ATTORNEY-CLIENT PRIVILEGE AND ITS IMPACT ON THE IN-HOUSE CLIENT RELATIONSHIP

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Attorney-Client Privilege and Its Impact on the In-House Client Relationship

Jonathan Baughman & Chuck Brownman[1]

I. Introduction

By fostering full disclosure and free communication, the attorney-client privilege makes effective legal representation possible. But where participants are uncertain as to the scope of privilege and whether it will remain in force, such communication is hampered. Though the protection offered by the privilege is strong, the details of its application are varied, complex, and poorly understood. In many key areas, the law does not provide definitive guidance on the scope of protection offered by the privilege, and the requirements to keep it from being waived.

The goal of this paper is to lay out the basic contours of the attorney-client privilege and then to provide more focused discussion on some areas of particular importance to in-house counsel. The paper concludes with a summary of practical recommendations to in-house counsel seeking to apply the privilege effectively.

II. What is Protected?

A. Attorney-Client Privilege and Work Product Doctrine Basics

1. Attorney-Client Privilege Basics

The attorney-client privilege is a rule of evidence that preserves the confidentiality of communications between a client and his or her attorney. It is the oldest and most well-established privilege of confidentiality in our common law system. *Upjohn v. United States*, 449 U.S. 383, 389 (1981). Essentially, the rule protects from disclosure a client's confidential communications with his or her lawyer. Stating the four corners of the rule is a bit more complicated. A relatively comprehensive and equally unwieldy formulation of the rule follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358–59 (D. Mass. 1950). More generically, the privilege applies to: "1. a communication, 2. between privileged persons, 3. in confidence, 4. for the purpose of obtaining or providing legal assistance to the client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 (2000).

The definition of "communication" is broad for the rule's purposes. It includes verbal statements, documents or electronic files reflecting communications, along with audio or video recordings. In general, the media containing the communication is not relevant. At the margins, courts generally find that the following facts do not constitute protected communications: the identity of the client, the fact that a consultation occurred between the attorney and his client, and fee arrangements. *See Reiserer v. United States*, 478 F.3d 1160, 1165–66 (9th Cir. 2007); *United States v. Bauer*¸ 132 F.3d 504, 508–09 (9th Cir. 1997); *But See Ehrich v. Binghamton City Sch. Dist.*, 210 F.R.D. 17, 20 (N.D.N.Y. 2002). More importantly, the privilege only protects the content of the communications, not the underlying information disclosed. *Upjohn*, 449 U.S. at 395–96. Thus, for example, a client may not protect a preexisting document from discovery by sending the document to his attorney. *U.S. v. Robinson,* 121 F.3d 971, 975 (5th Cir. 1997). Also, the fact that a client relates information to her attorney does not entitle the client to invoke the privilege when asked about the information itself, only whether and how the client communicated the recollection to the attorney. *See In re Six Grand Jury Witnesses*, 979 F.2d 939, 945 (2d Cir. 1992).

For the purpose of the rule, the "privileged persons" are the client, his or her lawyer, and any agents of either. Where the client is a corporate entity and includes an in-house legal department, the lines

[1] This paper and presentation represents the individual opinions of the authors/presenters, and should not be construed to reflect the views of their respective firms or employers. This paper touches on many issues, necessarily omitting a multitude of nuances, qualifications, and exceptions. Additionally, except where specified, the legal concepts herein are discussed generally, without regard to differences across jurisdictions, and case holdings are described without reference to specific factual circumstances, sometimes material or dispositive, discussed in the course of each opinion.

drawn are not immediately clear. Sections II.B. and II.C., below, provide further guidance.

A communication is not privileged if it is not made in confidence. This is not an absolute requirement, rather, it requires that the communicators intended for the communication to remain undisclosed to third parties, and that they acted reasonably to achieve this purpose. *See Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 226 (Tex. 1992). The waiver of privilege that may result from failing to maintain confidence is discussed in Section III, below. At the most basic level, privilege will not attach to a communication knowingly made in the presence of non-privileged persons. *See United States v. Evans*, 113 F.3d 1457, 1462–63 (7th Cir. 1997).

Finally, privilege only protects communications made for the purpose of providing or obtaining legal advice or assistance. Thus, where a client's purpose in communicating with his lawyer is not to obtain legal advice, but merely to further other interests, such as business interests, privilege will not protect the communication. *See United States v. Wilson*, 798 F.2d 509, 513 (1st Cir. 1986).

To take advantage of the protection the privilege provides, it must be affirmatively asserted. This generally takes the form of invoking the privilege to avoid disclosing information in discovery or to object to the introduction of evidence in a legal proceeding. The privilege may only be asserted by or on behalf of the client. *See Citibank N.A. v. Andros*, 666 F.2d 1192, 1195–96 (8th Cir. 1981). By way of example, if an attorney's legal representation of a client results in a later dispute between them, the attorney may not object to confidential communications arising out of the earlier representation as privileged; the client, not his attorney, holds the privilege. *United States v. Juarez*¸573 F.2d 267, 276 (5th Cir. 1978), *cert. denied*, 439 U.S. 915 (1978).

2. Work Product Doctrine—Basics

Somewhat related to the attorney-client privilege is the attorney work-product doctrine, which provides protection to materials created by the client's counsel or other agent in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495 (1947). The doctrine offers wider coverage than the privilege, but more limited protection. As articulated in the Federal Rules of Civil Procedure, under the doctrine, "the court shall protect against disclosure of 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). While the Federal rule only extents protection to "documents and tangible things" containing work product, the doctrine also covers information in an unwritten form. *See* FED. R. EVID. 502(g)(2); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3rd Cir. 2003). For example, a party may not elicit deposition testimony from an employee that would disclose the mental impressions, legal theories, or the like of an attorney representing the organization. *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 1, 4 (D.D.C. 2004).

Despite its moniker, the "attorney work product doctrine" protects far more than the materials and thoughts produced by attorneys. The role of the person creating the work product does not matter, it may be an attorney, employee of the client, an outside investigator, a retained expert, the list goes on. What matters is that the work product was prepared for the benefit of the party or their attorney, and that it was prepared to assist litigation preparations. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87. Of course, where the materials in question were produced by a non-lawyer and provided to a non-lawyer, it will be that much more difficult to show that the materials were prepared in anticipation of litigation.

One core limit to the doctrine is the requirement that protected materials be produced "in anticipation of litigation or for trial." FED. R. EVID. 26(b)(3)(A). Accordingly, documents produced in the ordinary course of business, however useful or necessary to prepare for litigation, are not protected. *See Binks Mfg. Co. v. National Presto Indus., Inc.* 709 F.2d 1109, 1120 (7th Cir. 1983). This leaves many documents prepared by and under supervision of an organization's lawyers outside the scope of work product protection. Filings or reports to the government, contracts negotiated with third parties, and reports created in the ordinary course of business; none of these are likely to be considered work product. *See* Advisory Committee Note to Rule 26(b)(3), 48 F.R.D. at 501 (1970).

Though the work product doctrine protects against disclosure of counsel's mental impressions and trial strategy, courts are reluctant to apply the doctrine when its connection to particular information is too abstract. For example, courts have refused to protect as work product the identity of "confidential witnesses" whose allegations were used in a party's complaint. *In re Bear Stearns Companies, Inc. Securities, Derivative & ERISA Litig.*, 08–MDL–No. 1963, 2012 WL 259326 at *3 (S.D.N.Y. January 27, 2012). Though one could argue that elements of counsel's trial strategy and counsel's mental impressions concerning the helpfulness of certain witnesses compared to others might be gleaned from providing the identities, courts have not been receptive to this line of thinking. *See Id.* at *2; *See Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron, Inc.*, No. 08

Civ. 4063, 2011 WL 5519840 at *5 (S.D.N.Y. Nov. 14, 2011).

Examples of possible work product:
Attorney's opinion letter to client
List of witnesses to be called at trial
Transcript of attorney's interview of a witness
Notes taken by a paralegal
Analysis prepared by investigator for attorney
Draft report of a consulting expert
Correspondence from company's insurance company to its counsel
Newspaper articles about company gathered by counsel
Amount of a company's litigation reserve
Unrecorded recollections of an attorney

3. Distinctions between Attorney-Client Privilege and Work Product Doctrine

One important distinction between attorney-client privilege and the work product doctrine is the degree of protection offered. The privilege, where it applies, is a rule of evidence deeming the covered material *inadmissible* in a legal action. Even where the material protected would be highly relevant, even itself sufficient to establish a party's liability, if it is privileged, the material is protected from disclosure and cannot be used. *See Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007). Material protected by the work product doctrine is not necessarily inadmissible, it is merely not discoverable. That is, if the doctrine applies, the covered material does not have to be disclosed to an adversary's discovery request. Even this degree of protection is qualified, however. As Rule 26 provides, a party may obtain otherwise protected work product in discovery if that party demonstrates "substantial need" for the materials to prepare his or her case, and cannot obtain equivalent information by other means without "undue hardship."[2] FRCP 26(b)(3). This exception imposes a high bar for those seeking work product. *Leviton Mfg. Co. v. Universal Sec. Instruments, Inc.*, 606 F.3d 1353, 1365 (Fed. Cir. 2010). Nevertheless, counsel must be aware that work product protection is not absolute.

Another large distinction to keep in mind concerns the effect of passing protected communications to third parties. Where disclosure of privileged information to a third party will generally waive protection, work product may be shared with third parties without any loss of protection as long as the third party is not an adversary or likely to transmit the document to an adversary. *Royal Surplus Lines Ins. v. Sofamor Danek Group*, 190 F.R.D. 463, 476 (W.D. Tenn. 1999)

B. Privilege and the Corporation

At this point, it is well established that corporate entities are entitled to assert the attorney-client privilege or the work-product doctrine, just as an individual may. *Radiant Burners, Inc. v. America Gas Ass'n*, 320 F.2d 314, 322 (7th Cir. 1963), cert. denied, 375 U.S. 929, (1963). Naturally, applying the rules surrounding these protections in a corporate context raises unique issues. This section will introduce how the basic rules surrounding the privilege apply to the corporation. A corporate entity is an abstract concept, yet the rules surrounding privilege are stated in terms of individual actors. Thus, the questions are raised, who constitutes a privileged party? who holds the privilege? what happens when the interests of individual actors and the corporation as a whole conflict?

1. Privilege and the corporation

In general, the difficulty of applying privilege rules to corporate entities arises from two axioms: 1. a corporation's privilege belongs to the entity, as opposed to any of its officers, employees, or agents; 2. a corporation as an abstract entity may only act through these officers, employees, and agents. Thus, questions arise regarding where the privilege arises, who it protects, and who may waive or assert it.

As mentioned above, a corporation is entitled to privilege protection. In this context, the privilege belongs to the corporation itself, and is asserted to protect its interests. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). Of course, to protect these interests, individuals acting on behalf of the corporation must assert the privilege. *Id.* 348–49. In most cases, corporate officers and directors will be those empowered to assert the privilege. This is a double edged sword; any officer that may assert the privilege is also able to waive it, whether purposefully or not.

[2]Additionally, under the Texas Rules of Civil Procedure, whether work product protection is qualified turns on whether it is "core" work product. A discussion of core vs. non-core work product is outside the scope of this article.

Originally, this same limited group were the only persons who were considered "privileged persons" of the corporation's employees. Under the now-disfavored "control-group test," communications would not be considered privileged unless the corporate representative communicating with counsel was "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197 (Tex. 1993) (superceded by rule as stated in *In re Monsanto Co.*, 998 S.W.2d 917 (Tex.App.—Waco 1999). Thus, under this rule, communications originating outside this upper echelon of directors and officers could not obtain privilege protection, even if made on the corporation's behalf.

Luckily, in almost every American jurisdiction, the control group approach has been supplanted by some version of the more liberal "subject matter test." In Texas, the change came with a 1998 amendment to state evidence rules. Under this amendment, the present rule, a corporation may assert attorney client privilege over communications by not only the control group, but also "[a]ny other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client." TEX. R. EVID. 503(a)(2). Under the "subject matter" test, practically any employee or agent of the corporation could initiate a communication protected by the corporation's privilege; it matters only what purpose the communication serves. In the seminal *Upjohn v. United States*, the Supreme Court adopted a similar test for federal cases, and this doctrine governs in almost every U.S. jurisdiction. *Upjohn* cited with approval a "modified" subject matter test that allows an employee's communications privilege protection where the following factors are satisfied:

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.

Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977).

On the other side of the communication, the question arises, may an employee's communication with an in-house attorney, as opposed to outside counsel, be privileged? Across American jurisdictions, the answer is yes, in-house counsel is treated no differently than outside counsel retained by the company. *See Shelton v. Am Motors Corp*., 805 F.2d 1323, 1326 n.3 (8th Cir 1986). In practice, however, communications to in-house counsel are treated with additional scrutiny, not subject to the general presumption that a client's communication with outside counsel is for the purpose of obtaining legal advice. *See In re Sealed Case*¸737 F.2d 94, 99 (D.C. Cir. 1984); *Diversified Indus. Inc.*, 572 F.2d at 610. This issue is treated in more detail in Section II.C.1., below.

Given that a broad swath of employee communications may be protected by the privilege, but the privilege is controlled and asserted on behalf of the corporation's interest alone, significant misunderstandings and conflicts of interest may arise. The classic example concerns a company's internal investigation of possible misconduct. In the course of the investigation, in-house counsel may seek information from various employees. It is possible that at a later point, an employee's interests may be adverse to the corporate entity, such as if the employee committed the misconduct which led to corporate liability. In the investigation, the employee may misunderstand the role of corporate counsel, believing that he or she is entitled to individual privilege protection for anything disclosed in the investigation. To fulfill ethical duties and provide effective representation, all attorneys, including in-house counsel, must take steps to prevent such misunderstandings and proactively cure potential conflicts.

In the first place, to prevent misunderstandings, corporate counsel and their representatives should make sure to explain their role when seeking information from employees. A well crafted warning may remove any doubt that the person speaking to the employee represents the company, and not the employee. Such a warning must clarify that anything revealed to the lawyer is only privileged on the corporation's behalf, and the employee will not control whether the company decides to waive or assert this privilege in any situation. Naturally, counsel should ensure that the employee reads and understands the warning and obtain the employee's signed affirmation to this effect.

Model *Upjohn* Warning

We represent the company alone. We do not have an attorney-client relationship with you.

This interview is part of an information-gathering effort. The information obtained in this interview is for the purpose of providing legal services to our client, the company. The interview is therefore protected by the attorney-client privilege.

The privilege is held by the company alone, and the company alone will decide whether to waive or assert this privilege. Accordingly, the company may choose to share information learned in this interview with other persons, the government, or in a court proceeding. This may be done without your consent or notice.

However, you must keep the matters discussed in this interview confidential. Please do not discuss these matters with anyone, including other employees. Doing so would destroy the privilege protection over this interview.

Please feel free to consult your own lawyer at any time. If you feel you should consult your own lawyer before participating in this interview, please inform us.

Please complete and sign the following statement:
I, _____ *have read and understand the warning above.*
Signed_____Date_____

Secondly, counsel must cure potential conflicts of interest. Some conflicts of interest may be cured by obtaining an employee's consent. More fundamental conflicts may only be avoided by an employee retaining separate counsel. Along with the general warning suggested above, employees should be warned that since their interests may diverge from those of the corporation, they may need to be represented by separate counsel. Depending on the situation, the company may pay for the employee to obtain counsel, or the employee may bear the expense. After an employee is warned, corporate counsel should obtain his or her signed waiver of any conflict of interest. If counsel believes the conflict is incurable, he or she must recommend that the employee engage separate counsel, even if the employee is willing to waive the conflict. *See United States v. Linton*, 502 F. Supp. 871, 877 (D. Nev. 1980).

The need to provide such a warning to employees may create tension with the investigatory goals in some instances. An effective investigation requires employees to offer complete and candid responses. However, an aggressive conflict warning may cause employees to be less forthcoming, especially with personally incriminating information. Even in cases where there is little or no potential for a conflict to arise, employees with less legal knowledge and experience may be spooked by the warnings.

The pitfalls that can arise when proper warnings are not given can be observed in an order in *United States v. Nicholas*, a prosecution of several Broadcom Corp. officers for stock option backdating. 606 F. Supp. 2d 1109 (C.D. Cal. 2009) (reversed by *U.S. v. Ruehle*, 583 F.3d 600, 611–12 (9th Cir. 2009). In 2006, the company had retained outside counsel as a result of a government investigation of the company's stock option practices. *Id.* at 1112. The firm conducted an internal investigation in response to allegations of stock option back dating. *Id.* The company decided to turn over interview statements made by one of the officers to the government and the officer was subsequently prosecuted. *Id.* at 1114. The officer moved to suppress the interview statements, as they had been turned over to the government without his consent or knowledge, and in the interview the only warning the lawyers had provided was a brief statement that the interview was being done "on behalf of Broadcom." *Id.* at 1117. The officer argued that the warning was especially inadequate in light of the fact that the same firm was representing him individually at that time in a civil suit arising out of the alleged back-dating. *Id.*

The Court agreed that the law firm had acted improperly. The judge pointed out that the law firm had breached its duty in the following respects: it did not clearly inform the officer that his statements could be disclosed by Broadcom; it failed to get his written waiver of conflict for the simultaneous representation of him and the company; and it failed to advise the officer that he should obtain separate counsel. *Id.* As a result, the court found that the law firm had violated its ethical duty of loyalty to the officer and referred the firm to the California State Bar for discipline. *Id.* at 1112, 1117–18. The court also suppressed the statements that the officer had made, holding that the statements were privileged. *Id.* at 1121.[3]

[3] This last holding was later reversed by the 9th Circuit due to a pitfall discussed in Section III.A.2., below, waiver of privilege by disclosure to third parties. *U.S. v. Ruehle*, 583 F.3d at 611–12.

C. Status of In-house Counsel Communications

1. The problem of mixed responsibilities

In-house counsel occupy a hybrid position, serving as legal counsel to their company, yet often taking on business roles separate and apart from traditional legal representation. Thankfully, U.S. courts recognize the legal role of in-house counsel, and consequently allow the same privileges to arise from their internal representation of their employers as a relationship with outside counsel would create. *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984). However, courts are properly unwilling to extend privilege protection to all corporate communications involving in-house counsel. Thus, to be protected by the privilege, in-house counsel's communication must be made for the purpose of giving legal assistance, rather than another purpose, such as assisting with business operations. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 72 (2000). Where the content of particular communication is mixed or debatable, it is categorized according to the "predominant purpose" for which it was made. *Neuder v. Battelle Pac. N.W. Nat'l Lab.*, 194 F.R.D. 289 (D.D.C. 2000).

Courts have signaled that claims of privilege involving in-house counsel are to be reviewed critically, "In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose . . . the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure." *Rossi v. Blue Cross and Blue Shield of Greater New York*¸ 73 N.Y.2d 558, 593 (N.Y. 1989) (internal citations omitted). One widely cited standard requires that when in-house counsel is involved, a party seeking privilege protection must "make a clear showing that the speaker made the communication for the purpose of obtaining or providing legal advice." *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065 (N.D. Cal. 2002).

The rigor with which courts apply this analysis was demonstrated by a recent order. The overarching case was a patent dispute between Google and Oracle. *Oracle America, Inc. v. Google Inc.*, No. C–10–03561, 2011 WL 3794892 at *1 (N.D. Cal. August 26, 2011). A discovery battle arose over an email from a google engineer sent to an in-house attorney and a senior officer. *Id.* The engineer and the attorney had recently met to discuss Oracle's putative patent claims against Google. *Id.* The engineer's email referred to that meeting, and provided his opinion that Google needed to negotiate with Oracle to license the disputed technology. *Id.* The email was marked "Attorney Work Product" and "Google Confidential." The Court held that Google had not established that the email communication was made for the purpose of obtaining legal advice, and thus the email would not be privileged. *Id.* at *3. The Court considered the following factors in finding no privilege was established:

1. The email text did not mention legal advice, lawyers, or litigation.
2. The email was directed to the non-legal Google officer, rather than the lawyer recipient.
3. The email could just as easily be characterized as a strategic discussion of business negotiations as it could be related to a potential legal dispute.
4. The email indicated that its author was acting under the CEO's direction, rather than the legal department.

The opinion also stated, more generally, that the attorney's "role as in-house counsel warrants heightened scrutiny, because in-house counsel may serve both business and legal functions." *Id.* at *4. Overall, the opinion demonstrates that courts may be willing to parse through communications with mixed or unclear purposes, and not to the advantage of a party asserting privilege.

2. Protecting privilege on internal communications involving in-house counsel.

Separating business concerns from legal concerns is not an easy task. The consequences from losing the privilege could be staggering. To freely communicate legal advice with a minimum of worry, in-house counsel must take action to preserve the privilege. In the first place, the legal department must develop internal procedures to distinguish legal work from non-legal business functions. These procedures may take several forms, but the goal is common: each in-house lawyer should know with respect to any project or communication whether the purpose is to provide legal assistance. As a consequence, members of the legal staff may be expected to use more care when communicating for non-legal purposes, with the knowledge that anything they express may subsequently be used in litigation.

One example of a procedural change would be for all legal staff to apply communication headers consciously, on a case by case basis. Thus, only emails arguably meeting the requirements for privilege would be marked as such, and likewise for work product. Along with imbuing the headers with significance normally lacking—how many of us have sent or received an email planning a personal lunch that was marked Attorney-Client Privileged, Confidential, and Work Product—this procedure has the added benefit of keeping the legal and business

distinction top of mind. Also, it connects to a related and necessary goal, educating employees outside the legal department on privileged and non-privileged communications. It may be too much to expect every employee to become a repository for obscure evidentiary doctrine. But, anyone who may communicate sensitive information internally must be given some understanding of the possibility that their communications could become ammunition in a lawsuit. Just as indiscriminate use of email headers sends a dangerous message to non-legal staff communicating with lawyers—suggesting all their communications are protected—intelligent use of headers, along with direct identification of a legal purpose when appropriate, may educate them on the distinction.

Another thing in-house counsel must consider is preserving their appearance as attorney's for the company. One helpful factor, though not always a strict requirement, is for in-house counsel to retain current bar membership. Additionally, some individuals may carry multiple titles at the company. It is always helpful for counsel to identify themselves using their legal title when performing legal work. Less obvious, but similarly helpful, is for counsel to opt for any non-legal title when performing non-legal work. Like the intelligent use of communication headers, this accentuates the difference between protected communications and the rest.

III. Waiver of Privilege: Confidentiality and Inadvertent Disclosure

A. Maintaining Confidentiality

1. Background on waiver of privilege

When attempting to protect privileged information, in-house counsel must be vigilant in maintaining confidentiality. Privilege is waived when a company or its lawyers divulge otherwise protected information to third parties. The stakes are high; where privilege is waived concerning a communication it may be likewise waived with respect to all other communications on the same subject. *See, e.g. In re Sealed Case*, 877 F.2d 976, 981 (D.C. Cir. 1989). While the need to maintain confidentiality is commonly known, companies may be unaware of the range of disclosures that can destroy privilege. Providing information to third-party agents such as auditors and public relations consultants, responding to government-mandated disclosure requirements, and even communicating internally may all act to waive privilege, depending on the surrounding circumstances. Luckily, by taking certain precautions, in-house counsel may minimize the risk of waiver.

A company may waive privilege in several ways. The simplest way is through deliberate consent. Privilege is waived by consent when the client or an authorized agent voluntarily discloses the protected information. *See United States v. Martin*, 773 F.2d 579, 583–84 (4th Cir. 1985). In general, a client's attorney is assumed to have authority to waive privilege; in the corporate context this presumption applies to in-house counsel. *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671, 674 (7th Cir. 1977). A company may expressly delineate which of its employees hold this authority, but failing this, courts may assume that the authority is restricted to a company's officers or directors. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). However, when privileged information is disclosed by an employee without such authority, the privilege will be waived if the client fails to act promptly to assert privilege or otherwise attempt to protect the communication. *See Bus. Integ. Svc's v. AT&T*, 251 F.R.D. 121, 125–27 (S.D.N.Y. 2008).

As a general rule, where a privileged communication is disclosed to a party outside the attorney-client relationship, the privileged is waived. *Nguyen v. Excel Corp.*, 197 F.3d 200, 207 (5th Cir. 1999). Such disclosure does not demonstrate adequate respect for the confidentiality required to assert privilege. At the most basic level, where a lawyer-client communication is conducted with a third party present, the privilege is waived. *Reed v. Baxter*, 134 F.3d 351, 358 (6th Cir. 1998). In contrast, privilege is not waived by disclosure to agents of the client or attorney, as they are considered within the privileged relationship. *First Wis. Mortg Trust v. First Wis. Corp.*, 86 F.R.D. 160, 171 (E.D. Wis. 1980).

To determine whether privilege has been waived, courts do not rely on the communicator's subjective intent, but rather whether, considered objectively, the disclosure was both voluntary and in substantial disregard of confidentiality. *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989). Of course, where a party demonstrates subjective intent for privilege to be waived, this is also sufficient to find waiver. *See Martin*, 773 F.2d at 583–84.[4] Even a company's employees, officers, and board of directors may be considered third parties outside the privilege relationship. To be sure, privilege protects communications between these individuals and counsel made to further legal assistance to the company. However, if a privileged communication is subsequently shared with another employee needlessly

[4] It should be noted that even where communication to third parties waives privilege, the communication may be protected, albeit in a more limited fashion, by the work product doctrine.

or for a non-legal purpose, privilege may be waived. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). The test applied is whether "the documents, and therefore the confidential information contained therein, were circulated no further than among those members of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). Put another way, the privilege will not be waived as long as anyone who received the documents had a reasonable "need to know" the information.

2. Waiver by disclosure to third parties

Companies need to determine who, aside from outside counsel and employees, may receive confidential information without waiving the privilege. Questions recur in several areas, among them, whether disclosure to outside auditors or public relations consultants may not be protected.

Courts have generally found disclosure of information to an outside auditor waives the attorney-client privilege. *See, e.g. United States v. El Paso Co.*, 682 F.2d 530, 540 (5th Cir. 1982). Courts recognize that the interests of independent auditors are not necessarily aligned with the corporation and thus place them outside the privilege relationship.

This places companies in a bind. Independent audits must be conducted and these audits require companies to convey sensitive information to auditors. Especially in the wake of Sarbanes-Oxley, independent auditors are likely to request normally privileged information, such as the result on internal investigations conducted by in-house or outside counsel. The conflicting duties that arise have been long recognized. In deciding what information must be provided, in-house counsel may turn for guidance to the 1975 American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information. In all cases, in-house counsel must be aware that privilege, once waived, is generally irretrievable. So, in providing information to any third party, counsel must be mindful of its potential impact in future litigation of all types.

In contrast to waiver of privilege, most courts have found that disclosure of work product to independent auditors does not waive work product protection in later litigation. *See United States v. Deloitte LLP*, 610 F.3d 129, 139 (D.C. Cir. 2010) (collecting cases). As noted in Section II.A.3., above, disclosure to third parties only waives work product protection when the recipient is an adversary or likely to transmit to an adversary. Since auditors are themselves bound by a professional duty of confidentiality, the "transmittal" waiver is unlikely. *Deloitte*, 610 F.3d at 142. The protection will only be waived in situations where the auditor's relationship to the company is considered sufficiently adversarial.

Though in the minority, some courts have found waiver on this basis. For example, reasoning that "good auditing requires adversarial tension between the auditor and the client," a court held waiver applied to work product disclosed to the auditor. *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 116–17 (S.D.N.Y. 2002); *but see Amer. S.S. Owners Mut. Protection and Indem. Ass'n v. Alcoa S.S. Co.*, No. 04 Civ. 4309 LAKJCF, 2006 WL 278131 at *2 (S.D.N.Y. Feb. 2, 2006) (declining to follow *Medinol*). Thus, while work product protection is less likely to be waived, in-house counsel must be aware that this area of the law is unsettled, may vary by jurisdiction, in addition to being fact-dependant.

However, where an auditor is retained by counsel to assist in providing legal advice, the auditor is an agent within the privilege relationship, and privilege, as well as work product, protection is preserved. *U.S. ex. Rel. Robinson v. Northrop Grumman Corp.*, No. 89 C 6111, 2002 WL 31478259 (N.D. Ill. Nov. 5, 2002). Similarly, counsel's communications with an outside accountant may be privileged where made to give the lawyer insight on the client's situation, and thus assisting the lawyer's representation. *United States v. Kovel*, 296 F.2d 918 (2nd Cir. 1961). The court in *Kovel* likened such an accountant's role to that of a translator, and noted "the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others," so "privilege must include all the persons who act as the attorney's agents." *Id.* at 921. Thus, under *Kovel*, an accountant, and presumably any other professional third party, may be within the privilege relationship if his services are "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." *Id.*at 922.

Given the media frenzy that may develop in high profile disputes, in-house counsel may view public relations assistance as just as necessary as accounting expertise. Corporations' internal expertise in public relations varies, and may be strained by litigation that raises unfamiliar and potentially prejudicial issues. Though in-house counsel may see public relations professionals as essential agents to support their representation, courts have not always agreed. Whether an outside PR professional may come within the privilege relationship, and thus may receive privileged communications without effecting a waiver, depends on the situation.

In *Calvin Klein Trademark Trust v. Wachner*, communications with a PR firm were held not privileged, despite the fact that the firm had been

hired and directed by outside counsel. 198 F.R.D. 53, 54 (S.D.N.Y. 2000). Counsel had engaged a PR firm in the run up to trademark litigation. Plaintiff subsequently claimed privilege protection over communications with the firm. The court refused, observing that the services provided by the PR company were along the lines of general public relations services that would be provided directly to a corporate client. *Id.* at 55. The court found the PR firm was not an agent within the privileged relationship, as, "[t]he possibility that [the PR firm's] activity may also have been helpful [to plaintiff's counsel] in formulating legal strategy is neither here nor there if [its] work and advice simply serves to assist counsel in assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice." *Id.* at 54–55. Though the court found privilege had thus been waived with respect to all documents provided to the PR firm, it protected a few under the work product doctrine. The court held that protection over an attorney's own work product was not waived merely by providing the work product to an outside PR firm. *Id.* at 55. On the other hand, the court rejected out of hand plaintiff's claim that materials prepared by the PR firm constituted work product *Id.*

A subsequent decision from a sister court came to an opposite conclusion. In *In re Grand Jury Subpoenas*, a party subject to press scrutiny regarding a grand jury investigation hired a PR firm due to concerns that negative press coverage could influence investigators to bring charges. 265 F. Supp. 2d 321, 323 (S.D.N.Y. 2003). The party successfully asserted privilege protection over documents shared with the PR firm. The party argued that her use of the PR firm was "defensive," stemmed from her legal representation, and was targeted at "the prosecutors and regulators responsible for charging decisions in the investigations" rather than the public as a whole. *Id.* 323-24. The court applied the *Kovel* standard, finding that the PR firm's services were "necessary to the legal representation," since the party's lawyers needed outside help in an area outside their expertise. *Id.* at 326.

Though this area is subject to considerable uncertainly, there are certain steps counsel should take to increase the likelihood that third party agents, such as accountants or PR professionals, will be included in the privilege relationship. First, the third party should be hired by outside counsel, if possible, or at least be hired and directed by the in-house legal department. Second, where the company already uses third party professionals for business services, counsel should consider hiring a separate provider for the litigation-related services, or, failing that, create a separate engagement letter for the litigation-related services explicitly delineating how the services will support counsel's legal representation. Finally, counsel should direct the third parties with the *Kovel* standard in mind, restricting third parties' activities and communications to supportive, "translator" functions.

3. Authority of former subsidiaries to waive privilege

A related issue arises concerning a corporation's sale of a subsidiary. Following the sale or spinoff of a subsidiary, generally, the authority to assert or waive attorney-client privilege passes in the transfer. The question arises, does that grant the transferred entity the right to unilaterally waive privilege on communications that occurred prior to the transfer? *In Re Sealed Case* is one opinion that has engaged this issue in-depth. 120 F.R.D. 66 (N.D. Ill. 1988). That case concerned a securities fraud suit brought by the purchaser of a corporation's subsidiary. *Id.* at 70. The corporation attempted to claim privilege over certain documents related to the sale sought by the purchaser in discovery. The subsidiary, now controlled by the purchaser, asserted voluntary waiver of the privilege. The court held that the subsidiary had the authority to unilaterally waive privilege on some of the documents sought but not others. *Id.* at 71–73.

The court recognized that two distinct categories of documents were at issue. In the first place, the purchaser sought memos and communications passed between the in-house legal department, shared by the parent corporation and its subsidiaries, and the subsidiary's employees and officers. For these documents, the court applied the general rule, and found that control of the privilege passed with the sale. Thus, the subsidiary's waiver was effective. *Id.* at 71.

However, for the second category of documents, the court came to the opposite conclusion. These documents related to a previous lawsuit where the subsidiary and parent corporation had been named as co-defendants, sharing the same legal counsel. The court decided that the subsidiary could only waive privilege on these documents with the parent's permission.

In reaching this conclusion, the court relied on the "joint defense" doctrine. At the outset, the doctrine provides that when litigation is anticipated, communications among co-defendants and joint counsel representing them are considered confidential, and thus may be privileged. *Id.* at 71. In general, the joint defense doctrine provides that if the parties' interests later become adverse, then each may freely use any of the privileged information without the consent of the other. *Id.* However, the court held that

at least where prior litigation had been terminated before the transfer of a subsidiary, the subsidiary may not unilaterally waive privilege over joint defense materials in the interest of its new owner's dispute with its former owner. *Id.* at 72.

A similar analysis has been applied even when the parent and subsidiary's joint representation was not related to prior litigation. In *Teleglobe Communications Corp. v. BCE, Inc.*, a subsidiary that had been defunded by its parent company sued its parent. 493 F.3d 345, 353 (3d Cir. 2007). Both had been jointly represented by a single in house legal department. In the first place, the court found that related corporate entities represented by a common in-house legal department should be generally considered as joint clients rather than a single client. *Id.* at 372. Recognizing that the this joint representation may create difficult outcomes where the interests of related entities become adverse, the court advised that corporations furnish related entities with separate counsel and end joint representation on matters that may be form a later dispute between the entities. *Id.* at 373–74. The court highlighted that subsidiary sales or spinoffs are likely to create such adverse interests. However, the court ultimately held that the subsidiary could not unilaterally waive privilege protection on documents and communications created by the in-house legal department's joint representation of the two entities. *Id.* at 379–80.

B. Inadvertent Disclosure

1. Introduction to inadvertent disclosure

As discussed above, for a party's act to waive privilege it must be voluntary, rather than involuntary. This does not mean, however, that the inadvertent disclosure of an otherwise privileged document may not waive privilege. Technological changes, chief among them email communication, electronic document storage, and electronic document review, have led to great danger of privilege waiver by inadvertent disclosure. As a result, in house counsel must take steps both to reduce the risk of inadvertent disclosure to adverse parties and to minimize the chance that such disclosure will be found to have waived privilege over the documents disclosed.

Where privileged documents have been inadvertently provided to an adversary, courts analyze whether the disclosure was sufficiently involuntary for privilege to be retained. According to the Texas Supreme Court, the party who inadvertently disclosed the document bears the burden of proof; the party must show that that under the circumstances the disclosure was involuntary. *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 226 (Tex. 1992). The court clarifies, "Disclosure is involuntary only if efforts reasonably calculated to prevent the disclosure were unavailing." *Id.* The following factors are examined to determine whether the disclosing party had met its burden: 1. precautionary measures to prevent disclosure; 2. delay in rectifying the error; 3. the extent of the inadvertent disclosure; and 4. the scope of discovery. *Id.* In federal court, the Rules of Evidence provide a simplified set of factors to be applied. The Rules provide that unintentional disclosure does not waive privilege as long as, "1) the disclosure is inadvertent; 2) the holder of the privilege. . . took reasonable steps to prevent disclosure; and 3) the holder promptly took reasonable steps to rectify the [inadvertent disclosure]. . . ." FED. R. EVID. 502(b).

The federal evidentiary rule operates alongside Federal Rule of Civil Procedure 26(b)(5)(B). This rule provides that where a party notifies the recipient of inadvertently disclosed privileged materials, the recipient must "promptly return, sequester or destroy the specified information and any copies it has . . . and [may] not use or disclose the information until the [privilege] claim is resolved." Likewise, the holding of *Granada* has been modified by a subsequent change to the Texas Rules of Civil Procedure. The rule is similar to its federal analogue, but requires that the producing party assert its privilege claim to the recipient within ten days, or a shorter time specified by the court, of discovering its inadvertent disclosure. TEX R. CIV. P. 193.3(d).

However, as a recent order demonstrates, inadvertent disclosure may be damaging even where privilege is not waived. In *Doca Co. v. Westinghouse Elec. Co.*, plaintiff had inadvertently provided to its adversary in discovery a privileged timeline of events. Civ. No. 04–1951, 2011 WL 2182439 at *1 (W.D. Pa. June 3, 2011). The defendant did not seek to use the timeline as evidence, but rather used it to specifically request non-privileged materials referenced therein. The court held that plaintiff must provide the requested information, "[defendant's] inquiry into non-privileged facts is permitted even though [defendant] first learned of the non-privileged fact through an inadvertently disclosed document." *Id.* at *5. The court reached this holding even recognizing that plaintiff was not at fault for the disclosure and had not waived privilege over the underlying timeline. *Id.* at *3.

2. Clawback Agreements

Probably the best protection against inadvertent production in litigation is for the party to enter into a comprehensive "clawback agreement" with the opposing parties. Through the recent revisions discussed in the previous section, the federal rules and

their Texas counterparts have now codified the sort of protection a traditional clawback agreement provides. However, vigilant counsel still enter into such agreements, both to guard against use of inadvertently produced documents in jurisdictions without default return rules, and to strengthen the protection the rules provide.

Through a clawback agreement, litigation adversaries agree to return inadvertently produced privileged materials once notified by the producing party of the inadvertent disclosure. Counsel should negotiate a clawback agreement at or before the "meet and confer" conference required by Rule 26(f). Also, counsel should ask the court to incorporate the clawback into the Scheduling Order, pursuant to Rule 16. The Rule 26(f) Advisory Committee Note endorses clawback agreements in appropriate cases: "these agreements . . . can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party."

While a clawback is especially essential to parties involved with high volume productions, such an agreement should never take the place of stringent privilege review. In the first place, clawback agreements only bind those who are a party to them. Thus, third parties remain free to argue that inadvertent production of privileged materials, even to a party covered by the agreement, waived privilege as to the third party. Also, not all jurisdictions recognize the validity of clawback agreements. Finally, as demonstrated in *Doca*, above, inadvertent disclosure may negatively impact a party even when the material disclosed is ultimately protected.

3. Email

The ubiquity of email communication increases the risk of inadvertent disclosure. Where sensitive communications were transmitted by letter and telephone calls, it was far less likely for them to reach unintended recipients. Now, however, most of us have mistakenly used "reply all," clicked on the wrong name in a contact list, or accidentally included text of a prior email conversation in a forwarded message. While such mistakes are usually harmless, companies must take precautions to keep sensitive communications from being accidentally disclosed via email.

One avoidable practice that popped up in recent ligation is the "bcc" or blind carbon copy. In *Charm v. Kohn*, Kohn's counsel sent an email to opposing counsel, including Kohn as a "bcc" recipient. Unfortunately, Kohn used "reply all" to respond to his counsel's email, so Charm's counsel received the message as well. No. 08–27890–BLS2, 2010 WL 3816716 at *1 (Mass. Super. Ct. September 30, 2010). Kohn's counsel quickly recognized the mistake and asked that the email be deleted. Charm's counsel later attempted to offer the email as evidence. To determine whether privilege had been waived, the court analyzed whether Kohn could demonstrate reasonable steps were taken to preserve confidentiality of the privileged communication. The court accepted that the transmittal had been accidental, was the result of a common mistake, and counsel acted quickly to rectify the error. *Id.* at *2. As a result, the court found that privilege had not be waived; the email was inadmissible. *Id.* However, the court delivered a clear warning, noting that Kohn's practice of bcc-ing the client (and even cc-ing co-counsel) on communications with the other side "gave rise to a forseeable risk that Kohn would respond exactly as he did." *Id.* Thus, the court characterized its ruling as an "indulgence" that was not likely to be repeated, stating "[r]eply all is risky. So is bcc. Further carelessness may compel a finding of waiver." *Id.*

Though this case did not result in waiver, the risk is clear. To avoid this situation, counsel need only keep corporate clients in the loop by forwarding communications with opposing parties, rather than including them as recipients in these emails.

4. Electronic Document Storage and Retrieval

Another technology that has increased the risk of inadvertent disclosure is electronic document storage, coupled with the rise of "e-discovery" practices. Since the rise of business computing, it is common for corporations to retain a massive amount of electronically stored information ("ESI") on their networks. Consequently, litigation involving companies often requires the review and production in discovery of thousands upon thousands of electronic documents. To deal with this flood of information, companies and their counsel often employ "e-discovery" technologies to locate responsive documents and review them in advance of production. Often, due to the costs of the alternative, companies must produce documents without having individually reviewed them for privileged material. Instead, the companies rely on e-discovery technologies, generally applied by outside contractors, to filter ESI for documents likely to be privileged which in turn may be individually reviewed. Both the staggering amount of information involved and the use of time-saving search and review technologies multiply the risk of inadvertent disclosure.

An overtime wages dispute concerning Duane Reade, a retail chain, provides a recent example. *Jacob v. Duane Reade, Inc.*, No. 11 CIV. 0160, 2012 WL 651536 (S.D.N.Y. Feb. 28, 2012). The parties agreed to use certain search terms to identify relevant

documents from the retailers ESI. The search turned up over two million potentially responsive documents to be produced. Since the retailer was not able to individually review all of these documents before production, it used search terms to flag any potentially privileged documents for review, including the full names of any in-house or outside counsel. Unfortunately, the search missed a single privileged email; a communication from one non-legal employee to another recounting legal advice provided by an in-house attorney concerning the dispute. The email was not flagged because the employee referred to the lawyer by his first name alone, and the lawyer was not included as a recipient on the email.

In analyzing whether privilege had been waived, the court first reviewed the procedure employed by the retailer to respond to discovery requests.

"Defendants hired an outside vendor to host the electronic data retrieved. They then retained a team of between ten and fifteen contract attorneys, working under the supervision of a Project Manager and litigation counsel, to review the ESI and produce relevant documents prior to depositions of witnesses, and to prevent the disclosure of privileged or irrelevant documents. Defendants prepared lists of names of attorneys whose communications could be privileged, employed search filters, and quality control reviews." *Id.* at *5. The court found that this process, along with how the email had been missed, indicated that the retailer had taken "reasonable measures to prevent inadvertent disclosure of privileged material." *Id.*

However, the court nevertheless found that privilege had been waived, because the retailer had failed to act promptly to rectify the disclosure. *Id.* at *6. The email had been discussed at a deposition without defendant's counsel realizing it was privileged, and thus counsel failed to assert a privilege claim at that time. *Id.* However, the court limited the waiver to the email itself, declining to extend it to all privileged communications on the same subject. *Id.* at *7.

This case demonstrates the difficulties corporations face protecting privileged information when voluminous ESI must be produced. While it may be impossible to prevent this sort of occurrence, in-house counsel must take all possible care to protect their companies. In the first place, where search terms must be used in the place of individual review of all documents, a rigorous methodology must be created in conjunction with an experienced and reputable e-discovery services provider. Counsel should also attempt to negotiate a comprehensive clawback agreement to cover any materials that may slip through privilege review. Finally, policies recommended in Section II.C.2., above, to mark and segregate privileged communications, may also prove helpful.

IV. Practical Wrap Up

The following provides a list of practical items to consider in ensuring protecting the attorney client privilege.

A. Discharging Ethical Obligations to Employees

Provide a strong *Upjohn* Warning

- Provide written warning, along the lines of the "model warning"
- Provide to employee early in investigation process
- Ensure employee understanding of the meaning of the warning
- Obtain employee signature affirming understanding of scope of counsel's representation and company's unilateral possession of privilege

Obtain employee waiver for any conflicts of interest

- Provide written waiver, laying out in detail potential conflicts of interest that may arise
- Obtain employee signature, reflecting informed waiver of conflicts

Recommend separate counsel where an incurable conflict may arise

- Proactively identify any potential conflict not curable by waiver
- Explain to employee potential conflict
- Suggest employee retain separate counsel
- Refuse to represent both employee and company simultaneously

B. Ensuring privilege protection for in-house legal assistance

Implement procedures in legal department to distinguish legal work from non-legal functions

Only use privilege and work product email or document headers for materials that qualify

For personnel with dual titles, use legal title only when performing legal function, use non-legal title for other functions

Educate non-lawyer employees on privilege basics

Require legal department attorneys to maintain bar membership

C. Bringing third party consultants into the privilege relationship

Retain third parties through counsel, preferably outside counsel

Retain third parties supporting legal services separately from those supporting other business operations

Restrict third party services to "translator" function when retained by legal department

Characterize scope of third party engagement as support related to specific litigation, investigation, or other legal project

D. Protecting against waiver through inadvertent disclosure

Restrict distribution of privileged communications to those with a "need to know" the information

Assess each individual, especially outside service providers, involved in privileged communications to determine if he or she would be considered outside the "privilege relationship"

Negotiate strong clawback agreements with litigation adversaries

Negotiate an agreement early, to put in place at Rule 26 meet and confer

Submit agreement to court to be incorporated into Rule 16 Scheduling Order

Include as signatories all parties that may seek to use inadvertently disclosed information

Draft agreement to incorporate any jurisdiction-specific requirements (e.g. Texas 10 day rule)

Implement email policies to minimize chance of inadvertent disclosure

Direct counsel to keep internal stakeholders informed by forwarding messages rather than "bcc"

Push back on employees' tendencies to "cc" unnecessary individuals on privileged communications

Shepherd the e-discovery process

Engage a reputable, experienced consultant to manage e-discovery

Implement robust controls and quality control protocols for any privilege review requiring filtering with search terms