emails were confidential communications, between its counsel and an agent hired by counsel, to aid counsel in providing legal advice to Hartford Iron. Valley Forge disagrees, contending that the primary purpose in retaining Keramida [environmental consultant] and CH2M [environmental consultant] was not to provide legal advice, but rather, to provide environmental remediation services – that is, to design and construct a new stormwater control system."; "Here, although Dameron's firm initially retained Keramida and CH2M, 'retention or employment by the attorney alone is insufficient to bring the consultant within the scope of the attorney-client privilege.'"; "Keramida and CH2M – like HydroTech and August Mack before them – were hired to design, build, and install a stormwater remediation plan that would be acceptable to IDEM and the EPA. In doing so, they 'were not simply putting into usable form information obtained from the client.'. . . In fact, it is evident that the assistance rendered by Keramida and CH2M 'was based on factual and scientific evidence obtained through studies and observation of the physical condition of the [Hartford Iron] site, and not through client confidences.'"; "The provision of environmental consulting advice or services falls outside the attorney-client privilege, which is to be 'strictly confined within the narrowest possible limits.'"; "It is apparent that Dameron employed language at times in a deliberate effort to bring Keramida and CH2M within the privilege. . . . But labeling communications as 'privileged and confidential' or 'attorney-client work product' 'does not render the documents privileged when they contain no communication made or work done for the purpose of providing informed legal advice.'"; "In fact, at times, Dameron's role as defense counsel appeared to morph into that of an environmental consultant, most likely due to her extensive experience performing clean ups as an environmental consulting geologist prior to practicing law. . . . Ultimately, Dameron's initial retention of Keramida did not appear to be because she needed information translated into a useable form so that she could render legal advice; rather, Dameron quickly spotted problems with August Mack's stormwater collection system and urged Valley Forge and Hartford Iron to get a second opinion from another environmental contractor." (emphases added)).

- Doe v. Phillips Exeter Acad., Civ. No. 16-cv-396-JL, 2016 U.S. Dist. LEXIS 141877, at *5, *8-9 (D.N.H. Oct. 13, 2016) (finding that defendant Phillips Exeter Academy could not successfully claim privilege protection for a lawyer's investigation into possible sexual misconduct by a student; noting that defendant called the lawyer an "independent investigator," which meant that the lawyer was not assisting the defendant's lawyer in providing legal advice; also finding an implied waiver because the defendant relied on the investigation report in disciplining a student; also finding that defendant waived any possible privilege protection by disclosing portions of the investigation report to parents; inexplicably failing to deal with the work product doctrine; "[D]efendants explain that PEA's outside counsel commissioned Attorney McGintee's reports 'for the purpose of providing legal advice related to the school's handling of this student sexual misconduct matter.' . . . PEA's own statements concerning the purpose of Attorney McGintee's investigation, however, as well as its description of her as an 'independent investigator,' suggest otherwise."; "Finally, PEA's Dean Mischke has consistently described Attorney McGintee as an 'independent investigator' or an 'external investigator' in her communications with the Does and her statements in this court. . . . It seems difficult to reconcile such a description with the argument that Attorney McGintee -- the reports of that 'independent' or 'external' investigator -- acted as an agent of PEA's counsel made for the purposes of obtaining or providing legal advice to PEA. To the contrary, by describing Attorney McGintee as 'independent,' PEA appears to signal that Attorney McGintee was not acting as its outside counsel's agent." (emphases added)).

- **[Privilege Point, 6/29/16]**

  Are Public Relations Consultants Inside or Outside Privilege Protection?

  June 29, 2016

  Companies frequently turn to outside public relations consultants to assist both in normal media relations and when confronting crises. For obvious reasons, these companies must consider the privilege implications of involving such consultants.

  In Guiffre v. Maxwell, defamation defendant Maxwell withheld communications involving her lawyer and her "'media agent.'" No. 15 Civ. 7433 (RWS), 2016 U.S. Dist. LEXIS 58204 (S.D.N.Y. May 2, 2016) (internal citation omitted). U.S. District Judge Sweet found that the media agent's involvement in otherwise privileged communications between the defendant and her lawyer destroyed any privilege protection. As the court put it, the media agent's involvement "at best . . . establishes only that [the agent's] input and presence potentially added value to [the lawyer's] legal advice." Id. at *24. But defendant "has failed to positively establish that [the agent] was necessary to implementing [the lawyer's] legal advice." Id. at *23-24. The court likewise held that defendant had not proven that she "was incapable of understanding counsel's advice . . . without the intervention of a 'media agent,' or that [the agent] was translating information between [the lawyer] and Defendant in the literal or figurative sense." Id. at *24-25. Significantly, the communications found undeserving of privilege protection involved a British lawyer and (presumably) a British media agent — whom defendant hired to assist her "in connection with legal matters in England and Wales." Id. at *3.

  The Southern District of New York has always taken an extremely narrow view of privilege protection for communications with client agents. Companies should remember that this hostile attitude might strip away possible privilege protection for communications outside New York, and even outside the United States. Fortunately, the more robust work product protection often protects litigation-related communications with public relations consultants.

- In re International Oil Trading Company, LLC, Case No. 15-21596-EPK, Ch. 7, 2016 Bankr. LEXIS 1856 (S.D. Fla. April 28, 2016) ("The Court believes the case law applying the broader approach to the 'agency exception' is more consistent with the purpose for the exception and thus better reasoned. The broader approach to the 'agency exception' is also in agreement with Florida law."; "In this case, Mr. Al-Saleh possesses a judgment against IOTC USA and is attempting to collect on that judgment. IOTC USA is an entity that has demonstrated an ability and willingness to resist Mr. Al-Saleh's collection efforts. In order to obtain counsel and collect the money he is owed, Mr. Al-Saleh secured outside funding from a lender. In order to determine whether to lend money to Mr. Al-Saleh, the litigation funder must assess the potential litigation, both at the outset and on an ongoing basis, using information provided by Mr. Al-Saleh and his counsel. With that information, the funder may advise Mr. Al-Saleh as to the cost of pursuing collection, the risks involved, and the best strategies to pursue in litigation. The thousands of pages of communications at issue in the Third Motion to Compel imply that the funder's involvement has significant value to Mr. Al-Saleh and is integral to his pursuit of legal advice."; "Communications with a litigation funder fall within the agency exception for the very reason that litigation funders exist -- because without litigation funders, parties owed money, or otherwise stymied by deep-pocketed judgment debtors, might have reduced or no ability to pursue their claims. Litigation funders may be essential to the provision of legal advice in such cases. . . . Mr. Al-Saleh has engaged Burford 'in furtherance of the rendition of legal services,' and the communication of otherwise privileged information to Burford did not result in waiver of the attorney-client privilege." (emphases added)).

- Certain Underwriters at Lloyd's v. AMTRAK, No. 14-CV-4717 (FB), 2016 U.S. Dist. LEXIS 27041, at *67-68, *68, *69 (E.D.N.Y. Feb. 19, 2016) (holding that London insurance brokers were outside privilege protection because they did not meet the Kovel standard; noting the difference between New York state and New York federal court law on the issue of client agents within privilege protection; "[C]ommunications from a client to a third-party accountant or foreign-language translator hired to assist a lawyer in providing legal advice to that client are protected under the privilege. See United States v. Kovel, 296 F.2d 918, 921-22 (2d Cir. 1961). Here, however, nothing in the record suggests that the London brokers served any analogous role. Rather, it appears that the London brokers acted as nothing more than an intermediary or clearing house for the Policies."; "The thrust of LMI's [London Market Insurers] arguments with respect to attorney-client communications sent through the London brokers is that such a practice was 'standard' and 'necessary' given the London market's structure. . . . LMI's position is unavailing for several reasons. First, the fact that a particular method of distributing and/or retaining documents is standard in an industry does not

determine whether that method of distribution comports with the law governing attorney-client privilege."; "Second, although LMI characterizes the utilization of the London brokers as a necessity . . ., there is nothing in the record to support a finding that this was the only method by which the U.S. lawyers could communicate with the relevant insurers -- save for a conclusory and ambiguous statement made in the Watson [London insurance market expert] Declaration that this method was the 'only way possible.'" (emphases added)).

- Lehman Bros. Int'l (Europe) v. AG Fin. Prods., Inc., No. 653284/2011, 2016 N.Y. Slip Op. 30187(U), at 11, 11-12, 12, 14, 15 (N.Y. Sup. Ct. Jan. 11, 2016) (analyzing whether various consultants hired by defendant's lawyers were inside privilege protection; ultimately finding after an in camera review that all but KPMG were inside privilege protection; assuming that the consultants' assistance was necessary to help defendant's lawyer; not analyzing work product protection after finding that the privilege protected the consultants' communications; "Osorio [People v Osorio, 549 N.E.2d 1183 (N.Y. 1989)] and Kovel [United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)] do not state, nor do the above cases, that the attorney-client privilege will attach to third-party communications only where the participation of the third-party is 'necessary' in order to facilitate the provision of legal advice. There is, however, authority to that effect."; "[E]ven assuming that the communications involving the consultants must have been necessary to facilitate Assured Guaranty's attorneys' provision to it of informed legal advice, the court finds that the record supports the Special Referee's findings that the communications involving Zolfo, ZAIS, and NEAM [non-party consultants] are protected by the attorney-client privilege, while those involving KPMG are not." (emphasis added); "The Special Referee reviewed the sample set of documents agreed to by the parties and made the following findings. With respect to the Zolfo documents, the Special Referee found that 'the sample set demonstrate[d] that Zolfo was providing assistance to Denton [Defendant's UK lawyers] in conveying legal advice to its client AGFP [Assured Guaranty]' and that 'the communications show that there was ongoing interplay between Denton, Zolfo and AGFP over the decisions that Denton had to advise AGFP about in attempting to settle or litigating the underlying dispute with LBIE [plaintiff].' . . . With respect to the ZAIS and NEAM documents, the Special Referee found that the documents in the sample set demonstrated that 'each of these consultants was providing assistance and guidance that assisted counsel's ability to advise AGFP; specifically they provided information about the valuation issues that were relevant to the settlement talks with LBIE or might ultimately be relevant if litigation ensued.' . . . Further, based on the retention letters and the documents, the Special Referee rejected LBIE's claim that ZAIS and NEAM were not acting as the agents of Assured Guaranty." (emphasis added; internal citation omitted); "The court further holds that in

light of the complexity of the financial instruments and the importance to Assured Guaranty's exercise of its contractual rights of a sophisticated understanding of the market for such instruments, any requirement that the services of financial consultants be 'necessary' to the effective provision of legal advice is satisfied. The reasoning of the Kovel Court in holding that the attorney-client privilege may apply to an accountant's services to a lawyer representing a client in an accounting matter is equally applicable to the services of the financial consultants here. Complex financial instruments 'are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence, the presence of the [financial consultants] . . . ought not destroy the privilege.'" (emphases added; citation omitted)). "Finally, the court holds that the KPMG documents are not protected by the attorney-client, work product, or trial preparation privileges. After reviewing the sample set, the Special Referee found that 'none of these [documents] actually reflects or gives any indication of legal advice' and that KPMG's advice 'was being sought and provided regarding the conduct and results of the post-termination auction process.' . . . In claiming privilege, Assured Guaranty merely asserts that KPMG was in fact assisting Denton and that a different firm ultimately conducted the auction. . . . These assertions are not sufficient to disturb the Special Referee's findings, which are supported by the record." (emphasis added)).

- LifeVantage v. Domingo, Case No. 2:13-CV-01037-DB-PMW, 2015 U.S. Dist. LEXIS 131731, at *5 (D. Utah Sept. 29, 2015) (finding that a public relations firm retained by a lawyer was not within privilege protection; also finding that the work product doctrine did not protect materials created by the public relations firm; "Courts have widely rejected claims of attorney-client privilege or work-product protection over communications with public relations firms." (emphasis added)).

- **[Privilege Point, 9/16/15]**

  Courts Continue to Catalogue Client and Lawyer Agents Outside Privilege Protection

  September 16, 2015

  Under the majority view, the only client agents/consultants inside privilege protection are those essential for the client-lawyer communications. Although courts take a more varied view of lawyer agents/consultants, many courts hold that the only lawyer agents within privilege protection are those essentially translating or interpreting data so the lawyer can understand it.

  In Cardinal Aluminum Co. v. Continental Casualty Co., Case No. 3:14-CV-857-TBR-LLK, 2015 U.S. Dist. LEXIS 95361 (W.D. Ky. July 22, 2015), the court held that plaintiff's insurance broker was outside privilege protection — despite the plaintiff's CFO's affidavit that the plaintiff relied on the broker to submit an insurance claim, negotiate with the insurance company, and advise the plaintiff about the claims process. Among other things, the court noted that "Plaintiff did not argue that its broker acted to effectuate legal representation for Plaintiff." Id. at *8. About three weeks earlier, another court addressed a company's claim that the privilege covered communications between its lawyers and environmental engineering firm AGC NL Indus., Inc. v. ACF Indus. LLC, No. 10CV89W, 2015 U.S. Dist. LEXIS 86677 (W.D.N.Y. July 2, 2015). Although acknowledging plaintiff's argument that AGC's "actions were done at the direction of counsel," the court found that AGC was outside privilege protection — noting that "[p]laintiff has not shown that AGC acted like an interpreter or translator of client communications." Id. at *12.

  One of the most dangerous client misperceptions is that the privilege can protect their communications with their agents/consultants. And one of the most dangerous lawyer misperceptions is that lawyers can automatically assume that their agents/consultants are within privilege protection.

- **[Privilege Point, 5/13/15]**

  Southern District of New York Reiterates its Narrow View of Privilege Protection for Consultants Assisting Lawyers

  May 13, 2015

  Client agents/consultants normally fall outside privilege protection, unless they help facilitate communications between the client and lawyer. Recognizing this, some lawyers seek privilege protection by hiring the consultants themselves, arguing that the consultants are helping them provide legal advice.

  In Scott v. Chipotle Mexican Grill, Inc., No. 12-CV-08333 (ALC) (SN), 2015 U.S. Dist. LEXIS 40176 (S.D.N.Y. Mar. 27, 2015), Judge Netburn continued a long line of Southern District of New York decisions taking a very narrow view of the privilege in that context. Chipotle received advice from its outside law firm about wage and hour issues. The law firm then retained a human resources consultant, who prepared a report for the law firm about Chipotle employees' classifications. The court first rejected Chipotle's argument that the report deserved protection because it went to its law firm — concluding that "this formalism is insufficient to establish that it is a privileged communication." Id. at *23. The court then explained that Chipotle could establish privilege protection only if it proved that its outside law firm "engaged [the consultant] as its agent for a specific type of information that it could not otherwise obtain." Id. at *28. The court concluded that "[i]t strains credulity to imagine that an attorney evaluating wage and hours laws would not be able to speak with employees or interpret those laws on his own." Id. at *29. The court ultimately rejected Chipotle's privilege claim — noting that the consultant's report did not "provide any specialized knowledge that [Chipotle's outside lawyers] could not have acquired or understood on their own or directly through [their] clients." Id.

  Lawyers should not assume that they can assure privilege protection merely by retaining a consultant to gather facts. Most courts require that consultants directly assist lawyers in giving legal advice — by gathering facts or providing other services the lawyers or the clients need, but could not undertake themselves.

- **[Privilege Point, 4/15/15]**

  Court Condemns Law Firm's Privilege Claim as "Subterfuge": Part II

  April 15, 2015

  Last week's Privilege Point described an outside regulatory compliance consultant's work for a company which worried about its non-compliant billing practices and about possible litigation, that consultant's later agreement to work under outside lawyers' "direction," and the admitted lack of any such day-to-day direction. United States v. NeuroScience, Inc., No. 14-mc-003-slc, 2015 U.S. Dist. LEXIS 20572, at *7 (W.D. Wis. Feb. 10, 2015).

  The court first rejected NeuroScience's work product claim. The court held that the company hired the compliance auditor CodeMap for business purposes, and that lawyers' later involvement "was a tactic designed solely to cloak the audit documents" with some protection. Id. at *17. The court concluded that the outside lawyers "in fact provided no direction at all," and found no evidence that "CodeMap changed the focus of its audit or conducted it any differently after it was agreed that the Services Proposal should be routed through counsel." Id. at *18. Although outside lawyers used the audit's result, the court explained that "the focus is on the circumstances of the communication at the time it was made." Id. The court also rejected NeuroScience's privilege claim. The court noted that the company hired CodeMap "without any direction from counsel," and that CodeMap "conducted and completed [its] coding review and transmitted the results" to NeuroScience before any lawyer's involvement. Id. at *24. And after the lawyers' "post-hoc retention of CodeMap," there was no evidence that "the focus of CodeMap's audits changed." Id. at *25. The court therefore concluded that "there is no question that [the outside law firm's] retention of CodeMap was a subterfuge specifically designed to cloak the audits with privilege." Id. at *26.

  This and other similar cases highlight the wisdom of involving lawyers at the first hint of a problem, and assuring their intense hands-on involvement in any consultants' work the company intends to withhold as privileged or as work product.

- **[Privilege Point, 4/8/15]**

  Court Condemns Law Firm's Privilege Claim as "Subterfuge": Part I

  April 8, 2015

  Some companies begin internal investigations or audits for business reasons, but later try to cloak related communications and documents with work product privilege protection. Although some companies successfully argue that a business-related investigation "morphed" into a privilege-protected investigation, most attempts fail.

  In United States v. NeuroScience, Inc., No. 14-mc-003-slc, 2015 U.S. Dist. LEXIS 20572, at *5 (W.D. Wis. Feb. 10, 2015), NeuroScience retained a regulatory compliance company (CodeMap) to conduct a "full, flat-fee compliance audit" of its billing practices after its billing manager suddenly resigned. About a month later, CodeMap reported that NeuroScience had overbilled Medicare and some insurance companies. In the meantime, NeuroScience's outside Minneapolis law firm learned that the ex-billing manager had accused the company of fraudulent billing practices. About ten days later, NeuroScience and its law firm agreed that the law firm "should supervise the remainder of CodeMap's audit activities." Id. at *7. CodeMap sent a Services Proposal indicating that the law firm would now direct CodeMap's "baseline" compliance audit, and stating that related communications would deserve privilege and work product protection. Id. However, CodeMap later admitted that (1) "counsel really did not provide much internal 'direction' to CodeMap at all" (id. at *8); (2) lawyers were not present when CodeMap auditors met with NeuroScience employees; and (3) lawyers generally did not receive copies of email message traffic between CodeMap and company employees during the audit. CodeMap's chief auditor later acknowledged that "'[b]y the time Counsel was involved, CodeMap already knew the work to be done and how to do it, so the legal oversight, as [he] understood it, was to maintain privilege.'" Id. at *9-10 (internal citation omitted).

- **[Privilege Point, 2/18/15]**

  A Southern District of New York Decision Adopts Narrow Views of Privilege Protection for Independent Contractors and Lawyer-Retained Consultants: Part II

  February 18, 2015

  Last week's Privilege Point described the Southern District of New York's prediction that the Second Circuit might reject the widely-accepted "functional equivalent" doctrine. Church & Dwight Co. Inc. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-cv-585, 2014 U.S. Dist. LEXIS 175552 (S.D.N.Y. Dec. 19, 2014). The court also assessed whether the defendant waived its privilege protection by sharing protected communications with an outside marketing consultant — ultimately rejecting defendant's argument that "in light of the complex regulatory scheme to which [its product] was subject, it was essential" to share such privileged communications with the consultant. Id. at *2.

  The court noted that agents or consultants considered inside privilege protection were generally translators or similar consultants "necessary to improve comprehension of the communication between attorney and client." Id. at *4. That standard arose in the context of client agents, but many courts inexplicably apply the same approach to lawyer agents. Here, the court found a waiver, because the defendant "makes no showing as to how the outside marketing firm improved counsel's comprehension of [the client's] communications to counsel, or vice versa." Id. at *4-5. Later in the opinion, the court similarly held that lawyers sharing privileged communications with their agents or consultants must show that the agent or consultant "enabled counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice." Id. at *6.

  Other courts apply the same narrow standard. Three weeks before the Church & Dwight opinion, another court explained that an accountant would have been inside privilege protection as a lawyer's agent only if the accountant was "included in the conversation at the behest of Plaintiff's attorney in order to help decipher the relationship." Yoder v. Long (In re Long), Case No. 09-23473, Adv. No. 09-6172, 2014 Bankr. LEXIS 4879, at *50 (Bankr. D. Kan. Dec. 1, 2014). Applying the same translator/interpreter standard to client agents and lawyer agents can make it very difficult for lawyers to protect their communications with consultants upon whom they legitimately rely when giving their clients legal advice.

- Cohen v. Cohen, No. 09 Civ. 10230 (LAP), 2015 U.S. Dist. LEXIS 21319, at *8-9 (S.D.N.Y. Jan. 29, 2015) (in an action by a wife against her former husband for fraud in connection with assets; analyzing the wife's communications to and from a litigation funder; finding that the funder did not meet the Kovel [United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)] doctrine; "Because Ms. Napp [Funder] is neither necessary to facilitate Plaintiff's communications with counsel nor in possession of a legal claim against Defendants, her communications with Plaintiff are not privileged. With regard to her Kovel argument, Plaintiff has made no showing that Ms. Napp is 'indispensable or serve[s] some specialized purpose in facilitating the attorney client communications.'. . . Rather, her primary purpose appears initially to be making a decision as to whether her company will fund Plaintiff's legal team and thereafter reviewing and commenting on legal strategy presumably to maximize the chances of a return on her investment. These functions cannot be analogized to the interpreters or accounts of the Kovel line, who serve a specific function necessary to effectuate legal representation.").

- **[Privilege Point, 2/13/13]**

  Another Court Takes a Narrow View of Privilege Protection for a Lawyer's Agent/Consultant

  February 13, 2013

  Nearly every court finds that client agents/consultants usually stand outside the privilege protection, unless they are necessary for the transmission of privileged communications. In contrast, most courts have been more willing to extend privilege protection to a lawyer's agent/consultant assisting the lawyer in providing legal advice.

  However, some courts recognize only a limited number of such lawyer agents/consultants who are within the privilege. In Columbia Data Products v. Autonomy Corp., Civ. A. No. 11-12077-NMG, 2012 U.S. Dist. LEXIS 175920 (D. Mass. Dec. 12, 2012), plaintiff's law firm Greenberg Traurig retained PriceWaterhouse Coopers ("PWC") to conduct an audit of royalty payments defendant owed Greenberg's client. Greenberg Traurig's retainer letter indicated that "PWC agreed to perform services intended to assist counsel with its provision of legal advice" to the client. Id. at *45. The court nevertheless rejected plaintiff's privilege claim for communications relating to the audit – concluding that "neither the [retainer] letter nor any other evidence set forth in the record suggested that PWC 'was necessary, or at least highly useful, in facilitating the legal advice' or that Greenberg Traurig was relying on PWC to translate or interpret information between the lawyers" and the client. Id. (citation omitted). The court later reiterated that the client had not "presented any supporting evidence or pointed to any facts showing that PWC played an interpretive role between Greenberg Traurig" and the client. Id. at *46.

  Cases taking such a narrow approach to privilege protection for lawyer agents/consultants represent a very troubling view – both because they ignore explicit retainer letters in which lawyers hire agents/consultants, and because they require that the agents/consultants essentially "interpret" raw data that the lawyers would not otherwise understand.

- **[Privilege Point, 5/23/12]**

  Courts Analyze Effect of Third Parties' Participation in Privileged Communications: Part II

  May 23, 2012

  Last week's Privilege Point dealt with the attorney-client privilege implications of third parties' participation in privileged communications, when the third party is acting on the client's behalf. Third parties assisting lawyers also occasionally participate in otherwise privileged communications. Most courts apply what is called the Kovel standard, under which the privilege protects such communications only if the third party is necessary for the lawyer to fully understand the client's communications (not merely if the third party's involvement is useful to the lawyer).

  In Ravenell v. Avis Budget Group, Inc., No. 08-CV-2113 (SLT), 2012 U.S. Dist. LEXIS 48658 (E.D.N.Y. Apr. 5, 2012), the Eastern District of New York found that the privilege did not protect in-house lawyers' communications with a consultant assisting the company in a Fair Labor Standards Act audit. The court noted that the consultant had preliminarily assessed whether employees were exempt or nonexempt, an analysis "that in-house counsel had the ability to make themselves." Id. at *15. The court concluded that the consultant's work "neither 'improve[d] the comprehension of the communications between attorney and client'" nor "provided advice outside the general expertise of attorneys yet essential to the ability of defendants' lawyers to provide legal advice." Id. at *15-16 (citation omitted). Seven days later, another court reached the same conclusion about a leasing agent's participation in privileged communications – noting that "the mere fact that 'an attorney's ability to represent a client is improved, even substantially, by the assistance of [a third party]' is insufficient for the attorney-client privilege to apply." Banco do Brasil, S.A. v. 275 Wash. St. Corp., Civ. A. No. 09-11343-NMG, 2012 U.S. Dist. LEXIS 51358, at *21 (D. Mass. Apr. 12, 2012) (citation omitted). That court also found that the leasing agent was not the "functional equivalent" of a corporate employee. Id. at *20-21.

  Lawyers often have as difficult a time as clients in establishing that communications with or in the presence of third parties acting on their behalf deserve privilege protection.

- Krys v. Sugrue (In re Refco Sec. Litig.), 280 F.R.D. 102, 105 (S.D.N.Y. 2011) (in an opinion by Judge Rakoff, holding that a party's consultant did not meet the Kovel standard; "[T]here is no evidence suggesting Ginsberg [client's lawyer] relied on Knight [former hedge fund manager] to translate or interpret information given to him by his clients. At oral argument, Ginsberg represented to the Court that Knight 'understood an awful lot about Ms. Farquharson's [client] professional duties and operations,' and that he 'was extremely knowledgeable about Standard & Poor's' and 'a platform and an investment mechanism that I . . . was not particularly familiar with. He also had a wealth of information from his 40 years or so in the field that I could only scratch the surface.' . . . From this and Ginsberg's Revised Declaration dated August 31, 2011 . . ., it appears Ginsberg relied on Knight's experience and specialized knowledge. What does not appear, however, is any evidence that there was information Ginsberg could not understand without Knight translating or interpreting the raw data for him. Accordingly, by sharing his client's information with a third party, Ginsberg waived attorney-client privilege for that information." (emphases added)).

VII. WAIVER

A. Intentional Express Waiver

Disclosing facts does not waive privilege protection.

- **[Privilege Point, 2/26/14]**

  Avoiding Waiver When Disclosing Facts to the Government: Part III

  February 26, 2014

  The last two Privilege Points (Part I & Part II) discussed the scope of a privilege and fact work product waiver caused by a company's presentations to the SEC about two internal corporate investigations. The Southern District of New York held that the waiver covered materials or oral representations given to the SEC, as well as "any underlying factual material explicitly referenced in" the materials or representations – but then had to provide additional guidance. In re Weatherford Int'l Sec. Litig., No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559, at *27 (S.D.N.Y. Nov. 5, 2013).

  In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278, at *10 (S.D.N.Y. Dec. 16, 2013), the court addressed plaintiffs' complaint that the company had not fully produced those witness interview summaries that were "explicitly identified, cited, or quoted in information disclosed to the SEC." The company explained that it had produced "only the 'portions of summaries . . . that were . . . read or conveyed in substantial part to the SEC,'" and redacted the rest. Id. at *12 (internal citation omitted). Criticizing that as a "crabbed view of their discovery obligations," the court ordered the company to produce all factual portions of any such interview summaries -- redacting "only material that reflects an attorney's 'explicit mental impressions, conclusions, opinions or legal theories.'" Id. at *12-13 (citation omitted). In other words, the company had to produce all non-opinion portions of any witness interview summaries the company had quoted to the SEC.

  It can be very difficult to reconcile two basic principles: (1) disclosure of privileged communications or work product to the government generally waives those protections; and (2) disclosing historical facts does not waive either protection. As explained in these opinions by widely-respected S.D.N.Y. Judge Francis, companies hoping to avoid a broad waiver when making disclosures to the government should limit their presentations to historical facts – without explicitly referencing, identifying, citing, or quoting any underlying material or witness interviews.

- **[Privilege Point, 2/19/14]**

  Avoiding Waiver When Disclosing Facts to the Government: Part II

  February 19, 2014

  Last week's Privilege Point described a Southern District of New York decision holding that a company providing information to the SEC about two internal corporate investigations waived privilege and fact work product protection for material or oral representations given to the SEC, and any "underlying factual material explicitly referenced" in such material or representations. In re Weatherford Int'l Sec. Litig., No. 11 Civ. 1646 (LAK (JCF), 2013 U.S. Dist. LEXIS 170559, at *27 (S.D.N.Y. Nov. 5, 2103).

  About a month later, the court had to provide additional guidance. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278, at *7 (S.D.N.Y. Dec. 16, 2013), the court first focused on "interview materials" Davis Polk lawyers used to create four PowerPoint presentations to the SEC. The court held that the company did not have to produce any interview materials "unless those specific materials are explicitly identified, cited, or quoted in information disclosed to the SEC." Id. at *10. Interestingly, the court rejected plaintiffs' argument that the company crossed that line "where the presentations assert that a particular witness made a statement." Id. at *7. The court acknowledged that such a representation to the SEC obviously implied "that an interview took place" and also provided "a strong inference that it was memorialized in some way" – but ultimately concluded that "plaintiffs have not shown that those memorializations were, themselves, explicitly referenced in communications with the SEC." Id. at *7-8.

  The court then turned to the company's redactions in the interview summaries produced in response to the earlier ruling.

- **[Privilege Point, 2/12/14]**

  Avoiding Waiver When Disclosing Facts to the Government: Part I

  February 12, 2014

  All but a handful of courts find that companies disclosing privileged communications or protected work product to the government waive both of those protections. Courts properly analyzing waiver rules also recognize that disclosing historical facts does not cause a waiver – because historical facts are not privileged.

  In two related cases, Judge Francis of the Southern District of New York dealt with the intersection of these basic principles. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559 (S.D.N.Y. Nov. 5, 2013), Weatherford retained Latham & Watkins and Davis Polk to conduct two separate corporate investigations into material weaknesses in the company's internal controls over financial reporting. The court acknowledged that both investigations deserved work product protection. However, the court also found that the company waived its privilege and fact (but not opinion) work product protection by disclosing information about the investigations to the SEC. In defining the scope of the resulting waiver, the court (1) rejected plaintiffs' argument that the waiver extended to "all materials relevant" to the investigations; (2) found that the waiver covered any material actually given to the SEC, and any oral representations company lawyers made to the SEC; and (3) held that the waiver also extended to any "underlying factual material explicitly referenced" in such material or representations. Id. at *28, *27.

  Perhaps not surprisingly, the parties soon disagreed about the company's interpretation of the waiver's scope – which resulted in another opinion one month later.

B. "At Issue" Doctrine

- **[Privilege Point, 10/23/13]**

  Court Applies the "At Issue" Doctrine

  October 23, 2013

  The "at issue" doctrine represents the most frightening type of implied waiver. Litigants can trigger such a waiver without disclosing, referring to, or relying on privileged communications. Instead, an "at issue" waiver can occur if litigants assert some position that necessarily places "at issue" such privileged communications.

  In Gefre v. Davis Wright Tremaine, LLP, 306 P.3d 1264 (Alaska 2013), shareholders filed a derivative action against a company's director and former law firm. The shareholders alleged that defendants engaged in fraudulent conduct of which the shareholders were unaware – although they were represented at the time by their own lawyer. The court found an "at issue" waiver – explaining that the shareholders "cannot be permitted to thrust their lack of knowledge into the litigation while simultaneously retaining the attorney-client privilege to frustrate proof of knowledge that negates the very foundation necessary to their positions." Id. at 1280. The court ordered the shareholders to produce communications with their lawyer during the time they claimed ignorance of defendants' alleged wrongdoing.

  Corporations and their lawyers should be wary of assertions that might trigger a stealthy "at issue" doctrine waiver.

- Chin v. Rogoff & Co., P.C., No. 05 Civ. 8360 (NRB), 2008 U.S. Dist. LEXIS 38735, at *14, *14-15, *16, *17-18, *19, *20-21 (S.D.N.Y. May 6, 2008) (in an opinion by Judge Naomi Buchwald, assessing a claim by a defendant accounting firm sued for accounting malpractice that the plaintiff had triggered an "at issue" waiver that required the plaintiff to produce documents from its law firm Akin Gump; "But a client may impliedly waive the attorney-client privilege when he or she places the subject of a privileged communication 'at issue' in a lawsuit."; "New York law on 'at issue' waiver derives from Hearn and close parallels federal law. . . . New York courts have held that an 'at issue' waiver occurs 'where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information.'" (citation omitted); "Both New York and Federal cases have emphasized that a key component of an 'at issue' waiver is the extent to which the privileged documents are indispensable to a party's claims or defenses."; "Applying these principles here, we find that plaintiffs have placed Akin Gump's legal advice 'at issue' in this case. The evidence shows that both Shelly Goch and Akin Gump advised plaintiffs about whether or not to release First Data from the indemnity agreement. Plaintiffs' claims for damages depend entirely on the presence of a causal link between Goch's alleged erroneous advice and the plaintiffs' ultimate decision to execute that release. But if, as it appears, Akin Gump was advising plaintiffs not to sign the release even after an despite Goch's determination that there would be no adverse consequences to the plaintiffs, then the existence of any causal link between Goch's advice and the plaintiffs' damages can only be assessed by invading the privilege and examining the nature of the advice that Akin Gump gave to plaintiffs. In other words, reliance and causation are dispositive issues here, and cannot be adequately resolved without invasion of the privilege."; noting that affidavits filed by the Akin Gump partner and associate were "framed carefully, if not deceptively"; "Finally, we note that any invasion of the attorney-client privilege under these circumstances is consistent with the important policy considerations that justify the existence of the privilege. It is well-established that the privilege exists so as 'to encourage clients to make full disclosure to their attorneys.' Fisher v. United States, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976). That purpose would be ill-served by allowing plaintiffs to bring suit against one advisor, Goch, while shrouding what they were told by another advisor, Akin Gump, when it is unclear which advice ultimately compelled them to act as they did. The privilege does not exist to allow clients to mask important elements of their claims against third-parties." (emphasis added)).