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ATTORNEY-CLIENT PRIVILEGE: THE ERODING CONCEPT OF CONFIDENTIALITY SHOULD BE ABOLISHED

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INTRODUCTION

In all formal definitions of the attorney-client privilege, whether employed in state¹ or federal courts,² the client or the attorney must

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I would like to express my appreciation to my colleagues, Professors Walter Effross, Herman Schwartz, Jamin Raskin, Bernard Corr, and Robert Vaughn, my research assistant, Roy Katriel, and my partner, Jane Bird Rice, for their substantive comments and editorial suggestions. So much of success is the product of the friends who share the ride.

1. For examples of state definitions of the privilege, see the following:

California's lawyer-client privilege statute:

[T]he client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

- (a) The holder of the privilege;
 - (b) A person who is authorized to claim the privilege by the holder of the privilege;
- or
- (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

CAL. EVID. CODE § 954 (West 1995).

The Illinois Supreme Court used Professor Wigmore's definition to write that state's privilege rule:

The essentials of [the privilege's] creation and continued existence have been defined as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived."

People v. Adam, 280 N.E.2d 205, 207 (Ill. 1972) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2292, at 554 (John T. McNaughton rev. ed., 1961)).

In 1831, the Massachusetts Supreme Court defined the privilege in these terms:

Although the general rule, that matters communicated by a client to his attorney, in professional confidence, the attorney shall not be at any time afterwards called upon or permitted to disclose in testimony, is very well established, still there is some difference of opinion as to its precise limits.

Some points seem clearly settled by the cases. It is confined strictly to communications to members of the legal profession, as barristers and counsellors, attorneys and solicitors, and those whose intervention is necessary to secure and facilitate the communication between attorney and client, as interpreters, agents, and attorney's clerks.

It seems also well established, that the matter thus disclosed in professional confidence cannot be disclosed at any future time, nor can it be given in evidence in another suit, although the client, from whom the communication came, is no party and has no interest in it.

....

... [T]he privilege extends to communications made to a legal adviser, duly qualified as such, employed and acting in that capacity, where the object of the party is to obtain a more exact and complete knowledge of the law, affecting his rights, obligations or duties, relative to the subject matter to which such communications relate.

Foster v. Hall, 29 Mass. (12 Pick.) 89, 93, 99 (1831) (internal citations omitted).

New York has codified its definition of the privilege:

Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

N.Y. C.P.L.R. 4503(a) (McKinney 1992).

For criminal proceedings, the Pennsylvania legislature has stated the privilege in these terms: "In a criminal proceeding 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." 42 PA. CONS. STAT. ANN. § 5916 (West 1982). Pennsylvania has an identical provision for civil proceedings. *See id.* § 5928.

The evidence rules in Texas define the privilege as follows:

communicate with the other *in confidence*, and subsequently that confidentiality must have been maintained. The content of the communication, as opposed to the facts communicated, must be secret.³

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between himself or his representative and his lawyer or his lawyer's representative;
- (B) between his lawyer and the lawyer's representative;
- (C) by him or his representative or his lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. Texas has a nearly identical rule covering attorney-client privilege in criminal proceedings. *See id.*

For a general discussion of the definition and elements of the attorney-client privilege, see PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE: STATE LAW § 2:1 (1997).

2. Two frequently quoted definitions of the attorney-client privilege in federal courts are from Professor Wigmore and Judge Wyzanski. Professor Wigmore defined the privilege in these terms:

- (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

WIGMORE, *supra* note 1, § 2292, at 554.

Judge Wyzanski offered this definition:

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 on 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 Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

3. If a client communicated certain business information to his attorney to obtain advice on the legal implications of a proposed business transaction, the fact that the client previously or subsequently communicated the same *information* to a business associate for other purposes would not affect the privileged status of his *communication* with his attorney. *See* United States v. O'Malley, 786 F.2d 786, 793-94 (7th Cir. 1986) (concluding that the client did not waive the privilege by disclosing the same information to the FBI that was contained in the client's communication to his attorney because the client did not disclose his communication to his attorney); United States v. El Paso Co., 682 F.2d 530, 538-39 n.10 (5th Cir. 1982) (observing that "[t]he attorney-client privilege does not protect against discovery of underlying facts from their source merely because those facts have been communicated to an attorney. The public disclosure of those facts, moreover, does not destroy the privilege with respect to attorney-client communications about those facts." (internal citation omitted)); High Tech Communications v. Panasonic Co., No. CIV.A.94-1477, 1995 WL 45847, at *5 (E.D. La. Feb. 2, 1995) ("[A] party who merely discloses the facts contained in a privileged communication has not placed the

That is, communications between an attorney and client may be protected by the attorney-client privilege even though the facts communicated are publicly known, so long as the substance of what was said or written remains a secret. As explained in *Nestle Co. v. A. Cherney & Sons, Inc.*:⁴

At the center of the dispute is the question whether information obtained through searches of public records, such as materials on file at the Patent and Trademark Office, can fall within the scope of the attorney-client privilege. . . . [A] document does not fall outside the attorney-client privilege merely because it contains technical or publicly-obtained information. If the party invoking the privilege can show that the document has some legal significance, then the document may be immune from discovery. More specifically, the *communication* of the publicly-obtained information "should be privileged to the extent that the communication was treated as confidential by the client and would tend to reveal a confidential communication of the client."⁵

This requirement of confidentiality limits the application of the privilege and provides a theoretical bright line for determining when the privilege's protection begins and ends. Once the information is communicated between the attorney and client in secret, the privilege is created and remains viable⁶ until the secret (the fact that certain

communication at issue because the privilege was never meant to protect against the disclosure of the underlying facts.").

4. No. HM79-653, 1980 WL 30337 (D. Md. Sept. 2, 1980).

5. *Id.* at *11-12 (internal citation omitted) (quoting *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 389-90 (D.D.C. 1978)).

6. Under federal law and the law of most states, once the attorney-client privilege has attached to confidential communications between the attorney and client, the privilege is absolute. *See* *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1493 (9th Cir. 1989) ("[No] rule applicable to the discovery process recognizes an exception to the protection afforded privileged materials and communications because the information sought to be discovered is not available from an unprivileged source."); *Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514, 522 (S.D.N.Y. 1992) (stating that the importance of the client's ability to consult frankly with counsel is underscored by the fact that the privilege is "absolute in the sense that it cannot be overcome merely by a showing that the information would be extremely helpful to the party seeking disclosure." (citations omitted)); *Bassett v. Newton*, 658 So. 2d 398, 401 (Ala. 1995) (stating that the foundation for Alabama's attorney-client privilege is that where a client seeks legal advice of "any kind," communications related to that advice are "*permanently protected* from disclosure" unless the client waives that protection (emphasis added)); *Hardy v. Martin*, 89 P. 111, 113 (Cal. 1907) (holding that the privilege continues to apply to information conveyed by a client to an attorney even after the client severs the relationship with the attorney); *Granger v. Warrington*, 8 Ill. 299, 308 (1846) (observing that the attorney-client privilege continues always and exists at the will of the client); *Johnson v. Sullivan*, 23 Mo. 474, 480 (1856) (same); *Martin v. Shaen*, 156 P.2d 681, 684 (Wash. 1945) (noting that the privilege survives the

things were communicated) is out. Beyond this convenient marker for determining the beginning and end of the protection,⁷ however, the secrecy requirement does not further the goal of the attorney-client privilege—encouraging openness and candor in communications between an attorney and client.⁸

death of the client and may be invoked by the client's heir); PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:5, at 69 (1993) (noting that "regardless of the intervention of time, clients may prevent the disclosure of their confidential communications with their attorneys through timely assertion of the attorney-client privilege").

7. Even this purpose is lost, however, by the constantly expanding circle of confidentiality that courts are recognizing, see *infra* Part I.A-B, and the growing list of exceptions (e.g., inadvertent disclosure, limited waiver, unauthorized disclosures by agents, purloined communications, protective orders). See *infra* Part I.C.

8. The purpose of the attorney-client privilege under both federal and state law is to encourage people to seek legal advice freely and to communicate candidly with their attorneys during those consultations. The theory is that by protecting client communications, the client will be more candid and will disclose all relevant information to the attorney, even potentially damaging and embarrassing facts. See, e.g., *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) ("Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice."); *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 874 (Ariz. 1993) (in banc) ("The privilege is intended to encourage the client in need of legal advice to tell the lawyer the truth. Unless the lawyer knows the truth, he . . . cannot be of much assistance to the client. Thus, the privilege is central to the delivery of legal services in this country."); *Andrews v. Simms*, 33 Ark. 771, 774 (1878) (characterizing the privilege as "[a] wise policy [which] encourages and sustains the most unlimited and generous confidence between lawyer and client by requiring that on all facts confided in professional consultation the lips of the attorney shall be forever sealed"); *Mitchell v. Superior Court*, 691 P.2d 642, 646 (Cal. 1984) (noting that the "fundamental purpose" of the privilege is "to safeguard the . . . relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters," and that the privilege fosters a public policy that "seeks to insure 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense'" (quoting *Baird v. Koerner*, 279 F.2d 623, 629 (9th Cir. 1960)); *Grubbs v. K Mart Corp.*, 411 N.W.2d 477, 480 (Mich. Ct. App. 1987) ("The purpose of the privilege is to allow a client to confide in his attorney, secure in the knowledge that the communication will not be disturbed."); *Haynes v. State*, 739 P.2d 497, 502 (Nev. 1987) ("The attorney client privilege rests on the theory that encouraging clients to make full disclosure to their attorneys enables the latter to act more effectively, justly, and expeditiously, a benefit out-weighing the risks posed to truth-finding."); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 349 (Ohio 1994) ("In the modern law, the privilege is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential. Only in this manner can there be freedom from apprehension in the client's consultation with his or her legal advisor."); *McMannus v. State*, 39 Tenn. (2 Head) 213, 215-16 (1858) (stating that the privilege "is supposed to be necessary to the administration of justice, and the prosecution and defence of rights, that the communications between client and their attorneys should be free and unembarrassed by any apprehensions of disclosure, or betrayal," and that "[t]he object of the rule is, that the professional intercourse between attorney and client should be protected by profound secrecy").

By guaranteeing that privileged communications can be neither discovered nor used against the client, the assumption underlying the privilege is that the client will be encouraged to be more forthright with his attorney.⁹ These enhanced disclosures to the attorney will make it possible for the attorney to give more accurate advice, which will increase the client's understanding of—and compliance with—legal responsibilities.

9. See *United States v. Upjohn Co.*, 600 F.2d 1223, 1225-26 (6th Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)):

The attorney-client privilege, as it exists today, is based on two related principles. The first is that it is an intrinsic part and a necessary incident of the attorney-client relationship. The legal profession has an intimate relationship with its clients and an important role in the administration of our system of justice. Privacy is the necessary context of the relationship between the individual and his lawyer. . . . The second principle is that the privilege "encourage[s] clients to make full disclosure to their attorneys." This policy of promoting full disclosure to counsel serves to implement the notion inherent in the first principle, that finding the truth and achieving justice in an adversary system are best served by fully-informed advocates loyal to their client's interests.

See also *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960):

While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer.

See also *People v. Gionis*, 892 P.2d 1199, 1204-05 (Cal. 1995) (citation omitted):

The attorney-client privilege is based on grounds of public policy and is in furtherance of the proper and orderly functioning of our judicial system, which necessarily depends on the confidential relationship between the attorney and the client. Without the ability to make a full disclosure of the facts to the attorney, the client risks inadequate representation. . . . [B]y encouraging complete disclosures, the attorney-client privilege enables the attorney to provide suitable legal representation.

See also *City & County of San Francisco v. Superior Court*, 231 P.2d 26, 30 (Cal. 1951) (en banc) (internal citations omitted):

The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. "Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result. Thirdly, unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavorable facts." Given the privilege, a client may make such a disclosure without fear that his attorney may be forced to reveal the information confided to him. "[T]he absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent."

See also *Stone v. Minter*, 36 S.E. 321, 322 (Ga. 1900) (stating that the rule was founded "out of regard to the interests of justice, and . . . if such communications were not protected, no man would consult a professional adviser with a view to his defense, nor safely go into a court either to obtain redress, or to defend himself" (internal citations omitted)).

The sole justification for the confidentiality requirement is the unsubstantiated belief that the privilege protection is unnecessary if the client has demonstrated a willingness to communicate in the presence of third parties.¹⁰ In his influential treatise, Professor Wigmore asserted that confidentiality is one of four “fundamental conditions . . . necessary to the establishment of a privilege against the disclosure of communications.”¹¹ He goes on to assert that “[t]his element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.”¹² He concludes that without this condition *no privilege*, attorney-client or otherwise, should be recognized.¹³ Beyond this *ipsi dixit*, there is no discussion of, or other justification offered for, the importance assigned to the requirement.

In this context, Wigmore asserts, without elaboration, that “[t]he reason for prohibiting disclosure ceases when the client does not appear to have been desirous of secrecy.”¹⁴ Quoting from Lord Eldon he states: “The moment confidence ceases . . . privilege ceases.”¹⁵ His explanation is that once secrecy is missing because, for example, a third party is present, the protection of the privilege is not “necessary to secure the client’s subjective freedom of consultation.”¹⁶ Throughout both English and U.S. history, however, not a single reported decision can be found in which a court has either explicated this reasoning or questioned its logic.

The fallacy in this reasoning is that it equates secrecy with safety; it assumes that a client who is not concerned with public embarrass-

10. See WIGMORE, *supra* note 1, § 2311, at 599 (stating that the rationale for the rule does not apply when client does not seek secrecy).

11. *Id.* § 2285, at 527.

12. *Id.* The four fundamental conditions delineated by Wigmore are:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. (internal citations omitted).

13. See *id.* § 2285, at 528.

14. *Id.* § 2311, at 599.

15. *Id.* (quoting *Parkhurst v. Lowten*, 36 Eng. Rep. 589, 596 (Ch. 1819)).

16. *Id.* § 2311, at 603.

ment is also unconcerned about being legally compromised by the use of these communications. Undoubtedly, if the client speaks to his attorney in the presence of third parties, knowing that he is not protected by the privilege, the privilege protection is not necessary to encourage that speech. However, it does not follow as simply that the privilege protection is justified *only* if the client communicated with the expectation of secrecy.

Indeed, there is justification for the attorney-client privilege even if the client has no desire for secrecy. It is the *exclusionary* effect of the privilege that is fundamental to the candor being sought, not the secret context of the communication being encouraged. While secrecy often may be desired by the client, it is ensured, in part, through the attorney by the Code of Professional Responsibility, and otherwise within the factual control of the client. Its presence, however, adds nothing positive to the privilege equation. If the client is willing to speak without secrecy, requiring it will not increase the client's candor. If the client is only willing to speak in a context of secrecy, requiring what will otherwise be insisted upon does not further the goal of the privilege. Conversely, not requiring what the client will otherwise insist upon in no way detracts from the privilege's effectiveness. The fact that secrecy may be desired is not justification for making it required. Therefore, premising the application of the privilege protection on the existence of confidentiality that the client does not desire serves only to restrict arbitrarily its application and increase the cost of its use for everyone,¹⁷ with no corresponding benefit.¹⁸

Because confidentiality is not a logical imperative of the attorney-client privilege, there is no evidence that extending the privilege protection to non-confidential attorney-client communications would suppress relevant communications that would occur without the privilege protection. Therefore extending the privilege protection to such communications would not be inconsistent with the philosophy of construing the privilege narrowly to suppress only those communi-

17. See *infra* note 20 and accompanying text.

18. While some may protest that it is unseemly to preclude the use of a communication at a trial when the client's public dissemination has made its contents known to the world, this situation has become quite common in our judicial system. For example, prior criminal activity of an accused may be openly discussed in the public media but inadmissible under our character evidence rules. Similarly, jurors often hear inadmissible testimony from witnesses at trial (for example, when a witness answers before an objection can be made, or when the answer is unresponsive to the question asked), requiring an instruction to disregard what has been heard.

cations that need the privilege's encouragement.¹⁹ Confidentiality, therefore, should be abandoned as a requirement for the attorney-client privilege because compliance with it generates significant unnecessary costs in the preservation of the secrecy, the proof of that preservation, and the resolution of disputes surrounding it.

These costs are incurred in a number of ways. First, for each communication withheld from discovery on a contested ground of attorney-client privilege, the proponent must establish that he intended the communication to be confidential.²⁰ If this is not apparent from

19. Most courts have accepted Professor Wigmore's pronouncement that because the "benefits [of the privilege] are all indirect and speculative [and] its obstruction is plain and concrete . . . [the privilege] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." WIGMORE, *supra* note 1, § 2291, at 554 (internal citation omitted); *see also, e.g.*, *United States v. (Under Seal) (In Re Grand Jury 83-2 John Doe No. 462)*, 748 F.2d 871, 875 (4th Cir. 1984) (construing the privilege strictly); *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) ("[T]he adverse effect of [the privilege's] application on the disclosure of truth may be such that the privilege is strictly construed."); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, MDL 997, 1995 WL 663684, at *1 (N.D. Ill. Nov. 6, 1995) ("Since the attorney-client privilege has the effect of withholding relevant information from the fact finder, the privilege is narrowly construed and applies only where necessary to achieve its purpose."); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 49 (M.D.N.C. 1987) ("[T]he privilege must be strictly construed to ensure that it does not unduly impinge on the more general, overriding duty of insisting that investigations and decisions be based on truth and reality as opposed to fiction or fabrication."); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 384 (D.D.C. 1978) ("While the privilege serves a very important purpose [it can] be an obstacle to the investigation of the truth. Therefore, the privilege ought to be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" (quoting WIGMORE, *supra* note 1, § 2291, at 554)).

20. *See, e.g.*, *United States v. Rockwell Int'l*, 897 F.2d 1255, 1265 (3d Cir. 1990) ("The attorney-client privilege does not apply to communications that are intended to be disclosed to third parties or that in fact are so disclosed."); *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983) (holding fact that conversation took place in a public hallway not to be fatal to confidentiality if conversation held in low voices and if outsiders are clearly not present; in this case, however, defense counsel spoke loudly enough for any passersby to hear); *Griffith v. Davis*, 161 F.R.D. 687, 694 (C.D. Cal. 1995) ("[C]ourts have consistently refused to apply the privilege to information that the client intends or understands may be conveyed to others. . . ." (quoting *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984))); *Brimley v. Hardee's Food Sys., Inc.*, No. 93 CIV 1797 (LAK), 1995 WL 51177, at *2 (S.D.N.Y. Feb. 9, 1995) ("The privilege protects only those attorney-client communications . . . intended to be confidential. . . . [I]f a client employs an attorney both to advise the client and to communicate the client's position to another party, the privilege does not [cover communications that] the client intends the lawyer to communicate to the third party. . . ." (internal citations omitted)); *see also Tisby v. Buffalo Gen. Hosp.*, 157 F.R.D. 157, 168 (W.D.N.Y. 1994) ("Where . . . there is a clear intention that the document communicated to counsel is to be provided to a third party, the privilege is rendered inapplicable as the document is not intended to be confidential.") (internal citations omitted); *Winchester Capital Management Co. v. Manufacturers Hanover Trust Co.*, 144 F.R.D. 170, 174 (D. Mass. 1992) (stating that in order to protect attorney-client communications, circumstances must show that they were intended to be secret); *In re Ampicillin Antitrust*

the circumstances surrounding the communication, usually it will be established through an affidavit from the author or recipient of the communication, or, in a business setting, through an affidavit from someone within the company who is familiar either with company policy, or custom and practice, regarding storage and distribution of communications of this nature.²¹ Second, the client must offer evidence of the relationship of each of the named recipients to the client, either as the attorney rendering the advice sought, an agent of the attorney, or a representative of the client whose business responsibilities allow him to be privy to the communication.²²

Litig., 81 F.R.D. at 390 ("Intent and confidentiality will depend on the circumstances of the particular case and may require a document-by-document determination in which the substance of the document may be the only objective indicator of the client's intention.").

21. See, e.g., *United States v. First State Bank*, 691 F.2d 332, 335 (7th Cir. 1982) (stating that "allegations must be supported by affidavits"); *Varo, Inc. v. Litton Sys., Inc.*, 129 F.R.D. 139, 142 (N.D. Tex. 1989) ("A party claiming the privilege must make a proper showing, usually by affidavit, that all factors have been satisfied."); *Nutmeg Ins. Co. v. Atwell, Vogel & Sterling*, 120 F.R.D. 504, 510 (W.D. La. 1988) ("[T]he proponent must provide the court with enough information to enable the court to determine privilege, and the proponent must show by affidavit that precise facts exist to support the claim of privilege."); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 515 (M.D.N.C. 1986) ("[T]he proponent must provide the court with enough information to enable the court to determine privilege, and the proponent must show by affidavit that precise facts exist to support the claim of privilege."); *Barr Marine Prods. Co. v. Borg-Warner Corp.*, 84 F.R.D. 631, 637 (E.D. Pa. 1979) ("In short, a party resisting discovery on the ground of the attorney-client privilege must by affidavit show sufficient *facts* as to bring the identified and described documents within the narrow confines of the privilege." (quoting *International Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88, 94 (D. Del. 1974))); *International Paper Co.*, 63 F.R.D. at 93 ("It is incumbent on one asserting the privilege to make a proper showing that each of the criteria [for the privilege] existed. Such a showing is usually by affidavit in which the documents are adequately listed and described. . . ." (citation omitted)).

22. See, e.g., *United States v. Witmer*, 835 F. Supp. 208, 223 (M.D. Pa. 1993) ("The Department claims that, without an identification of the individuals to whom the documents were disclosed and their positions and reasons for needing to know the information contained in the documents, it has no way of testing Harsco's claim of privilege. This court agrees."); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, No. 88-9752, 1991 U.S. Dist. LEXIS 15824, at *4 (E.D. Pa. Oct. 31, 1991) (chastising defendants for leaving the court "in the dark" about the possible confidentiality of certain documents and who, if anyone, had access to them); *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1047 (D. Del. 1985) (noting that a list detailing the role of each employee who had contact with disputed documents helped the court determine whether the documents were privileged).

Within the organizational structure of an entity client, like a corporation,²³ partnership,²⁴ governmental organization²⁵ or other enterprise,²⁶ confidential attorney-client communications can only be shared with individuals who “personify” the entity. Under the Supreme Court decision in *Upjohn Co. v. United States*,²⁷ only those individuals whose employment responsibilities involve the subject of the communication can be privy to it.²⁸

Third, it must be established that the initial confidentiality has been maintained.²⁹ This can be far more complex than establishing

23. See *Upjohn Co. v. United States*, 449 U.S. 383, 391-97 (1981).

24. See *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255 (S.D.N.Y. 1994) (upholding the ability of a law partnership to use a partner or associate as counsel of record in a litigated matter without violating the attorney-client privilege).

25. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *EEOC v. Pasta House Co.*, No. 4:94CV1715 TIA, 1996 WL 153959, at *1 (E.D. Mo. Feb. 6, 1996); *Boyer v. Board of County Comm'rs*, 162 F.R.D. 687, 688-90 (D. Kan. 1995); *United States v. Miracle Recreation Equip. Co.*, 118 F.R.D. 100, 107 (S.D. Iowa 1987).

26. See, e.g., *United States v. Layton*, 855 F.2d 1388, 1406-07 (9th Cir. 1988) (church); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 59-61 (7th Cir. 1980) (association); *Arcuri v. Trump Taj Mahal Assocs.*, 154 F.R.D. 97, 101-03 (D.N.J. 1994) (union); *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F. Supp. 906, 909 (D.D.C. 1982) (trust).

27. 449 U.S. 383 (1981).

28. See *id.* at 394. In *Upjohn*, the Court was deciding who, within the corporate hierarchy, personifies the corporation in communications with corporate counsel. See *id.* at 390-91. Before *Upjohn*, lower courts had developed two tests to determine who within a corporation can invoke privilege. In *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962), it was held that only individuals within the corporation's “control group”—those employees with the authority to act upon the legal advice received by the corporation—could speak with corporate counsel under the protection of the privilege. In *Harper & Row Publishers Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970), the court held that communications between corporate counsel and all employees on subjects within the scope of their employment responsibilities are protected by the attorney-client privilege. This was dubbed the “subject matter” test. See *id.* at 491.

While rejecting the “control group” test, see *Upjohn*, 449 U.S. at 390-94, and claiming not to have adopted any specific test, see *id.* at 396-97, the *Upjohn* Court's analysis, and the factors it relied upon, marched in lock-step to the requirements of the “subject matter” test. Those factors included: 1) The chairman of the board directed lower echelon employee to speak with counsel; 2) legal advice was the purpose underlying the interviews; 3) employees were aware that the “[i]nformation . . . was needed to supply a basis for legal advice;” 4) the “[c]ommunications concerned matters within the scope of the employees' corporate duties;” and 5) the communications were considered “highly confidential” and that confidentiality was maintained. *Id.* at 394-95.

29. See *Scott Paper Co. v. United States*, 943 F. Supp. 489, 499-500 (E.D. Pa. 1996) (denying defendant's claim of attorney-client privilege because it was unclear whether documents for which defendant sought privilege “were maintained in files subject to open review by all members of the IRS or whether they were maintained with an expectation of confidentiality”); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954) (“It is difficult to be persuaded that these documents were intended to remain confidential in the light

the initial expectation. If there is no company policy about copying and secondary distribution of confidential communications, each recipient (all addressees and distributees) must file an affidavit attesting to the fact that there was no further distribution. If there has been secondary distribution, the proponent must identify each distributee, establish that person's business duties (to demonstrate that he or she should have been privy to the communications) and obtain affidavits from each secondary distributee establishing that still further distribution has not occurred.

As part of the determination of whether there has been improper distribution, the privilege claimant must provide affidavits from knowledgeable persons to account for each handwritten notation, interlineation or initial appearing on *every copy of every document in every distributee's file*. Consequently, in large companies with wide distribution circles, many copies of the same document must be produced for judicial examination. Each entry must be identified and matched with previously identified individuals. If new individuals are identified, their responsibilities within the organization must be established and the relationship of the document to those responsibilities explained. In addition, an affidavit must be filed by each person verifying that there has not been further distribution, or justifying the distribution that has occurred. None of this would be necessary if the confidentiality requirement were abolished.

Once the attorney-client privilege protection has attached, it will continue to protect the communication until the client waives it.³⁰

of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files with special protections was made.").

The record-keeping practices of the client need to provide assurances that unauthorized persons will not have access to the confidential communications, or will provide notice to those with access that special information within the file should be read only by those with a need to know arising from their agency responsibilities. Nevertheless, the client's record-keeping practices and distribution or access policies, as well as its procedures for confidential attorney-client communications, need not be so cumbersome that they interfere with the normal efficient operations of the enterprise. *See James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 142 (D. Del. 1982) (explaining that finding a document has been rendered nonconfidential when an unauthorized corporate employee purposefully or inadvertently reads a privileged document would require every corporation to establish extensive monitoring procedures that would be "neither practical nor in the Court's opinion required by the case law").

30. *See Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 306 (S.D.N.Y. 1993) ("Unlike the deliberative privilege or the work-product rule, the attorney-client privilege in its federally recognized form cannot be overcome simply by a showing of need."); *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 503-04 (Cal. 1994) ("[W]here the elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the par-

How this issue must be raised, and the burdens that must be borne by the proponent and opponent of the privilege claim, are unclear. Some courts hold that an established privilege protection will be recognized until the opponent proves that it has been waived.³¹ Other courts have held that since waiver is so closely tied to the element of confidentiality, the proponent of the privilege must prove that the confidentiality initially intended has subsequently been maintained.³² The prevalent, albeit unstated, practice appears to impose the initial burden of establishing the basic elements on the privilege proponent. Once proven, the burden of going forward with evidence shifts to the opponent to establish a *prima facie* case of waiver, predicated on facts which would lead a reasonable person to find that the privilege has been waived. If the opponent of the privilege meets the burden,

ticular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege.”); *State ex rel. United States Fidelity & Guar. Co. v. Montana Second Judicial Dist. Court*, 783 P.2d 911, 915 (Mont. 1989) (noting that “[w]hereas a showing of need may overcome the immunity given to work product, no showing of need can be invoked to overcome the [attorney-client] privilege”); *State ex rel. North Pac. Lumber Co. v. Unis*, 579 P.2d 1291, 1293 (Or. 1978) (“On its face, the statute provides absolute protection to all communications to and advice given by an attorney in the course of professional employment, permitting testimonial disclosure only with the client’s consent.”); *see also Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956) (“It is well settled . . . that the confidential relationship of attorney and client is . . . a privilege which belongs to the client, and the client alone, to claim or to waive . . .”); *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 421 (1834) (“By this rule, it is well established, that all confidential communications between attorney and client, are not to be revealed at any period of time, nor in any action or proceeding between other persons; nor after the relation of attorney and client has ceased.”). *But see State v. Cuffle*, 828 P.2d 773, 775 (Ariz. 1992) (“In general, the attorney-client privilege is not absolute.”).

31. *See, e.g., Texaco, Inc. v. Louisiana Land & Exploration Co.*, 805 F. Supp. 385, 387 (M.D. La. 1992) (“Once a claim of privilege has been established, then the burden or [sic] proof shifts to the party seeking discovery to prove any applicable exception to the privilege.”), *appeal dismissed*, 995 F.2d 43 (5th Cir. 1993); *Gramm v. Horsehead Indus., Inc.*, No. 87 Civ. 5122 (MJL), 1990 U.S. Dist. LEXIS 773, at *5 (S.D.N.Y. Jan. 25, 1990) (“If such a privilege is established, it then becomes the burden of plaintiffs [the opponent of the privilege] to demonstrate the facts establishing a waiver.”).

32. *See, e.g., United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996) (“[T]he party claiming the privilege carries the burden of demonstrating that: (1) the attorney-client privilege applies; (2) the communications were protected by the privilege; and (3) the privilege was not waived.”); *United States v. Zolin*, 809 F.2d 1411, 1415 (9th Cir. 1987) (“In order to establish the applicability of the attorney-client privilege to a given communication, the party asserting the privilege must affirmatively demonstrate non-waiver.”), *aff’d in part and vacated in part on other grounds, remanded*, 491 U.S. 554 (1988); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (holding that the proponent must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived).

the burden shifts back to the proponent to demonstrate that the privilege is still viable.³³

Because of the confidentiality requirement, the privilege protection can be waived by the client's voluntarily disclosing a communication to third parties,³⁴ failing to take reasonable precautions to

33.

The Court finds that this "shared burden" approach to establishing waiver of the attorney-client privilege alleviates the onerous burden on, [sic] a client asserting attorney-client privilege to prove a negative, i.e. that the privilege has not been waived, while still placing the ultimate burden of proof on the client.

Thus, the party asserting the attorney-client privilege bears the initial burden of proving that the communication in question is privileged. If the party seeking discovery asserts that the privilege which initially attached to the communication in question was subsequently waived, that party must bear the burden of production on the issue of waiver. Once the opponent has proffered evidence that the claimed privilege has been waived, the party asserting attorney-client privilege bears the ultimate burden of proving that the privilege was not waived. In other words, the party asserting the privilege must prove that the acts proffered by the other side do not constitute a waiver with respect to the withheld documents.

United States v. Chevron Corp., No. C94-1885SBA, 1996 U.S. Dist. LEXIS 8646, at *10-11 (N.D. Cal. May 30, 1996) (citations omitted); *see also In re Grand Jury Proceedings*, 73 F.R.D. 647, 652 (M.D. Fla. 1977) ("When faced with a document that on its face appears to be a genuine, voluntary waiver of the attorney-client privilege, corroborated by witnesses present at the time the waiver was executed, the Court concludes that the burden is on movant to rebut the prima facie case of validity.").

34. This voluntary disclosure can be through releasing documents, whether or not in response to a subpoena, *see* United States v. Knoll, 16 F.3d 1313, 1322 (2d Cir. 1994) (holding that because a party sent letters to an individual with whom he had no relationship of confidentiality, any legitimate expectation of privacy he may have had in them was thereby abandoned); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) (involving voluntary disclosure to outside auditor); *Olson v. United States*, 872 F.2d 820, 823 (8th Cir. 1989) (involving disclosure of documents in response to subpoena without objection); *Hollins v. Powell*, 773 F.2d 191, 197 (8th Cir. 1985) (involving attorney testimony); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (concerning client which allowed third party unrestricted access to privileged documents); *Howell v. United States*, 442 F.2d 265, 269 (7th Cir. 1971) (involving client who testified at hearing about communications with counsel); *Matz v. United States*, No. CIV96-0957-PHX-SMM, 1996 U.S. Dist. LEXIS 13218, at *4 (D. Ariz. July 24, 1996) (holding that releasing documents to third party bank constituted waiver); *Donaggio v. Arlington County*, 880 F. Supp. 446, 451 n.5 (E.D. Va. 1995) (finding waiver where client revealed what may have been privileged information at his deposition and attorney made no objection at that time); *Federal Trade Comm'n v. Abbott Labs.*, 853 F. Supp. 526, 537 (D.D.C. 1994) ("From the beginning, Abbott's posture was that it had nothing to hide and turned over all its information and records to the FTC. As part of its cooperation, Abbott waived all its legal privileges including its extremely important and sensitive attorney-client privilege."), responding to an interrogatory, *see Malco Mfg. Co. v. Elco Corp.*, 307 F. Supp. 1177, 1179 (E.D. Pa. 1969), incorporating privileged communications in an affidavit, *see Computer Network Corp. v. Spohler*, 95 F.R.D. 500, 502 (D.D.C. 1982) (client affidavit); *In re Grand Jury Subpoena*, 438 F. Supp. 1176, 1177-78 (S.D.N.Y. 1977) (attorney's affidavit), or informally disclosing through oral communications the substance of privileged communications, *see In re Grand Jury Proceedings*, 78 F.3d 251, 254-55 (6th Cir. 1996) (finding waiver where client disclosed substance of attorney's advice to government investigators); *United States v. Hamilton*, 19 F.3d 350, 353 (7th Cir. 1994)

preserve the confidentiality,³⁵ or failing to object, or to object properly, to the disclosure of confidential communications.³⁶ If eviden-

("[R]egardless of whether Mr. Hamilton could demonstrate that the information Wildman obtained through their prison cell communications was privileged, Mr. Hamilton waived any such privilege when he voluntarily disclosed the confidential information to his cellmate."); *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989) (finding waiver where client disclosed conversation with attorney as part of business negotiations); *Ziemann v. Burlington County Bridge Comm'n*, 155 F.R.D. 497, 503 (D.N.J. 1994) ("[T]he treating physician was not the agent of plaintiff's attorney. Consequently, Ziemann's disclosure of the advice to the physician waived the attorney-client privilege that previously attached to the communication."); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, No. 88-9752, 1993 U.S. Dist. LEXIS 5234, at *13 (E.D. Pa. Mar. 31, 1993) (involving disclosure of attorney's advice through deposition testimony to which no objection was made).

35. See *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (holding that if a client wishes to preserve the privilege, it must "treat the confidentiality of attorney-client communications like jewels—if not crown jewels"); *Scott Paper Co. v. United States*, 943 F. Supp. 489, 499-500 (E.D. Pa. 1996) (finding no privilege where defendant failed to clarify whether documents at issue "were maintained in files subject to open review by all members of the IRS or whether they were maintained with an expectation of confidentiality"); *Bower v. Weisman*, 669 F. Supp. 602, 606 (S.D.N.Y. 1987) ("[L]eaving a document out on a table (as opposed to putting it in a briefcase or in a drawer) in a public room in a suite in which another person is staying is insufficient to demonstrate Weisman's objective interest in its confidentiality."); *In re Victor*, 422 F. Supp. 475, 476 (S.D.N.Y. 1976) (finding no privilege for documents placed in a public hallway since "it certainly could not be said that the client expected these papers to be kept from the eyes of third parties"); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954) (finding no privilege where documents "were indiscriminately mingled with the other routine documents of the corporation and . . . no special effort to preserve them in segregated files with special protections was made"); *D.I. Chadbourne, Inc. v. Superior Court*, 388 P.2d 700, 708 (Cal. 1964) ("[W]here, as here, there was not a direct chain of communication [between client and attorney], we must ask ourselves to what extent the corporation should be allowed to disseminate the 'privileged' information and still claim confidentiality."); *Hoy v. Morris*, 79 Mass. (13 Gray) 519, 521 (1859) (finding no privilege for communication overheard by third party who was sitting, out of sight, behind a closed window); *Lanza v. New York State Joint Legislative Comm.*, 164 N.Y.S.2d 531, 533 (N.Y. Sup. Ct. 1957) (holding that an argument that an electronic device is comparable to a third person, though neither party was aware of or consented to its use, is "without merit").

36. See *United States v. O'Neill*, 619 F.2d 222, 225 (3d Cir. 1980) (finding asserted claim of privilege "unsatisfactory" where it was invoked orally, without affidavit, and "failed to designate with particularity the specific documents or file to which the claim of privilege applied"); *Fox v. California Sierra Fin. Serv.*, 120 F.R.D. 520, 527 (N.D. Cal. 1988) ("A client may not knowingly allow his attorney to testify without objection and later claim that the matters testified to were subject to the attorney-client privilege and that he did not waive the privilege."); *Montgomery v. First Nat'l Bank*, 439 S.W.2d 299, 303 (Ark. 1969) ("Although privileged communications cannot be disclosed through the testimony of an attorney, the failure of the beneficiary of the privilege to object to the admissibility of the questioned testimony renders it competent."); *Mize v. Atchison, Topeka & Santa Fe Ry. Co.*, 120 Cal. Rptr. 787, 795 (Cal. Ct. App. 1975) ("On appeal counsel strongly urges that in the actions above outlined, the trial court violated appellant's work product and lawyer-client privileges. He overlooks a fundamental and fatal weakness which destroys this claim. Counsel never presented a proper objection to the trial court."); *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982) (ruling that the privilege had been waived because no objection was made during the cross-examination of the defendant);

tiary hearings are not held, affidavits would have to be filed addressing each claim. If any of the waiver claims are upheld, the burden would be shifted to the proponent to establish facts that would excuse the breach of confidentiality, for example, that the disclosures were the result of inadvertence.³⁷

If the confidentiality requirement has no legitimate purpose, the complex process for establishing the element of confidentiality for each communication, and the process for litigating questions of waiver because of its absence, are completely unnecessary, annually costing litigants and our judicial systems hundreds of millions of dollars and wasting the time of both lawyers and judges. The fact that over the past century, courts increasingly have honored secrecy in theory more than in practice is evidence that secrecy is not generally regarded as a logical imperative of the attorney-client privilege.

I. EVOLUTION OF THE CONFIDENTIALITY REQUIREMENT

In the eighteenth and early nineteenth centuries, the case law spoke of the attorney's duty not to disclose the "secrets" of his client.³⁸ The attorney-client privilege was premised upon the confidential nature of the attorney-client relationship—the attorney's obligation not to reveal what his client had communicated to him—not upon the confidential or secret nature of the communications.³⁹

Shobe v. EPI Corp., 815 S.W.2d 395, 397 (Ky. 1991) ("A party seeking to protect the confidentiality of documents and other communications from discovery by an adverse party is required to assert and prove the applicable privilege before the trial court, or have the privilege waived."); *Forestire v. Inter-Stop, Inc.*, 621 N.Y.S.2d 686, 687 (N.Y. App. Div. 1995) (characterizing defense counsel's first assertion of attorney-client privilege in response to court's second demand for documents as "patently frivolous" and dismissing claim).

37. See *supra* note 33 and accompanying text.

38. See, e.g., *Baker v. Arnold*, 1 Cai. R. 258, 272 (N.Y. Sup. Ct. 1803) ("The right which clients have to the secrecy of their counsel produces confidence and a full disclosure of every fact necessary to the latter's forming a just estimate of their several cases . . ."); *Craig v. Earl of Anglesea*, 17 How. St. Tr. 1139, 1244 (Ex. in Ir. 1743) ("The attorney is to keep secret what comes to him as an attorney . . ."); *Waldron v. Ward*, 82 Eng. Rep. 853, 853 (K.B. 1654) ("[The counselor] is not bound to make answer for things which may disclose the secrets of his clients [sic] cause, and thereupon he was forborn to be examined.")

39. See *Andrews v. Solomon*, 1 F. Cas. 899, 900-01 (C.C.D. Pa. 1816) (No. 378) ("An attorney is not permitted to disclose as a witness, the secrets of his client, because in doing so, he would betray a confidence, which from necessity the client must repose in him."); *State v. Phelps*, 1 Kirby 282, 282 (Conn. 1787) ("Disclosures, under such circumstances, to the [State's] Attorney, ought to be considered as confidential, and it would tend to defeat the benefits the public may derive from them, should they be made use of to the prejudice of those from whom they come."); *Cromack v. Heathcote*, 129 Eng. Rep. 857, 858 (C.P. 1820) ("[H]ere is a client who goes to give instructions touching a deed, and the communication must be deemed confi-

Therefore, the fact that third parties, unconnected with either the attorney or the client, were present during the attorney-client discussions did not destroy the privilege as a bar to the attorney's revealing what the client had said.⁴⁰

During the nineteenth century courts increasingly interpreted the expectation of confidentiality as imposing a secrecy requirement on communications between an attorney and client.⁴¹ Beyond the

dential, as between attorney and client, though the attorney happens to refuse the employment.”).

The first edition of *Black's Law Dictionary*, published in 1891, defined a “privileged communication” in the law of evidence to be “[a] communication made to a counsel, solicitor, or attorney, in professional confidence, and which he is not permitted to divulge; otherwise called a ‘confidential communication.’” BLACK'S LAW DICTIONARY 941 (St. Paul, Minn., West 1891). “Confidential communications” were defined as communications

passing between persons who stand in a confidential or fiduciary relation to each other, (or who, on account of their relative situation, are under a special duty of secrecy and fidelity,) which the law will not permit to be divulged, or allow them to be inquired into in a court of justice, for the sake of public policy and the good order of society. Examples of such privileged relations are those of husband and wife and attorney and client.

Id. at 249.

40. See *Goddard v. Gardner*, 28 Conn. 172, 175 (1859) (finding that a third party present at communication between attorney and client, unlike attorney, is not covered by the privilege); *Hoy*, 79 Mass. (13 Gray) at 521 (finding a bystander who overheard the communications between an attorney and his client not within the privilege); *Blount v. Kimpton*, 29 N.E. 590, 591 (Mass. 1892) (holding that communications between an attorney and his client, though made in the presence or hearing of a third party, are still confidential as between the attorney and the client); *People v. Buchanan*, 39 N.E. 846, 854 (N.Y. 1895) (finding that the privilege prevents the attorney from revealing the communications between him and his client although a third person present during the communications is not within the privilege); *Jackson v. French*, 3 Wend. 337, 339 (N.Y. Sup. Ct. 1829) (distinguishing applicability of privilege to attorney, who is bound even though third party is present, and to third party himself, who is not); *State v. Falsetta*, 86 P. 168, 169 (Wash. 1906) (“[T]he rule that precludes the attorney from testifying has no application to a third person who, by accident or design, overhears the communication.”); see also *Rex v. Withers*, 170 Eng. Rep. 1258, 1258 (Nisi Prius 1811) (applying privilege to communication made in the presence of a third party).

41. In the influential treatise 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 245 (John Henry Wigmore ed., 16th ed. 1899), the requirement of secrecy in communication between the attorney and client was *not mentioned until 1899* when the sixteenth edition was published. In illustrations of communications that were *not protected* by the attorney-client privilege, the sixteenth edition added: “[The presence of a third person will usually be treated as indicating that the communication was not confidential; moreover, a third person who overhears the communication is not within the confidence and may disclose what he hears. . . .]” *Id.* (alteration in original). John Henry Wigmore was the editor of the sixteenth edition of Greenleaf's treatise. In his own treatise, appearing five years later, Wigmore elaborated on this evolved secrecy requirement:

The privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure ceases when the client does not appear to have been desirous of secrecy. . . . No express request for secrecy, to be sure, is necessary; but the circumstances are to indicate whether by implication

fact that most attorney-client communications occurred in a context of privacy and secrecy, it is not clear what prompted this change in interpretation. By the end of the nineteenth century a number of courts had denied the applicability of the privilege because the communication in question had been in the presence of third parties who were agents of neither the attorney nor the client.⁴² As reinterpreted, the initial communication had to be made under conditions of se-

the communication was of a sort intended to be confidential; and the mere relation of attorney and client does not raise a presumption of confidentiality.

These circumstances will of course vary in individual cases, and the ruling must therefore depend much on the case in hand. One of the circumstances, by which it is commonly apparent that the communication is not confidential, is the *presence of a third person*, not being the agent of either client or attorney. Here, even if we might predicate a desire for confidence by the client, the policy of the privilege would still not protect him, because it goes no further than is necessary to secure the client's subjective freedom of consultation, and the presence of a third person (other than the agent of either) is obviously unnecessary for communication to the attorney as such—however useful it may be for communications in negotiation with the third person. It follows, of course, *a priori*, that communications *to the third person* in the presence of the attorney are not within the privilege.

4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 2311, at 3233-34 (1904) (citations omitted).

42. See, e.g., *Frank v. Morley's Estate*, 64 N.W. 577, 578 (Mich. 1895) (holding that statement made to attorney in presence of third party under circumstances which did not exclude that third party is not privileged); *David Adler & Sons Clothing Co. v. Hellman*, 75 N.W. 877, 883 (Neb. 1898):

In none of the interviews or conversations which were then and there had was there anything which was confided by Mr. Hellman to Mr. Connell in his professional capacity. The parties to the purported agreement were both there, and what was said was open and without reserve, and it was competent for Connell to give it in evidence.

See also, e.g., *People v. Buchanan*, 39 N.E. 846, 854 (N.Y. 1895):

A communication intended to be confidential should not be made in the hearing of a third person, unless that person stood in a peculiar relation of confidence The protection extended by the statute to communications between attorney and client is intended to cover those which the relation calls for, and are supposed to be confided to the lawyer to guide him in giving his professional aid and advice. I am not aware of any extension of the rule which would protect the revelation of confidences made to a friend, or to a lawyer in the presence of a friend.

See also, e.g., *Hummel v. Kistner*, 37 A. 815, 816 (Pa. 1897) ("The declarations of the deceased to the scrivener who wrote the deed for one of the properties to Mrs. Kistner were not privileged, being made in the presence of both parties to the transaction.").

crecy,⁴³ and that secrecy had to be maintained thereafter.⁴⁴ Some courts strictly enforced the secrecy requirement. If it were breached by voluntary disclosure,⁴⁵ or by third party stealth,⁴⁶ the privilege pro-

43. See, e.g., *Sharon v. Sharon*, 22 P. 26, 39-40 (Cal. 1889) (en banc):

The witness testifies positively that he was not her attorney, and the facts testified to by him show that he was not. And the communication that took place was on a public street, and in the presence of, and mostly with, a third party, and was not, for that reason, in any sense, confidential, or in the course of his employment.

See also, e.g., *People v. White*, 283 P. 368, 369 (Cal. Dist. Ct. App. 1929) ("The communications about which Coen testified were made in the presence of third persons, and under such circumstances that the court was justified in holding that they were not intended to be of a confidential nature."); *Vought's Ex'rs v. Vought*, 27 A. 489, 490 (N.J. Ch. 1884):

This satisfied me that Mrs. Vought was consulting him, and that in contemplation of law the relation of counsel and client did exist. This being so, I conceived that it was my duty to overrule his testimony on this point. Of all her friends, relatives and acquaintances no one else seems ever to have elicited or to have been entrusted with this secret, if the supposed secret had a foundation in fact, and this is a circumstance which emphasizes the conviction that her statement to Mr. Throckmorton was, in the highest nature, confidential.

See also, e.g., *In re Barnes' Will*, 75 N.Y.S. 373, 376-77 (N.Y. App. Div. 1902) (emphasis added):

[Where the attorney] read the attestation and revocation clauses of the will in the hearing and presence of the testator and the subscribing witnesses, with the testator's assent and approval, it was an *express waiver of secrecy*. . . . [I]t would seem that the testator had no intention that the lips of the attorney should be sealed as to what took place at the time the will was executed, or that he should be prevented from testifying in support of the will.

See also, e.g., *Lecour v. Importers & Traders' Nat'l Bank*, 70 N.Y.S. 419, 424 (N.Y. App. Div. 1901):

[For the attorney-client privilege to apply,] it is inherently necessary that the communication made by the client to the attorney or to the clerk should be secret and confidential. If the client chooses to make his communication open, so that others may hear, it ceases to be such a communication as is entitled to protection; and neither the reason for the rule, nor the rule itself, closes the mouth of any person.

See also, e.g., *Kistner*, 37 A. at 816 ("The declarations of the deceased to the scrivener who wrote the deed for one of the properties to Mrs. Kistner were not privileged, being made in the presence of both parties to the transaction."); *Lyle v. Higgenbotham*, 37 Va. (10 Leigh) 67, 80 (1839):

[S]everal things must concur to bring a case within the rule. The matter must have been one of *professional confidence*; it must have been at the time a secret, for if known to all the world there is no reason for farther concealment; the disclosure must be *in invitum*, as it respects the client; and lastly, if it might be forced from the client by the rules of the court, *pari ratione* it may be drawn from the attorney.

44. See *Parkhurst v. Lowten*, 36 Eng. Rep. 589, 596 (Ch. 1818) ("[T]he moment confidence ceases, privilege ceases. . . .").

45. See, e.g., *Eldridge v. State*, 28 So. 580, 581 (Ala. 1900) (permitting the prosecution to call a client's attorney to rebut the client's testimony as to his privileged communications "although [the attorney's testimony] would have been inadmissible, because [it involved] the disclosure of confidential communications between attorney and client, as original testimony."); *Hager v. Shindler*, 29 Cal. 48, 68 (1865) ("It is settled, if an attorney is retained in an action, and the client after final judgment makes disclosures respecting the subject of the foregone employment, that the communication is not privileged."); *Kelly v. Cummins*, 121 N.W.

tection ceased.⁴⁷ Secrecy was therefore both a condition precedent to the creation of the privilege and a necessary condition to its continuation.

This confidentiality requirement had both an objective and a subjective dimension. First, to deny disclosure, communications had to be kept factually secret from their inception to the moment the privilege claim was asserted.⁴⁸ Second, the client must subjectively have intended that the secrecy be maintained⁴⁹ and the expectation

540, 541 (Iowa 1909) (finding that "a client who goes upon the stand in an attempt to secure some advantage by reason of the transactions between himself and his counsel waives his right to object to the attorney's being called by the other side to give his account of the matter."); *Tays v. Carr*, 14 P. 456, 456 (Kan. 1887) (finding no privilege protection for letter client wrote to his attorney and then included in deposition given to opponent); *Shelton v. Northern Tex. Traction Co.*, 75 S.W. 338, 339 (Tex. Civ. App. 1903, no writ):

We think appellant clearly waived the bar of 'privilege' (if it ever existed) to the communication of which one of appellee's counsel testified. The testimony of another who was present at this conversation had been received without objection on appellant's part, and he also had fully and freely testified in relation thereto.

See also, e.g., *Sanpere v. Sanpair*, 107 P. 369, 370 (Wash. 1910) (holding that a client who testifies to what occurred between himself and his attorney cannot then prevent the attorney from giving evidence upon the ground of privilege because he has "broken the seal of privilege, and cannot restore it").

46. *See United States ex rel. Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1252 (D. Md. 1995) (holding that the privilege does not apply to a document stolen by a trusted employee); *In re Grand Jury Proceedings*, 466 F. Supp. 863, 868 (D. Minn. 1979) ("The protection afforded by the privilege, however, does not apply to the documents obtained from Berkley's former employee, for the privilege does not apply to stolen or lost documents.").

47. Professor Wigmore explained:

All *involuntary* disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle . . . that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client. This principle applies equally to documents.

WIGMORE, *supra* note 1, § 2325, at 633.

48. *See supra* note 44 and accompanying text.

49. *See, e.g., Hager*, 29 Cal. at 64 ("If it appears by extraneous evidence, or from the very nature of the transaction, that confidence was not, and on the maxims by which human nature is ordinarily governed, could not have been contemplated, then the fact communicated may be proved by the testimony of the attorney."); *Burnside v. Terry*, 51 Ga. 186, 192 (1874) (refusing to allow attorney-client privilege to block testimony on instructions of client to attorney to negotiate a contract with plaintiff because "that is not intended to be confidential or sacredly secret which the attorney is to propose to the other party as a foundation for bargains and contracts for the benefit of the client when these proposals are accepted and acted on and the benefits secured"); *Shawmut Mining Co. v. Padgett*, 104 A. 40, 43 (Md. 1918) ("The privilege resulting from communications between attorney and client is designed to secure the client's confidence in the secrecy of his communication, but it assumes, of course, that the communications are made with the intention of confidentiality. The moment confidence ceases privilege ceases."); *Heaton v. Findlay*, 12 Pa. 304, 310-11 (1849):

must have been continuous from the time of the communication.⁵⁰ Therefore, the preservation of confidentiality alone was a necessary, but not sufficient, condition. Consequently, a client's letter to, or conversation with, an attorney initially must have been made outside the presence of unauthorized third parties.⁵¹ Assuming the other elements of the privilege were satisfied, this would permit the privilege protection *to attach* to the communication. Thereafter, the privilege protection *continued* only if the client dealt with the communications in a fashion that reflected a continuous intention that the initial confidentiality be maintained. Therefore, the client could not leave a copy of his letter to an attorney, or the attorney's responsive letter, exposed in a way that would allow others access to it. For example, the client could not leave the letter on a coffee table, exposed to guests,⁵² in a file on the floor in a hallway outside an office for later

[T]he rule of policy, which forbids a counsel to reveal information derived from his client, is confined to confidential communications, and knowledge derived from private and professional intercourse, and does not embrace those facts the counsel may become acquainted with collaterally, or those which were publicly disclosed by direction of the client himself.

See also, e.g., *Earle v. Grout*, 46 Vt. 113, 125-26 (1873) ("[N]or is there any evidence that the plaintiff understood at the time that he was consulting, confidentially, his counsel."); *Parker v. Carter*, 18 Va. (4 Munf.) 273, 286 (1814) (holding that attorney-client discourse is confidential unless client "vaunt[s] his disclosures to the public, . . . challeng[ing] the bystanders to hear them.").

50. See, e.g., *Bower v. Weisman*, 669 F. Supp. 602, 605-06 (S.D.N.Y. 1987); *In re Victor*, 422 F. Supp. 475, 476 (S.D.N.Y. 1976); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464-65 (D. Mich. 1954).

51. See *Springer v. Byram*, 36 N.E. 361, 363 (Ind. 1894) ("It is settled law that if parties sustaining confidential relations to each other hold their conversation in the presence and hearing of third persons, whether they be necessarily present as officers, or indifferent bystanders, such third persons are not prohibited from testifying to what they heard."); *State v. Loponio*, 88 A. 1045, 1047 (N.J. 1913) (citations omitted):

[C]ertainly a client who adopts the indirect instead of the direct method without good reason or reasonable necessity for so doing comes perilously near the one who makes his verbal communication to his attorney in the presence of a third person. In that case the verbal communication is not privileged because it is presumed that it was not intended to be confidential, otherwise it would not have been communicated in the presence of one in whose mouth it would not be privileged. . . . The question probably comes down after all to one of whether or not the method employed was intended and understood to be confidential, and in deciding that question, the presence or absence of reasonable necessity would doubtless be an important element.

See also *Bacon v. Frisbie*, 80 N.Y. 394, 401 (1880) ("[I]t may be that if a client chooses to speak his mind to his counsel, in the presence and hearing of persons unrelated to him in the matter, that what is said is not privileged.").

52. See *Bower*, 669 F. Supp. at 605-06 (citation omitted) (internal quotation marks omitted):

[L]eaving a letter spread out on a table in a room in a suite in which [a third party] was [staying] fails to reach the level of taking all possible precautions to ensure con-

retrieval by the attorney,⁵³ or indiscriminately mingled with routine documents in a business file.⁵⁴ The same was true when confidential documents were stored in a location where third parties had unrestricted access to them.⁵⁵ In each of these instances, the privilege protection ended with the objective evidence of the subjective relinquishment of the expectation of confidentiality. It was irrelevant that the communications, in fact, remained confidential because they were not read by the third parties who were given access.⁵⁶

After confidentiality evolved to such a restrictive secrecy requirement throughout the nineteenth century, twentieth century courts have demonstrated, albeit without acknowledgment, an appreciation of the illogic and unfairness of the requirement. Courts in the twentieth century have gradually expanded the permissible circle of confidentiality, and ultimately ignored the requirement when the secrecy has been lost.

A. *Expanding Circle of Confidentiality—Who Represents the Attorney and Client*

Throughout the history of the attorney-client privilege, it has been universally accepted that agents of both the attorney and the client, who were vital to the legal assistance sought, could be brought within the circle of confidentiality.⁵⁷ For the attorney, this expanded the circle to include not only the secretaries and paralegals,⁵⁸ but also

confidentiality. . . . [L]eaving a document out on a table (as opposed to putting it in a briefcase or drawer) . . . is insufficient to demonstrate Weisman's objective interest in its confidentiality.

53. See *In re Victor*, 422 F. Supp. at 476 ("By placing the documents in the public hallway outside of Mr. Victor's office, the privilege which might have theretofore existed with respect to these papers was totally destroyed. . . . [I]t certainly could not be said that the client expected these papers to be kept from the eyes of third parties.").

54. See *Kelsey-Hayes Wheel Co.*, 15 F.R.D. at 465 ("It is difficult to be persuaded that these documents were intended to remain confidential in the light of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files with special protections was made.").

55. See *In re Horowitz*, 482 F.2d 72, 80-82 (2d Cir. 1973).

56. See, e.g., *United States v. Tellier*, 255 F.2d 441, 447 (2d Cir. 1958) (stating that whether advice letter from attorney to client was actually read by third parties is irrelevant when determining if communication was privileged); see also *supra* notes 52-55 and accompanying text.

57. See, e.g., *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (investigator); *In re Hill*, 786 F.2d 3, 6 n.4 (1st Cir. 1986) (paralegal); *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976) (handwriting analyst).

58. See *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976) ("Given the complexities of modern existence few, if any, lawyers could as a practical matter

the experts who were hired to assist in investigating or providing scientific or technical assistance in preparation for litigation.⁵⁹ For the client, this included everyone who was under the control of the client and necessary for the advice being sought.⁶⁰ Within this category are outside consultants retained to perform business services, whose knowledge and experience from that service was important to legal assistance later sought.⁶¹ When the attorney-client privilege was extended to the corporate entity,⁶² the circle of confidentiality bur-

represent the interests of their clients without the assistance of a variety of trained legal associates not yet admitted to the bar, clerks, typists, messengers, and similar aides.”).

59. See *Pipkins*, 528 F.2d at 563 (handwriting analyst); *NLRB v. Harvey*, 349 F.2d 900, 906-07 (4th Cir. 1965):

[C]ircumstances may exist where a lawyer finds it necessary to employ a detective to enable him adequately to furnish legal services to his client. In such a situation the client's communication [sic], including those relating to the hiring of the detective, would be privileged because the legal services are indistinguishable from the the [sic] non-legal.

See also *Flood v. Waste Management, Inc.*, No. 87 C 4643, 1989 U.S. Dist. LEXIS 10822, at *1 (N.D. Ill. Sept. 13, 1989) (hypnotist); *Smith*, 425 F. Supp. at 1043-46 (psychiatrist); *United States v. Schmidt*, 343 F. Supp. 444, 446 (M.D. Pa. 1972) (accountant); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 360-61 (D. Mass. 1950) (patent agents); *LaLance & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 F. 563, 564 (C.C.S.D.N.Y. 1898) (patent expert witness).

60. See *Macario v. Pratt & Whitney*, No. 90-3906, 1991 U.S. Dist. LEXIS 2826, at *1-2 (E.D. Pa. Mar. 8, 1991) (stating that a teletype sheet sent by consultant employed by Pratt & Whitney to attorney retained by company was protected by the attorney-client privilege because legal advice was being sought on behalf of the company); *Danisch v. Guardian Life Ins. Co.*, 18 F.R.D. 77, 79 (S.D.N.Y. 1955) (“Where the agent communicates with the attorney on behalf of his principal and concerning the matter of professional employment the communication is privileged. . . . The attorney is a party to the communication and the agent stands in the [client's] . . . shoes” (internal quotation marks omitted) (internal citations omitted)).

61. See *In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1189-91 (4th Cir. 1991). In this case, the accountant was initially hired to provide business and tax assistance. Later the accountant worked with the client in presenting relevant information to the attorney. The court held that the communications between the client and the accountant, in preparation for communications with the attorney were protected by the attorney-client privilege. Similar results were reached in *In re Beiter Co.*, 16 F.3d 929, 939-40 (8th Cir. 1994) (holding that communications between independent consultant hired by client and client's lawyer were protected by attorney-client privilege where purpose of communications were for seeking legal advice), and *McCaugherty v. Siffermann*, 132 F.R.D. 234, 239 (N.D. Cal. 1990) (holding that communications between client's attorneys and consultant hired by client were protected by attorney-client privilege).

62. The Supreme Court first extended the attorney-client privilege to corporations in *United States v. Louisville & Nashville Railroad Co.*, 236 U.S. 318 (1915). The application of the privilege to corporations was not contested in *Louisville & Nashville*. The Court stated:

The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

geoned because the entity is a legal fiction that has no physical existence independent of the individuals who speak and act for it. Therefore, the entity "client" inevitably encompassed many individuals.

While courts initially defined the personification of the entity by those who controlled the entity's collective judgment—the control group, defined as the corporation's directors and officers⁶³—they ultimately expanded the definition of the corporate client to include anyone within the corporate structure whose duties related to the issues upon which the attorney was asked to render legal assistance.⁶⁴ This, of course, resulted in the radical expansion of the permissible circle of confidentiality for corporate and all other entity "clients." That expansion was complicated, of course, by the endless change of corporate personnel and the evolution of the duties of each position.

With this widening gyre⁶⁵ of confidentiality came an increasing risk of its breach. In a highly mobile workforce, where employees take with them their knowledge of confidential communications, if not the communications themselves,⁶⁶ and employ that knowledge for the benefit of the new employer, the requirement of secrecy has become little more than a fiction. The fictional nature of this confidentiality/secrecy requirement is also demonstrated in the common practice of corporations having *overlapping* board members. By defini-

Id. at 336.

63. See *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962); see also *supra* note 28.

64. See *Upjohn Co. v. United States*, 449 U.S. 383, 394-97 (1981); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970).

65. From *The Second Coming* by William Butler Yeats:

Turning and turning in the widening gyre^a
The falcon cannot hear the falconer;
Things fall apart; the center cannot hold;

^a The gyre—the cone whose shape is traced in the falcon's sweep upward and out in widening circles from the falconer who should control its flight—involves a reference to the geometrical figure of the interpenetrating cones, the 'fundamental symbol' Yeats used to diagram his cyclical view of history.

THE NORTON ANTHOLOGY OF POETRY 914 (Arthur M. Eastman et al. eds., 1970).

66. See, e.g., *Crabb v. KFC Nat'l Management Co.*, No. 91-5474, 1992 U.S. App. LEXIS 38268, at *6 (6th Cir. Jan. 6, 1992) (holding that because adequate efforts to preserve confidentiality had been made, the possession of a privileged document by an ex-employee was excused); *United States ex rel. Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1246 (D. Md. 1995) (noting that trusted employee stole document upon departure after certifying that he had returned all company property); *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512, 516 n.4 (Minn. Ct. App. 1991) ("[T]he company's delay in objecting to use of the letter did not waive the privilege given the former employee's surreptitious actions [in taking the communication and sending it to an employee of the opposing side].").

tion, a corporation has not maintained secrecy if it communicates matters to an individual who simultaneously sits on the board of directors of, and therefore personifies, more than one corporation.⁶⁷

B. A Further Expanding Circle of Confidentiality—Shared Communications

While courts expanded the definition of “client” and the circle of those who represented the client, they also enlarged the range of those outside a traditional agency relationship with whom the client could share confidential communications without waiving the privilege protection. Clients could be represented by the same attorney and, as joint clients, could share information on matters of common legal interest.⁶⁸ If clients were jointly involved in litigation as parties,

67. This point was first raised by Judge Campbell in *Radiant Burners, Inc. v. American Gas Association*, in which he denied the application of the privilege to “any of the corporate parties to this suit.” 207 F. Supp. 771, 775 (N.D. Ill. 1962). As stated by Judge Campbell:

Were we to assume, as obviously many of us have heretofore, that a corporation may claim the privilege, then we are immediately presented with the anomalous situation of determining what persons within the corporate structure hold its confidence and may properly be considered as its *alter ego* and therefore the “client.” In making such a determination should we include within the scope of the term “client” the corporation’s president? What then of other officers, members of the board of directors, executive committee members, supervisory personnel, office workers, or for that matter any employee, and finally what about the individual stockholders? If an individual is not permitted to make an agent of still another individual, or more accurately of large groups of individuals, and thus increase the scope of the protection afforded to him through the attorney-client privilege and “profane” its confidence why permit a corporation to do the same thing through normal corporate operations? Clearly, even at common law the client’s necessity and the attorney’s of having immediate office personnel permitted access to documents without destroying their confidential nature is accepted and approved. (The solicitor or the barrister’s clerk for example.) However, it is obvious that there is no comparison between this accepted extension of the scope of the terms “attorney” and “client,” and an attempted extension of the term to encompass all those persons who constitute a corporate entity. This is well illustrated by considering the boards of directors and executive committees of most large corporations. Such groups are often made up of dominant and influential individuals of other corporations and organizations, with many of which the corporation has business dealings. . . . Information from or in the hands of these individuals would unquestionably be information from or in the hands of persons outside the scope of the term “client,” as this term is intended with reference to the attorney-client privilege. It is most unrealistic to presume that such communications are made with the intention of confidentiality or could possibly avoid the “profanation” so clearly condemned by the Rule as created at common law.

Id. at 774.

When the appellate court reversed, *see Radiant Burners, Inc. v. American Gas Ass’n*, 320 F.2d 314, 324 (7th Cir. 1963), it did not address the absence of confidentiality as a basis for denying the application of the privilege.

68. *See In re the Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996) (noting that when two or more clients are represented on the same matter by the same attorney, “those represented are viewed as joint clients for purposes of privilege. . . . [T]he joint client doctrine

but with separate counsel, they were permitted to pool their resources in a *joint defense* effort.⁶⁹ Similarly, if clients shared *common interests* or a *community of interests*, without being involved in, or anticipating, specific litigation, they were still permitted to share confidential communications in a common effort to achieve sound legal advice without waiving the privilege protection.⁷⁰ While this “com-

typically has been applied to overcome what would otherwise have constituted a waiver of confidentiality because a communication had been shared between two clients.”); *Griffith v. Davis*, 161 F.R.D. 687, 693 (C.D. Cal. 1995) (same); *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 8 (N.D. Ill. 1980) (“In order that an attorney-client privilege prevail as to outsiders, the community of interest among joint clients must be an identical legal interest with regard to the subject-matter of the communications between an attorney and a client and must concern legal advice, it cannot be commercial in nature.”).

The rationale for extending the protection of the privilege among several clients is no different from the basic rationale for the attorney-client privilege itself—to ensure more informed, and therefore, more effective, legal advice and assistance, through the concerned efforts of individuals with common legal interests. See *In re Grand Jury Subpoena Duces Tecum* Dated Nov. 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975):

[W]here there is consultation among several clients and their jointly retained counsel, allied in a common legal cause, it may reasonably be inferred that resultant disclosures are intended to be insulated from exposure beyond the confines of the group; that inference, supported by a demonstration that the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation, will give sufficient force to a subsequent claim to the privilege.

69. See *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (“[The joint defense privilege] serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.”); *In re Beville, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (“The joint defense privilege protects communications between an individual and an attorney for another when the communications are ‘part of an on-going and joint effort to set up a common defense strategy.’”); *Griffith*, 161 F.R.D. at 693 (“Thus, the joint client doctrine typically has been applied to overcome what would otherwise have constituted a waiver of confidentiality because a communication had been shared between two clients.”).

70. See *Hodges, Grant & Kaufmann v. United States Dep’t of Treasury, IRS*, 768 F.2d 719, 721 (5th Cir. 1985) (“The privilege is not . . . waived if a privileged communication is shared with a third person who has a common *legal interest* with respect to the subject matter of the communication.” (emphasis added)); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 514 (D. Conn. 1976) (“Chester Carlson, Battelle, and Xerox shared a business interest in the successful exploitation of certain patents. Whether the legal advice was focused on pending litigation or on developing a patent program that would afford maximum protection, the privilege should not be denied when the common interest is clear.”); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) (noting that different persons of corporations have a community of interest “where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice. . . . The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.”). In *Draus v. Healthtrust, Inc.*, the court concluded that Indiana would apply the community of interest doctrine consistently with *Duplan*, noting that “[t]he fact that there may be an overlap of a commercial and a legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest.” No. NA92-0083-6 HPE,

mon interest” category was initially limited to those who shared *identical* legal interests,⁷¹ over time, that limitation was relaxed so that even similar legal interests were considered sufficient.⁷² As a

1997 U.S. Dist. LEXIS 4439 at *23 (S.D. Ind. Mar. 24, 1997) (quoting *Duplan*, 397 F. Supp. at 1172). It also is unimportant whether litigation is pending or anticipated: “The third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non-party to any anticipated or pending litigation.” *Id.* (quoting *Duplan*, 397 F. Supp. at 1172); *see also* Hartford Steam Boiler Inspection and Ins. Co. v. Stauffer Chem. Co., No. 701223, 1991 Conn. Super. LEXIS 2527, at *5 (Nov. 4, 1991) (finding documents shared between insurer and reinsurer and their attorneys maintained privilege because of the “common interest rule”); *In re* State Comm’n of Investigation Subpoena No. 5441, 544 A.2d 893, 896 (N.J. Super. Ct. App. Div. 1988) (“To be sure, a voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege generally waives the privilege. But courts have fashioned a “common interest” doctrine which protects communications made to a non-party who shares the client’s interests.” (citations omitted)); *Cooke v. Superior Court*, 147 Cal. Rptr. 915, 919 (Cal. Ct. App. 1978) (“The law is that privilege extends to communications . . . intended to be confidential, if . . . made to attorneys, to family members, business associates, or agents of the party or his attorneys *on matters of joint concern*, when disclosure of the communication is reasonably necessary to further the interests of the litigant.” (emphasis added)).

71. The restrictive standard was coined in *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974). Thereafter it was widely followed. *See, e.g.*, *Bank Brussels Lambert v. Crédit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 446 (S.D.N.Y. 1995); *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 152 F.R.D. 132, 140 (N.D. Ill. 1993); *Stavanger Prince K/S v. M/V Joseph Patrick Eckstein*, No. 92-0983, 1993 U.S. Dist. LEXIS 1610, at *8 (E.D. La. Feb. 10, 1993); *Anderson v. Torrington Co.*, 120 F.R.D. 82, 86 (N.D. Ind. 1987); *Research Inst. for Med. & Chemistry, Inc. v. Wisconsin Alumni Research Found.*, 114 F.R.D. 672, 676 (W.D. Wis. 1987).

72. *See, e.g.*, *Baltimore Scrap Corp. v. David J. Joseph Co.*, No. L-96-827, 1996 U.S. Dist. LEXIS 18617, at *21 (D. Md. Sept. 17, 1996) (requiring only some common interest about a legal matter and noting that “the privilege arises out of a need for a common defense as opposed merely to a common problem”); *In re* United Mine Workers Employee Benefit Plans Litig., 159 F.R.D. 307, 314 (D.D.C. 1994) (“[T]he common interest rule is concerned with the relationship between the transferor and the transferee at the time that the confidential information is disclosed. The fact that the parties’ interests have diverged over the course of the litigation does not necessarily negate the applicability of the common interest rule.”); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.* 115 F.R.D. 308, 311-12 (N.D. Cal. 1987) (permitting disclosure of patent attorney’s opinion letter during negotiations with persons interested in purchasing one of its divisions); *see also, e.g., In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (“The privilege is not, however, waived if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication.” (citations omitted)). In *SCM Corp. v. Xerox Corp.*, the court stated,

[o]f course there need not be a clear demonstration of actual liability before a third party and a client can be considered to have a sufficiently common interest in legal advice. And the prospect of liability need not arise solely in the context of trial preparation. But a client’s sharing of its attorney’s advice with a third party is not in confidence simply because the third party’s lawyer thought that there ‘might’ be [an antitrust] challenge [to a joint venture in which they were involved], which ‘could’ involve his client. Unless the interests of the parties are demonstrably common, as when potential defendants discuss grand jury questioning, . . . or intended pleas, . . . the risk of shared exposure must at least be sufficiently substantial to have prompted the third party’s lawyer to counsel his client regarding the prospective hazard.

consequence, the privilege protection has evolved into little more than a right of privacy that the client can choose to share with others, while preserving its viability. This evolution of the attorney-client privilege to a right of privacy that can be shared continued with the advent of intent-driven waiver theories and waiver exceptions that ignored the absence of confidentiality.

C. A Still Further Expanding Circle—Client Intent Driven Waivers; Waiver Exceptions

As the secrecy requirement gained importance, and despite its theoretical inconsistencies, courts began to overlook the loss of confidentiality when its destruction was not due to any serious fault on the part of the client or the client's authorized agent. When documents and oral communications were stolen,⁷³ or illegally seized,⁷⁴ or when employees surreptitiously exposed or left their employment with confidential communications in their possession,⁷⁵ courts contin-

70 F.R.D. 508, 524-25 (D. Conn. 1976).

73. See *United States v. Cable News Network*, 865 F. Supp. 1549, 1560 (S.D. Fla. 1994) (rejecting claim that privilege was waived when defendant and his attorneys knew their conversations were being recorded); *Blackmon v. State*, 653 P.2d 669, 671 (Alaska Ct. App. 1982) (upholding privilege where defendant and attorney made reasonable efforts to maintain confidentiality even though eavesdropper heard part of the conversation); *Concrete Block & Prods. Co. v. Kurtz*, 190 N.W.2d 725, 726 (Mich. Ct. App. 1971) (upholding privilege where communications were tape recorded); *Lanza v. New York State Joint Legislative Comm.*, 164 N.Y.S.2d 531, 533 (N.Y. Sup. Ct. 1957) (finding that the attorney-client privilege was not destroyed where an attorney-client communication was surreptitiously recorded during the client's incarceration); *State v. Today's Bookstores, Inc.*, 621 N.E.2d 1283, 1288-89 (Ohio Ct. App. 1993) (rejecting Nichols's argument that the attorney-client privilege was waived and that the document lost its privilege when it was "somehow disclosed to the news media. . . . If disclosure was by some person who was not entitled to have the memorandum or who did not have authority to waive the privilege, the document is still privileged.").

74. See *Lanza*, 164 N.Y.S.2d at 533 (enjoining committee from publishing attorney-client conversation which had been obtained through the use of electronic device).

75. See *Crabb v. KFC Nat'l Management Co.*, No. 91-5474, 1992 U.S. App. LEXIS 38268, at *6 (6th Cir. Jan. 6, 1992) (finding that ex-employee's possession of privileged document did not waive privilege because KFC made adequate efforts to preserve document's confidentiality); *United States ex rel. Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1246 (D. Md. 1995) (finding no waiver of privilege where documents were stolen by employee who falsely claimed that he had returned all property upon departure); *Camp v. Jeffer, Mangels, Butler & Marmaro*, 41 Cal. Rptr. 2d 329 (Cal. Ct. App. 1995) (upholding privilege where ex-employee took a file of correspondence between firm's attorney and clients without the firm's knowledge); *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161, 163 n.4 (Mass. 1995) (noting that privilege is not waived when an employee, after being discharged, takes confidential communications with him); *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512, 516 n.4 (Minn. Ct. App. 1991) ("[T]he company's delay in objecting to use of the letter did not waive the privilege given the former

ued to recognize the privilege and disallow use of the communications against the client. Some courts began applying the standard for waiver of the Sixth Amendment right to counsel—a “voluntary relinquishment of a known right or privilege,”⁷⁶ to the waiver of attorney-client privilege, even though the attorney-client privilege is not a constitutionally guaranteed right.⁷⁷ As courts moved away from requiring confidentiality as an absolute prerequisite for the existence of the privilege, and embraced instead a theory where the continuation of the privilege turned on fairness and the intentions of clients, a number of new waiver concepts emerged.

1. *Inadvertent Waiver.* The first is the doctrine of “inadvertence.” A disclosure is considered inadvertent if it is made under circumstances in which the client is reasonably unaware of the fact that confidential attorney-client communications are being

employee’s surreptitious actions [in taking the communication and sending it to opposing counsel].”).

76. See *Eisenberg v. Gagnon*, 766 F.2d 770, 788 (3d Cir. 1985) (“No matter what standard of waiver [of privilege] is applied, the waiver must be knowing.” (internal quotation marks omitted)); *Berg Elecs. v. Molex, Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995) (finding that “the rule of law . . . that look[s] to intent best serves the interests of the attorney-client privilege, as it protects the client from the apprehension that consultations with their legal advisors will be inadvertently disclosed and applies the privilege in a way that is predictable and certain”); *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) (“Waiver is defined as the intentional relinquishment of a known right. Clearly, there was no intent to waive, under the circumstances here present.”); *Smith v. Armour Pharm. Co.*, 838 F. Supp. 1573, 1575-76 (S.D. Fla. 1993) (holding that a document originally covered by attorney-client privilege does not lose privilege unless client intentionally waives the privilege); *Monarch Cement Co. v. Lone Star Indus., Inc.*, 132 F.R.D. 558, 559 (D. Kan. 1990) (“Waiver imports an intentional relinquishment or abandonment of a known right, and to hold that a waiver could occur through inadvertence would be the antithesis of that concept.”); *Mendhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982) (holding that “waiver imports the ‘intentional relinquishment or abandonment of a known right.’ Inadvertent production is the antithesis of that concept.”); *Suburban Sew ‘N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 260 (N.D. Ill. 1981) (“[T]he relevant consideration is the intent of the defendants to maintain the confidentiality of the documents as manifested in the precautions they took.”); *In re Associated Gas & Elec. Co.*, 59 F. Supp. 743, 744 (S.D.N.Y. 1944) (holding that waiver “need not be expressed in writing nor in any particular form, but the intent to waive must be expressed either by word or act or omission to speak or act”); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, No. C.A. 88C-JA-118, 1991 WL 53822, at *1 (Del. Super. Ct. Apr. 8, 1991) (“[A] party does not waive any attorney-client . . . privilege by the unintended production of documents during discovery.”); *State v. Beaupre*, 459 A.2d 233, 236 (N.H. 1983) (holding the waiver must be the product of “a voluntary relinquishment of the attorney-client privilege”).

77. See *Clutchett v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985) (“Standing alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right. In some situations, however, government interference with the confidential relationship between a defendant and his counsel may implicate Sixth Amendment rights.”).

revealed.⁷⁸ In the course of massive, expedited document production,⁷⁹ or other compelling circumstances where reasonable good faith efforts have been employed, if the client inadvertently disclosed privileged communications to a third party, courts have excused the destruction of confidentiality.⁸⁰

Most courts that have addressed the issue have concluded that it would be harsh to deprive a client of the protection of a privilege when confidentiality has been lost without the client's serious fault. The continued recognition of the privilege in this circumstance, however, reflects a fundamental conflict between the courts' perception of the privilege and the secrecy upon which it has been premised. Judicial practices have made secrecy a non-essential element to the privilege's *continuation*—suggesting that there is little justification for imposing it in the first instance as a condition for the privilege's *creation*.

2. *Limited Waiver*. The second concept emerging from the shift in focus from the absolute requirement of secrecy, to the intentions of the client to relinquish the confidentiality that it represents, has been "limited waiver." Limited waiver permits a client to disclose confidential communications to a third party, and limit the scope of

78. See *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987) (holding that church secretary's delivery of tapes containing privileged communications under the mistaken impression that they were blank "was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver").

Factors the courts will consider in assessing inadvertence were delineated in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*:

The elements which go into [the determination of whether the release of documents is a waiver or an excusable mistake] include the reasonableness of the precautions [taken] to prevent inadvertent disclosure, the time taken to rectify the error, the scope of the discovery and the extent of the disclosure. There is, of course, an over-reaching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded

104 F.R.D. 103, 105 (S.D.N.Y. 1985).

79. See *Transamerica Computer Co., Inc. v. International Bus. Machs. Corp.*, 573 F.2d 646, 652 (9th Cir. 1978) (involving 17 million pages of documents in a three month period); *Lois Sportswear*, 104 F.R.D. at 105 (involving 16,000 pages inspected and 3,000 pages produced).

80. See, e.g., *Aldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("[Considering] the circumstances surrounding a disclosure . . . is preferable to a *per se* rule of waiver. This . . . serves the purpose of the . . . privilege, yet . . . will not relieve those claiming the privilege of the consequences of their carelessness if the circumstances . . . do not clearly demonstrate that continued protection is warranted."); *Monarch Cement Co.*, 132 F.R.D. at 559 ("Waiver imports an intentional relinquishment or abandonment of a known right, and to hold that a waiver could occur through inadvertence would be the antithesis of that concept.").

the resulting waiver to *that specific party*. For example, a corporation might wish to give privileged communications to the Securities and Exchange Commission (SEC) for the limited purpose of helping the SEC to complete an investigation of the company's internal practices.⁸¹ The limited waiver concept permits the client to limit waiver to only the SEC—precluding third parties from later acquiring the same communications from either the client or the SEC,⁸² or if acquired by some means, precluding use against the client.⁸³ Like

81. See *Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc).

82. The court in *Diversified* explained:

As *Diversified* disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. . . . To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.

Id. at 611.

83. A number of state courts have endorsed limited waiver when confidential information must be revealed in proceedings separate from those which gave rise to the privilege. In *State v. Cinel*, 1995 La. App. LEXIS 2302, the court affirmed the trial court's conclusion that Cinel, by calling his former counsel as a witness in order to prove that he was being prosecuted in contravention of an agreement with the district attorney's office, had "waived the attorney-client privilege for the purposes of the motion hearing only." *Id.* at *7. An earlier case from Florida, *Adelman v. Adelman*, 561 So. 2d 671 (Fla. Dist. Ct. App. 1990), involved a divorce proceeding in which the lawyer representing the husband was also representing the ex-lawyer of the wife in a malpractice suit arising out of the ex-lawyer's representation of the wife in the divorce proceeding. The court ruled that the wife had waived her attorney-client privilege with the ex-lawyer only for the purposes of the malpractice action and that her ex-lawyer could reveal confidential information concerning Mrs. Adelman only as necessary to defend himself in the malpractice suit. (The court also upheld the trial court's decision disqualifying the lawyer representing the ex-lawyer from representing the husband in a divorce proceeding). See *id.* at 673. Delaware seems to recognize limited waiver, although no court has provided an extensive discussion. In *Rollins Properties, Inc. v. CRS Serrine, Inc.*, No. CIV.A. 87C-NO-159, 1989 Del. Super. LEXIS 504 (Del. Super. Ct. Dec. 13, 1989), an attorney retained by the defendants had submitted an affidavit and supporting documents during pretrial arbitration. Defendants later resisted producing these documents, claiming privilege. The court held that "if there has been a waiver via . . . the affidavit and the documents produced pursuant thereto, it has been a specifically limited waiver." *Id.* at *14. In *O'Brien v. New England Mutual Life Insurance Co.*, 197 P. 1100 (Kan. 1921), the court implicitly recognized the concept of limited waiver. The client had communicated with her attorney in the presence of an opposing party (her husband). The court acknowledged that such an action would waive the attorney-client privilege in litigation between the former husband and wife, but held that there was no waiver vis-à-vis third parties. See *id.* at 1102. It was therefore appropriate to exclude the testimony of the wife's attorney in litigation between the wife and the former husband's insurance company:

There is no room for presuming that statements made to his attorney by one party to a divorce action in the presence of the other in the course of a conference looking to an adjustment of the controversy are not intended to be confidential. That situation is peculiarly one in which public policy favors encouraging the fullest freedom of utterance.

Id.

sharing communications with a joint client,⁸⁴ or a party with whom the client was engaging in a joint defense effort,⁸⁵ or with whom the client shared a common interest,⁸⁶ the disclosure to the third party was perceived as an expansion of the circle of confidentiality rather than as a breach that destroyed it. The Supreme Court confronted this issue in *Upjohn Co. v. United States*,⁸⁷ where the corporation's general counsel had shared with the SEC a corporate report on bribes to foreign government officials. Without addressing the question, the Court's decision indirectly condoned the concept of limited waiver by concluding that the communication disclosed in the report remained privileged as against subpoenas from the IRS.⁸⁸

While most lower courts have rejected the "limited waiver" concept when *directly* confronted with its propriety,⁸⁹ *indirectly* they have sanctioned much the same thing either by issuing protective orders or by allowing the reassertion of privilege claims that were denied in prior judicial proceedings.

a. Protective Orders. Many courts have begun to issue protective orders in massive pretrial discovery programs to expedite the disclosure process. Under Federal Rule of Civil Procedure 26(c),⁹⁰

84. See *supra* note 68 and accompanying text.

85. See *supra* note 69 and accompanying text.

86. See *supra* note 70 and accompanying text.

87. 449 U.S. 383 (1981).

88. See *id.* at 392-94.

89. See, e.g., *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3rd Cir. 1991); *Permian Corp. v. United States*, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981); *McMorgan & Co. v. First Cal. Mortgage Co.*, 931 F. Supp. 703, 708 (N.D. Cal. 1996); *Neal v. Honeywell, Inc.*, No. 93-C1143, 1995 U.S. Dist. LEXIS 14488, at *16 (N.D. Ill. Oct. 3, 1995); *In re Leslie Fay Cos. Sec. Litig.*, 152 F.R.D. 42, 45 (S.D.N.Y. 1993); *In re Grand Jury Subpoenas Dated Dec. 18, 1981 and Jan. 4, 1982*, 561 F. Supp. 1247, 1259 (E.D.N.Y. 1982); *Fidelity & Cas. Co. v. Mobay Chem. Corp.*, 625 N.E.2d 151, 157 (Ill. App. Ct. 1993). Many of these decisions explicitly reject the Eighth Circuit's reasoning in *Diversified*:

The Eighth Circuit's "limited waiver" rule has little to do with th[e] confidential link between the client and his legal advisor. Voluntary cooperation with governmental investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a "friendly" agency.

Permian Corp., 665 F.2d at 1220-21.

90. Rule 26(c) provides:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, . . . and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a

and comparable state procedures,⁹¹ a party may seek a wide variety of protections in the discovery process to preserve the confidentiality of his attorney-client communications. Under one form of protective order that has become popular in actions in which discovery is being expedited, parties are permitted to disclose privileged communications to an adversary without formally asserting the privilege, but still preserve the claim for future assertion. By simply noting on each document its privileged nature, the client can limit its circulation to designated individuals, and, at the end of the litigation, require their return with all privilege claims intact for future assertion.⁹² Occasionally, parties attempt to accomplish the same thing through

party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

FED. R. CIV. P. 26(c).

91. See, e.g., *Vela v. Superior Court*, 255 Cal. Rptr. 921, 927 (Cal. Ct. App. 1989) ("To protect City's rights in any future civil litigation it may also be necessary for the trial court to permit the requested discovery subject to an appropriate protective order limiting use of the material in the pending criminal prosecution and preventing its use in any other proceeding . . ."); *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, C.A. No. 89C-SE-35, 1995 Del. Super. LEXIS 320, at *6-7 (Del. Super. Ct. Mar. 17, 1995) (quoting the court's Case Management Order, which provided for the right of the parties to assert a claim of privilege for any document inadvertently produced by giving written notice, within 30 days of discovery of the inadvertent production but no later than 45 days before trial, to all parties who had received copies of the document); *International Bus. Machs. Corp. v. Comdisco, Inc.*, C.A. No. 91-C-07-199, 1992 Del. Super. LEXIS 255, at *2 n.2 (Del. Super. Ct. June 22, 1992) (stating that the protective order entered into by the parties provided that "privileged documents inadvertently produced during discovery must be returned to the producing party on request without prejudice to or waiver of the privileged nature of the documents"); *Braglia v. Cephus*, 496 N.E.2d 1171, 1176 (Ill. App. Ct. 1986) (holding that defendants did not waive the attorney-client privilege when they gave plaintiff a copy of a statement already subject to a protective order); *Sterling v. Keidan*, 412 N.W.2d 255, 256, 259 (Mich. Ct. App. 1987) (affirming, on the ground that the defendant had not impliedly waived his privilege, the grant of a protective order where the defendant mistakenly provided plaintiff with a letter summarizing a telephone conversation between himself and his attorney).

92. See, e.g., *Bayer AG v. Barr Lab., Inc.*, No. 92 Civ. 0381, 1994 U.S. Dist. LEXIS 17988, at *2 n.1 (S.D.N.Y. Dec. 15, 1994); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 76 F.R.D. 47, 59-62 (W.D. Pa. 1977); *United States v. American Tel. & Tel. Co.*, discussed in WAYNE D. BRAZIL ET AL., *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* 94-97, app. 9 at 180-83 (1983).

stipulations rather than judicially issued protective orders.⁹³ In substance, these judicial orders, and judicially sanctioned stipulations and confidentiality agreements, directly permit what the concept of limited waiver sanctions without judicial approval, effectuating a limited destruction of confidentiality with limited consequences.

b. Collateral Estoppel. When a party has unsuccessfully asserted a privilege claim in another proceeding, a judge will have ordered production and the confidential communications will have been produced pursuant to a judicial order. While this is not a voluntary production by the client,⁹⁴ it destroys the communications' confidenci-

93. See, e.g., *Permian Corp.*, 665 F.2d at 1216; *In re Rospach Sec. Litig.*, Nos. 1:90-cv-805-07, 1:91-cv-085, 1991 U.S. Dist. LEXIS 3270, at *46 (W.D. Mich. Mar. 14, 1991); *Baxter Travenol Lab., Inc. v. Abbott Labs.*, 117 F.R.D. 119, 120 (N.D. Ill. 1987); *Dowd v. Calabrese*, 101 F.R.D. 427, 439-40 (D.D.C. 1984). But see *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (upholding trial court's refusal to honor a confidentiality agreement between the parties); *Westinghouse Elec. Corp.*, 951 F.2d at 1427 (holding that an agreement between Westinghouse and the Department of Justice did not preserve the attorney-client privilege with respect to third parties).

Occasionally, courts have cited the fact that the parties did not enter into a pre-disclosure agreement as support for the conclusion that waiver has occurred. See *Prebilt Corp. v. Preway, Inc.*, 1988 U.S. Dist. LEXIS 10764, at *7 (E.D. Pa. Sept. 23, 1988); *Nye v. Sage Prods., Inc.*, 98 F.R.D. 452, 453 (N.D. Ill. 1982). See generally Rodney D. Joslin, *Confidentiality Orders in Complex Litigation*, 4 REV. LITIG. 109, 109-10 (1984) (discussing the widespread use of confidentiality orders and the fact that many judges expect parties to negotiate the terms of the orders on their own).

Parties have also attempted to preserve privilege protections when disclosing documents by accompanying the disclosures with *reservations* of privilege claim. See *United States v. Miller*, 600 F.2d 498, 500-01 (5th Cir. 1979). Most courts that have specifically addressed the issue of the legal effect of such reservations have held that they are a nullity. See *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 331 (N.D. Cal. 1985); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1162 (D.S.C. 1974); *Malco Mfg. Co. v. Elco Corp.*, 307 F. Supp. 1177, 1179 (E.D. Pa. 1969). In *W.R. Grace & Co. v. Pullman, Inc.*, the court explained:

The "conditional" response served on Plaintiffs Fluor in which production was permitted with the right to later assert objections purportedly reserved unnecessarily complicates what is designed to be a simplified discovery procedure. The Court determines that Defendant Pullman has waived any objection it could have made as to any documents it produced in response to the Rule 34 . . . Request for Production for the reason it elected to produce request documents rather than to object for stated reasons.

....

. . . The purported reservation contained in its Response was in effect a legal nullity. One cannot produce documents and later assert a privilege which ceases to exist because of the production.

446 F. Supp. 771, 775 (W.D. Okla. 1976).

94. See *Rattner v. Netburn*, No. 88 Civ. 2080, 1989 U.S. Dist. LEXIS 6876, at *27 (S.D.N.Y. June 20, 1989) ("If a party withholds a document from disclosure on the basis of privilege and, on motion of its adversary, the Court holds that the document is not privileged,

ality. Nevertheless, it is a common practice among trial courts to permit parties to reassert privilege claims that were unsuccessfully raised in the past. Indeed, it is such a common practice that parties virtually never seek to discover whether the documents upon which privilege claims are asserted have been the subject of unsuccessful privilege rulings in the past, or, when they are aware of this fact, never raise the doctrine of collateral estoppel to bar the relitigation of denied claims.⁹⁵ In the one instance where the collateral estoppel issue was raised and addressed by a court, it was accepted as a basis for precluding the relitigation of a previously denied attorney-client privilege claim.⁹⁶

Most courts before which the collateral estoppel claim has been raised have either avoided resolving the question of its applicability⁹⁷ or rejected the estoppel claim on other grounds.⁹⁸ While the applicability of the collateral estoppel doctrine is uncertain, because one of its requirements is that the previous decision have been "final,"

the resulting disclosure of the document will not be deemed a waiver of the privilege for purposes of other lawsuits.").

95. The collateral estoppel doctrine precludes the relitigation of issues by a party that has been afforded a fair opportunity to litigate claims that were definitively resolved against it. For the sake of judicial economy, parties should not be permitted to burden courts with issues that have been resolved after interested parties have been given a fair, albeit unsuccessful, opportunity to be heard. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.").

96. In *Sprecher v. Graber*, the court concluded:

As to . . . the claim that the subpoena violated the attorney-client privilege, we agree with the district court that collateral estoppel applies since Sprecher's opportunity to litigate the merits of the privilege in [the prior action] was the substantial equivalent of that which would be available in a plenary action. . . . There thus was a full and fair opportunity to litigate that issue in [the prior action], and relitigation in the instant case is precluded.

716 F.2d 968, 972-73 (2d Cir. 1983).

97. *See Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1045-46 (D. Del. 1985) (recognizing the gravity of the lower court's decision; the court chose to "decline to consider whether her decision should be afforded preclusive effect and turn instead to the substantive application of the attorney-client privilege and work-product doctrine to the documents in question").

98. *See Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 555 n.1 (2d Cir. 1967) (holding that an estoppel claim must fail "[w]here, as here, the previous disposition was not on the merits but was only a dismissal for a lack of jurisdiction" (citation omitted)); *Robertson v. Yamaha Motor Corp.*, 143 F.R.D. 194, 199 (S.D. Ill. 1992) (refusing to employ the collateral estoppel doctrine because the prior privilege ruling was not "essential to [the court's] judgment"). For a general discussion of the collateral estoppel doctrine and its potential application to privilege determinations, see RICE, *supra* note 6, § 11:25, at 1033-40.

courts cannot insist on looking at the prior disclosure only from the perspective of whether the judicially compelled disclosure constituted a voluntary waiver. Regardless of who was responsible for the disclosure, the factual reality is that the disclosure destroyed the confidentiality that allegedly formed the basis of the privilege. When this production is not seen as a bar to the future assertion of the same claim in another proceeding, the courts are permitting a "limited destruction" of the privilege, which is the equivalent of limited waiver.

II. BENEFITS FROM ABOLISHING THE CONFIDENTIALITY REQUIREMENT

Contrary to Wigmore's unsubstantiated claim that confidentiality is essential to the existence of the privilege, the requirement of confidentiality has remained an absolute requirement only at the point of the privilege's inception. Courts have intuitively grasped that requiring the *preservation* of confidentiality following an attorney-client communication does not further the end of open communication between the attorney and client since the basic communication has already taken place. What the courts have not accepted, however, is that the confidentiality/secretcy requirement is equally irrelevant to the privilege's goal at its inception.

The privilege's protection of the use of a client's statements to counsel is what encourages openness and candor in such communications. While a client's desire for privacy or secrecy may inhibit open communications in the presence of third parties, this is a condition that the client can control if he wishes. The presence or absence of secrecy, however, neither furthers nor detracts from the distinct goal of the privilege, independent of the client's predilections. Aside from tradition, there is no justification for courts' preoccupation with the context of communications or the conditions under which they are subsequently maintained.

Abolition of the element of confidentiality will not have a negative impact on the candor of those who wish to speak secretly with their attorney. Consistent with existing practices, the client simply will arrange an environment that accommodates his comfort level, and will follow procedures that will ensure the maintenance of that secrecy. Conversely, the abolition of the confidentiality requirement would have significant positive consequences for the creation, maintenance and assertion of the attorney-client privilege.

The question of who constitutes or represents the client in the corporate or other entity setting would only be an issue relative to the determination of whether legal assistance was being sought for a particular individual or entity. No longer would the client have to be concerned with inappropriate distribution to unauthorized representatives. Therefore, the client would not have to segregate attorney-client communications and would not have to account for initials, notations and other markings on each document that might be evidence of inappropriate distribution.⁹⁹ More importantly, the client would not have to assert the privilege claim for every copy of every allegedly privileged document, and would not need to file supporting affidavits identifying the file from which it was retrieved, explaining the responsibilities of each recipient, revealing the source of each marking on it (and if different from the individual from whose file it was retrieved, making the same disclosures for that person). Correspondingly, while the presiding judge would still examine each written communication *in camera*¹⁰⁰ to determine whether the content is

99. See *Bristol-Meyers Squibb Co. v. Rhône-Poulenc Rorer, Inc.*, No. 95 Civ. 8833, 1997 U.S. Dist. LEXIS 12071, at *11 (S.D.N.Y. Aug. 15, 1997) (instructing parties on the necessary content of a privilege log and supporting affidavits; the court noted that for each document the proponent must identify "the source of any handwritten notations on a document by name, title, occupation and organization").

100. *In camera* examinations of allegedly privileged documents are those that are conducted by the presiding judge in chambers, outside the presence of the parties. *In camera* inspections, used in conjunction with privilege log representations, affidavits, and arguments of counsel, are the most efficacious means for courts to fulfill their independent fact finding role for each privilege claim. See, e.g., *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1988) (noting that the proper procedure for judicial consideration of an attorney-client privilege claim is *in camera* inspection); *Salas v. United States*, 695 F.2d 359, 362 (9th Cir. 1982) (noting that the "proper procedure for asserting the attorney-client privilege as to particular documents, or portions thereof, would have been for appellants to submit them *in camera* for the court's inspection, providing an explanation of how the information fits within the privilege"); *United States v. Tratner*, 511 F.2d 248, 252 (7th Cir. 1975) ("The responsibility of determining whether the privilege exists rests upon the . . . Judge and not upon the lawyer whose client claims the privilege. . . . Where this evidence may be presented only by revealing the very information sought to be protected . . . , an *in camera* inspection . . . may be appropriate." (quoting *N.L.R.B. v. Harvey*, 349 F.2d 900, 907 (1965))); *Baltimore Scrap Corp. v. David J. Joseph Co.*, Civil No. L-96-827, 1996 U.S. Dist. LEXIS 18617, at *57-58 (D. Md. 1996) ("In camera review of the above identified documents, in conjunction with the privilege log representations, affidavits and argument, however, has enabled the Court to determine that the attorney-client privilege shields the production of [specified documents]"); *Saxholm AS v. Dynal, Inc.*, 164 F.R.D. 331, 339 (E.D.N.Y. 1996) ("On their face, however, the descriptions of these documents in the privilege log do not convey enough information for the court to determine whether the communications reveal client confidences. Accordingly, those documents will be presented to the court for *in camera* inspection within ten days."); *Anderson v. St. Mary's Hosp.*, 428 N.E.2d 528, 531 (Ill. App. Ct. 1981) ("[W]here there is a genuine dispute as

consistent with the claim that legal advice was either sought or given, the judge would not have to examine and rule upon the privilege status of multiple copies of each allegedly privileged document found in the files of each addressee and distributee because the judge would no longer be concerned about the propriety of each communication's distribution.

Some courts, ignoring the confidentiality of the privilege, have already demonstrated the possibilities of privilege without confidentiality: patent opinions could be shared with potential licensees and purchasers to allay fears of infringement,¹⁰¹ legal advice could be shown to potential purchasers of an enterprise in order to avoid a

to the nature or content of the document sought to be discovered, an attorney must ordinarily comply with the trial court's order for an *in camera* inspection of the document or be subject to sanctions for contempt."); *Coyle v. Estate of Simon*, 588 A.2d 1293, 1296-97 (N.J. Super. Ct. App. Div. 1991) ("Upon request of the other party, the trial judge shall determine by an *in camera* review of the statements which portions are relevant in that respect and must therefore be disclosed in discovery."); *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 581 N.E.2d 1055, 1060 (N.Y. 1991) (noting that "whether a particular document is or is not protected is necessarily a fact-specific determination, most often requiring *in camera* review" (citing *Rossi v. Blue Cross & Blue Shield*, 504 N.E.2d 703, 735 (1989))); *Peyko v. Frederick*, 495 N.E.2d 918, 921 (Ohio 1986) ("If the defense asserts the attorney-client privilege with regard to the contents of the 'claims file,' the trial court shall determine by *in camera* inspection which portions of the file, if any, are so privileged."); *State ex rel. Shroades v. Henry*, 421 S.E.2d 264, 265 (W. Va. 1992) (noting that "the circuit court should have held an *in camera* examination to determine if the requested documents were privileged").

Courts have resisted using *in camera* inspection for a variety of reasons. These include: 1) the time-consumption the inspection entails, see *Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. 76, 86 (S.D.N.Y. 1986) ("If this court were to review each and every document withheld as privileged in litigation in this courthouse, for no reason other than counsel's distrust of his adversary, this courthouse could hardly function."); 2) the inspection represents an "unwarranted prying" into the attorney-client relationship, see *Dura Corp. v. Milwaukee Hydraulic Prods., Inc.*, 37 F.R.D. 470, 471 (E.D. Wis. 1965); 3) if no legitimate question is raised about a particular document, *in camera* inspection shifts responsibility for discovery from counsel to the courts, see *In re Horowitz*, 482 F.2d 72, 82 (2d Cir. 1973); 4) it is unnecessary in light of counsels' ethical duty, as well as counsels' duty under procedural rules to make a truthful, good-faith determination of what documents are privileged and to present a proper listing, see *Grossman v. A.O. Schwarz*, 125 F.R.D. 376, 390 (S.D.N.Y. 1989); 5) it is unnecessary if there is no reason to question the representations of opposing counsel, see *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 445 (D. Del. 1982); and 6) the procedure should be disfavored because factual disputes are best served by the adversarial process, see *Natta v. Zletz*, 418 F.2d 633, 636 (7th Cir. 1969) (noting that "*in camera* inspection often places too great a burden upon the trial judge and hinders accurate determination of issues of basically adversary nature"). For arguments as to why none of these reasons justify not employing *in camera* review, see RICE, *supra* note 6, § 11:15, at 1003-06.

101. See *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 310-11 (N.D. Cal. 1987) (holding that privilege was not waived when Hewlett-Packard disclosed its patent attorney's opinion letter during negotiations with person interested in purchasing one of its divisions).

subsequent lawsuit over claims of fraudulent misrepresentations,¹⁰² and disclosures could be made in settlement negotiations to encourage more open and frank interchanges.¹⁰³ The only thing that the client would lose in any of these instances of sharing privileged communications is the exclusive knowledge of the content of those communications. None, however, could be used against the client unless the client's sharing had placed the third party in an unfair position relative to issues later being litigated. For example, if the client and third party were litigating the content of representations that were previously made in contract negotiations in which the privileged communication played a part, the privileged communication should be admissible because it may have formed the basis of what were perceived to be representations.

The elimination of secrecy as a condition of the privilege would necessitate only minor adjustments to the manner in which all waiver issues are presently determined. Rather than assessing whether there has been a waiver due to a breach of confidentiality,¹⁰⁴ and then de-

102. See *Oak Indus. v. Zenith Indus.*, No. 86 C 4302, 1988 U.S. Dist. LEXIS 7985, at *9-10 (N.D. Ill. July 25, 1988) (finding that the attorney-client privilege protection for communications between employees in Zenith's consumer electronics group and Zenith's counsel was waived by the disclosure of these communications to potential buyers of the consumer electronics group).

103. See *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 139 F.R.D. 269, 273 (D. Mass. 1991) (holding that disclosure to regulatory agency in an effort to settle dispute did not automatically waive privilege claims); *O'Brien v. New England Mut. Life Ins. Co.*, 197 P. 1100, 1102 (Kan. 1921) (finding that statements made by a client to her attorney in the presence of the opposing party (the client's husband) in the midst of settlement discussions were held privileged vis-à-vis third parties).

104. Grounds of waiver involving a breach of confidentiality have included: 1) failing to take reasonable precautions to preserve confidentiality, see *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 260-61 (N.D. Ill. 1981) (holding that failing to dispose of document in a way that precluded others from retrieving it constituted a waiver of privilege); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 292 (D. Colo. 1979) (finding privilege waived for a document kept in a file routinely examined by third parties); *In re Horowitz*, 482 F.2d at 80-81 (deciding that storing privileged documents in an accountant's office amounted to a waiver of privilege); 2) voluntarily disclosing all or portions of communications, see *United States v. Knoll*, 16 F.3d 1313, 1322 (2d Cir. 1994) ("[B]ecause Gleave sent the letters to an individual with whom he had no relationship of confidentiality, any legitimate expectation of privacy he may have had in them was abandoned."); *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("[S]ince the purpose of the attorney-client privilege is . . . to foster candor within the attorney-client relationship, voluntary breach of confidence or selective disclosure for tactical purposes waives the privilege. Disclosure is inconsistent with confidentiality, and courts need not permit . . . manipulation of confidences in order to foster candor."); 3) failing to object properly to disclosures, see *In re E.I. duPont de Nemours & Co.-Benlate Litig.*, 99 F.3d 363, 371-72 (11th Cir. 1996) (holding that failure to delineate privilege claims in the privilege log that the court directed be filed waived the right later to assert privilege claims that could have

termining, on the basis of fairness, either the scope of the resulting waiver,¹⁰⁵ or whether an excuse like inadvertence will be recognized,¹⁰⁶

been raised); *Kraemer v. Franklin & Marshall College*, No. 95-0020, 1995 U.S. Dist. LEXIS 10592, at *4-5 (E.D. Pa. July 25, 1995) (finding privilege waived due to the failure to object to a deposition question propounded to employee, the answer to which would have revealed privileged information); *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 556 N.Y.S.2d 763, 764 (N.Y. App. Div. 1990) (“The repeated failure of the LIRR to take any action when the plaintiff quoted from . . . privileged documents in court papers and its failure to . . . raise the issue of privilege with respect to one . . . document[] for approximately 10 months after it had been utilized during a deposition . . . constituted a waiver.”); 4) making evidentiary use of privileged communications, see *IDS Life Ins. Co. v. Sunamerica, Inc.*, Nos. 95 C 1204 & 95 C 1212, 1995 U.S. Dist. LEXIS 12116, at *2 (N.D. Ill. Aug. 18, 1995) (holding that the verification of certain allegations that were made in the complaint by in-house counsel waived the privilege that previously may have protected the bases for the verification); *Massachusetts Sch. of Law v. American Bar Ass’n*, 895 F. Supp. 88, 91-92 (E.D. Pa. 1995) (“Even if the communications between Mr. Chaplin and MSL . . . would have . . . been protected under the attorney-client privilege, MSL waived the privilege when it attached to, and relied on the report in its complaint. . . . MSL waived [the privilege] when MSL attempted to prove a claim by disclosing the [communications].”); *Mize v. Atchison, Topeka & Santa Fe Ry.*, 120 Cal. Rptr. 787, 795 (Cal. Ct. App. 1975) (“On appeal counsel strongly urges that in the actions above outlined, the trial court violated appellant’s work product and lawyer-client privileges. He overlooks a fundamental and fatal weakness which destroys this claim. Counsel never presented a proper objection to the trial court.”); and 5) relying on the advice of counsel as an element of a claim or defense, see *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486-87 (3d Cir. 1995) (holding that the client waived the privilege protection in raising reliance on advice of counsel as a defense, not only for the letter that was disclosed to support that defense, but also for all underlying communications, both written and oral, from which the reasonableness of the reliance can be determined); *TWA v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964) (“[T]he attorney-client privilege claimed by the defendants . . . had been waived as the result of the defendants’ pleading advice of counsel as a defense”); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995) (“Where, however, an insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party an opportunity to uncover the foundation for those assertions in order to contradict them.” (internal quotation marks omitted)); *Safeway Ins. Co. v. Superior Ct.*, No. 1 CA-SA 94-0254, 1995 Ariz. App. LEXIS 54, at *5 (Ariz. Ct. App. Feb. 28, 1995) (“Generally, a client’s deliberate injection of the advice of counsel into a case waives the attorney-client privilege.”); *State Farm Mut. Auto. Ins. Co. v. Superior Ct.*, 279 Cal. Rptr. 116, 119 (Cal. Ct. App. 1991) (“The defense of advice of counsel generally waives the attorney-client privilege as to communications and documents relating to the advice.”); *Williams v. Preman*, 911 S.W.2d 288, 301 (Mo. Ct. App. 1995) (“Mr. Preman correctly states that the attorney-client *privilege* had been waived when Dr. Williams asserted advice of counsel as a defense to the objection lodged by Dr. Bradley.”); *Village Bd. v. Rattner*, 515 N.Y.S.2d 585, 586 (N.Y. App. Div. 1987) (“Where a party asserts as an affirmative defense the reliance upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel’s advice was sought.” (citations omitted)).

105. See, e.g., *In re von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987) (“These considerations—which underlie ‘the fairness doctrine’—aim to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder’s selective disclosure.”); *Central Soya Co. v. Geo. A. Hormel & Co.*, 581 F. Supp. 51, 53 (W.D. Okla. 1982) (“The underlying rationale [of the waiver] is one of fairness.”); *Champion Int’l Corp. v. International Paper Co.*, 486 F. Supp. 1328, 1333 (N.D. Ga. 1980) (“An important consideration in assessing

courts would simply collapse the determinations of waiver and its scope into a single determination of whether, and to what extent, the client should be required to relinquish the privilege protection. This would involve consideration of the claims being asserted by the client,¹⁰⁷ the client's use of other privileged materials,¹⁰⁸ and the client's

the issue of waiver [of privilege] is fairness. An element of fairness is proportionality." (internal quotation marks and citations omitted); *United States v. Aronoff*, 466 F. Supp. 855, 862 (S.D.N.Y. 1979) ("[A] disclosure of, or even merely an assertion about, the communication may effect a waiver of privilege not only as to that communication, but also as to other communications . . . about the same subject. This . . . principle, referred to by Wigmore as waiver by implication, is based on considerations of fairness." (internal quotation marks and citations omitted)); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977) ("The privilege . . . has been found to be waived only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny the other party an opportunity to discover other relevant facts with respect to that subject matter."); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1161-62 (D.S.C. 1974) ("The reason behind the rule [of waiver] is one of basic fairness."); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 457 (N.D. Ill. 1974) ("Practically speaking, a person should be seldom found to waive . . . privilege because the . . . nature of . . . privilege presumes confidentiality and intention to [prevent] public disclosure. However, when a party's conduct reaches a certain point of disclosure fairness requires that . . . privilege should cease whether the party intended that result or not."); *Martin v. Shaen*, 156 P.2d 681, 685 (Wash. 1945) (finding that when the holder of the privilege voluntarily takes the stand and testifies upon a key issue in the case, "he waive[s] the privilege of withholding his testimony as to all matters relevant to that issue and open[s] the door for inquiry into that particular subject matter").

106. The most frequently quoted statement of factors considered in assessing inadvertence is in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*:

The elements which go into [the determination of whether the release of documents is a waiver or an excusable mistake] include the reasonableness of the precautions [taken] to prevent inadvertent disclosure, the time taken to rectify the error, the scope of the discovery and the extent of the disclosure. There is, of course, an over-reaching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded

104 F.R.D. 103, 105 (S.D.N.Y. 1985); see also *Goldsborough v. Eagle Crest Partners, Ltd.*, 838 P.2d 1069, 1073 (Or. 1992) ("A court need not . . . conclude that . . . privilege has been waived when a document [is] produced during discovery. Factors to be considered [include] whether the disclosure was inadvertent, whether any attempt was made to remedy any error promptly, and whether preservation of the privilege will occasion unfairness to the opponent.").

107. See *Glenmede Trust Co.*, 56 F.3d at 486-87 (holding that the client waived the privilege protection in raising reliance on advice of counsel as a defense, not only for the letter that was disclosed to support that defense, but also for all underlying communications, both written and oral, from which the reasonableness of the reliance could be determined); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) ("[T]o the extent that Pennzoil claims that its . . . position is reasonable because it was based on advice of counsel, Pennzoil puts at issue [that advice]. . . . Pennzoil cannot invoke . . . privilege to deny Chevron access to the . . . information that Chevron must refute . . . to demonstrate that Pennzoil's Schedule 13D is materially misleading."); *United States v. Miller*, 600 F.2d 498, 501 (5th Cir. 1979) ("We obviously cannot condone a practice that enables a defendant or any witness, after giving the jury his version of a privileged communication, to prevent the cross-examiner from utilizing the communication itself to get at the truth."); *Haney v. Timesavers, Inc.*, Nos. 93-151-FR, 92-270-FR, 93-703-FR,

good faith in pursuing the privilege protection,¹⁰⁹—*viz.*, the extent to which the client has placed an adversary in an unfair position that can only be corrected by disclosure and permitting the use of, privileged communications—factors presently being employed to determine waiver.

Assessing waiver *solely* from the perspective of fairness is neither revolutionary nor even unusual. Many grounds of waiver are presently recognized when confidentiality has not been breached, based solely on the conduct of the client and fairness to the opposing party. Examples include making claims that implicate privileged communications,¹¹⁰ using privileged communications to refresh the

& 94-804-FR, 1995 U.S. Dist. LEXIS 15222, at *7-8 (D. Or. Oct. 11, 1995) (“Once a party asserts the defense of the advice of counsel, the party must produce all documents pertaining to the infringement of the patent.”); *Kabushiki Kaisha Hattori Seiko v. Gruen Indus., Inc.*, No. 84 Civ. 2267(CES), 1986 U.S. Dist. LEXIS 26343, at *5 (S.D.N.Y. 1986) (“By avoiding defendant’s fraud claim through reliance on its attorneys’ claimed misunderstanding or confusion, plaintiff has put defendant at such a disadvantage that fairness dictates discovery by defendant of those documents out of which the confusion or misunderstanding arose.”).

108. See *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976) (“By putting their lawyers on the witness stand . . . to demonstrate that the prior lawsuits were pursued on the basis of competent legal advice and were . . . in good faith, defendants will waive . . . privilege as to communications relating to the issue of the good-faith prosecution of the patent actions.”); see also *Multiform Dessicants, Inc. v. Stanhope Prods. Co.*, 930 F. Supp. 45, 46-47 (W.D.N.Y. 1996) (holding that the designation of an attorney as an expert witness in a patent infringement case waives privilege for all communications relating to the subject of the proposed testimony).

109. See *In re E.I. duPont de Nemours & Co.-Benlate Litig.*, 99 F.3d 363, 371-72 (11th Cir. 1996) (finding that the failure to delineate privilege claims in privilege log that the court directed be filed constituted a waiver of the right to later assert privilege claims that could have been raised); *PKFinans Int’l Corp. v. IBJ Schroder Leasing Corp.*, No. 96 Civ. 1816, 1996 U.S. Dist. LEXIS 13505, at*12-13 (S.D.N.Y. Sept. 16, 1996) (holding that, after three years, the failure to file a privilege log waived all privilege claims that could have been asserted); *Dana Corp. v. American Standard*, No. 3:92-cv-581RM, 1994 U.S. Dist. LEXIS 6358, at *8-9 (N.D. Ind. April 15, 1994) (“Plaintiffs, however, have not specifically identified any documents which they claim are privileged. . . . Without identification of the documents, the party against whom the privilege is claimed is completely unable to challenge the validity of that claim. The outcome is indefensible.” (internal quotation marks omitted)).

110. See, e.g., *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991):

This waiver principle is applicable here for Bilzerian’s testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.

See also, e.g., *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989) (holding that plaintiff waived the privilege by making a claim implicating confidential communications); *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987) (“Syndicate 627 waives its attorney-client privilege when it injects into this litigation an issue that requires testimony from its attorneys or testimony concerning the reasonableness of its attorneys’ conduct.”); *Sedco Int’l*,

recollection of a witness,¹¹¹ attacking the assistance of the attorney,¹¹² attorney-initiated actions for payment of fees,¹¹³ and using the attorney-client relationship to perpetrate or perpetuate a crime or fraud.¹¹⁴ Consequently, the elimination of the confidentiality requirement should only serve to simplify the application of a privilege that has become increasingly complex as courts increasingly have developed justifications for ignoring it in situations where its application would produce unfair results.

S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir. 1982) (“We conclude that by asserting fraud, Carver, at most, waived his right to assert the privilege to prevent disclosure of communications which might have proven he did not rely on Sedco employees’ statements or that such reliance was unreasonable.”).

111. Rule 612 of the Federal Rules of Evidence provides:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

FED. R. EVID. 612.

112. See, e.g., *Doe v. A Corp.*, 709 F.2d 1043, 1048-49 (5th Cir. 1983) (stating that attorney may disclose confidential information when necessary to defend against charges of wrongdoing); *United States v. McCambridge*, 551 F.2d 865, 873 (1st Cir. 1977) (deciding that client waived the attorney-client privilege protection by making ineffectiveness claim and by calling attorney to testify about their communications); *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) (“A client has a privilege . . . but that privilege is waived when a client attacks his attorney’s competence in giving legal advice, puts in issue that advice and ascribes a course of action to his attorney that raises the specter of ineffectiveness or incompetence.”); *Laughner v. United States*, 373 F.2d 326, 327 (5th Cir. 1967) (“Having . . . claim[ed] that the attorney appointed to render him the assistance of counsel for his defense failed to discharge his responsibilities properly, appellant now proposes to invoke the privilege . . . to eliminate the one source of evidence likely to contradict his allegations. We are unable to subscribe to this proposition.”).

113. See, e.g., *Nakasian v. Incontrade, Inc.*, 409 F. Supp. 1220, 1224 (S.D.N.Y. 1976) (stating that a lawyer may use or reveal confidential information as necessary to collect his fee).

114. See, e.g., *Clark v. United States*, 289 U.S. 1, 15 (1933) (discussing fraud exception generally); *In re Antitrust Grand Jury (Advanced Publications, Inc.)*, 805 F.2d 155, 162 (6th Cir. 1986) (noting that purposes of privilege do not extend to cases where client seeks aid in committing crime or fraud).

III. OTHER CONCERNS ABOUT ABOLISHING THE CONFIDENTIALITY REQUIREMENT

The elimination of the confidentiality requirement will not result in an increase in the fraudulent use of the attorney-client relationship to make business communications privileged by circulating them through an attorney.¹¹⁵ This is a problem that is exclusively related to the purpose of the communication—its primary purpose must be to obtain legal advice or assistance.¹¹⁶ The presence or absence of confidentiality is unrelated to this problem.

Without a confidentiality requirement, the client's communication to the attorney could be known to many third parties, but still excluded from judicial proceedings. While this possibility creates the appearance of manipulated or managed justice, because decisions will be based on less than all relevant evidence, it is a problem of far less magnitude than first appears. Because the privilege protects *communications*, not information, the fact that a client may relate to third parties the *same information* that was communicated to the attorney will not make the privilege applicable to those communications to third parties.¹¹⁷ Those third parties may be called to testify to the in-

115. For examples of litigants trying to create such a false privilege, see *McGuire v. Sigma Coatings Inc.*, 48 F.3d 902, 903 (5th Cir. 1995) (noting that company "had unnecessarily injected counsel into the audit process in a deliberate attempt to bring the resulting documents under the attorney-client privilege"); *Reich v. Hercules, Inc.*, 857 F. Supp. 367, 372 (D.N.J. 1994) (stating that Hercules attempted to convert regularly conducted safety evaluations into privileged communications by sending the evaluations to attorneys); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 138 (N.D. Ill. 1993) (describing attempts of insurance company to create privilege by running information through its attorney); *Johnston v. Dillard Dep't Stores, Inc.*, 152 F.R.D. 89, 92-94 (E.D. La. 1993) (denying that deliberations of insurance company's claims committee became privileged merely because company's in-house counsel sat on the committee).

116. Indeed, all the aforementioned businesses attempting to create a false privilege, see *supra* note 115, failed. See also, e.g., *United States v. Jones*, 696 F.2d 1069, 1072-73 (4th Cir. 1982) (stating and enforcing the purpose requirement); *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981) ("Only where the document is primarily concerned with legal assistance does it come within [the privilege]."); *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 43 (D. Conn. 1996) (concluding that communications for reasons other than legal advice are not within the privilege).

117. The following cases establish that while the *client*, or the *client's agents*, may not be required to reveal what was communicated to the attorney, the facts that were incorporated into those communications remain unprotected. If third parties were brought within the scope of the attorney-client privilege protection by abolishing the confidentiality requirement, the same principle would apply to disclosures by them. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) ("[T]he protection of the privilege extends only to *communications* and not to facts. . . . The client . . . may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his at-

formation the client had related to them. The only thing the third party would be prohibited from revealing, if it were disclosed by the client, is the fact that the client had communicated the same information to his attorney—the substance of that particular attorney-client communication. Of course, if the third party's source of factual information was the attorney-client communication itself, the third party would not be permitted to testify to those facts.¹¹⁸ This same result would apply if the client exposed a copy of a written communication with the attorney. In neither instance could the substance of what was said to the attorney be revealed.

CONCLUSION

Antiquities, time-honored and resistant to change, are the hardest doctrines to reform because the doctrinal assumptions underlying them are so ingrained in our jurisprudence we refuse to even question them. The attorney-client privilege and the need for secrecy in communications constitute one such doctrinal assumption. Evolving from the *nature of the attorney-client relationship* and the factual context of most attorney-client communications, confidentiality was equated with secrecy and expanded to describe the *type of communications that are protected* by the privilege. Transformed from a description to a normative imperative, the confidentiality/secrecy requirement is without logical foundation, which has resulted in courts' progressively honoring it more in theory than in practice. Serving no apparent purpose during either the inception or duration of the privilege, this requirement unnecessarily magnifies the costs of the privilege's creation and preservation and complicates the judicial resolution of each claim. Accordingly, courts should take the final step in the evolution of the confidentiality concept by acknowledging

torney." (quoting *City of Phila. v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)); *Favala v. Cumberland Eng'g Co.*, 17 F.3d 987, 990 (7th Cir. 1994) (drawing the underlying fact/communication distinction); *Knogo Corp. v. United States*, 213 U.S.P.Q. 936, 940 (Ct. Cl. 1980) ("In other words, the client cannot assert the privilege if asked how the invention works, but he can assert the privilege if he is asked to recount what he told his attorney concerning how the invention works."). For additional discussion of this issue, see generally RICE, *supra* note 6, § 5:1, at 287-302.

118. This is, of course, currently the law as to the attorney and the client. See, e.g., *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989) (holding that facts may not be disclosed insofar as they are known *solely* by means of a privileged communication); *Bucks County Bank & Trust Co. v. Storck*, 297 F. Supp 1122, 1123 (D. Haw. 1969) (applying this doctrine to improper questions at a deposition).

what has been intuitively recognized, and then abandoning the requirement of secrecy.