THE LEGAL PRIVILEGES: HOW TO ESTABLISH, MAINTAIN AND PROTECT THEM

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Victoria E. Fimea
Vice President, General Counsel and Secretary
Dearborn National® brand companies
Downers Grove, Illinois
Victoria_Fimea@dearbornnational.com
630-824-5684

Gary L. Howard
Partner
Bradley Arant Boult Cummings, LLP
Birmingham, Alabama
ghoward@babc.com
205-521-8595

Jamie L. Moore
Partner
Bradley Arant Boult Cummings LLP
Birmingham, Alabama
jmoore@babc.com
205-521-8045

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Legal Privileges:

How to Establish, Maintain and Protect Them

Gary L. Howard, Partner, Bradley Arant Boult Cummings, LLP
Jamie L. Moore, Partner, Bradley Arant Boult Cummings, LLP
Victoria E. Fimea, Vice President, General Counsel and Secretary, Dearborn National

I. Introduction

This paper discusses legal privileges as they relate to corporations, specifically addressing issues relevant and typical in the insurance industry. The first portion of the paper discusses the Attorney-Client Privilege. First, the paper discusses the background of the Attorney-Client Privilege and outlines the two-pronged test used to determine when the Privilege applies. The exceptions to the Privilege are also provided. Second, this section discusses issues particular to the role of in-house counsel, as well as the practical aspects of e-mail communications and claims handling in the insurance business. Third, a list of proper steps to preserve the Attorney-Client Privilege is presented. Fourth, the paper contains a description of the Privilege as it exists between parent and subsidiary corporations and related entities that are engaged together in the same legal matters.

Next, the Work Product Doctrine is addressed. This section explains the differences between the Privilege and the Work Product Doctrine and it contemplates the practical matters of claim investigation and retention of Work Product and regulatory disclosures. This section concludes by presenting suggestions for retention of Work Product privileges.

This paper also considers the inclusion of amended Federal Rule of Evidence 502 and the effect that it has had on the Attorney-Client Privilege and the Work Product Doctrine.

Finally, the self-critical analysis and other legal privileges are addressed.

II. What is the Attorney-Client Privilege as it applies to Corporations?

The Attorney-Client Privilege is one of the oldest common law doctrines in the United States. If properly preserved, the Privilege can encourage open lines of communication between in-house counsel and corporate representatives, as well as prevent disclosure of private corporate communications.[1]

[1] John William Gergacz, *Attorney-Corporate Client Privilege* § 1.06-1.07 (2000).

A. What is Privileged: The Two-Pronged Test.

1. Step One: Traditional Privilege Requirements

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

b. The person to whom the communication was made:

i. is a member of the bar of a court, or his subordinate; and

ii. in connection with this communication is acting as a lawyer.

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

i. by his client;[2]

ii. without the presence of strangers;

iii. for the purpose of securing primarily an opinion of law, legal services, or[3] assistance in some legal proceeding;

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[2] Because a corporation is an entity made up of natural persons serving as members, directors, officers, employees, and shareholders, it becomes a question as to (1) which natural persons' communications are privileged, (2) who of "the client" can assert the privilege and (3) who of "the client" can waive the privilege. Vincent Walkowiak, *Attorney-Client Privilege in Civil Litigation: Protecting and Defending Confidentiality* 4-7 (2004). To answer these questions, states have developed tests that vary with each jurisdiction. However, most states have adopted a variation of the "control group test" and the "subject matter test." The "control group test" extends the privilege to employees who are in a position to control the decisions of the corporation or with the authority to act on or solicit legal advice. This translates into top management personnel of the corporation. *Id.* The "subject matter test" has been modified to generally encompass these five factors: "(1) the communication must be made for the purpose of securing legal advice; (2) The employee making the communication should be doing so at the direction of his corporate supervisor; (3) The employee's superior made the request for the communication in order for the corporation to secure legal advice; (4) The subject matter of the communication was within the scope of the employee's corporate duties; and (5) The communication was not disseminated beyond those persons who, because of the corporate structure, needed to know its contents." *Id.* In *Upjohn v. United States*, the Supreme Court developed what is now commonly referred to as the "subject matter test" and is applied in Federal non-diversity cases. *Id.* (citing *Upjohn Co. v. U.S.*, 449 U.S. 383, 402-403 (1981)). The *Upjohn* standard abandons the "control group," stating that lower-level employees often have information that is relevant and should be privileged. *Upjohn* added the additional factors of (1) the information needed was not available from upper level management and (2) the identity and recourses of the opposing party (considering that the requesting party was the Government and could obtain the facts requested from another source). *Gergacz*, §§3.81-3.83. States are free to accept or reject the *Upjohn* factors; some such states include Illinois, Georgia, New Jersey (which developed a more liberal Privilege than *Upjohn*; New Jersey has a privilege exception making it easier for discovering parties to gain access to privileged communications by showing a need, not unlike the showing of necessity needed to gain access to work product). *Gergacz* §3.97 (supplement); Arizona (which applied *Upjohn* factors but added additional guidance), and Florida (which created a hybrid test broader than the *Upjohn* factors). *Gergacz* §§3.94-3.101. Specifically, Illinois adopted a control group test, though broader than the pre-*Upjohn* test. The Illinois control group includes (1) top management (2) those advisors to top management who would normally be consulted before making a decision, but the group would not include persons who supply information. *Id.* at §3.94.

[3] *See also In re Alexander Grant & Co. Litigation*, 110 F.R.D. 545 (S.D. Fla. 1986) (holding that employee had to make the communication at the behest of the corporation and must have been aware that the communicated

iv. not for the purpose of committing a crime or tort; and

d. The privilege has been claimed and not waived by the client.[4]

2. Step 2: Whether Corporate Communications with Counsel Will Activate the Privilege.

a. The communications were made by corporate employees to corporate counsel upon order of superiors in order for the corporation to secure legal advice from counsel.

b. The information needed by corporate counsel to formulate legal advice was not available to upper level management.

c. The information communicated concerned matters within the scope of employee's corporate duties.

d. The employees were aware that the reason for communications with counsel so the corporation could obtain legal advice.

e. The communications were ordered to be kept confidential and they remained confidential. The identity and resources of the opposing party.[5]

B. Exceptions: When the Attorney-Client Privilege Does Not Apply

1. Crime-Fraud Exception

The Attorney-Client Privilege does not protect communications between counsel and a client regarding an intended or ongoing crime or fraud.[6]

2. Good Cause Exception

Shareholders instituting litigation against their corporation may discover attorney-client confidential communications that would otherwise be privileged, upon a

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information was needed to obtain legal advice from counsel, and the communication must have related solely to the employee's obligations and duties to the corporation.)

[4] GERGACZ, *supra* note 1, § 3.03 (quoting *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[5] GERGACZ, *supra* note 1, § 3.03. *(*quoting *Gergacz, Attorney-Corporate Client Privilege,* 37 Bus. Law. 461, 504-508 [sec. 3.05], (1982)). This second step for the evaluation of privileged corporate communications was identified in *Upjohn v. United States*, 449 U.S. 383 (1981), however not all states are bound to follow Upjohn even though all states follow the same basic privilege rules. Therefore these are merely factors to be considered. *Id.*

[6] *Id.* at § 4.03.

showing of good cause. The benchmark case for this exception is a Fifth Circuit case, *Garner v. Wolfinbarger*.[7]

3. Waiver

   The waiver exception varies among jurisdictions because of the application of different characterizations of the Attorney-Client Privilege doctrine. The Privilege can be considered waived when a client has the intent to disclose and discloses the substance of a privileged communication.[8] Courts also apply a more objective test to determine whether the Privilege has been waived that focuses on the state of communications and whether the client maintained confidentiality.[9] The burden of proof regarding waiver varies depending on the characterization of the Privilege that the court applies.[10]

4. Disclosure to Outside Parties

   Jurisdictions agree that disclosure to a third party outside the organization waives the Privilege, whether the third party is an auditor or the general public.[11] However, there has been some support for retention of the privilege if information is disclosed to experts for the purpose of obtaining advice from attorneys.[12]

5. Circulation within the Corporation

   The Privilege is not waived if the confidential communications are revealed to employees who need to know them.[13]

      (1) Suggestions for internal communications: restricted circulation lists, separate filings for privileged communications kept in separately marked locations with color-coding to prevent co-mingling with non-

[7] *Id.* at § 6.01; *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).
[8] *Id.* at § 5.07.
[9] *Id.* at § 5.08.
[10] GERGACZ, *supra* note 1, § 5.13 (stating that for the intent theory, the burden belongs to the discovering party; for the status theory, the burden belongs to the party asserting the privilege).
[11] GERGACZ, *supra* note 1, § 5.19 (supplement) (citing *In re Teleglobe Communications Corp.*, 392 B.R. 561 (Bankr. D.Del. 2008) (holding that "disclosure to a corporate board that contained members who sat on other corporate boards, too, was found not to be a waiver.”))
[12] *Id.* (citing *In re Consolidating Litig*., 666 F. Supp. 1148, 1156-57 (N.D. Ill. 1987)).
[13] *Id.* at § 5.47 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 557412 (N.D. Ill. Sept. 19, 1995)); *see also Federal Trade Comm'n v. Glaxosmithkline,* 294 F.3d 141, 148 (D.C. Cir. 2002) (while the party asserting the privilege must establish a "need-to-know," that showing does not entail a justification of the business purpose for the disclosure. Additionally, there is a presumption of need-to-know where materials are circulated to a limited group whose corporate duties relate to the contents of the materials.)

privileged documents, policy of authorized/un-authorized access for employees to various files.[14]

C. Inadvertent Disclosure: Four Approaches

Courts address claims of inadvertent disclosure in the following ways:

1. Automatic waiver because the disclosure breached confidentiality.[15]

2. No waiver, except where there is evidence that the client voluntarily or willingly made the disclosure.[16]

3. A good-faith effort to exclude privileged materials from disclosure precludes waiver; this majority approach focuses on confidentiality safeguards.[17]

   The test for excusable disclosures asks "(a) was the disclosure obviously accidental? (b) Did disclosure occur in spite of appropriate precautions being taken to preserve the confidentiality of the privileged communications? (c) Did the party asserting the privilege make prompt objection after the disclosure? (d) How many documents were produced and how many of those were claimed to be privileged?"[18]

4. Strict application of the majority approach, such that waiver results.[19]

III. The Law Applicable to the Attorney-Client Privilege

The Attorney-Client Privilege is a common law doctrine. Each state has developed its own standards through precedent, with most codifying the Privilege.[20] Federal courts

[14] *Id.* at § 5.48.

[15] GERGACZ, *supra* note 1, § 5.30. *See e.g. Harmony Gold U.S.A., Inc. v. FASA Corp*., 169 F.R.D. 113 (N.D. Ill. 1996); *ICI Americas, Inc. v. John Wanamaker of Philadelphia*, 1989 WL 38647 (E.D. Pa. April 18, 1989).

[16] GERGACZ, *supra* note 1, § 5.31 (supplement). *See e.g. Jones v. Eagle-North Hills Shopping Centre, L.P.*, 239 F.R.D. 684 (E.D. Okla. 2007)(finding a waiver where the client was unaware of the inadvertent disclosure would only serve to punish the innocent. The court rejected the majority approach because it fostered uncertainty.); *Mendenhall v. Barber-Greene, Co.*, 531 F. Supp. 951 (N.D. Ill. 1982).

[17] *Id.* at § 5.32. *See Lois Sportswear v. Levi Strauss*, 104 F.R.D. 103 (S.D.N.Y. 1985); *see also FMC Corp. v. R.W. Christy, Inc.*, 1988 WL 76097 (E.D. Pa. July 15, 1988). A significant drawback to the majority approach is that careful screening procedures are often costly and time intensive. There are no "safe harbor" procedures, so courts evaluate the adequacy of procedures on a case-by-case basis. As an added protection, counsel should enter into a stipulation that will mitigate inadvertent disclosure concerns prior to the commencement of discovery. *Id*. at § 5.32 (citing *United States ex rel Bagley v. TRW, Inc.*, 204 F.R.D. 170, at n. 10 (C.D. Cal. 2001); *see also* GERGACZ, *supra* note 1, § 5.41 for a discussion of stipulations and inadvertent disclosure.

[18] *Id.* at § 5.32 (citing *Magnavox v. Bally Midway Mfg.*, 1984 U.S. Dist. LEXIS 22206 (N.D. Ill. Nov. 5, 1984); *Permian Corp. v. U.S.* 665 F.2d 1214 (D.C. Cir. 1981); *Prebilt Corp. v. Preway, Inc.*, 1988 WL 99713 (E.D. Pa. Sept. 23, 1988)).

[19] GERGACZ, *supra* note 1, § 5.33.

rely on the codification in Rule 501 and 502 of the Federal Rules of Evidence,[21] as well as the controlling precedent, *Upjohn v. United States*,[22] which set forth several factors to consider in determining privilege. State courts are not bound to these factors and have liberty to develop their own standards, for example, Illinois courts have chosen not to apply the *Upjohn* factors.[23]

IV. In-House Counsel and the Attorney-Client Privilege

A. Heightened Scrutiny for In-House Counsel: Acting as Attorney

Courts make no distinction between in-house counsel and outside counsel for the purposes of Attorney-Client Privilege.[24] However, case law suggests that communications with in-house counsel are more likely to be discoverable than communications with outside counsel.[25] This result occurs because heightened scrutiny is applied to communications between in-house counsel and corporate representatives to determine whether counsel is acting as a lawyer, resulting in Privilege, or in some other business capacity, where no Privilege exists.[26]

In-house counselors who have roles in the company as attorney and manager, member, or business advisor either dispense legal advice, which would be Privileged, or business

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[20] GERGACZ, *supra* note 1, § 3.07. *See e.g*. Illinois: Ill. Compiled Stat., Supreme Court Rule 201(b)(2)(stating "*Privilege and Work Product.* All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. The court may apportion the cost involved in originally securing the discoverable material, including when appropriate a reasonable attorney's fee, in such manner as is just") available at http://www.state.il.us/court/supremecourt/rules/Art_II/ArtII.htm#201(last visited Aug. 25, 2010); Indiana: Ind. Code Ann. § 34-46-3-1(1); and Pennsylvania: 42 Pa. Cons. Stat. Ann. § 5928 (stating "In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.") available at http://law.onecle.com/pennsylvania/judiciary-and-judicial-procedure/00.059.028.000.html (last visited Aug. 25, 2010).

[21] Fed. R. Evid. 501.

[22] GERGACZ, *supra* note 1, § 3.05 (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 (1981)).

[23] *Id.* at § 3.05.

[24] *Id.* at § 3.18 (citing *Upjohn*, 449 U.S. 383)(citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 360 (D. Mass. 1950)).

[25] *Id.* at § 3.19.

[26] *Id.* (quoting *Rossi v. Blue Cross & Blue Shield*, 540 N.E.2d 703 (N.Y. 1998)) (citing also *Strategem Dev. Corp. v. Heron Int'l N.V.*, 1991 WL 274328, at *2 (S.D.N.Y. Dec. 6, 1991)); *see also State v. Lead Indus. Ass'n*, R.I. Super. Ct. C.A. No.: PB/995226, at 10 (March 25, 2009), http://www.courts.ri.gov/superior/pdf/99-5226-3-26-09.pdf (last visited Aug. 26, 2010) (holding that greater scrutiny would be applied to communications of in-house counsel to determine if they are "truly legal in nature")); *see also U.S. v. Ruehle*, No. 09-50161, 2009 WL 3152971, at *7 (9th Cir. Sept. 30, 2009)(holding that a CFO's statements made to the company's lawyer were not protected by the Attorney-Client privilege during an internal investigation because the CFO knew that his statements to lawyers could be turned over to outside auditors and, therefore, did not meet his burden under state law to prove that he made the communications "in confidence").

advice, which would not.[27] Common scenarios involve in-house counsel speaking as an attorney, the "communicator" between the Corporation and outside counsel, or as one corporate employee to another.[28] Advice given by in-house counsel will only be protected by the Privilege if it is "legal" advice.[29] Further, some courts will require proof that the "communication would not have been made but for the client's need for legal advice or services."[30] Because of the distinction between "legal" and "business" advice, a rebuttable presumption has emerged that a lawyer employed by a corporation in the legal department gives "legal" advice and a lawyer employed in a business or management role gives "business" advice.[31] Courts are particularly wary of the use of lawyers in communications solely for the sake of maintaining the privilege.[32] Therefore, proper care should be taken to ensure that the communications are properly identified when they are made from the role of attorney.[33]

On a side note, lack of license for the bar of a specific state in which in-house counsel does business, through the corporation, will not destroy the Attorney-Client Privilege in communications with corporate employees.[34]

B. Logistics of Communication: E-Mails

The nature of the communication between in-house counsel and corporate representatives can affect whether or not the Attorney-Client Privilege applies. For example, merely sending an email to an attorney does not ensure privilege if no legal advice was sought

[27] *See Welch v. Eli Lilly & Co*., No. 1:06-cv-0641-RLY-JMS, 2009 WL 700199 (S.D. Ind. March 16, 2009)(stating "[t]o be entitled to the privilege, a corporate lawyer must not only be functioning as a lawyer, but the advice given must be predominately legal, as opposed to business, in nature").

[28] GERGACZ, *supra* note 1, § 3.20.

[29] *Id.*; *see also Rexam Beverage Can Co. v. Bolger*, No. 06 C 2234, 2008 WL 4344921 (N.D. Ill. March 18, 2008)(finding that the Court would "not tolerate the use of in-house counsel to give a veneer of privilege to otherwise non-privileged business communications. This is especially true in this case, where Frank Brown [in-house counsel] doubles as Plaintiff's president.").

[30] *Spiniello Companies v. Hartford Fire Ins. Co.*, No. 07-cv-2689 (DMC), 2008 WL 2775643 (D.N.J. July 14, 2008).

[31] Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 206 (5th Ed. Vol. 1 2007).

[32] *Id.* (citing *B.F.G. of Illinois, Inc. v. Ameritech Corp.*, No. 99 C 4604, 2001 WL 1414468 (N.D. Ill. Nov. 13, 2001)); *Bell Microproducts, Inc. v. Relational Funding Corp*., No. 02 C 329, 2002 WL 31133195, at *3-4 (N.D. Ill. Sept. 25, 2002).

[33] GERGACZ, *supra* note 1, § 3.20 (supplement) (citing *TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143 (S.D. N.Y. 2003) (holding that blanket privilege assertions are overly broad for communications with in-house counsel who is dual-hatted as a high level executive); *Aviance, Inc. v. Corriea*, 705 F. Supp. 666, 676 (D.D.C. 1989)).

[34] *Id.* at § 3.21 (supplement) (citing *Georgia-Pacific Plywood Co. v. U.S. Plywood Corp*., 18 F.R.D. 463 (S.D.N.Y. 1956); *Financial Technologies International, Inc. v. Smith*, 2000 WL 1855131 (S.D.N.Y. Dec. 19, 2000) (holding that under New York law, a corporation cannot have privileged communications with its general counsel when counsel is not a member of any bar)).

and the email was not directed to the attorney or sent from the attorney.[35] On the other hand, copying or sending emails to non-lawyers does not generally destroy the privilege, especially if those who receive the advice require it to complete their corporate duties or to provide information regarding the reason for the need for legal advice.[36] However, a court may interpret that communications to lawyers and non-lawyers imply that the email was sent for both legal and business purposes, and should not be protected.[37]

If, during the course of litigation, privilege arguments arise regarding an email string, the corporation should request that the Court consider each email individually. This will allow protection and redaction of emails that contain legal advice and production of business-related emails.[38] The substance of the individual communications may illustrate their legal nature; for example, communications containing case law were held privileged in one case.[39]

C. Attorney-client privilege and Claims Handling

In many cases when making a claim determination, claims managers or attorneys are required to conduct interviews of the persons involved in the claim. These interviews can be protected by the Attorney-Client Privilege if properly conducted. For example, the Privilege was maintained for notes and summaries when an in-house attorney prefaced interviews with employees with notice that she was an attorney for the corporation and that the interviews were subject to the Attorney-Client Privilege, even when a member of the internal audit group of the corporation was also present.[40] Further, if a meeting is required regarding the claim in question, the presence of a non-lawyer will not necessarily destroy the Attorney-Client Privilege. In such cases, the Court will likely make a determination as to whether the non-lawyer present had a "significant relationship to the [client] and the [client's] involvement in the transaction that is the subject of the

[35] *See In Re ConAgra Peanut Butter Prods. Liab. Litig.*, 1:07-MD-1845-TWT, 2009 WL 799422 (N.D. Ga. March 24, 2009)(finding that the email and the attached power point presentation were privileged); *AIU Ins. Co. v. TIG Ins. Co.*, No. 07 Civ. 7052(SHS)(HBP), 2008 WL 4067437 (S.D.N.Y. Aug. 28, 2008); *Spiniello Companies v. Hartford Fire Ins. Co.*, No. 07-cv-2689 (DMC), 2008 WL 2775643 (D.N.J. July 14, 2008)(stating that, in order to be privileged, attachments to privileged emails must individually satisfy privilege requirements)); *see also In re New York Renu with Moistureloc Product Liability Litigation*, 2008 WL 2338552 (D.S.C. 2008)(holding that "copying" an attorney on an email did not automatically destroy privilege, and that the attorney did not need to be sent a direct message, that copying was 'merely an email convenience" instead of an indicator of the client's intent)).

[36] *See Roth v. Aon Corp.*, 254 F.R.D. 538, 542 (N.D. Ill. 2009); *SEPTA v. CaremarkPCS Health, L.P.*, 254 F.R.D. 253, 260 (E.D. Pa. 2008); *Rowe v. E.I. DuPont de Nemours & Co.*, Nos. 06-1810-RMB-AMD, 06-3080-RMB-AMD, 2008 WL 4514092 (D.N.J. Sept. 30, 2008).

[37] *In re Seroquel Prods. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB, 2008 WL 821889 (M.D. Fla. March, 21, 2008).

[38] *See In re ConAgra Peanut Butter Prods. Liab. Litig.*, No. 1:07-MD-1845-TWT, 2009 WL 799422 (N.D. Ga. March 24, 2009).

[39] *See Spiniello Companies v. Hartford Fire Ins. Co.*, No. 07-cv-2689 (DMC), 2008 WL 2775643 (D.N.J. July 14, 2008) (finding that communications between in-house and outside counsel containing case law were privileged)).

[40] *See Wagoner v. Pfizer, Inc.*, No. 07-1229-JTM, 2008 WL 821952 (D. Kan. March 26, 2008).

legal services."[41] Further, internal corporate communications may be privileged even if an attorney did not send or receive the message, for example, if the corporate employees are discussing advice from counsel in their communications.[42]

However, a claims investigator of a client's insurer was not a "representative of the client" for purposes of the Privilege when a statement was given in the preliminary stages of an investigation before litigation, was not taken under the direction of counsel, and there was no evidence of confidentiality or that the statement was for any other reason than professional services.[43]

D. How to Preserve the Attorney-Client Privilege

1. Prior to responding to a request for advice, in-house counsel should determine whether business or legal advice is sought.

2. Communications or investigations regarding that advice should then be designated (stamped, etc.) that they were created by an attorney and for the purpose of dispensing legal advice; this will be persuasive but not dispositive.[44]

3. Communications should not be signed by in-house counsel in a managerial role, but as an attorney.[45]

4. The corporation should segregate privileged documents and limit their availability to those employees who need to know their substance.[46]

5. The corporation should instruct employees undertaking document review of the procedure for segregation of privileged documents and the importance of the procedure. The company also should have employees sign a form stating that they searched the documents pursuant to company policy and instruction.

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[41] *Jones v. Nissan N. Am. Inc.*, No. 3:07-0645, 2008 WL 4366055 (M.D. Tenn. Sept. 17, 2008) (quoting *In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994)).

[42] GERGACZ, *supra* note 1, § 3.60 (Supplement)(citing *Medical Protective Co. v. Bubenik*, 2007 WL 3026939 (E.D. Mo. Oct. 15, 2007); *see also Williams v. Sprint/United Management Co*., 2006 WL 266599 (D. Kan. Feb. 1, 2006) aff'd 238 F.R.D. 633 (D. Kan. 2006).

[43] 66 A.L.R. 4th 1227, §4[d] (quoting *Di Cenzo v. Izawa* 723 P.2d 171 (HI 1986)(applying Federal Rule of Evidence 502)).

[44] GERGACZ, *supra* note 1, § 3.20 (supplement) (citing *California Union Ins. Co. v. National Union Fire Ins. Co.*, 1989 WL 48413 (N.D.N.Y. April 27, 1989) (holding that even though a memo was stamped as "privileged counsel communications," it was prepared by an attorney who was also a claims manager and the contents of the memo contained advice of a claims manager that was not Privileged)).

[45] *Id.* at § 3.20 (supplement) (citing *United States v. Lipshy*, 492 F. Supp. 35, 41 (N.D. Tex. 1979)).

[46] GERGACZ, *supra* note 1, § 5.32 (supplement).

This will encourage a finding that proper procedures for privileged documents are in place.[47]

6. Inform employees that communications that would otherwise be privileged can be easily waived.

7. If it appears that discovery will be compelled regarding privileged documents, request *in camera* inspection of documents rather than allowing blanket production.

8. If privileged documents are accidentally disclosed, immediately demand their return. Delay may encourage the finding that privilege will not stand.

9. Compile all factual allegations for the court that show that the disclosure was accidental and, therefore, excusable.[48]

V. Attorney-Client Privilege: Corporations and Associated Entities (Mergers, Subsidiaries, and Trusts)

A. Joint Defense Doctrine

The Joint Defense Doctrine may apply in the corporate context when independent parties are communicating for the purpose of aiding in their joint defense, even if they are represented by different counsel. Specifically, in order for this doctrine to apply, there must be (1) confidential communications (intended at the outset); (2) the communications must concern common issues; (3) the purpose must be to engage in legal representation in an ongoing or potential proceeding; and (4) the communications must be made in confidence in order to aid the parties in the proceeding.[49]

This doctrine is sometimes applied outside the context of pending or potential litigation, to situations of common economic interest.[50]

B. Joint Client Doctrine

Two corporations may be represented by single counsel if they have a common interest in litigation, and their communications remain privileged.[51] This doctrine does not require a parent-subsidiary or organizational corporate relationship, instead, the requirement is

[47] *Id.*
[48] *Id.*
[49] GERGACZ, *supra* note 1, § 3.64 (supplement) (citing *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981)).
[50] *Id.* at § 3.64 (supplement) (citing *Hewlett-Packard Co. v. Bausch & Lomb, Inc*., 115 F.R.D. 308 (N.D. Cal. 1987)).
[51] *Id.* at § 3.64 (supplement).

"common interests."[52] The limitations on this doctrine include the prohibition against one party asserting the Privilege against the other, and the prohibition of waiver of the Privilege without consent by the other party.[53] In addition, the Privilege will not attach if the relationship between the parties becomes adversarial.[54] This rule exists to "prevent attorneys from protecting the interest of one client by refusing to disclose information received from that client, to the detriment of another client."[55]

In the insurance context, specifically, situations often arise where the attorney for the insured may also be considered the attorney for the insurer, thus making the two parties joint clients because of their common interest. Jurisdictions disagree as to whether the attorney should be deemed to represent both parties, even when the insurer has no contact with the insured's attorney. [56] In addition, when the insurer and the insured are involved in a dispute, the insurer often seeks information that may be privileged, in order to properly audit the insured attorney's compensation.[57] Specifically, the insurer may seek bills, detailed work descriptions, or hours spent on a task. Generally, such information will not be subject to the Privilege. If counsel for the insured insists that the Privilege applies, the insurer may require that confidential information be redacted in order to properly audit the attorney's work on the matter.

C. The Parent-Subsidiary Relationship

Within the parent-subsidiary corporate structure, three possibilities for Attorney-Client Privilege arise. The parent-subsidiary may be considered (1) a single entity for the purposes of the Privilege[58] (2) separate entities, for which a joint defense or joint client

[52] *Id.* at § 3.64 (supplement); "In a trust situation, no artificial entity exists, for the purposes of privilege, when identifying the client, the true party in interest must be determined." 2.05 (citing *Gump v. Wells Fargo Bank*, 192 Cal. App. 3d 222, 237 (1987), overruled by, *Gump v. Wells Fargo Bank*, 237 Cal. Rptr. 311 (1987))(citing *also Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976)).

[53] GERGACZ, *supra* note 1, § 3.64 (supplement) (citing *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 689 F. Supp. 841, 844-45 (N.D. Ill. 1988)).

[54] *Id.* at § 3.64 (supplement).

[55] *Id.* at § 3.64 (supplement) (quoting *Heyman v. Beatrice Co., Inc.*, 1992 WL 245682 (N.D. Ill. 1992)(in which a parent corporation (holding 80% of stock) attempted to assert the privilege against the trustee of a creditors' trust that all of its subsidiary's assets had been put into)).

[56] *Id.* at §3.64 (supplement) (*see e.g.* footnote 20).

[57] *Id.* at §3.64. (supplement) (citing *In the Matter of the Rules of Professional Conduct*, 2 P.3d 806 (Mont. 2000)).

[58] *Id.* at §3.64 (supplement); §§2.29-2.34 (supplement). Case law surrounding the issue of the Attorney-Client Privilege in the parent-subsidiary context can be divided into two subsets, those cases focusing on the organizational structure of the corporations to discern who is "client," or the policy considerations of the Privilege. *Id.* (*See* fn 1 for case examples). For the organizational assessment, courts determine whether the subsidiary is a separate legal entity from the parent. If so, if later litigation arises, the subsidiary has the right to waive the privilege if representatives engage in confidential communications with the attorney of the parent. *Id.* The subsidiary may also be deemed "the client" alongside the parent corporation because, for example, "these corporations used the same outside and inside counsel. The legal affairs of these corporations were closely related. Except for convenience in billing and formal accounting there was no attempt to regard one particular corporation as 'the client.' The key was to determine whether the separate entity status of the parent and subsidiary corporations should be subordinated to the business

doctrine may apply,[59] or (3) persons present who would normally be considered third parties, such that they destroy the Privilege, may be considered "temporary employee[s]" or "legal advisor[s]."[60] If any of these three situations arise, sharing privileged information between the parent and the subsidiary (or related entity) will not result in a waiver.

Although it appears that parent-subsidiaries are treated similarly to the theory of joint defendants, there is no case law specifically dictating that subsidiaries may be treated as the same client. Therefore, in order to maintain the Privilege during communications, special care should be taken to document the "common interests" between the parent and subsidiary to encourage a court's finding that the communications fall within one of the joint doctrines, or find that the third party was a "temporary employee."[61]

On a side note, the Privilege may not be destroyed if a third party that is present is considered an agent of the corporation. If an opposing party challenges the Privilege on the grounds that a third party was present, the argument may be made and research should be done to determine if the person could be considered an agent.[62]

VI. The Work Product Doctrine: What is the Doctrine and How to Establish It

A. Attorney-Client Privilege versus the Work Product Doctrine

The Attorney-Client Privilege protects communications between clients and counsel and can be asserted by the client. In contrast, the Work Product Doctrine protects materials prepared by or for a party or his representative in anticipation of litigation, and can be

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reality of the company." *See id* § 2.31 (supplement) (quoting *United States v. United Shoe Mach. Corp*., 89 F. Supp. 357, 359 (D. Mass. 1950)). The Privilege policy method focuses on the furtherance of attorney-client communications. *See e.g. Insurance Co. of N. Am. v. Superior Court*, 108 Cal. App. 3d 758 (1980)(holding that three wholly owned subsidiaries and the parent were "the client" in totality because of the importance of disseminating the information regarding liability for asbestos use between the parties); *United States v. Under Seal*, 902 F.2d 244 (4th Cir. 1990)(finding that when a parent "caused the management of Subsidiary to change from that of a true subsidiary to that of independent corporation, there was a change of management in the normal course of business" such that the management of the prior subsidiary could waive the privilege regarding documents that did not have a bearing on the litigation, and applying the joint defense doctrine to the communications between the parent and subsidiary to documents produced to the subsidiary before and after incorporation.).

[59] *See In re Sulfuric Acid Antitrust Litig*., 235 F.R.D. 407 (N.D. Ill. 2006) (finding that no waiver existed in communications between two corporations when one corporation owned 46% of the stock in the other and sustained control over the other through appointing its Board and where the Chairman of the Board was the Deputy Chairman of the board of the other corporation such that the common interest exception to waiver applied). To determine whether the joint defense or joint client doctrine applies, courts will often look to who is the "client" by applying a variation of a "subject matter" test.

[60] GERGACZ, *supra* note 1, § 3.64 (supplement) (quoting *Insurance Co. of N. Am. v. Superior Court*, 180 Cal. App. 3d 758, 880, 887 (1980)(holding, in dicta, that the presence of a representative from the parent of a wholly owned subsidiary during communications between the subsidiary and its attorney did not destroy the privilege)).

[61] *Id*. at § 3.64 (supplement).

[62] *See id*. at § 3.65 (supplement).

asserted by the client or an attorney.[63] Therefore, the Work Product Doctrine is much broader than the Attorney-Client Privilege. On the other hand, the Attorney-Client Privilege is a stronger shield than the Work Product Doctrine; Work Product can be discoverable upon a showing of sufficient need and undue hardship, but privileged communications can only be discoverable if they fall within the exceptions to the doctrine.[64] There are many rules that are specifically applicable to corporations regarding the Attorney-Client Privilege. The Work Product Doctrine, however, has few requirements established solely for corporate entities; instead, the rules for corporations are similar to an individual asserting Work Product protections.[65]

The theories and purposes behind the Work Product Doctrine and the Attorney-Client Privilege are also fundamentally different. The Privilege promotes candor between clients and attorneys, prohibits attorney "gossip," facilitates the legal system, and encourages clients to abide the law.[66] Work Product protections allow attorneys to prepare for litigation without stringent restrictions, which indirectly benefits the client; the protection also promotes the adversary legal system.[67]

Practically, these differences in policy translate to mean that Privilege protects information that often has relevance and importance in resolving litigation; Work Product will not generally have a direct bearing on the case.[68] A recent court noted:

> The attorney-client privilege often conceals information that has a direct bearing on the proper resolution of matters in dispute; the work-product [protection] rarely, if ever, does. The substantive content of work product, particularly so-called opinion work product ... is almost certainly of no legitimate use to an opponent. While it would no doubt provide a tremendous tactical advantage to an adversary to be able to pry into the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation," Fed. R. Civ. P. 26(b)(3), a competent adversary will never need access to such information in order to prepare and present his or her case effectively.[69]

[63] GERGACZ, *supra* note 1, §7.03 (supplement).
[64] *Id.*
[65] *Id.*
[66] *Id.* at 1.07-15 (supplement).
[67] *Id.* at 7.9-12 (supplement).
[68] Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 1-2 (5th Ed. Vol. 1 2007).
[69] *Id. (*quoting *K.W. Muth Co. v. Bing-Lear MFG. Group,* 219 F.R.D. 554 (E.D. Mich. 2003)).

Considering their differences, both the Attorney-Client Privilege and the Work Product Doctrine can be helpful strategic tools in litigation, as such, both should be contemplated and asserted separately.[70]

B. Work Product Doctrine and the Insurance Industry: Claims Investigation

If a corporation undertakes an internal investigation, it is possible that the materials produced as a result of the investigation were created in anticipation of litigation and, thus, are undiscoverable because of the Work Product Doctrine.[71] Although investigations for insurance companies as a part of the claims process are a regular part of business, and, therefore, unprotected, many times investigations become preparations for impending litigation. If the company is able to show that the materials produced in an investigation were in "anticipation of litigation" they will be protected by Work Product.[72] Because preparation for litigation and regular business activities are intermingled for insurance companies, their work product will be treated with a higher scrutiny than other corporations. Therefore, attorneys working in the claims process should be careful, on the front end, to show that materials were created in anticipation of litigation and not for management of claims, investigation, or settlement assessments, which would not be protected by the Work Product Doctrine.[73] This can be done in the following ways:

1. Beyond Normal Procedure

   If a claim is handled according to the standard company procedure, the investigatory materials will likely not be protected work product, even if the type of claim is atypical or commonly litigated. Instead, if the company pursues a special course of action, such as submitting the claim to counsel, the argument for work product protection is stronger, though not dispositive.[74]

[70] *Id.*
[71] *Id.* at § 7.37 (supplement).
[72] *Id.* at § 7.38 (supplement).
[73] *Id.*
[74] *Id.* at § 7.39 (supplement) (quoting *Milder v. Farm Family Cas. Ins.* Col, 2008 WL 4671003 (D.R.I. Oct. 21, 2008) and *Allendale Mut. Ins. Co. v. Bull Data Sys*., 1993 WL 20164 (N.D. Ill. 1993); *Pioneer Lumber, Inc. v. Bartels*, 673 N.E.2d 12 (Ind. App. 1996)); *Front Royal Ins. Co. v. Gold Players, Inc*., 187 F.R.D. 252 (W.D. Va. 1999); *but see* 7.39 (supplement)(quoting *Stout v. Illinois Farmers Ins. Co*., 150 F.R.D. 594 (S.D. Ind. 1993)("court rejected an argument based on the atypical nature of the investigation, noting that such a showing alone would be insufficient. The special investigation must be shown to have taken place to prepare for litigation. Without more, one could suggest that the atypical investigation was intended instead for business purposes, such as deciding whether to pay a suspicious claim")).

2. Counsel Steps In

   Submitting a claim to counsel may trigger preparations for litigation and protection as work product.[75] Prior to claim denial, courts often require specific proof that litigation is looming.[76] After a claim is denied, company procedures regarding claims handling cease and any further work will generally be in anticipation of litigation.[77]

3. Decision to Pursue Litigation

   If the company decides to litigate a claim, materials produced after the decision will be protected work product as opposed to regular business activities.[78]

C. Waiver of Work Product

A voluntary waiver of the Attorney-Client Privilege does not automatically waive work product protections.[79] If a client waives work product protections, jurisdictions are split as to whether the attorney can assert the protection of his or her own accord. Further, not all voluntary disclosures of work product constitute a waiver; waiver results if there is a disclosure and also an increased chance that the adversary will gain access to the materials produced.[80] When materials were produced to parties or entities with a common interest,[81] or the other party was litigation support, an accountant, or the grand jury, courts have upheld a work product claim.[82]

1. A three-prong test has been developed to determine whether work product protections have been waived:

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[75] *Id.* at § 7.40 (quoting *Langdon v. Champion Corp*., 752 P.2d 999 (Alaska 1988)(holding that "unless the insurer's investigation has been performed at the request or under the direction of an attorney, the materials resulting from the investigation are conclusively presumed to have been made in the ordinary course of business and not in anticipation of litigation.")).

[76] GERGACZ, *supra* note 1, § 7.41 (supplement) (citing *Ring v. Commercial Union Ins. Co*. 159 FRD 653 (M.D.N.C. 1995); *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co*., 1994 WL 698230 (S.D.N.Y. Dec. 13, 1994)).

[77] *Id.* at § 7.41 (supplement) (citing *St. Paul Fire & Marine Ins. Co. v. Continental Cameras Co*., 1986 WL 6497 (S.D.N.Y. June 5, 1986)).

[78] *Id.* at § 7.42 (supplement) (citing *Issuance of Reservation of Rights Letter: St. Paul Fire and Marine Ins. Co. v. ConAgra Foods*, Inc., 2008 WL 222518 (S.D. Ohio Jan. 25, 2008); *Medford v. Duggan*, 732 A.2d 533 (1999); *Uresil Corp. v. Cook Group Inc*., 1989 WL 152525, at *2 (N.D. Ill. Dec. 1, 1989)).

[79] *Id.* at § 7.58 (supplement).

[80] GERGACZ, *supra* note 1, § 7.59-7.60 (supplement).

[81] *Id.* at § 7.60 (supplement) (citing *Sheets v. Insurance Co. of N.Am*. 2005 WL 3006670 (W.D. Va. Nov. 8, 2005)(disclosure of work product to those who shared a common interest in obtaining insurance coverage for an accident was not a waiver, even though at some future date they may become adversaries)).

[82] *Id.* at § 7.60 (citing *Chamberlain Mfg. Corp. v. Maremont Corp*., 1993 WL 625511 (N.D. Ill. July 21, 1993); *Compulit v. Banctec, Inc*., 117 F.R.D. 410 (W.D. Mich. 1997); *In re Latin Inv. Corp*., 160 B.R. 262 (Bankr. D.D.C. 1993)).

a. "Did the party claiming the privilege seek to use it in a way that is not consistent with the purpose of the privilege."[83]

b. "Did the party have any reasonable basis for believing that the disclosed materials would be kept confidential."[84]

c. "Would waiver of the privilege under the circumstances for the case trench on any policy elements now inherent in the privilege."[85]

2. When is the application of the doctrine waived?

a. Inadvertent Disclosure

The majority approach for an inadvertent disclosure that does not cause a waiver takes into consideration four factors:[86]

i. The reasonableness of precautions taken to prevent the inadvertent disclosure of the work product.

ii. The time taken to rectify the disclosure error.

iii. The amount and scope of discovery in the case.

iv. The extent of the disclosure.[87]

b. Waiver by Placing Subject Matter "At Issue."

If a party has introduced an issue into the lawsuit and desires to withhold disclosure of materials based on the Work Product Doctrine, in the interest of fairness, the party may forfeit the privilege's protection.[88]

VII. Suggestions for Protecting Work Product

A. Extract a claim from ordinary business procedure.

B. Consult counsel, if litigation is the most likely course of action.

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[83] GERGACZ, *supra* note 1, § 7.60 (quoting *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 564 (E.D. Pa. 1989)).
[84] *Id.*
[85] *Id.*
[86] The minority approaches are (1) if the disclosure is made to an adversary or increases the likelihood that an adversary can view the materials, the privilege is waived (s*ee e.g. Union Pacific Resources Co. v. Natural Gas Pipeline Co. of America*, 1993 WL 278526 (N.D. Ill. July 20, 1993)), and (2) waiver upon evidence of client intent (s*ee e.g. Sullivan v. Conway*, 1994 WL 419649 (N.D. Ill. Aug. 5, 1994)).
[87] GERGACZ, *supra* note 1, § 7.62 (supplement)*; see Lois Sportswear v. Levi Strauss*, 104 F.R.D. 103 (S.D.N.Y. 1985); *see also Dalen v. Ozite Corp.*, 594 N.E.2d 1365 (Ill. Ct. App. 1992)(applying a four factor test).
[88] *Id.* at § 7.65 (supplement); s*ee e.g. Fidelity & Deposit Co. v. McCulloch*, 168 F.R.D. 516 (E.D. Pa. 1996).

C. State in the claims file that the company intends to pursue litigation or anticipates that litigations will be filed against it.

VIII. Work Product Doctrine and Attorney-Client Privilege: Regulatory Disclosures

A. Background

Often, State Departments of Insurance conduct investigations or regulatory examinations in which Insurance corporations are required to disclose a myriad of documents and materials, some of which may or may not be subject to the Attorney-Client Privilege and the Work Product Doctrine.

B. Application of the Attorney-Client Privilege in Regulatory Disclosures

The majority of courts find waiver of the Attorney-Client Privilege when confidential corporate communications are provided to the government.[89] However, a few cases have ruled in support of a limited waiver.[90] In addition, at least one court has considered communications regarding what documents, materials, or information will be provided in mandatory disclosures or regulatory investigations (or preparations to disclose) to be legal determinations, and, therefore, protected by the Attorney-Client Privilege.[91]

C. To Protect the Attorney-Client Privilege in Regulatory Disclosures

1. Document that the disclosure of materials to a regulatory agency is made for the purpose of mandatory compliance and full cooperation, instead of for the benefit of the company. Further, the mandatory disclosure of materials should be kept separate from other business functions associated with the agency;

2. Clearly denote that the corporation does not intend to waive the Privilege but merely to cooperate with the government investigation;

3. Obtain a confidentiality agreement with the agency or otherwise request that the materials remain confidential; and

4. Argue the fairness element that the discovering party should show need for the information requested.

[89] *Id.* at § 5.50. The Third District and the North District of Illinois have issued rulings in support of the majority rule. *Id; see e.g. Mottoros v. Abrams*, 524 F.Supp. 254 (N.D. Ill. 1981); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3rd Cir. 1991).

[90] GERGACZ, *supra* note 1, § 5.51; s*ee e.g. Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978).

[91] *See Roth v. Aon Corp*., 254 F.R.D. 538 (N.D. Ill. 2009) (finding that legal counsel's involvement in "the determination of what information should be disclosed for compliance [with SEC mandated Form 10-K disclosures] is not merely a business operation, but a legal concern").

D. Application of the Work Product Doctrine in Regulatory Disclosures

The Work Product applied to Regulatory Disclosures is somewhat different. If a company discloses materials that would be covered under the Work Product Doctrine when the Government is an adversary – the Work Product Doctrine will likely be waived. However, if the Government does not occupy an adversarial role, no waiver will lie. [92] In addition, if the parties agree to a Confidentiality Agreement, it is more likely that a Court will not find that a waiver occurred.[93]

Some state statutes provide that all information and materials disclosed as part of a regulatory investigation will become subject to disclosure in future litigation. For example, Florida Statute § 624.319(3) has been interpreted to mean that "Department of Insurance investigative records collected during investigation of probable violations of the state insurance code are public records subject to disclosure once the investigation is closed."[94]

On the other hand, many states have a self-evaluative audit exception for documents and materials created during an internal investigation.[95] This protection prohibits the disclosure and use in litigation documents prepared for audit compliance.[96] However, if a company chooses to disclose a self-evaluative audit-related document in the absence of an investigation or a request for the document, the self-evaluative privilege will likely be waived.[97] In addition, self-evaluative audits will not be protected by the Work Product Doctrine unless litigation was anticipated at the material's inception.[98]

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[92] GERGACZ, *supra* note 1, § 7.61 (supplement) (citing *Wsol v. Fiduciary Mgt. Assocs., Inc*., 1999 WL 1129100 (N.D. Ill. Dec. 7, 1999)(no waiver)).

[93] *Id.* at § 7.61; s*ee e.g. Permian Corp. v. U.S.*, 665 F.2d 1214 (D.C. Cir 1981); *Vanguard Savings & Loan Ass'n v. Banks*, 1995 WL 555871 (E.D. Pa. Sept. 18, 1995).

[94] *See Hill v. Prudential Ins. Co.*, 701 So. 2d 1218, 1219 (Fla. Dist. Ct. App. 1997)(finding that "documents received from anonymous sources, documents received from a Prudential office that Prudential claims were not authorized to be sent, and statements or memoranda taken or prepared by the state agencies in the course of an investigation, but which allegedly claim information contained in the privileged documents" were public records after disclosure in an insurance investigation).

[95] *See* § 155.35 of the Illinois Insurance Code.

[96] *Lawndale Restoration Ltd. Partnership v. Acordia of Illinois, Inc.*, 853 N.E.2d 791 (Ill. App. Ct. 2006)(citing Mich. Comp. Laws § 500.221(5) (West 2002) ("Disclosure of an insurance compliance self-evaluative audit document to a governmental agency, whether voluntary or pursuant to compulsion of law, does not constitute a waiver of the privilege"); N.D. Cent. Code § 26.1-51-05(3) (1999) (same); Or. Rev. Stat. § 731.762(4) (2001) (same); N.J. Stat. Ann. § 17:23C-1(b) (West 1999) ("Voluntary compliance reviews shall be privileged and shall not be considered public records or public documents subject to inspection or examination under any statutory or common-law right to know request"); Tex. Insur. Code Ann. § 751.251(a) (2005) ("The disclosure to the commissioner under this subchapter of a document . . . does not constitute the waiver of any applicable privilege or claim of confidentiality regarding the document "); *but see* D.C. Code Ann. § 31-853(b) (2003) ("If, in connection with examinations conducted under the insurance laws, a company voluntarily submits an insurance compliance self-evaluative audit document to the Commissioner . . . as a confidential document, [the privilege applies]")).

[97] *Id.*

[98] *Id.* (taking into consideration the two-year gap between publishing the audit materials to the Department of Insurance and the filing of the lawsuit).

IX. The Attorney-Client Privilege, Work Product Doctrine, and Federal Rule of Evidence 502

A. In 2008, Federal Rule of Evidence 502 was adopted and has since impacted discovery as it relates to the Attorney-Client Privilege and the Work Product Doctrine. The rule states as follows:

> Rule 502. Attorney-Client Privilege and Work-Product; Limitations on Waiver
>
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> (a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.
>
> When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
>
> 1. the waiver is intentional;
> 2. the disclosed and undisclosed communications or information concern the same subject matter; and
> 3. they ought in fairness to be considered together.[99]
>
> (b) Inadvertent Disclosure.
>
> When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
>
> 1. the disclosure is inadvertent;
> 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> 3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

[99] GERGACZ, *supra* note 1, § 7.62 (supplement); *see Lois Sportswear v. Levi Strauss*, 104 F.R.D. 103 (S.D.N.Y. 1985); *see also Dalen v. Ozite Corp.*, 594 N.E.2d 1365 (Ill. Ct. App. 1992)(applying a four factor test).

(c) Disclosure Made in a State Proceeding.

When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

1. would not be a waiver under this rule if it had been made in a Federal proceeding; or
2. is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of court orders.

A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling Effect of a Party Agreement.

An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule.
Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions

In this rule:

1. "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
2. "work-product protection' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial in anticipation of litigation or for trial.[100]

[100] Fed. R. Evid. 502 (2008). Also available at http://www.law.cornell.edu/rules/fre/rules.htm (last visited, August 26, 2010).

B. According to Rule 502, a voluntary disclosure in federal court or other proceeding that constitutes a waiver affects only the communication or information disclosed. Therefore, subject matter waiver will only be found when "fairness" requires it, for example, to prevent a selective and misleading presentation of evidence to the unfair disadvantage of the adversary.[101] In addition, Rule 502 adopts the current majority rule for inadvertent disclosures.[102]

C. For applicability purposes, Rule 502 applies in Federal Court and also encompasses disclosures made to "a Federal office or agency," including the SEC or IRS. Unfortunately, Rule 502 has no protective effect in state courts or for disclosures to state agencies, such as the department of insurance. Therefore, disclosure of protected materials to the department of insurance will still, likely, result in a subject-matter waiver of the Privilege. Rule 502 will, albeit rarely, affect state court cases if a state court has not made an order regarding waiver and the case is later brought in federal court; in such a case, Rule 502 requires the federal court apply either the state or federal rule, whichever is more protective of the Privilege. In the converse, if a waiver is found at the federal level, during a subsequent state court proceeding, Rule 502 should be applied.[103]

D. Judicial Interpretations and Analysis of Rule 502

    a. The judicial interpretations of Rule 502 have been varied, resulting in disparate interpretations of the standards of reasonableness.[104] Since the adoption of Rule 502, many courts have applied various analyses to protect the privilege of inadvertently disclosed privileged communications.

    b. There have been many Rule 502 cases in which courts have protected the privilege of inadvertently disclosed privileged communication.

        i. In *Alcon Mfg. v. Apotex, Inc.*, the court found non-waiver where the plaintiff, after inadvertently disclosing privileged documents, made a good-faith representation that the disclosure was inadvertent and took prompt remedial action to claw back the documents.[105] The court

[101] *See* Fed. R. Evid. 502. Committee Notes. (2008)(citing *In re United Mine Workers of America Employee Benefit Plans Litig*., 159 F.R.D. 307, 312 (D.D.C. 1994) ("waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage")).
[102] *See* Fed. R. of Evid. 502 (Advisory Committee Notes (b)) (2008).
[103] *See* Fed. R. Evid. 502 (Advisory Committee Notes (a), (c))(2008).
[104] *See* Patrick L. Oot, *The Protective Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237, 242 (2009).
[105] *Id.* at 242 (citing *Alcon Mfg. v. Apotex, Inc.*, 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. Nov. 26, 2008)).

noted that the plaintiff's actions were all in accordance with the protective order.[106]

ii. In *Rhoads Industries, Inc. v. Building Materials Corp.*, the court looked to various common law factors even after completing a Rule 502 analysis to protect the inadvertently disclosed privileged documents.[107] The court held that there was no waiver of the privilege and concluded that "loss of the attorney-client privilege in a high-stakes, hard fought litigation is a severe sanction and can lead to serious prejudice."[108]

iii. Some courts have instead applied a totality-of-the-circumstances approach to protect the privilege associated with inadvertently disclosed privileged documents.[109] The advantage of the totality-of-the-circumstances approach is that it affords a "more comprehensive and sensitive assessment of the often complex and sensitive concerns present in inadvertent waivers."[110]

iv. Still many courts place considerable weight on the adequacy and/or existence of reasonable precautions employed by the party making the inadvertent disclosure.[111] Applying this type of analysis, courts consider the volume of documents inadvertently disclosed as compared to the volume of the entire production, procedures put in place to protect the privileged documents during discovery, and the timing and nature of the corrective actions taken once the disclosure is discovered.[112]

v. In this day of computers, document production can be voluminous, requiring the use of outside vendors to assist in the production process. Taking this into account, courts have even considered vendor error when weighing the factors of an inadvertent disclosure.[113] In *Heriot v.*

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[106] *Id.*
[107] 10 SEDONA CONF. J. at 242-243 (citing *Rhoads Industries, Inc. v. Building Materials Corp.*, 254 F.R.D. 216 (E.D. Pa. 2008)).
[108] 10 SEDONA CONF. J. at 243 (quoting *Rhoads Industries, Inc. v. Building Materials Corp.*, 254 F.R.D. 216 (E.D. Pa. 2008)).
[109] *Id.* at 244 (citing *Koch Foods of Alabama, LLC v. General Electric Capital Corp.*, 2008 U.S. Dist. LEXIS 3738 (M.D. Ala. Jan. 17, 2008)).
[110] *Id.* (quoting *Koch Foods of Alabama, LLC v. General Electric Capital Corp.*, 2008 U.S. Dist. LEXIS 3738 (M.D. Ala. Jan. 17, 2008)).
[111] 10 SEDONA CONF. J. at 244 (citing *Laethem Equip. Co. v. Deere & Co.*, 2008 U.S. Dist. LEXIS 107635 (E.D. Mich. Nov. 21, 2008)).
[112] *Id.*
[113] 10 SEDONA CONF. J. at 244.

Byrne, the court concluded that Rule 502 "does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake."[114]

vi. Some courts are more liberal than others when determining the reasonableness of the precautions taken to protect the privilege – noting the intent of the parties and promptness with which counsel attempted to correct the situation.[115]

c. Nevertheless, not every case results in protection of the waiver and many courts have found waiver of the privilege of inadvertently disclosed privileged communication.

i. In *Sitterson v. Evergreen Sch. Dist. No. 114*, the court refused to protect the privilege where the disclosing party filed to offer any evidence of any precautions taken to prevent disclosure of privileged documents.[116] The court noted the relatively small volume of documents produced, describing it as manageable, unlike the large quantity of documents contemplated by Rule 502.[117]

ii. Courts also place considerable weight on the amount of time expended to take corrective actions upon discovery of the disclosure.[118]

iii. Some courts have also considered whether the disclosing party acted affirmatively upon discovery of the disclosure.[119] Specifically, in *AHF Community Development v. City of Dallas*, the court concluded that while the disclosure was inadvertent, the privilege was waived because the defendant failed to act when "emails clearly labeled as attorney-client privileged were marked as exhibits, shown to a witness at deposition, and the subject of substantive questioning – all without objection."[120]

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[114] *Id.* (quoting *Heriot v. Byrne*, 2009 U.S. Dist. LEXIS 22552 (N.D. Ill. Mar. 20, 2009)).
[115] 10 SEDONA CONF. J. at 246 (citing *Reckley v. City of Springfield*, 2008 U.S. Dist. LEXIS 103663 (S.D. Ohio Dec. 12, 2008) and *Kumar v. Hilton Hotels Corp.*, 2009 U.S. Dist. LEXIS 55387 (W.D. Tenn. June 16, 2009)).
[116] 10 SEDONA CONF. J. at 246-7 (citing *Sitterson v. Evergreen Sch. Dist. No. 114*, 147 Wn. App. 576 (Wash. Ct. App. 2008)).
[117] *Id.*
[118] 10 SEDONA CONF. J. at 247 (citing *SEC v. Badian*, 2009 U.S. Dist. LEXIS 9204 (S.D. N.Y. Jan. 26, 2009)).
[119] 10 SEDONA CONF. J. at 248-9 (citing *AHF Cmsy. Dev. LLC v. City of Dallas*, 2009 U.S. Dist. LEXIS 10603 (N.D. Tex. Feb. 12, 2009)).
[120] *Id.* at 249 (quoting *AHF Cmsy. Dev. LLC v. City of Dallas*, 2009 U.S. Dist. LEXIS 10603 (N.D. Tex. Feb. 12, 2009)).

X. The Privilege of Self-Critical Analysis

A. Explanation of the Surge in Self-Critical Analyses

1. It is not uncommon for corporations and other organizations to engage in critical self-evaluation studies.[121] The increase in these self-critical studies is attributable in part to: (1) a general movement toward greater corporate accountability given disclosure of illegal corporate practices, and (2) corporations' belief that it is in the public's interest to engage in a complete and frank self-evaluation of their corporate operations.[122]

B. Evolution of the Privilege of Self-Critical Analysis

1. "Despite the prophylactic benefit of corporate self-analyses," there is the significant risk that the resulting reports of these studies/evaluations which provide a critical eye to a company's operations and practices could later be used against them in a civil suit.[123] To minimize this risk and to "foster the free and honest flow of self-critical information, the common law privilege of self-critical analysis has evolved."[124]

2. *Bredice v. Doctors Hospital, Inc*. is the seminal case acknowledging the privilege of self-critical analysis.[125] In *Bredice*, the court protected medical staff review documents in a medical malpractice case, noting that while the documents were certainly relevant, there was an overriding public interest in improving medical care that would be undermined were disclosure allowed.[126] The court emphasized the fact that self-improvement in such situations required confidentiality, without which there would be no free-flow of information essential to promoting a recognized public interest.[127]

3. With concern over the chilling effect disclosure would have on the process of self-critical analysis as supporting rationale, many courts have carved out a limited privilege in the following contexts: review of medical procedures and patient care, post-accident investigations by a railroad company, police department investigations of arrests and shootings, affirmative action studies, confidential peer reviews in the academic setting, and investigations conducted pursuant to a Securities and Exchange

[121] *See* David P. Leonard, *Codifying A Privilege For Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113, 116 (1988).
[122] *Id*.
[123] *See* Donald P. Vandegrift, Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 ALB. L. REV. 171, 173 (1996-1997) (citing *Dowling v. American Haw Cruises, Inc.*, 971 F.2d 423,426 (9th Cir. 1992)).
[124] 60 ALB. L. REV. at 173.
[125] 25 HARV. J. ON LEGIS. at 117 (citing 50 F.R.D. 249 (D.D.C. 1970), adhered to on reconsideration, 51 F.R.E. 187(D.D.C. 1970), aff'd without opinion, 479 F.2d 920(D.C. Cir. 1973); *see also* Stuart E. Rickerson, *The Privilege of Critical Self-Examination: How to Raise and Use It*, 58 DEF. COUNSEL J. 504, 505 (1991).
[126] 58 DEF. COUNSEL J. 504, 505.
[127] *Id*.

Commission program of voluntary disclosure of information.[128] Almost every state has enacted legislation following the federal mandate for medical review of patient care.[129]

4. Arguably, the attorney-client privilege and/or the work product doctrine would protect some materials covered by the privilege for self-critical analysis, but such coverage would have significant limitations that are best addressed by the self-critical analysis privilege.[130]

5. Since *Bredice*, many federal and state courts have recognized the privilege of self-critical analysis both at common law and statutorily.[131]

C. Application of the Privilege for Self-Critical Analysis

1. The privilege for self-critical analysis is rooted at common law. When applying the privilege, courts engage in a balancing test of two competing interests:

i. The public interest in protecting candid corporate self-assessments; and

ii. The private interest of the litigant in obtaining all relevant documentation through discovery.[132]

2. To further assist in this balancing test, courts consider four factors:

i. Whether the information sought in discovery results from a critical self-analysis undertaken by the party seeking protection;

ii. Whether the public has a strong interest in preserving the free flow of the type of information sought;

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[128] 25 HARV. J. ON LEGIS. at 118-119.
[129] *Id.* at 119.
[130] *Id.* at 120-122 (proposes a model statute for the privilege for self-critical analysis to close the gaps created by the attorney-client privilege and the work product doctrine.)
[131] *See* 58 DEF. COUNSEL J. at 506 (citing *Gillman v. United States*, 53 F.R.D. 316 (S.D. N.Y. 1971); *Oviatt v. Archbishop Bergen Mercy Hosp.*, 191 Neb. 224, 226-7, 214 N.W.2d 490, 492 (1974). Several states have also codified the privilege. *See, e.g.*, 215 ILL. COMP. STAT. 5 §155.35 (2010); NEB. REV. STAT. § 71-2048 (1986); Wis. STAT. § 146.38 (West Supp. 1982); FLA. STAT. § 766.101 (1988 Supp.), renumbered from § 768.40(5). *But see*, Robin Generous, *Lander v. Hartford Life & Annuity Insurance Co.: Variable Annuities and the Future of Market Conduct Controls Post-SLUSA*, 8 Conn. Ins. L.J. 505, 518 n.59 and Michelle R. Mosby –Scott and Michael Todd Scott, *Protecting Evidence of Self-Critical Analysis from Discovery in Illinois*, 88 ILL. B.J. 648, 650-651 (2000) (The self-critical analysis privilege has been more extensively developed at the federal level evidenced in the fact that the privilege has been relied on in the areas of accounting records, academic peer reviews, railroad accident investigations, product safety assessments, products liability, and assessment of equal employment opportunity/discrimination practices. The following states have rejected the common-law self-critical analysis privilege: New Jersey, Kentucky, Indiana, Florida, Colorado, California, Delaware, Massachusetts, Connecticut, and New York; while Kansas and Pennsylvania have recognized the privilege.).
[132] 60 ALB. L. REV. at 176.

iii. Whether the free flow of that information would be curtailed if discovery were allowed; and

iv. Whether the information sought was intended to be confidential and has been kept confidential.[133]

D. Waiver and Assertion of the Privilege for Self-Critical Analysis

1. Privilege of self-critical analysis can be waived.[134]

2. In order to assert the privilege, the party must ensure that the self-critical documents are not widely disseminated or unnecessarily divulged.[135]

3. In order to avoid waiver of the privilege, it must be expressly asserted at the time discovery of the information is sought.[136]

E. Drafting Considerations for Protecting Self-Critical Documents

1. Given the four factors to be considered by the court when determining application of the privilege, certain drafting strategies may pay huge dividends in protecting potentially privileged materials.[137]

2. A self-evaluative document should be drafted with the intent that it be kept confidential and must in fact be kept confidential.[138] This can be achieved by:

i. Conspicuously marking the self-critical documents as "confidential"; and

ii. Limiting both internal and external dissemination of the document.[139]

XI. Other Privileges

A. Physician-Patient Privilege

a. The physician-patient privilege dates back to nineteenth century when legislatures noted a need to create the privilege as a public health measure to encourage

[133] *Id*. at 177. *See also*, Robin Generous, *Lander v. Hartford Life & Annuity Insurance Co.: Variable Annuities and the Future of Market Conduct Controls Post-SLUSA*, 8 Conn. Ins. L.J. 505, 517-518.
[134] *Id.* (citing *Coates v. Johnson & Johnson*, 756 F.2d 524, 552 (7th Cir. 1985)).
[135] *Id.*; *see also* FED. R. CIV. P. 26(b)(5).
[136] *Id.* (citing *First E. Corp. v. Mainwaring*, 21 F.3d 465, 467 (D.C. Cir. 1994) (court refused to acknowledge defendant's privilege claim against disclosure of requested documents because defendant failed to raise the claim in the court below)).
[137] 60 ALB. L. REV. at 187-188.
[138] *Id.*
[139] 60 ALB. L. REV. at 187-188.

patients to disclose all information necessary to ensure adequate medical treatment.[140]

b. The privilege is limited to those cases in which the application of the privilege would be "consistent with its underlying purposes of facilitating medical diagnosis and treatment."[141]

c. The privilege is limited to confidential communications which includes all information obtained by the physician during treatment whether relayed verbally by the patient or observed by the physician during examination.[142]

d. Generally, only the patient may exercise and/or waive the privilege. Waiver can be achieved expressly or impliedly.[143]

B. Psychotherapist-Patient Privilege

a. The psychotherapist-patient privilege is limited to certain professionals, with the majority being psychologists, psychiatrists, and psychotherapists. Only confidential communications are protected. [144]

b. The privilege may only be waived (either expressly or impliedly) by the patient or his/her authorized representative.[145]

C. Clergy-Communicant Privilege

a. The clergy-communicant privilege is one of the oldest privileges with forty-nine states and the District of Columbia have some variation of the clergy-communicant privilege.[146]

b. Each state varies in whether the clergy member or the communicant or both may waive/assert the privilege. The states also differ in their definition of clergy.[147]

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[140] *Developments – Privileged Communications*, 98 HARV. L. REV. 1452, 1532-33 (1984-1985).
[141] *Id.* at 1533.
[142] *Id.* at 1534. But, note that confidential communications is not so expansive as to include information divulged during court-ordered medical examinations because there is no treatment contemplated in that scenario. *Id.* at 1535.
[143] *Id.* at 1536 (the patient-litigant exception provides that the privilege is waived when the patient places her physical condition at issue in the underlying judicial proceeding).
[144] *See* 98 HARV. L. REV. at 1539-1540 (confidential communications are limited to those necessary for treatment).
[145] *See id.* at 1541. Similar to the physician-patient privilege, the patient-litigant exception results in an implied waiver when the patient places his/her mental condition at issue at trial. *Id.*
[146] *See id.* at 1555-1556. West Virginia is the only state that does not have a clergy-communicant privilege.
[147] *See id.* at 1557 (while no court has denied the privilege to a clergyman on the grounds that he did not qualify as clergy under the state's definition, many courts have denied the privilege to non-ordained religious practitioners).

D. Marital Privileges

a. Adverse Testimony Privilege

The adverse testimony privilege allows witnesses to refused to testify against their spouses, and, depending on the jurisdiction, may give parties to the lawsuit the power to prevent their spouses from testifying against them.[148]

b. Confidential Communications Privilege

The confidential communications privilege allows individuals to refuse to reveal confidential marital communications. This privilege also allows individuals to prevent their spouses from revealing confidential marital communications.[149]

c. Both marital privileges require that the witness have a valid marriage under the state's laws. Divorce negates any claim to the privilege.[150] However, the two marital privileges differ in when the marriage must be in existence.

i. The adverse testimony privilege requires that the marriage to be in existence at the time the testimony is given.[151]

ii. The confidential communications privilege requires that the marriage must have been in existence at the time of the communication. The status of the marriage at trial is irrelevant.[152]

E. Parent-Child Privilege

a. There are only three states (New York, Idaho, and Minnesota) and only two federal districts that recognize the parent-child privilege.[153]

b. Advocates of this privilege believe that the privilege works to prevent family discord while fostering confidential communications within the family ranks.[154]

[148] *See id.* at 1563-1564.
[149] *See id.*
[150] *See id.* at 1565-1567.
[151] *See* 98 HARV. L. REV. at 1567.
[152] *See id.*
[153] *See id.* at 1575 (citing *In re Agosto*, 553 F.Supp. 1298, 1325 (D. Nev. 1983); *In re Greenberg*, 11 Fed. R. Evid. Serv. (Callaghan) 579, 582-84 (D. Conn. 1982)).
[154] *See id.* at 1578.

F. Proposal for a Limited Privilege for Intimate Relationships

a. Some commentators have proposed that familial privileges be extended beyond legally recognized marriages to include relationships between unmarried cohabitants, homosexual partners, and "intimate" friends.[155]

[155] *See id.* at 1588-92.