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Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated

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Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated

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ARTICLES

ATTORNEY-CLIENT PRIVILEGE: CONTINUING CONFUSION ABOUT ATTORNEY COMMUNICATIONS, DRAFTS, PRE-EXISTING DOCUMENTS, AND THE SOURCE OF THE FACTS COMMUNICATED

PAUL R. RICE*

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INTRODUCTION

The attorney-client privilege has become one of the most complex and therefore, litigated privileges.¹ This is due, in significant part, to the difficulties created by the concept of confidentiality.² From the creation and preservation of the privilege, to the development of the facts to prove the legitimacy of the claim, the requirement of confidentiality³ has created time-consuming and costly responsibilities for both litigants and judges.⁴ In addition, confidentiality has been interpreted as imposing a superfluous secrecy requirement that has generated conflicting decisions and practices.⁵

As judges and lawyers have forgotten the fundamental principles of the attorney-client privilege, opportunities for confusion and misunderstanding have grown. A common problem has been the

1. See THE EVIDENCE PROJECT: PROPOSED REVISIONS TO THE FEDERAL RULES OF EVIDENCE (Thomas C. Goldstein, ed.), 171 F.R.D. 330, 346 (1997) [hereinafter THE EVIDENCE PROJECT] ("[The attorney-client privilege] is the oldest, most litigated, complex, defined and developed privilege in our jurisprudence."). Annually, there are thousands of decisions from the bench and unpublished written decisions involving this privilege. See *id.* at 346 n.16 ("[The privilege] has generated a body of federal case law that exceeds five thousand cases. A similar body of case law has developed in the states.").

2. See Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 861-63 (1998) (observing that the illogical concept of confidentiality has generated "significant unnecessary costs").

3. Historically, albeit unnecessarily and illogically, the requirement of confidentiality has been equated with secrecy. See *id.* at 868-74 (describing the evolution of the confidentiality requirement and the "illogic and unfairness" of restrictive secrecy); see also PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 6:3, at 385 (1993) (discussing the history of the secrecy requirement). The superfluous nature of the confidentiality requirement has led to a significant body of inconsistent case law. See *id.* § 6:4, at 402 (recognizing the various understandings of the meaning of confidentiality and the various models of the privilege that have emerged in case law).

4. See Rice, *supra* note 2, at 861-63 (explaining how proving that a communication was intended to be confidential, that the relationships of external parties privy to the communication did not breach the confidentiality, and that the confidentiality was maintained is costly to the parties and the judicial system).

5. The concept of confidentiality and secrecy was literally made up by Wigmore in the first edition of his treatise. See 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 3185 (1905) (stating that one of the underlying requirements for a privileged communication was an understanding that the communication would not be disclosed); see also RICE, *supra* note 3, § 6:3, at 397 n.37, 398-99 (discussing Wigmore's interpretation of a statement made in confidence). Wigmore's understanding of confidentiality was not, however, accepted universally at that time. See *id.* § 6:3, at 399 (comparing Wigmore's characterization of confidentiality with Burr Jones'). Under English precedents, the requirement of confidentiality referred to the nature of the attorney-client relationship, not the context in which the communications were held. See 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 245, at 331-32 (Boston, Little, Brown, & Co. 15th ed. 1892) (describing the extension of privilege in the context of professional relationships between attorneys and their clients). See generally RICE, *supra* note 3, § 6:3, at 388-89 ("When the word 'confidential' was used, courts were referring to the professional *relationship* between attorney and client, *not* the client's *communication*."). Neither Wigmore nor the many cases that have followed his lead have logically justified the requirement of secrecy as a condition precedent to the creation of the privilege protection.

failure to remember the distinction between communication and information, and that the privilege protects only communication.⁶ This misunderstanding has led to: (1) confusion about how the privilege is applied to the attorney's communication to the client;⁷ (2) unnecessary restrictions on the source of information communicated by the client to the attorney;⁸ (3) misperceptions about pre-existing documents communicated by the client to the attorney;⁹ and (4) erroneous decisions regarding drafts of documents prepared for dissemination to third parties.¹⁰

I. WHOSE COMMUNICATIONS ARE PROTECTED BY THE PRIVILEGE?

A. *Rationale for the Attorney-Client Privilege*

To understand which communications qualify for the protection of the attorney-client privilege, it is necessary to first understand the rationale for the privilege.¹¹ The rationale is simple. If the client is assured that what she says to an attorney cannot later come back to harm her, she will be more open and candid in her communications with the attorney—that is, willing to communicate things that she otherwise would suppress.¹² Consequently, the attorney will be better informed, will be able to give more accurate advice, and the client will be better able to conform her conduct to the law.¹³ Despite these

6. See THE EVIDENCE PROJECT, *supra* note 1, at 347 (recommending that this confusion be addressed in a revision of Rule 502 by defining communication, and explicitly stating that the attorney-client privilege only protects communications not information).

7. See *infra* note 16 (describing how various courts view the applicability of the privilege protection).

8. See *infra* note 16 (presenting the judicial response to the scope of the privilege covering communications from client to attorney).

9. See THE EVIDENCE PROJECT, *supra* note 1, at 347 (explaining efforts to correct the misunderstandings concerning pre-existing documents).

10. See, e.g., Alvin K. Hellerstein, *A Comprehensive Survey of the Attorney-Client Privilege and Work Product Doctrine*, 540 PLI/LIT 589, 821-22 (1996) (reviewing how the different federal circuits treat drafts containing client communications).

11. See RICE, *supra* note 3, § 2:3, at 51 (explaining the purpose, rationale, and general construction of the privilege).

12. See, e.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976) (discussing the importance of full disclosure between an attorney and client in our adversarial justice system).

13. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (illustrating that for corporate and individual clients, the attorney-client privilege serves to promote full and frank communications with attorneys, and observing that this, in turn, encourages and reinforces the law); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that encouraging full and frank communication between attorneys and their clients promotes the interests of obedience to the law and the easier administration of justice); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (emphasizing that the attorney-client privilege was founded in the interest of justice, knowing that legal practitioners must be able to elicit and secure the confidences of the clients). See generally RICE, *supra* note 3, § 2:3, at 52-53 (explaining that by protecting client communications the client will be more forthcoming, thereby increasing the law's effectiveness).

important benefits, courts have consistently held that the privilege must be construed narrowly because it limits the disclosure of relevant evidence.¹⁴ The basic privilege only protects client communications with the attorney; the privilege does not protect the underlying facts in these communications.¹⁵

14. See, e.g., *In re* Grand Jury Subpoena Issued to Joseph P. Powers, No. 94-56603, 1995 U.S. App. LEXIS 30124, at *3 (9th Cir. Oct. 11, 1995) ("Courts strictly construe the attorney-client privilege."); *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1423 (3d Cir. 1991) (noting that a narrow interpretation of the attorney-client privilege is necessary because the privilege hinders "the truth-finding process"); *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (explaining that the attorney-client privilege obstructs the quest for truth); *United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990) (stating that the attorney-client privilege requires a strict interpretation); *United States v. Under Seal*, 748 F.2d 871, 875 (4th Cir. 1984) ("[W]e concluded . . . that the privilege must be strictly construed."), *vacated as moot*, 757 F.2d 600 (4th Cir. 1985); *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."); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1100 (5th Cir. 1970) ("[E]xemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional."); *United States v. Wells*, 929 F. Supp. 423, 425 (S.D. Ga. 1996) ("The privilege is to be construed narrowly because it serves to obscure, rather than further, the truth."); *United States v. Sindel*, 854 F. Supp. 595, 599 (E.D. Mo. 1994) ("The privilege cannot stand in the face of countervailing law or strong public policy and should be confined strictly within the narrowest possible limits underlying 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, the Court is aware of the fact that it may nevertheless 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.") (citation omitted); RICE, *supra* note 3, § 2:3, at 55 (stating that most courts have agreed with Professor Wigmore 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"). Of course, if the theory of the privilege were accurate—that the client would not be willing to risk saying those things that the privilege suppresses—there would be no suppression of relevant evidence that otherwise would exist without it. Courts intuitively understand this and therefore, often pay only lip service to the restrictive interpretation theory. See *id.* § 2:3, at 56-57 (questioning "how the privilege will obstruct the search for truth since it conceals nothing that otherwise would have been available").

15. See *Upjohn*, 449 U.S. at 395-96 (holding that the attorney-client privilege only protects disclosure of communications from client to attorney, and not disclosure of underlying facts by those who communicated with the attorney).

B. Communication from Attorney to Client

To protect the client's communications *to the attorney* adequately, the responsive communications *from the attorney* to the client (whether legal advice or other correspondence)¹⁶ also are protected by the

16. See *In re Grand Jury Proceeding*, 68 F.3d 193, 195-96 (7th Cir. 1995) (holding that the attorney-client privilege was inapplicable because there was no disclosure of confidential communications of the client where an attorney was asked three questions: (1) whether he directed someone else to conduct a search of files to gather information in response to a subpoena; (2) whether he directed anyone to produce a certain list for disclosure; and (3) whether he asked someone to give him certain contracts for disclosure to the government); *United States v. Sayan*, 968 F.2d 55, 64 (D.C. Cir. 1992) (concluding that when the attorney referred to the client as a "sly fox," the attorney was making a general observation or impression, not revealing a confidential communication and therefore, the comment was not privileged); *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990) (holding that an attorney's communication to a client relaying statement of IRS agent was not privileged); *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 745, 3 U.S.P.Q.2d (BNA) 1817, 1824 (Fed. Cir. 1987) (noting that the privilege applies "to lawyer-to-client communications that reveal, directly or indirectly, the substance of a confidential communication by the client"); *In re Sealed Case*, 737 F.2d 94, 99-100 (D.C. Cir. 1984) (holding that the party claiming the privilege must demonstrate with reasonable certainty that the lawyer's communication was inseparable from the client's original confidential disclosure); *United States v. Amerada Hess Corp.*, 619 F.2d 980, 986 (3d Cir. 1980) (emphasizing that a list of the client's employees interviewed by the attorney is not privileged because "[t]he list itself gives no clue as to what . . . the [client's agents] told [the attorney]"); *In re Fischel*, 557 F.2d 209, 211-12 (9th Cir. 1977) (stating that the privilege also applies to documents prepared by an attorney or at an attorney's request for a client, provided the papers incorporate and reveal the client's confidential communications); *Avery Dennison Corp. v. UCB Films PLC*, No. 95C 6351, 1998 WL 703647, at *3 (N.D. Ill. Sept. 30, 1998) (concluding that communications from an attorney to a client should be privileged if the statements reveal, directly or indirectly, the essence of a confidential communication by the client); *Ami/Rec-Pro, Inc. v. Illinois Tool Works, Inc.*, No. 97C 5409, 1998 WL 70607, at *3 (N.D. Ill. Feb. 11, 1998) ("Lawyer-authored communications are covered by the privilege only if they reveal the client's confidences . . ."); *Federal Election Comm'n v. Christian Coalition*, 178 F.R.D. 61, 66 (E.D. Va. 1998) ("The attorney-client privilege . . . extends 'to protect communications by the lawyer to his client, agents, or superiors, or to other lawyers in the case of joint representation, if those communications reveal confidential client communications.'") (quoting *United States v. Under Seal*, 748 F.2d 871, 874 (4th Cir. 1984)); *Evans v. Atwood*, 177 F.R.D. 1, 3-6, (D.D.C. 1997) (observing that if a client seeks a legal opinion without communicating any confidential information, the opinion is not privileged); *Bristol-Meyers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, No. 95 CIV.8833 RPP, 1997 WL 470115, at *3 (S.D.N.Y. Aug. 15, 1997) (requiring the defendant to supply a privilege log, supplemented with supporting affidavits based on personal knowledge, which, among other things, establishes the derivative protection for the attorneys' responsive communications by explaining how each reveals prior confidential communications from the client); *Johnson v. Rauland-Borg Corp.*, 961 F. Supp. 208, 211 (N.D. Ill. 1997) ("Legal advice, standing alone, does not automatically receive protection."); *Gen-Probe, Inc. v. Amoco Corp.*, No. 94-C-5069, 1996 WL 264707, at *4 n.10 (N.D. Ill. May 16, 1996) (observing that the burden is on the party asserting the privilege to show that the advice or legal opinion relates to a prior confidential client communications); *County of Santa Clara v. Myers Indus.*, No. 95-298, 1996 WL 53800, at *1 (E.D. Pa. Feb. 9, 1996) (holding that the documents on the revised privilege list were covered by the privilege since they were communications relating to facts of which the attorney was informed by the client); *Bush Ranch v. E.I. du Pont de Nemours & Co.*, 918 F. Supp. 1524, 1547 (M.D. Ga. 1995) (determining reports of consultants retained to assist attorney were not protected by the attorney-client privilege because they were based on information that did not come from the client); *New Orleans Silversmiths, Inc. v. Miles, Inc.*, No. Civ.A.93-0096, 1993 WL 149081, at *1 (E.D. La. May 5, 1993) ("The attorney-client privilege protects the confidential communication of the client to the lawyer for the purpose of obtaining legal advice, and communications from the lawyer to the client which would tend to disclose the client's confidential

privilege to the extent that the responses reveal the content of what the client previously communicated.¹⁷ This is a *derivative protection* that is dependent upon the continued privileged character of the previously revealed communications.¹⁸ Therefore, to establish the privilege for the responsive communication of the attorney, the client must prove that the attorney-client privilege protects both sides of the conversation.¹⁹

communications.”); *Grid Sys. Corp. v. Texas Instruments, Inc.*, No. C-90-2571, 1992 U.S. Dist. LEXIS 14582, at *18 (N.D. Cal. Sept. 4, 1992) (“The purpose of the privilege is to protect and foster the client’s freedom of expression. It is not to permit an attorney to conduct his client’s business affairs in secret.”) (citations omitted); *Republican Party of N.C. v. Martin*, 136 F.R.D. 421, 426-27 (E.D.N.C. 1991) (asserting that because the privilege does not cover legal advice that does not arguably reveal a client’s confidences, any documents produced in preparation for litigating a client’s case that do not include confidences are not privileged); *Black & Decker, Inc. v. Hoover Serv. Ctr.*, No. H-87-851, 1990 WL 181523, at *3 (D. Conn. Nov. 5, 1990) (considering precedent in the Second Circuit that adopted a broad view of the attorney-client privilege and concluding that the Second Circuit did not intend to shield all legal advice from disclosure); *United States v. Bonnell*, 483 F. Supp. 1070, 1077 (D. Minn. 1979) (“Communications from the attorney to the client are ordinarily protected only if the communications reveal the substance of the client’s own statement.”); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 516, 522-23 (D. Conn. 1976) (“Communications by the attorney to the client in the consultation process are privileged when they state or imply facts communicated to the attorney in confidence Unless the legal advice reveals what the client has said, no legitimate interest of the client is impaired by disclosing the advice.”); *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 85-86 (E.D. Pa. 1969) (concluding that documents that only reveal public information, such as business records, obtained from third parties are not protected). *But see In re Grand Jury Proceeding*, 68 F.3d 193, 196-97 (7th Cir. 1995) (stating that when an attorney was asked questions about his communications to the client and third parties, the court held that “if the questions do not entail legal advice, the attorney-client privilege does not come into play—irrespective of whether the attorney is or is not also the records custodian. The privilege is limited to legal advice”).

Appearing to follow the derivative theory for the protection of responsive communications, the court in *In re Richard Roe, Inc.*, No. 95-6142, 1999 U.S. App. LEXIS 1415, at *5 (2d Cir. Feb. 3, 1999), employed it in a rather novel fashion. The court concluded that a document written by a former attorney for the Richard Roe company was protected by the privilege, not because it revealed the content of prior confidential communications of the corporate client, but because “the information in [the communication] reflects knowledge obtained while acting as corporate counsel.” *Id.* at *9. In the strictest sense of the derivative protection, the revealing of knowledge of the attorney should not activate the privilege protection. There are many sources of information. Knowledge of that information reveals nothing about the means by which it was acquired. Furthermore, an attorney’s knowledge acquired through confidential client communications does not disclose that legal advice was being sought or that confidentiality has been preserved.

17. See *supra* note 16 (listing cases that protect attorney-client communications which incorporate the client’s original confidential statements); see also THE EVIDENCE PROJECT, *supra* note 1, at 348 (explaining that the attorney-client privilege protection needed to cover those responsive communications from the attorney to the client to the extent that those communications revealed what the client had previously communicated).

18. See THE EVIDENCE PROJECT, *supra* note 1, at 348 (“[A] derivative protection was created for responsive attorney communications—protecting the attorney’s response to the extent it revealed what the privilege had previously protected.”). See generally RICE, *supra* note 3, § 5:2, at 302-20 (describing the derivative protection for attorney to client communications).

19. See RICE, *supra* note 3, § 5:2, at 302-20 (“[T]he privilege proponent will have to prove two to get one – proving the client’s communications was, and remains, privileged and that the attorney’s response reveals its substance.”); see also *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (observing that the client bears the burden of proving that the communication was

Because of inevitable disclosures in attorney communications, many courts have begun to define the attorney-client privilege loosely to protect communications “between” the attorney and client.²⁰ This

privileged and that the attorney’s subsequent communication is inseparable from the client’s confidential communication).

20. See, e.g., *Upjohn*, 449 U.S. at 390 (“[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370-71 (10th Cir. 1997) (considering the approach some courts have taken, protecting any communication from an attorney and a client in the course of providing legal advice in the interest of predictability, and concluding this interpretation is correct); *In re Grand Jury Subpoena*, 765 F.2d 1014, 1018 (11th Cir. 1985) (“Communications between an attorney and his client made for the purpose of securing legal advice are protected under the attorney-client privilege.”); *Amerada Hess*, 619 F.2d at 986 (explaining the merits of the “two-way application” of attorney client privilege in both preventing inferences being drawn from the attorney’s advice and promoting client confidentiality); *United States v. First Midwest Bank*, No. 94-C07365, 1997 U.S. Dist. LEXIS 3871, at *5 (N.D. Ill. Feb. 20, 1997) (“This is a communication between in house counsel for CTI in which one attorney seeks ‘counsel’ (legal advice, strategic advice) from another with respect to a claim under one of the policies. The document is privileged.”); *EEOC v. HBE Corp.*, No. 93-CV-722, 1994 WL 376273, at *2 (E.D. Mo. 1994) (“A number of courts have held that when the EEOC brings suit on behalf of individuals, the communications between the attorneys for the EEOC and the charging party are protected by the attorney-client privilege.”); *Arcuri v. Trump Taj Mahal Assocs.*, 154 F.R.D. 97, 103 (D.N.J. 1994) (“The privilege protects the entirety of the communicative process between the client and the attorney, in both directions, when it is engaged in to facilitate the client’s seeking of advice and the attorney’s provision of advice.”); *Golden Trade, S.R.L. v. Lee Apparel Co.*, No. 90 CIV. 6291, 1992 WL 367070, at *8 (S.D.N.Y. Nov. 20, 1992) (holding that the plaintiff’s invocation of the attorney-client privilege failed because there was no evidence that the notes incorporated any confidential communications); *Moore v. Tri-City Hosp. Auth.*, 118 F.R.D. 646, 648 (N.D. Ga. 1988) (“The privilege extends to communications from the attorney to the client, as well as the reverse.”). The court in *In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981), stated:

In theory, the client states facts and the attorney gives advice; and in theory, if the advice to the client does not reveal what the client told him it is not privileged. . . . Whatever the conceptual purity of this “rule,” it fails to deal with the reality that lifting the cover from the advice will seldom leave covered the client’s communication to his lawyer. Nor does it recognize the independent fact-gathering role of the attorney. Finally, enforcement of the rule would be imprecise at best, leading to uncertainty as to when the privilege will apply. . . . A broader rule . . . protects from forced disclosure any communication from an attorney to his client when made in the course of giving legal advice. . . . [W]e think the broader rule better serves the interests underlying the attorney-client privilege and is not inconsistent with the principle that the attorney-client privilege should be applied narrowly.

interpretation was spurred, in part, by the language in Proposed Federal Rule of Evidence 503 that used the same preposition.²¹ This characterization of the privilege is problematic in that it extends the privilege's protection far beyond what is necessary to further its limited goal—to encourage open and candid communications from the client.²² There is no apparent reason why clients would be less candid in communications with attorneys if attorney communications revealing information from other sources were discoverable.²³

As illustrated in Figure 3, the use of the preposition "between" obscures the scope of the protection.²⁴ This preposition could mean no more than its common law progenitor illustrated at 3.a—communications to the attorney and responsive communications that reveal the content of what the client originally said.²⁵ On the other hand, the word "between" could include any other communication from the attorney, regardless of whether the conversation only revealed the law that the attorney communicated to the client (independent of its application to the client's circumstances),²⁶ illustrated at 3.b, or facts acquired from third parties, illustrated at 3.c.²⁷

Id. at 602-03.

21. Rule 503(b) of the Proposed Federal Rules of Evidence provided:

(b) General rule of privilege—

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications for the purpose of facilitating the rendition of professional legal services to the client, (1) *between* himself or his representative and his lawyer or his lawyer's representative, or (2) *between* his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) *between* representatives of the client or *between* the client and a representative of the client, or (5) *between* lawyers representing the client.

THE EVIDENCE PROJECT, *supra* note 1, at 491 (emphasis added); *see also* JACK B. WEINSTEIN & MARGARET A. BERGAN, WEINSTEIN'S FEDERAL EVIDENCE § 503, at 503-01 (Joseph M. McLaughlin ed., 2d ed. 1999). Most states that have patterned their evidence codes after the Federal Rules of Evidence have adopted the language of Proposed Rule 503(b). *See* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE: STATE LAW § 2:1 (Rice Publishing 1999) (formatted on diskettes).

22. *See* RICE, *supra* note 3, § 5:4, at 325-26 ("It is not clear . . . that this expansion goes beyond what is necessary to achieve the privilege's limited goal of encouraging more open communications from the client.").

23. *See id.* § 5:4, at 327-28, 330-32 (explaining the implications of expanding direct protection to attorney communications and to what extent communications from attorneys reveal confidential client communications).

24. *See* THE EVIDENCE PROJECT, *supra* note 1, at 348 (noting the mischaracterization of the privilege as courts began to increasingly use the phrase "between the attorney and client").

25. *See* RICE, *supra* note 3, § 5.2, at 304-05 (noting that courts apply the privilege to what the client originally disclosed to the attorney).

26. If the attorney is applying the law to the unique circumstance of the client, the responsive communication will reveal the content of the client's prior communications. *See* THE EVIDENCE PROJECT, *supra* note 1, at 348 (explaining that the privilege protection of communications was "incomplete to the extent that responsive communications from the attorney to the client revealed what the client had previously communicated").

27. *See* RICE, *supra* note 3, § 5:2, at 309-14 (illuminating the privilege in the context of third

As a result of this re-characterization of the scope of the attorney-client privilege, the original protection of the privilege expanded radically.²⁸ Without either acknowledging this expansion or appreciating its consequences, many courts have adopted it.²⁹ Although many courts have intended the expansion to include only the responsive *advice* of the attorney, 3.b, most have given no indication of this limitation.³⁰ A few courts have gone so far as to

parties); see also *In re LTV Sec. Litig.*, 89 F.R.D. 595, 602-03 (N.D. Tex. 1981) (holding that an attorney could be compelled to disclose information acquired from third parties); THE EVIDENCE PROJECT, *supra* note 1, at 348 (describing the "privilege protection . . . extend[ing] to purely factual communications from the attorney that were the product of . . . communications from third parties").

28. See THE EVIDENCE PROJECT, *supra* note 1, at 348-49 (1997) (illustrating that the extension of the protection of the privilege to communications between attorney and client was "a significant clarification that many will feel is a change").

29. See *supra* note 16 and accompanying text (reviewing various courts' holdings on the scope of the privilege).

30. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981) (contributing to the confusion by expounding that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice"); *In re Grand Jury Proceeding*, 68 F.3d 193, 196-97 (7th Cir. 1995) (holding that the privilege only applies to legal advice and did not apply when an attorney was asked questions about his communications with a client and third parties); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) ("In a given case, advice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters. We have therefore stated that the privilege cloaks a communication from attorney to client 'based, in part at least, upon a confidential communication [to the lawyer] from [the client].'" (emphasis added) (citations omitted); *United States v. Margolis (In re Fischel)*, 557 F.2d 209, 211 (9th Cir. 1977) (observing that the privilege applies to both the substance of the communication as well as the attorney's advice to protect the attorney's ability to provide advice confidentially); *Salgado v. Club Quarters, Inc.*, No. 96 CIV. 383, 1997 WL 227598, at *1 (S.D.N.Y. May 5, 1997) (determining that because the document was merely an objective report of non-privileged proceedings, it was not within the attorney-client privilege); *Direct Response Consulting Serv. v. IRS*, No. 94 CV1156, 1995 WL 623282, at *3 (D.D.C. Aug. 21, 1995) ("Moreover, although it ordinarily applies to facts divulged by a client to his attorney, this privilege also encompasses any opinions given by an attorney to his client based upon those

extend the privilege's coverage to *all communications* from the attorney, even those relaying information only from third parties, 3.c.³¹

This expansion of the privilege appeals to judges for two reasons. First, it is roughly accurate. Most responsive communications will reveal or depend upon, to some extent, the content of prior communications of the client.³² This interpretation of the privilege simplifies the resolution process. Second, and more important, eliminating the derivative theory removes the need to prove two valid attorney-client privilege claims in order to assert one successfully.³³

facts . . ."); Phillips Elecs. N. Am. Corp. v. Universal Elecs., Inc., 892 F. Supp. 108, 109 (D. Del. 1995) (holding that the attorney's notes and draft licensing agreements were protected under the attorney-client privilege only to the extent that they are shown to reveal confidential communications from the client or advice from the attorney); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 441-42 (S.D.N.Y. 1995) ("It is now well established that the privilege attaches not only to communications by the client to the attorney, but also to advice rendered by the attorney to the client, at least to the extent that such advice may reflect confidential information conveyed by the client."); Sequa Corp. v. Gelmin, No. 91 CIV. 8675, 1994 WL 538124, at *4 (S.D.N.Y. Sept. 30, 1994) ("The only portion withheld consists of legal advice, and hence the redaction is proper."); United States Fidelity & Guar. Co. v. Barron Indus. Inc., 809 F. Supp. 355, 364 (M.D. Pa. 1992) (clarifying that the attorney-client privilege only applies to discussions where the individual is acting as an advisor and does not apply to a discussion of the facts); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 144 (D. Del. 1977) ("The privilege also extends to the attorney's legal advice and opinions which encompass the thoughts and confidences of the client."); Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971) ("[D]ocuments containing considerable technical factual information but which were nonetheless primarily concerned with giving legal guidance to the client were classified as privileged.").

31. See *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991) ("The privilege extends to *all* communications between State Farm and the attorneys it retained for the purpose of ascertaining its legal obligations to the Dunns.") (emphasis added); *In re LTV Sec. Lit.*, 89 F.R.D. at 603 (holding that an attorney could be compelled to disclose information acquired from third parties, even though that information was later conveyed to the client, only if the information was obtained outside the investigation necessary for the attorney to provide the legal advice sought from him).

The more appropriate position was explained by the Second Circuit in the recent case of *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999), where the attorney consulted with an investment banker to assist him in the rendering of legal advice to the client. Despite the importance of the assistance to the legal advice that was given, the communications from the agent to the attorney were not protected by the privilege because extending the protection would not further the purpose of the privilege, which is "to encourage clients to make full disclosure to their attorneys." See *id.* at 139 (citation omitted). The court explained:

We assume . . . that Meyers interviewed Ackert [the investment banker] in order to gain information and to better advise his client Paramount. That, however, is insufficient to give rise to the privilege. The purpose of the privilege is "to encourage clients to make full disclosure to their attorneys." . . . To that end, the privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client. Thus, a communication between an attorney and client may be privileged even if it turns out to be unimportant to the legal services provided.

Id. (citation omitted).

32. See THE EVIDENCE PROJECT, *supra* note 1, at 348 (explaining that responsive communications reveal what the client has previously communicated).

33. See *id.* at 348-49 (asserting that the "privilege proponent will have to prove two

Under this expanded definition, all the proponent has to demonstrate is that the lawyer communicated legal advice or assistance to the client in confidence. The hidden dangers in this practice surfaced in the Ninth Circuit's decision in *United States v. Bauer*.³⁴

Bauer involved the prosecution of a bankruptcy petitioner for fraudulently failing to report all of his assets in his bankruptcy petition.³⁵ In his defense, Bauer claimed that he withheld information about certain assets innocently, believing that they did not have to be reported.³⁶ Consequently, the principal focus of the trial was on Bauer's knowledge and intent.³⁷ To establish a knowing misrepresentation, the government called the defendant's former bankruptcy attorney.³⁸ Over the objections of Bauer, the attorney was required to testify that he had informed the defendant that, as a bankruptcy petitioner, Bauer had a legal obligation to report all of his property in the petition, and that any false statement would constitute perjury.³⁹ On the appeal of his conviction, Bauer claimed that the trial judge's order violated his attorney-client privilege.⁴⁰ The Ninth Circuit agreed.⁴¹

The trial judge required the bankruptcy attorney to disclose his communications with Bauer on the belief that when an attorney advises the client about the rules of the court, he is not acting as an attorney, but as an officer of the court conveying public information.⁴² This decision was influenced by a well-established body of law holding that when an attorney notifies a client of the dates on which the client has been ordered by the court to appear for sentencing, there can be no reasonable expectation on the part of the client that such communications are confidential.⁴³

[privilege claims] to get one").

34. 132 F.3d 504, 512 (9th Cir. 1997) (holding that Bauer's attorney-client privilege was violated during his criminal trial and that although this was not a constitutional error, it was enough to influence the jury's verdict).

35. *See id.* at 506.

36. *See id.* at 510 (reporting that Bauer claimed to be innocent and that his failure to disclose certain assets stemmed from his own "ignorance," "mistake," or "stupidity").

37. *See id.* at 506 (stating that the case turned upon a determination of Bauer's intent).

38. *See id.*

39. *See id.* at 506-07.

40. *See id.* at 507.

41. *See id.* at 508 (distinguishing mere conveyance of public information from advising a client of legal obligations involved in filing a bankruptcy petition).

42. *See id.* (observing that the attorney's duties to the court as an officer of the court, and to the client as an advocate, overlap).

43. *See id.*; *see also* *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 110 (6th Cir. 1995) (observing that when an attorney informs a client of the date and time of court proceedings the communication is not privileged); *United States v. Franke*, Nos. 94-3063, 94-3063, 1995 WL 298137, at *3-4 (10th Cir. May 16, 1995) (unpublished disposition) ("All that was material to

Consequently, the attorney can be required to reveal that the client was advised of the appearance date when he is later tried for failing to appear.⁴⁴ This interpretation of the attorney-client privilege yielded a similar result in *McKay v. Commissioner*,⁴⁵ where the Ninth Circuit had to ascertain when a taxpayer received an IRS deficiency notice from his lawyer, to determine whether the taxpayer filed his petition for review in a timely manner. The Ninth Circuit held that an attorney could be required to testify that he sent the IRS deficiency notice to the client.⁴⁶

Without explaining why the privilege does not protect an attorney's communication to a client, when the communication informs the client of a judicial order or IRS notice of deficiency that requires the client to *personally appear*, a court has held that an attorney's communication to a client, which informs the client of a congressional act that requires that the client's assets "*appear*," is privileged legal advice.⁴⁷ This decision was a product of the re-characterization of the attorney-client privilege to protect communications "between" the attorney and client—affording a *direct protection* to all responsive *attorney communications*.⁴⁸

the offense charged was the attorney's testimony that the time of trial had been communicated to [the client] and that [the client] had been advised that no continuance would be requested. These communications were not privileged."); *United States v. Posin*, No. 92-15188, 1993 WL 230270, at * 1 (9th Cir. June 29, 1993) (unpublished disposition) (requiring attorney to appear before grand jury and disclose whether he informed client of the sentencing date); *McKay v. Commissioner*, 886 F.2d 1237, 1238 (9th Cir. 1989) (finding that the attorney could testify that he sent the IRS deficiency notice to the client); *United States v. Gray*, 876 F.2d 1411, 1415 (9th Cir. 1989) (allowing an attorney to testify that he informed the client of sentencing date); *United States v. Clemons*, 676 F.2d 124, 125 (5th Cir. 1982) ("An attorney's message to his client concerning the date of trial is not a privileged communication."); *United States v. Freeman*, 519 F.2d 67, 68 (9th Cir. 1975) (finding attorney's advising a client of a court order to appear not protected); *United States v. Hall*, 346 F.2d 875, 882 (2d Cir. 1965) (finding that there was no invasion of the attorney-client privilege when the lawyer testified that he told his client about the Assistant United States Attorney's message requiring his client to appear at each calendar call and further stating "[d]efense counsel served merely as a conduit for transmission of a message," so the communication was not found to be confidential); *United States v. Woodruff*, 383 F. Supp. 696, 698 (E.D. Pa. 1974) (observing that communication to the client of time and date of trial by an attorney not privileged).

44. See *Antoine*, 66 F.3d at 110-11 (holding that "no privilege attaches to the mere mailing, or failure to mail," by the attorney of motions for entry of default judgments); *Franke*, 1995 WL 298137, at *3-4 (refusing to extend "last-link exception" that would privilege communications where disclosure would reveal information tantamount to a confidential professional communication); *Gray*, 876 F.2d at 1415-16 (finding that the lower court properly allowed attorney to testify about communicating sentence date to defendant and refusing to extend last-link exception).

45. 886 F.2d 1237 (9th Cir. 1989).

46. See *id.* at 1238 ("The relaying of this message is not in the nature of confidential communication.") (quoting *Freeman*, 519 F.2d at 68).

47. See *Bauer*, 132 F.3d at 509 ("[N]o reasonable interpretation of Rivera's communication with Bauer regarding the legal obligations involved in filing a bankruptcy petition would characterize them as anything other than legal advice.")

48. See *supra* note 24 and accompanying text.

Under the classical derivative theory for responsive attorney communications, this attorney's communication about the abstract requirements of the law would not have been privileged because the communication did not apply or interpret those principles in light of the client's unique circumstances, and thus, did not reveal prior privileged communications of the client.⁴⁹ This would be true regardless of whether the attorney's communications were characterized as "legal advice" or the "transmission of public information."⁵⁰

II. THE PRIVILEGE PROTECTS COMMUNICATIONS, NOT INFORMATION

The attorney-client privilege protects communications made to obtain legal advice;⁵¹ it does not protect the information communicated. This concept has proved to be one of the more difficult principles of the attorney-client privilege for courts to apply.⁵² Confusing the two, courts often decline to apply the privilege where the information contained within a communication was not confidential, even if the communication itself was confidential.⁵³

49. See *Bristol-Meyers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, No. 95 Civ. 8833 RPP, 1997 WL 470115, at *4 (S.D.N.Y. Aug. 15, 1997).

50. See *supra* note 16 (demonstrating that the key to determining whether information is protected under the attorney-client privilege is if it reveals confidential client communications). While the transmission of information about the law *could* reasonably be interpreted as "legal assistance," unless that "assistance" involved the application of the legal principles to the unique facts communicated by the client, in a way that reveals that he had communicated those facts, there is no basis for extending the privilege protection. See *In re Grand Jury Proceeding*, 68 F.3d at 197.

51. See generally RICE, *supra* note 3, § 5:1, at 287 ("The attorney-client privilege protects communications between the client and the attorney.")

52. See *supra* note 15 (citing *Upjohn*, which held that the attorney-client privilege does not prevent disclosure of underlying facts of a communication with an attorney).

53. See, e.g., *Tax Analysts v. IRS*, 117 F.3d 607, 618-19 (D.C. Cir. 1997) (applying the standard that the attorney-client privilege protects communication from attorneys to clients containing confidential information obtained from the client, and denying attorney-client protection to letters from the IRS Office of Chief Counsel to field personnel because the letters were based on information gathered from taxpayers, not confidential information regarding the agency itself); *United States v. Billmyer*, 57 F.3d 31, 37-38 (1st Cir. 1995) (concluding that disclosure of facts by a third party to the government constituted a waiver of the attorney-client privilege such that a criminal defendant could discover both the facts *and* the communication); *In re Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991*, 959 F.2d 1158, 1165-66 (2d Cir. 1992) (holding that documents created by and received from a third party and given by the client to his attorney in the course of seeking legal advice do not thereby become privileged); *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 746, 3 U.S.P.Q.2d (BNA) 1817, 1824-25 (Fed. Cir. 1987) (holding that a letter of opinion that discussed the fact that a patent was not infringed did not contain confidential communications and therefore, was not privileged); *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, No. 97-3012, 1998 WL 310779, at *1 (E.D. La. June 10, 1998) ("Letters that merely transmit documents to or from an attorney, even at the attorney's request for purposes of rendering legal advice to a client, are neither privileged nor attorney work product, without more."); *Alexander v. FBI*, No. 96-2123, 1998 WL 292083, at *20 (D.D.C. May 28, 1998) ("Furthermore, the privilege extends to communications from attorneys to their clients if the communications rest on *confidential information* obtained from the client.")

The privilege protects what the client confidentially communicated to the attorney to obtain legal advice or assistance.⁵⁴ The privilege protects the fact that the information was communicated (graphically illustrated in Figure 4 in the box at level 1), but not the information

(emphasis added); *White v. United States Catholic Conference*, No. 97-1253, 1998 WL 429842, at *1 (D.D.C. May 22, 1998) (explaining that “[i]n the letter, [the client] seeks legal advice but in doing so does not disclose any information which is known only to him and which he intends the lawyer to keep in confidence. To the contrary, he premises his request on objective facts which occurred and which other people (including plaintiff) are aware have taken place. In that sense, there is nothing confidential about the facts he discusses.”); *Evans v. Atwood*, 177 F.R.D. 1, 5 (D.D.C. 1997) (stating that “[i]f as is true of many of the documents, the client official sought the opinion without disclosing any confidential information, the existence of the opinion and its contents are not privileged” and reasoning that the communications from the client to the attorney are privileged only if factual information is contained in it, rather than just a request for a legal opinion on a particular subject); *Soriano v. Treasure Chest Casino, Inc.* No. 95-3945, 1996 WL 736962, at *2 (E.D. La. Dec. 23, 1996) (finding that under both common law and Louisiana statutory law the attorney-client privilege “protects communications only to the extent the communications may disclose confidential information provided by the client for the purpose of facilitating legal advice”); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94C897, 1996 WL 5180, at *3 (N.D. Ill. Jan. 3, 1996) (emphasizing in its ruling on 30 documents that the attorney’s responsive communications revealed the client’s “confidential business information” but ignored the question of whether the business information was actually confidential); *Apex Mun. Fund v. N-Group Sec.*, 841 F. Supp. 1423, 1428 (S.D. Tex. 1993) (concluding that drafts of documents that are disclosed to third parties do not lose their privilege protection through the disclosure of the final product, but further noting that documents containing information conveyed by the client to legal counsel are privileged to the extent the information in them actually appears in public documents); *EEOC v. Fina Oil & Chem. Co.*, 145 F.R.D. 74, 76 (E.D. Tex. 1992) (“In federal courts, [the] attorney-client privilege extends to confidential communications between [the] attorney and client only if the communications are based on *confidential information* provided by the client . . .”) (emphasis added); *International Surplus Lines Ins. Co. v. Willis Corroon Corp.*, No. 91-C-6057, 1992 WL 345051, at *9 (N.D. Ill. Nov. 10, 1992) (“Several other documents that are purportedly covered by the attorney-client privilege, in fact, contain no legal or confidential, but *mere factual information*, at times already known to WCC.”) (emphasis added); *Allegheny Ludlum Corp. v. Nippon Steel Corp.*, No. 89-5940, 1991 WL 61144, at *4 (E.D. Pa. Apr. 15, 1991) (holding that communication which was meant to assist counsel in preparing a patent application and render an opinion on the patentability of the invention was not protected by the privilege because “plaintiff [did] not demonstrate to the Court that the *information was kept confidential*”); *In re Department of Energy Stripper Well Exemption Lit.*, No. 78-1513, 1988 U.S. Dist. LEXIS 11092, at *6 (D. Kan. Sept. 27, 1988) (holding that communication is protected “when the communication from the attorney to the client is confidential and is based on *confidential information* provided by the client”) (emphasis added); *McDonald v. St. Joseph’s Hosp. of Atlanta, Inc.*, No. C80-1295A, 1982 U.S. Dist. LEXIS 14662, at *11 (N.D. Ga. Sept. 20, 1982) (“The privilege does not attach unless the information and documents involved were intended as confidential communication at the time they were made.”); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980) (“Many of the documents [from the attorney to the client] reveal matters of public record that could have been discovered by other means. None of the documents reveals any information that even approaches a breach of the confidentiality necessary for the proper functioning of the attorney-client relationship.”). Even in the landmark opinion of *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950), the judge indicated that judicial opinions reflecting information in public records are not protected regardless of how the attorney acquired that information, stating that “there is no privilege for so much of a lawyer’s letter, report or opinion as relates to a fact gleaned from . . . a public document.” *Id.* at 359.

54. See EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE* 3 (3d ed. 1997) (finding that the privilege exists to protect against the compulsion of communications made by clients to lawyers for the purpose of seeking legal counsel).

itself, aside from the fact of the communication.⁵⁵ Therefore, the client's knowledge of Facts A, B, and C is not privileged, and third parties may obtain access to these facts.

If the client voluntarily testifies⁵⁶ to the same facts communicated to the attorney, or informally discloses them to third parties, but does not disclose that he previously related the same information to his attorney, the privilege protection is unaffected.⁵⁷ This is illustrated at level 2 in Figure 4. Similarly, as illustrated in level 3, the client can be required to disclose Facts A, B, and C⁵⁸ because they are within his

55. *See id.* at 9 (maintaining that "[t]he privilege does not protect facts from disclosure").

56. *See* United States v. Rakes, 136 F.3d 1, 5 (1st Cir. 1998) (asserting that facts recounted within a privileged communication and the communication are two different things). Testifying at trial regarding the same events discussed with one's lawyer in a privileged communication usually does not involve the loss of the privilege. *See id.*

57. *See* United States v. O'Malley, 786 F.2d 786, 793-94 (7th Cir. 1986) (finding that a client did not waive his attorney-client privilege by communicating the same information to a third party as he did to his attorney). The *O'Malley* court distinguished disclosure of communications made to a third party about communications with an attorney, which are not privileged, and attorney-client communications that maintain the privilege. *See id.*

58. This is illustrated in *In re Six Grand Jury Witnesses*, 979 F.2d 939 (2d Cir. 1992). Upon learning that it was being investigated for contract fraud, a corporation sought the assistance of outside legal counsel. In rendering this assistance, counsel requested that an analysis of costs be made by the high-ranking corporate employees who had been responsible for monitoring the costs under the contract. *See id.* at 942. Each employee independently chose the documents that would be reviewed in this analysis. Upon their completion, each employee was subpoenaed before a grand jury and asked about his analysis of those costs. *See id.* In response to these questions, each refused to answer on the ground that the information in his analysis was protected by the attorney-client privilege because it was developed at the request of legal counsel. *See id.* The district court and the appellate court, upon expedited appeal, rejected this claim. *See id.* at 945.

After a review of the questions propounded to the witnesses, the district court ordered that they be answered because "the information sought by the prosecutor was limited to underlying facts" and, it was believed, "the witnesses' responses would not infringe on . . . the privilege [] XYZ Corporation had asserted so long as . . . the questions were not connected to or identified with the analyses the witnesses had conducted at the request of defense counsel." *Id.* at 942. The appellate court explained further why most of these questions had to be answered:

We turn to the pending questions. To begin with it seems plain that merely by asking witnesses to conduct an analysis defense counsel may not thereby silence all the key witnesses on the cost aspects of the Fox contracts under either [the work product or the attorney-client] privilege. Were counsel to succeed in such a tactic, the government would never be able to conduct a full and complete investigation of an alleged crime because the critical witnesses would have been effectively silenced, nor for the same reason would the government be able to present all the evidence at trial regarding a defendant's guilt or innocence.

Examining the 23 questions we see no trampling of either privilege, except in four questions. Questions #8 "With whom did you discuss this analysis," #9 "What was said [other than to counsel]," #14 "What information did you give them [anyone other than [XYZ's] attorney]," and question #15 "When did you give this information to anyone other than [XYZ's] attorney." The form of these four questions, considered in sequence, risks violation of the attorney-client privilege because the witness, in responding, might be understood to be implying to the grand jury that he had conveyed privileged information to the lawyer. . . .

Although an attorney-client communication is privileged and may not be divulged, . . . the underlying information or substance of the communication is not, as appellants incorrectly believe, so privileged. Further, the remaining 19 questions seek

knowledge, but he cannot be required to disclose that he communicated Facts A, B, and C to his attorney.⁵⁹

The privilege focuses on the communication. It is not concerned with, and does not affect, the facts within the communication, as the facts exist outside the box. The privilege does not bestow an independent protection on such information, and the information's nature (factual or technical) or status (public or private) does not

underlying factual information to which the prosecutor is clearly entitled. The factual information is not protected by the attorney-client privilege just because the information was developed in anticipation of litigation.

Id. at 944-45.

59. The client or his attorney may be required to disclose that there was a *communication*, but its specific content is made off-limits by the privilege.

affect the privilege.⁶⁰ The information does not have to be confidential for the communication in which it is incorporated to be confidential, and therefore, privileged.⁶¹

III. THE SOURCE AND NATURE OF THE INFORMATION COMMUNICATED TO THE ATTORNEY IS IRRELEVANT TO THE PRIVILEGE PROTECTION APPLIED TO THE CLIENT'S COMMUNICATIONS

Another persistent attorney-client privilege misperception is that a client's communication of non-confidential information precludes the communication from being confidential, and this, in turn, prevents the privilege from being applicable.⁶²

For example, an IRS field agent may communicate with IRS attorneys in Washington, D.C. on a novel issue that he is confronting. That communication should be privileged if its purpose is to obtain legal advice, regardless of the nature or source of the facts and information included within the communication.⁶³ Even if the agent's communication consists predominantly of tax information acquired from a taxpayer, the communication should be protected by the government's attorney-client privilege.⁶⁴ The United States Court of Appeals for the D.C. Circuit, in *Tax Analysts v. IRS*,⁶⁵ however, recently held that because of the nonconfidential nature of the *information* communicated, the government cannot have a reasonable expectation that either the agent's communication or the attorney's response would be confidential, and therefore, privileged.⁶⁶

This decision was wrong. It focused erroneously on the nature and source of the information, which is irrelevant to the privilege, rather than focusing on the client's request and the attorney's response,

60. The privilege protects what the client communicated to the attorney. Discovery efforts that would do the equivalent are inappropriate. Therefore, a litigant should not be permitted to discover Facts A, B, and C from the attorney (of course, without asking if the client had communicated the same to him) and then follow with the question: "Did you know Facts A, B, and C before the client communicated with you?" If the attorney answers no, this will reveal the equivalent of the question: "What did your client say to you?" See generally RICE, *supra* note 3, § 5:1, at 287.

61. See *supra* note 43 (providing support for confidential treatment of certain communications of non-confidential information).

62. See *supra* note 53 (providing case law that communication of non-confidential information can be privileged).

63. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (recognizing that the attorney-client privilege rests on the rationale that "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client").

64. See generally RICE, *supra* note 3, § 5:1, at 287 ("The attorney-client privilege protects communications between the client and the attorney.").

65. 117 F.3d 607 (D.C. Cir. 1997).

66. See *supra* note 46 and accompanying text (noting that an attorney can be required to testify that he sent an IRS notice of deficiency to the client).

which revealed the communication's content.⁶⁷

In *Tax Analysts*, the court found that the communications from the attorneys, in what is called the Field Service Advice Memoranda ("FSA"), were not based on "confidential information obtained from the client,"⁶⁸ but rather on communications from other taxpayers that did not contain "any confidential information concerning the Agency."⁶⁹ The court then held that because opinions from the Office of Chief Counsel were used as a basis for agency policy, those

67. See *Burton v. R.J. Reynolds Tobacco Co.*, 175 F.R.D. 321, 327-28 (D. Kan. 1997) ("To establish that such communications are protected by the attorney-client privilege there must be a connection between the scientific information which is the subject of the communications and the rendering of legal advice."); *Saxholm AS v. Dynal, Inc.*, 164 F.R.D. 331, 336 (E.D.N.Y. 1996) ("That the communication contains highly technical matter should not take it out of the domain of communications entitled to protection under the privilege."); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 631 (W.D.N.Y. 1993) (asserting that privilege protection requires "some expectation" of confidentiality and that such expectation is not negated by the fact that the information may be found in the public domain); *Rohm & Haas Co. v. Brotech Corp.*, 815 F. Supp. 793, 797, 26 U.S.P.Q.2d (BNA) 1800, 1801-03 (D. Del. 1993) (concluding that communications regarding a patent application, including technical information, contained nothing to prevent the communication from being privileged); *Advanced Cardiovascular Sys., Inc. v. C.R. Bard, Inc.*, 144 F.R.D. 372, 374, 25 U.S.P.Q.2d (BNA) 1354, 1355-58 (N.D. Cal. 1992) (distinguishing between communications and technical information in the patent application process and rejecting the "conduit concept" by which previous courts had found that there was no reasonable expectation of confidentiality in client communications in the patent application process) (citation omitted); *Max-Planck-Gesellschaft Zur Foerderung Der Wissenschaften E.V. v. North Am. Philips Corp.*, No. 90 CIV.6147, 1991 WL 177255, at *1 (S.D.N.Y. Sept. 3, 1991) (stating that "the critical issue is not whether the information is purely technical or whether it later finds its way into a patent application but whether the communication was made in confidence to the attorneys") (quoting *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 202 (E.D.N.Y. 1988)); *Cuno*, 121 F.R.D. at 202 ("The fact that the submissions exclusively contain technical data is not controlling."); *Paramount Packaging Corp. v. Triple R Indus., Inc.*, No. 87-CV-18, 1988 WL 12780, at *1 (N.D.N.Y. Feb. 19, 1988) ("Although documents containing only technical information are not privileged, . . . the court finds correspondence between Paramount and its attorneys which either reveals or seeks legal advice to be privileged."); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 683 (S.D.N.Y. 1980) ("[T]hat the information in these documents was not necessarily confidential—that is known only to the client—does not defeat the privilege as long as the communication is made in confidence."); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 389-90 (D.D.C. 1978) ("It is not necessary that the *Information* be confidential. . . . The *Communication* of . . . 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."); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 39-40 (D. Md. 1974) ("The policy which dictated the creation of the privilege applies with equal force to the area of patent law."); *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 41 (E.D.N.Y. 1973) ("[T]he attorney-client privilege will not be defeated simply because the documents are also highly technical."); *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal. 1971) ("[D]ocuments containing considerable technical factual information but which were nonetheless primarily concerned with giving legal guidance to the client were classified as privileged."); see also *United States v. Willis*, 565 F. Supp. 1186, 1213 (S.D. Iowa 1983) ("While [preexisting] documents themselves are not privileged, the attorney's knowledge of the documents may be privileged. . . . What is crucial is whether the client 'communicated' the document to the attorney in confidence in order to receive legal advice.").

68. 117 F.3d at 618 (quoting *Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977)).

69. *Id.* at 619 (quoting *Schlefer v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983)).

opinions were law created by the IRS which should be applied consistently to all taxpayers.⁷⁰ Therefore, the communication should be discoverable by all taxpayers.⁷¹

The first line of reasoning—requiring the client to communicate confidential *information* in order to assert the privilege—reflects a common misconception about the privilege.⁷²

The nature of the information contained in the communications from the client to the attorney is irrelevant to the communications' privileged status.⁷³ Regardless of where the client acquired the *information*, or the information's confidential or public nature, the *content* of the client's communication with his attorney is privileged.⁷⁴

70. *See id.* at 617 (holding that legal conclusions in FSAs constitute law that is applied although not binding on field personnel).

71. *See id.* at 619 (noting that IRS cannot invoke either FOIA exemption five or the attorney-client privilege to prevent disclosure to the public of communications contained in FSAs).

72. *See supra* note 53 (supporting the assertion that courts have often declined to apply the privilege where the information within a communication was not confidential, even if the communication itself was confidential). The same problem arises when the nature of the information communicated by the client is technical or scientific. *See, e.g.,* Pacamor Bearings v. Minebea Co., 918 F. Supp. 491, 511 (D.N.H. 1996) (noting that the attorney-client privilege does not protect communications related only to technical data and not to legal advice); Glaxo, Inc. v. Novopharm, Ltd., 148 F.R.D. 535, 540 (E.D.N.C. 1993) ("The scope of the privilege in the patent context is no greater than in any other area of the law."); Burroughs Wellcome Co. v. Barr Labs, Inc., 143 F.R.D. 611, 616 (E.D.N.C. 1992) ("[T]he . . . attorney-client privilege does not protect communications consisting primarily of technical information made to a patent lawyer in connection with the prosecution of a patent application that were intended to be passed on to the Patent & Trademark Office."); Bio-Rad Lab. v. Pharmacia, Inc., 130 F.R.D. 116, 126, 14 U.S.P.Q.2d (BNA) 4924, 1931 (N.D. Cal. 1990) (stating that in patent litigation, the attorney-client privilege does not protect attorney-client communications that consist largely of factual information to be used for disclosure in the patent application process because the attorney is acting not primarily as a lawyer but rather as a mere conduit for factual information intended for a third-party or a file); Nikkal Indus., Ltd. v. Salton, Inc., 689 F. Supp. 187, 191-92 (S.D.N.Y. 1988) ("Communication based on technical information as opposed to legal advice is not considered privileged."); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980) (affirming the magistrate's opinion that attorney-client privilege should not attach to the documents at issue because those documents contained matters of public record discoverable by other means); American Optical Corp. v. United States, 180 U.S.P.Q. (BNA) 143, 145 (Ct. Cl. 1973) (denying attorney-client privilege for certain documents because they reflect matters of public record); Sperti Prods., Inc. v. Coca-Cola Co., 262 F. Supp. 148, 149 (D. Del. 1966) (determining that a communication is not privileged if based solely on public documents such as patents, statutes, decisional law, third-party information, or sources other than client disclosures).

73. *See RICE, supra* note 3, § 6:2, at 9 (asserting that the information within the communication need not be confidential to gain attorney-client protection).

74. *See Baxter Travenol Lab., Inc. v. Lemay*, 89 F.R.D. 410, 414 (S.D. Ohio 1981). This case cites *Upjohn* as authority when assessing whether attorney-client privilege applies. In making this determination, *Upjohn* focused on neither the *status* of the communicator nor the *content* of the communication. *See id.* Instead, the *Upjohn* court looked at (1) whether the communication was made by the client (or in case of client's employee, at the client's behest) in order to obtain legal advice, and (2) whether the client intended for the communication to be confidential. *See id.*

Similarly, *Nestle Co. v. A. Cherney and Sons, Inc.*, 207 U.S.P.Q. (BNA) 930 (D. Md. 1980), addressed whether information obtained through searches of public records fell within the

That is, if the client acquires the information in the communication from the public record, the daily newspaper, or direct communications with third parties (such as taxpayers), the content of what the client confidentially communicated is privileged, and therefore, should not be discoverable from either the attorney or the client.⁷⁵ As illustrated in Figure 5, what is privileged is what was communicated—what is in the privilege box. The status of the information outside the privilege box is irrelevant to the privilege status of the communications that employ the information.

scope of the attorney-client privilege. *See id.* at 933. The court held that a document does not lose its attorney-client protection merely because it contains technical or publicly-obtained information. *See id.* To maintain such protection the party invoking the privilege bears the burden of showing that the document has some legal significance and that the client treated the communication of the publicly-obtained information to the attorney as a confidential communication. *Id.*

Lastly, Paul Rice discusses this issue. *See* PAUL R. RICE, *supra* note 3, § 6:29, at 133-34. Neither the nature nor the source of the information communicated should be considered in assessing whether the communication is privileged. The assessment should focus on the communication itself, and not the information it contains. *See id.* Indeed, “the privilege protects communications, not information.” *Id.* As one court explained: “[T]hat the [technical] information in these documents was not necessarily confidential—that is, known only to the client—does not defeat the privilege as long as the communication is made in confidence.” *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 683 (S.D.N.Y. 1980). Professor Rice continues: “A communication should remain protected even though the *information* may be discoverable through a request that does not inquire as to communications with the attorney, as long as those communications related is primarily relate to the seeking of legal advice.” RICE, *supra* note 3, § 6:29, at 133-34.

75. *See* RICE, *supra* note 3, § 6:29, at 132-33.

In *Tax Analysts*, the IRS field agent acquired nonconfidential facts from a third party and sought advice based on those communicated facts.⁷⁶ The agent communicated these facts to the Office of Chief Counsel seeking *legal* advice on how to best handle a particular issue, and the agent did so with the expectation of *confidentiality*.⁷⁷ If the responsive communications from the Office of Chief Counsel explored the legal position that should be taken by the field agents, focusing on the unique facts of each inquiry, the responsive communication should be afforded the derivative protection of the privilege. The court acknowledged that the FSAs gave guidance to field agents “with reference to the situation of a specific taxpayer”⁷⁸ and included “a statement of issues, a conclusions section, a statement of facts, and a legal analysis section.”⁷⁹ These memoranda “state any limitations or conditions to which a conclusion may be subject,”⁸⁰ and are exploratory and descriptive in nature “so that the strengths and weaknesses of a case are presented and developed candidly, directing attention to the authorities against the conclusions arrived at as well as those which support them.”⁸¹

The court, in *Tax Analysts*, appeared to have followed the classical derivative definition of the privilege for responsive legal advice, but inappropriately required that the privileged conversation reveal or “rest on *confidential information* obtained from the client,”⁸² rather than on *confidential communications* of the client.

In *Tax Analysts*, the court’s second reason for requiring the disclosure of the FSAs was the unique nature of the legal opinions of IRS counsel.⁸³ Because the IRS interprets and applies the law to individual taxpayers, the court characterized the Chief Counsel’s opinions as “making law,” and held that such law should be accessible to all taxpayers.⁸⁴ The court continued:

But no private attorney has the power to formulate the law to be applied to others. Matters are different in the governmental context, when the counsel rendering the legal opinion in effect is *making law*. Here, the Office of Chief Counsel is one of the principal tax lawgivers within the Executive Branch. Nearly all the interpretations of the tax laws the IRS applies in assessing and

76. See *Tax Analysts v. IRS*, 117 F.3d 607, 609 (D.C. Cir. 1997).

77. See *id.*

78. *Id.* (quoting Chief Counsel Directives Manual (35) (19) 44 (1992)).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 618 (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir.)) (emphasis added).

83. See *id.* at 616-17 (discussing “Deliberative Process Privilege”).

84. See *id.* at 617.

collecting taxes emanate from the Office of Chief Counsel As we have discussed previously, FSAs issued by the Chief Counsel create a body of private law, applied routinely as the government's legal position in its dealings with taxpayers. It is this quality . . . that [makes them] significant.⁸⁵

Although the court had previously acknowledged that the FSAs are not binding on IRS field personnel, it still characterized these documents as "making law" simply because they are held in "high regard" and "generally followed."⁸⁶ This is most likely true in all government agencies and regulatory bodies. Legal opinions of counsel are highly respected and generally followed by all clients, whether government agencies, private corporations, or individuals. This alone, however, does not change the privileged character of those opinions, even for government clients who convert them into law. It is the actions of the agency client that creates a body of law, not the rendering of the opinion.⁸⁷ Although the client can be compelled to explain the rationale for its actions, which may be identical to the legal advice previously obtained, the content of that advice should remain privileged until the client chooses to waive it. If the logic of the opinion in *Tax Analysts* was generally followed it would, at the very minimum, jeopardize the privileged status of the legal advice obtained by all governmental regulatory bodies.⁸⁸

85. *Id.* at 619 (emphasis added).

86. *See id.*

87. *See id.*; *see also In re Lindsey*, 148 F.3d 1100, 1104-05 (D.C. Cir. 1998).

88. One could contrast the application of the attorney-client privilege between a citizen-taxpayer and his attorney with a corporate shareholder and corporate counsel. Citizen-taxpayers, unlike corporate shareholders, have a unique relationship to government regulatory agencies. Unlike the corporate context, where shareholder access to attorney-client communications is restricted because of the needs of executives in managing the entity, citizens have a pressing need to know the standards by which the government's enormous powers are being employed against them. *See In re Lindsey*, 148 F.3d at 1109.

The D.C. Circuit has written that:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

See id. (quoting Letter from James Madison to W.T. Barry (Aug. 1, 1922), in 9 THE LETTER WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910)). This reality, rather than being the basis for creating a far-reaching exception to the privilege, may be the most compelling reason for generally abolishing the government attorney-client privilege. A number of states have done this. *See, e.g.*, ARK. CODE ANN. § 25-19-105(b) (Michie 1987 & Supp. 1996) (noting that these exceptions are public records that are not open to inspection and copying of any Arkansas citizen, including tax records, medical records, unpublished judicial opinions, and other documents protected from disclosure). This is Arkansas' version of the Freedom of Information Act. Specifically, exceptions (b) (7), unpublished memoranda, working papers and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, and the Attorney General; and (b) (8), documents that are protected from disclosure through an order or rule of court, are protected from public inspection and copying, but Arkansas courts have held that this is not extended to the attorney-client privilege. *See* ARK. CODE ANN. §

IV. PRE-EXISTING DOCUMENTS

The *source or type of information* is not relevant to the application of the privilege, because the focus of the privilege is on the communication, not the information within the communication.⁸⁹ The *form of the communication* is also irrelevant.⁹⁰ Although courts have had little difficulty with the application of this principle when dealing with the distinction between oral and written communication from the client to the attorney,⁹¹ there has been great confusion about the application of the privilege when the client discloses non-privileged, pre-existing documents to the attorney during the course of a communication.⁹²

For a *written communication* to be protected by the attorney-client privilege, the correspondence, like all other forms of

25-19-105(b)(7), (b)(8) (Michie 1987 & Supp. 1996) (listing various cases in which courts have found that there is no attorney-client privilege under § 25-19-105(b)). Exceptions to the Act appear at ARK. CODE ANN. § 25-19-105 (b)(7) and (b)(8) (Michie 1987). The courts of Arkansas, however, have held that neither of these exceptions provide an exemption to communications protected by attorney-client privilege. See *Arkansas Highway & Transp. Dep't v. Hope Brick Works, Inc.*, 744 S.W.2d 711, 713-14 (Ark. 1988).

Similarly, in Florida it has been held that the attorney-client privilege is not an exception to the Public Records Act. See FLA. STAT. ANN. § 119.01(1) (West 1999); *Neu v. Miami Herald Publ'g Co.*, 462 So.2d 821, 824-25 (Fla. 1985). In Florida, however, the attorney-client privilege has been recognized only in the context of litigation preparation—not unlike the work product immunity. See *City of N. Miami v. Miami Herald Publ'g Co.*, 468 So.2d 218, 220 (Fla. 1985) (holding that “[t]he lawyer-client privilege section of chapter 90 does not exempt written communications between lawyers and governmental clients from disclosure as public records, but section 119.07(3) does provide a limited exception [mainly for attorney-prepared, litigation files during the pendency of litigation] within its terms”). See generally RICE, *supra* note 21, § 8:27.

89. See *supra* notes 25-37 and accompanying text.

90. See *infra* note 91 (citing cases where courts have applied the attorney-client privilege to written and oral communications).

91. See *Jackson v. Capital Bank & Trust Co.*, Nos. Civ.A. 90-4734, 90-4735, 1993 WL 192201, at *1 (E.D. La. May 28, 1993) (holding that employees' answers to questionnaire provided to an attorney so the company could obtain legal advice are privileged); see also *In re Wirebound Boxes Antitrust Litig.*, 129 F.R.D. 534, 537 (D. Minn. 1990) (determining that details of an investigation conducted by counsel through interviews with employees are privileged); *Commonwealth v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 151 (D. Mass. 1986) (finding communications between employees of client and attorney conducting internal investigation to be privileged). See generally RICE, *supra* note 3, § 5:2, at 35 (“[t]he purpose of the attorney-client privilege is to encourage more open and complete communications from the client to the attorney The privilege, therefore, provides a direct protection for confidential communications from the client to the attorney . . .”).

92. Compare *In re Grand Jury Empanelled May 7, 1987*, No. 87-165 Misc., 1989 U.S. Dist. LEXIS 7416, at *18 (D.N.J. June 29, 1989) (denying the privilege protection when discovery is sought from the attorney unless it can be shown that the document would have been privileged in the client's hands), with *United States v. Hankins*, 631 F.2d 360, 364-65 (5th Cir. 1980) (holding that permitting discovery of preexisting documents provided to an attorney by the client would seriously weaken the attorney-client relationship “if the client had the fear that the lawyer could disclose to an opposing party the identity of the client's records that he had used to build up the case”). The court reversed the contempt convictions rendered against the attorney. See *Hankins*, 631 F.2d at 361.

communication, must have been *created* primarily for the purpose of obtaining legal advice or assistance.⁹³ Documents created in the normal course of business do not satisfy this element of the privilege and cannot retroactively satisfy this element by being sent to the attorney.⁹⁴ Otherwise, a client could immunize all documents simply by sending them to his legal counsel, who would screen the documents for potential legal problems.⁹⁵ If these business documents are discoverable before and after they are transferred to an attorney, are they discoverable *from the attorney?*

The Supreme Court addressed this issue in *Fisher v. United States*.⁹⁶ After correctly holding that the status of the *document* does not change with its communication to the attorney, the Court erroneously permitted the discovery of those pre-existing documents *from the attorney*.⁹⁷

93. See *United States v. Davis*, 636 F.2d 1028, 1041 (5th Cir. 1981) (“[D]ocuments created outside the attorney-client relationship should not be held privileged in the hands of the attorney unless otherwise privileged in the hands of the client, lest the client immunize incriminating evidence merely by depositing it with his attorney.”); see also *United States v. Bartlett*, 449 F.2d 700, 703 (8th Cir. 1971) (“[I]f an unprivileged document exists before there exists an attorney-client relationship the mere delivery of the document to an attorney does not create a privilege.”) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554-57 (McNaughton Rev. 1961); *Henson v. Wyeth Lab., Inc.*, 118 F.R.D. 584, 587 (W.D. Va. 1987) (“[F]or the privilege to apply, the client’s confidential communications must be for the *primary* purpose of soliciting legal, rather than business, advice.”) (quoting *N.C. Elec. Membership Corp. v. Carolina Power*, 110 F.R.D. 511, 514 (M.D.N.C. 1986)); *FTC v. TRW, Inc.*, 479 F. Supp. 160, 163 (D.D.C. 1979) (“When a document is prepared for simultaneous review by non-legal as well as legal personnel, it is not considered to have been prepared primarily to seek legal advice and the attorney-client privilege does not apply.”).

94. See *In re Grand Jury Proceedings*, 655 F.2d 882, 885 (8th Cir. 1981) (concluding that ordinary business records would not be privileged in the client’s hands and “[m]ere delivery of the documents to the attorney would not create the privilege where it previously did not exist”).

95. See *Radiant Burners, Inc. v. American Gas Ass’n*, 320 F.2d 314, 324 (7th Cir. 1963) (“[T]he privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure.”). In *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), the court stated:

Insofar as the papers include pre-existing documents and financial records not prepared by the [clients] for the purpose of communicating with their lawyers in confidence, their contents have acquired no special protection from the simple fact of being turned over to an attorney. It is only if the client could have refused to produce such papers that the attorney may do so when they have passed into his possession.

Id. at 639.

96. 425 U.S. 391 (1975).

97. See *id.* at 403-05 (believing that obtaining pre-existing documents from the client requires the same hurdles as obtaining these documents from the attorney). This precedent, of course, has been widely followed. For example, in *In re Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991*, 959 F.2d 1158 (2d Cir. 1992), the court held:

Documents created by and received from an unrelated third party and given by the client to his attorney in the course of seeking legal advice do not thereby become privileged. . . . The November subpoena calls for documents [telephone bills] created by the telephone company. Those documents, though transmitted to Paul-Weiss, are not the client’s confidential communications, are not within the privilege, and did not become exempt from discovery by that transmission.

Id. at 1165-66. The court, therefore, required the *attorney* to disclose these records. See *id.* at

Permitting discovery from the attorney erroneously equates the document's content with the act of communicating, and thereby

1167. Requiring the attorney to make this disclosure, however, indirectly forced the disclosure of the content of the client's prior communication with his attorney. The court in *In re Hyde*, 222 B.R. 214 (S.D.N.Y. 1998) stated:

The Roth subpoena commands Neil Roth to produce *documents* of the debtor. Simply stated, it is unthinkable that any party should have it within his power to shield documents which do not themselves constitute or embody privileged attorney/client communications by the simple expedient of placing his documents in the custody of his attorney or his attorney's employees or independent contractors. No case or other authority supports such a radical proposition, and the decisions which have addressed [the] question reject any such argument.

Id. at 220 (emphasis added); *see also* *Al-Turki v. Fenn*, Nos. 89 CIV.6217, 90 CIV.4470, 1995 WL 231278, at *1 (S.D.N.Y. Apr. 18, 1995) (permitting discovery from a law firm, even though the former client was permitted to review the documents and assert privilege claims as if the documents were in the client's possession and being sought from the client); *In re Grand Jury Empanelled May 7, 1987*, Misc. No. 87-165, 1989 WL 72260, at *6 (D.N.J. June 29, 1989). Randall, the attorney, moved to quash grand jury subpoenas issued as part of an investigation into tax fraud by Randall's client. *See id.* One of the questions the U.S. Attorney requested Randall to answer was: "Were you provided with any documents regarding the source of that ['other'] income?" *Id.* The court directed Randall to answer the question because "[t]o bar disclosure of documents transmitted to an attorney, a person asserting the attorney-client privilege must establish not only that an attorney-client privilege existed; he must also demonstrate that the documents would be privileged in the client's hands." *Id.*; *see also* *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 684 (S.D.N.Y. 1980) (holding that the attorney-client privilege applied to documents and deposition testimony of attorneys who provided advice to their clients); *In re Victor*, 422 F. Supp. 475, 477 (S.D.N.Y. 1976) ("If certain documents deposited with an attorney would be required of the client, then certainly they are required of the attorney."); *United States v. Threlkeld*, 241 F. Supp. 324, 327 (W.D. Tenn. 1965) ("All documents in [the attorney's] possession which do not . . . constitute privileged communications from the client must be produced, e.g., financial books and records, deeds, and instruments of inter vivos transfer, whether or not the documents were delivered to [the attorney] by the client."); *United States v. Province*, 42 M.J. 821, 826 (C.M.A. 1995) ("In *Fisher*, the Supreme Court held that, 'pre-existing documents which could have been obtained from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice.'").

Often, courts ignore the claim that the communication of pre-existing documents to the attorney are protected communications. *See In re Search Warrant Executed at Law Offices of Stephen Garea*, No. 97-4112, 1999 U.S. App. LEXIS 3861, at *12-14 (6th Cir. Mar. 5, 1999) (Kennedy, J., dissenting).

Professor McCormick contributes to the confusion over pre-existing documents in his *Hornbook*. *See* JOHN W. STRONG, *MCCORMICK ON EVIDENCE* § 89, at 323-30 (West Pub. 4th ed. 1992). McCormick has explained:

As to these pre-existing documents two notions come into play. First, the client may make communications about the document by words or by acts, such as sending the document to the lawyer for perusal or handing to him and calling attention to its terms. These communications, and the knowledge of the terms and appearance of the documents which the lawyer gains thereby are privileged from disclosure by testimony in court.

Id. § 89, at 329. Quite inconsistent with this first notion, however, is McCormick's second point that the attorney should have to produce those pre-existing documents when they are sought from him in the discovery process because if such production were not required, the client could avoid his pretrial disclosure obligations by simply transferring his otherwise discoverable documents to his attorney. *See id.* Of course, the fallacy in this position is that the client still has an obligation to produce the pre-existing documents in his attorney's possession because those documents are still within the client's "custody and control." *See id.* § 89, at 329-30. The client need only retrieve them, and this retrieval is required under Rule 34(a) of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 34(a).

ignores the distinction between communications and information. Over one hundred years ago, the Eighth Circuit explained in *Liggett v. Glenn*:⁹⁸

In considering questions of this kind, regard must be had to nature of the evidence sought to be elicited. It not infrequently happens that deeds, contracts, or other written instruments may be delivered by a client to an attorney under such circumstances that the attorney cannot be compelled or permitted to produce the same in evidence against his client at the demand of an adversary party. In this class of cases the deed or other written instrument is not itself privileged. It is merely the possession of the attorney that is protected. As he received the instrument by reason of the confidential relation of client and attorney, he cannot be compelled to yield up such possession at the demand of another, nor to reveal the contents of the paper. In such cases, however, it is open to the other party to prove, by any other competent evidence, the contents of the paper because the same are not, in and of themselves, privileged. The decisions in this class of cases do not touch the principle that is involved in the matter of confidential communications, whether oral or written, passing between client and counsel.⁹⁹

The pre-existing document, as a piece of paper containing writing, is *information* subject to discovery.¹⁰⁰ When the pre-existing document was originally drafted it also may have been a communication—perhaps even between an attorney and client—but now, for reasons that are irrelevant to this discussion, it is no longer privileged. Therefore, like any other non-privileged piece of *information* possessed by the client, it is discoverable *from the client* even though it had been previously incorporated into a communication to the attorney.¹⁰¹ This does not mean, however, that the same information,

98. 51 F. 381 (8th Cir. 1892).

99. *See id.* at 395-96.

100. *See* FED. R. CIV. P. 26 (identifying documents and data compilations in the possession, custody, or control of a party that are relevant to the disputed facts as subjects of required disclosure).

101. The court in *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994) stated:

The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "what did you say or write to the attorney?" but 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 attorney.

Id. at 862 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)); *see also* *Favala v. Cumberland Eng'g Co.*, 17 F.3d 987, 990 (7th Cir. 1994) (holding that a corporate employee could be deposed about the facts he knew, even though he had conveyed those same facts to corporate counsel; he simply couldn't be asked whether he had communicated those facts to

counsel). In *United States v. Moscony*, 927 F.2d 742 (3d Cir. 1991), individuals arguing a common defense prepared and signed affidavits in the presence of one another. *See id.* at 753. The court found these affidavits to be privileged because the individuals reasonably believed that they were necessary for the legal advice that was being sought and that they would remain confidential. *See id.* The court, therefore, refused to allow one of the individuals to use the affidavits at his criminal trial. *See id.* Despite this suppression of the evidence, the court found that the defendant's Sixth Amendment right to confront witnesses against him was not violated because the defendant "was perfectly free to question the two witnesses about the matters asserted in the affidavits." *See id.* Moreover, in *Andritz SproutBauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609 (M.D. Pa. 1997), the court stated:

The privilege attaches to the communication itself, not to the facts communicated. Facts gathered by counsel in the course of investigating a claim or preparing for trial are not privileged and must be divulged if requested in the course of proper discovery. [Assuming, of course, that the work product immunity, or some other privilege does not protect the information.] Opposing counsel is entitled to obtain through discovery the names of witnesses, facts underlying the cause of action, technical data, the results of studies, investigations and testing to be used at trial, and other factual information. The inclusion of such information in documents prepared by, or circulated to, counsel does not render them inviolate on grounds of privilege.

Id. at 632; *see also* *Lahr v. Fulbright & Jaworski*, No. 3:94-CV-0981-D, 1996 U.S. Dist. LEXIS 20741, at *17 n.3 (N.D. Tex. July 11, 1996) ("*Upjohn* precludes discovery of communications between employees and counsel, but specifically holds that facts known to those witnesses do not become privileged by virtue of their being revealed to counsel."); *Black v. Fluor Corp.*, No. 4:95CV1219, 1996 U.S. Dist. LEXIS 20739, at *6 (E.D. Mo. Sept. 18, 1996) (stating that "asking for deposition testimony regarding any and all communications with the attorneys who drafted the release and other documents given to Plaintiff in connection with his termination" would not be allowed because it is clearly covered by the attorney-client privilege); *Mike v. Dymon, Inc.*, No. 95-2405-EEO, 1996 WL 674007, at *11 (D. Kan. Nov. 14, 1996) ("The attorney-client privilege does not protect disclosure of underlying facts other than the substantive content of communications."); *Vanguard Sav. & Loan Ass'n v. Banks*, No. 93-CV-4627, 1995 WL 555871, at *3 (E.D. Pa. Sept. 18, 1995) ("Therefore, a client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but 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 attorney."); *International Bhd. of Teamsters v. Local 743, Warehouse, Mail Order Office, Technical & Prof'l Employees Union*, No. 94C 5128, 1995 WL 22942, at *2 (N.D. Ill. Jan. 14, 1995) ("Facts revealed during a privileged communication are not themselves privileged, only the communication is privileged."); *Allen v. West Point-Pepperell, Inc.*, 848 F. Supp. 423, 427 (S.D.N.Y. 1994) (citing *Upjohn* for the premise that the privilege only protects communications, not facts); *United States v. Kramer*, No. 89-4340(G), 1992 U.S. Dist. LEXIS 7651, at *14-15 (D.N.J. Mar. 31, 1992) ("But the rules protecting privileged communications . . . do not shield from discovery the facts within a party's knowledge that are transmitted to its attorney. . . . The attorney is the conduit of the internal inquiry which assembles the corporate knowledge, but that knowledge is not immunized by its passage through an attorney's briefcase."); *Spicer v. Chicago Bd. of Options Exch., Inc.*, No. 88 C 2139, 1992 WL 14168, at *1 (N.D. Ill. Jan. 17, 1992) ("The plaintiffs' attorney argued that deponents' were trying to hide facts, which *Upjohn* explicitly prohibited. That is not this case, however. In this case the deponents' counsel said repeatedly that the plaintiffs' attorneys were free to question her clients about the events of October 20, 1987, but that she objected to questions about what they said to their attorney."); *Nutmeg Ins. Co. v. Atwell, Vogel & Sterling*, 120 F.R.D. 504, 509 (W.D. La. 1988) ("Defendant's counsel may inquire into the substance of the witness's knowledge concerning matters relevant to the subject matter of this action regardless of whether the knowledge was at some time discussed with counsel."); *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 306 (S.D.N.Y. 1982) ("Simply because the defendants provided this information to their attorneys or because one attorney told it to another does not relieve the defendants of the obligation to provide this information to other parties in response to interrogatories."); *Baxter Travenol Lab., Inc. v. LeMay*, 89 F.R.D. 410, 415 (S.D. Ohio 1981) ("But Warnick may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to Plaintiffs' attorney."); *Knogo Corp. v. United States*, 213 U.S.P.Q. (BNA) 936, 940 (Ct. Cl. 1980) ("In other words, the client cannot assert the

after being *communicated* to the attorney by the client, should be discoverable *from the attorney*.¹⁰² To permit such discovery would, in effect, allow an adversary to circumvent the privilege by asking an attorney what he “knew” about a subject before a communication, and then, what he “knew” about the subject after the communication. If an attorney knows about a subject through a client’s communications, discovery of that knowledge would necessarily reveal the content of the client’s previous communications. Discovery of a pre-existing document from the attorney produces the same result.

Just as a client may discuss the non-privileged circumstances of a contractual arrangement with his attorney and protect such consultation with the privilege, the client also should be able to send his attorney copies of the non-privileged pre-existing documents that were part of the contractual arrangement and expect that *communication* of the pre-existing communications will be protected by the privilege. The pre-existing document and its content contain no less information than the facts orally communicated. For privilege purposes, the law should not distinguish between a writing created specifically for a particular consultation and a document recycled from a previous non-privileged communication. In either instance, discovery *from the attorney* discloses the content of the client’s new

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.”); *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962) (“The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?,’ but 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 attorney.”).

102. See *United States v. Hankins*, 631 F.2d 360, 365 (5th Cir. 1980). *Hankins* involved the appeal of a contempt citation of an attorney who refused to produce certain documents given to him by his client and to answer questions about his client’s records that he refused to produce. See *id.* at 361. The court reversed the magistrate’s contempt citation by stating:

It is clear that the record indicated that after he had been engaged as an attorney to assist Hankins, for himself and for his several associated businesses, in income tax difficulties involving the years 1971 and 1972, he had obtained certain books and records from Hankins for the purpose of assisting him in preparing for his representation of his client’s interests. It is important to note that Montgomery does not contend that any books and records which were in his possession at the time the subpoena was served on him, were not subject to being delivered to the Internal Revenue agent. In view of this state of the law, the United States contends that the questions asked of Montgomery, as to precisely which of the books and records of the tax payer he had seen and when he had seen them could not be the subject of a privileged communication between lawyer and client . . . but we are of the view that the relation between a lawyer and client require that the client feel absolutely free to divulge everything connected with his case to his lawyer to assist the latter in preparing for the representation of the client, and that this relationship would be seriously weakened if the client had the fear that the lawyer could disclose to an opposing party the identity of the client’s records that he had used to build up his case.

Id. at 364-65.

privileged communication. By contrast, no court would permit discovery from the attorney if the client had *orally transmitted* the content of a pre-existing document to the attorney, or *created a new written communication* into which its contents were copied.¹⁰³ This interpretation of the attorney-client privilege intolerably elevates form over substance—penalizing the client because he used a more efficient form of communication.

The nature of the information communicated (public or private), format (oral or written), and source (third party or internal) are irrelevant to the attorney-client privilege protection. This is illustrated in Figure 6.

When applied properly, the pre-existing documents should be discoverable only from the client. If the client gave the original document to the attorney and retained no copies, the client would be obligated to retrieve and produce such document, under the discovery rules, as if the writing had never been part of an attorney-client communication.¹⁰⁴

103. See Brian M. Smith, *Be Careful How You Use It or You May Lose It: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits*, 75 U. DET. MERCY L. REV. 389, 393 n.21 (1998) (“The confidential communication protected by the attorney-client privilege includes oral, written, and body language, but does not encompass pre-existing information.”).

104. For discovery from parties to an action, Rule 34(a) of the Federal Rules of Civil Procedure provides, in relevant part:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor’s behalf, to inspect and copy, any designated documents (including writings, drawings, graphics, charts,

V. THE SCOPE OF WAIVER—DRAFTS OF DOCUMENTS PREPARED FOR
RELEASE TO THIRD PARTIES

As the number of attorney-client privilege disputes continues to increase, the issue of waiver may be one of the most frequently litigated of all attorney-client privilege issues.¹⁰⁵ It involves difficult judgments about the preservation of confidentiality and the scope of the waiver.¹⁰⁶ Decisions concerning the existence and scope of a waiver are based on a fairness standard.¹⁰⁷ It must be determined whether the disclosure adequately revealed the content of the communication beneficial to the client so that to allow the remaining, detrimental content¹⁰⁸ (or, in the case of an entire

photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are *in the possession, custody or control of the party* upon whom the request is served

FED. R. CIV. P. 34(a) (emphasis added). Comparable discovery from third parties may be obtained under Rule 45. See FED. R. CIV. P. 45 (governing subpoenas).

105. See Roberta M. Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 CATH. U. L. REV. 465, 465-68 (1993) (discussing the increased frequency of inadvertent document productions).

106. See *id.* at 468 n.8 (noting that courts apply one of four criteria to determine "the scope of the waiver issue: 1) the *specific* documents in issue; 2) documents *on the same subject* matter; 3) documents *relating to the same subject* matter; and 4) documents *on the same general subject* matter").

107. See, e.g., *United States v. Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) ("This objective determination [of whether the privilege should be recognized] should be based upon whether the position taken by the party goes so far into the matter covered by the privilege that fairness requires the privilege shall cease even when, subjectively, he never intended that result."); *United States v. South Chicago Bank*, No. 97 CR 849-1, 1998 WL 774001, at *3 (N.D. Ill. Oct. 30, 1998) ("Under the doctrine of partial waiver, the disclosure of a part of a privileged document or a set of such waives the privilege as to the rest of it. . . . The rationale underlying partial waiver is that a party should not be able to gain a tactical advantage by disclosing favorable portions of privileged documents and withholding unfavorable portions. . . ."); *Bieter Co. v. Blomquist*, 156 F.R.D. 173, 176 (D. Minn. 1994) ("In determining whether there has been an implied waiver, two elements must be examined: 1) implied intention; and 2) fairness and consistency.") (quoting *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982)); *Goldman, Sachs & Co. v. Blondis*, 412 F. Supp. 286, 288 (N.D. Ill. 1976) ("[I]t is a uniform rule that when a party's conduct reaches a certain point of disclosure, fairness requires that the privilege cease, whether or not this is the result intended."). See generally *Bierman v. Marcus*, 122 F. Supp. 250, 252 (D.N.J. 1954) (stating that fairness is the most important consideration in determining whether the attorney-client privilege has been waived); RICE, *supra* note 3, § 9:85, at 385-87 (noting that although the scope of the waiver is initially defined by subject matter, it is refined in terms of fairness and the disadvantage created without disclosure requirements); 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2327, at 636 (McNaughton rev. ed. 1961) ("A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness required that his privilege shall cease whether he intended that result or not.")

108. The court in *Avery Dennison Corp. v. UCB Films PLC*, No. 95 C 6351, 1998 WL 703647, at *4 (N.D. Ill. Sept. 30, 1998), stated:

A party may not waive the privilege to some materials on a given subject and then withhold other materials on that same subject. . . . Through Mr. Moore's deposition testimony, Avery has attempted to reveal nothing more than the fact that it conferred

communication having been disclosed, other related communications on the same subject),¹⁰⁹ would violate fundamental

with in-house and outside patent counsel regarding the Duffield patent Avery now argues that merely revealing the fact that those communications took place did not waive the attorney-client privilege. However, when placed within the full context of Mr. Moore's twelve days of deposition testimony, Avery's disclosures clearly go beyond the mere fact of communications regarding the Duffield patent and instead implicitly reveal the legal conclusions of Avery's in-house and outside counsel. . . . Avery testified (via Mr. Moore's deposition) that it was notified of the existence of the Duffield patent during the course of its earlier licensing agreement negotiations and that, after conferring with outside counsel, it determined that it should draft a reissue application. Since Avery drafted and executed (but did not file with PTO) the reissue application, presumably this legal analysis concluded that the Duffield patent might materially impact the '273 patent. Nonetheless, Avery testified that it decided to withdraw the reissue application after conferring with in-house and outside patent counsel, and deciding that the Duffield patent did not materially impact the '273 patent. Together, these disclosures constitute a voluntary waiver of the attorney-client privilege with respect to Avery's legal analyses of the Duffield patent.

Id.; see also *Fly v. Atlas Assurance Co.*, No. 91-C6234, 1994 U.S. Dist. LEXIS 2554, at *5 (E.D. Pa. Mar. 18, 1994) ("[T]hat disclosure of part of a privilege communication requires the disclosure of the remainder, 'to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information.'" (citation omitted); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 311 (N.D. Cal. 1987) ("Partial disclosure occurs when a party tries to use advantageous portions of the privileged information while shielding portions that might be harmful to their case."); *Kabushiki Kaisha Hattori Seiko v. Gruen Indus., Inc.*, 230 U.S.P.Q. (BNA) 76, 77 (S.D.N.Y. 1986) ("[I]ntention is not determinative when partial disclosure dictates that in fairness the remainder of a privileged communication should be disclosed.").

109. See *In re Subpoena Duces Tecum*, No. M8-85 (JSM), 1997 WL 118369, at *3 (S.D.N.Y. Mar. 14, 1997) (determining whether the documents are protected by the work product doctrine, the self-evaluative privilege, or the attorney-client privilege); see also *Alpex Computer Corp. v. Nintendo Co.*, No. 8b CIV. 179, 1994 WL 330381, at *2 (S.D.N.Y. July 11, 1994) (ruling that subject matter waiver is found based on considerations of fairness and prevention of distortion of the judicial process).

In *Diversey U.S. Holdings v. Sara Lee Corp.*, No. 91 C 6234, 1994 WL 71462, at *2 (N.D. Ill. Mar. 3, 1994), the court disclosed the memorandum of one executive stating his interpretation of a particular agreement waived the privilege protection for similar documents by other executives on the same agreement. See *id.* In resisting this disclosure, Sara Lee tried to distinguish the withheld documents from the produced documents on two grounds: "(1) that some were authored by a different executive within the company and (2) that some concerned a later draft of the stock purchase agreement." *Id.* The court rejected these distinctions explaining:

We reject the first distinction because the client was the corporation, not the various authors Therefore, the disclosure acts as a waiver as to other communications on the same subject matter. Documents 85 and 87 are clearly on the same subject matter as the produced documents because they all concern the first draft of the SPA. Therefore, [they] must be produced. . . . As to documents 15 and 86, Sara Lee asserts that the produced documents were on a different subject matter because they contained comments concerning the first draft of the agreement whereas documents 15 and 86 concerned later drafts. We are not persuaded that comments about different drafts of the same agreement constitute different subject matter. For one thing, Sara Lee has not shown that the language of Section 4.9 changed from one draft to another. Even if there were changes to that section, Sara Lee's interpretation of the various drafts shaped Sara Lee's negotiating position and understanding of the final draft that is now in dispute. Therefore, we hold that documents 15 and 86, concerning later drafts, must be produced because the various drafts constitute the same subject matter. . . . We are convinced that a fairness analysis dictates the above result. . . . Once the shield of confidentiality has been let down by the intentional disclosure of communications relating to a subject, the reason for protecting other

fairness. Courts often express this in terms of using the privilege as “both a sword and a shield.”¹¹⁰

Differences of opinion are inevitable with these types of judgments. The judgments are fact-dependent and each judge perceives the

communications on the same subject fades. . . . The proper resolution of this litigation, though, may be considerably aided by the disclosure of documents bearing on the issue [of] the intent of the parties in drafting section 4.9. For these reasons, we find that fairness also compels the disclosure[s directed].

Id.; see also *Medtronic, Inc. v. Intermedics, Inc.*, 162 F.R.D. 133, 135 (D. Minn. 1995) (stating that when a party selectively offers evidence for brandishing certain privileged documents of its choice, a party uses its privilege as a “sword and a shield”).

110. See *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) (holding that when an insured seeks recovery of the costs of underlying litigation, he waives the privilege as to documents pertaining to the underlying litigation and explaining that “the privilege which protects attorney-client communications may not be used both as a sword and a shield”). The court noted that “Pennzoil cannot invoke the attorney-client privilege to deny Chevron access to the very information Chevron must refute in order to demonstrate that Pennzoil’s [document] is materially misleading.” *Id.*; see also *Herrick Co. v. Vetta Sports, Inc.*, No. 94 Civ. 0905 (RPP), 1998 WL 637468, at *2 (S.D.N.Y. Sept. 17, 1998). *Herrick* involved attorney-client privilege between a law firm and an expert witness hired by the firm. See *id.* The law firm of Skadden, Arps, Slate, Meagher, and Flom (“Skadden”) designated a law professor as an expert witness on the subject of legal ethics. Because of this designation, the trial judge concluded that Skadden had waived the attorney-client privilege protection not only for the communication between Skadden and the professor that were relied upon by the professor, but also for other privileged communications relating to the same subject matter that might be important to the opponent’s ability to impeach the professor. See *id.* The court wrote that:

By designating Wolfram as an expert trial witness, Skadden has opened the door to such discovery, which covers documents other than those directly considered by Wolfram in forming his opinions. Prior inconsistent opinions by Wolfram on the same subject matter would be highly relevant material. Where an attorney is called as an expert to testify regarding legal ethics, a subject which lies at the heart of defendants’ liability, and it can reasonably be forecast that the expert’s opinion will be accorded great weight by the jury, who are unfamiliar with the rules of professional responsibility, it is especially critical that opposing counsel be properly equipped to impeach this attorney-expert. . . . Skadden cannot present Wolfram as an expert on legal ethics and then prevent Wolfram’s expert testimony from being effectively impeached by claims of privilege. To do so would be to use Wolfram’s status as an expert on matters of legal ethics as both sword and a shield, for the very status which grants his testimony weight with the jury would prevent his testimony from being thoroughly cross-examined.

Id. at *2-3; see also *North River Ins. Co. v. Columbia Cas. Co.*, No 90 Civ. 2518, 1995 WL 408214, at *2 (S.D.N.Y. July 11, 1995) (holding that waiver of privilege as to one document does not mean that privilege is being used as a sword and a shield when the document was not deliberately introduced for tactical purposes). The court stated that when privileged communications are disclosed extra judicially, however, the court cautioned that subject matter waiver might apply, provided they are affirmatively used in court or they prejudice the other party’s trial preparation. See *id.* But see *In re Shearman & Sterling*, No. 2-194, M8-85, 84-3894, C84-743, 1986 WL 6157, at *1 (S.D.N.Y. May 30, 1986). The *Shearman & Sterling* court noted that:

Here, there is no indication that the holder of the privilege, defendant, seeks to use a part of the communication while withholding other portions. On the contrary, it is plaintiff who wishes to use this material; apparently, defendant would be satisfied if neither this nor the challenged material appears at trial. Thus, it cannot be said that defendant is using the privilege as both a sword and a shield. Rather, because defendant has partially let down its shield, plaintiff insists it must be stripped entirely. This I decline to do.

Id.

relevant facts differently. Even if their perceptions were consistent, there is no way for judges to assign consistent values to each fact relative to its importance in the “fairness” calculation.¹¹¹

The privilege usually protects confidential communications that the client intends to continue to hold in confidence.¹¹² The client communicates with the attorney, expecting that the attorney will advise him on what course of action is appropriate. If the client pursues his lawyer’s recommendation, the confidential communications of the attorney and client remain confidential and unavailable to third parties because the client’s conduct does not necessarily reveal the content of prior attorney-client communications.¹¹³ The situation is slightly different when the client consults with an attorney for the purpose of drafting an instrument that ultimately will be made public. The dissemination of the instrument inevitably reveals a great deal of substance about the content of the prior communications between the attorney and client.

If a client consults with a lawyer to draft a communication or instrument that eventually will be disclosed to third parties (a prospectus, for example), are drafts protected by the attorney-client privilege? Stated differently, if drafts were initially considered confidential, would the client’s continuing expectation of confidentiality be reasonable after the dissemination of the final approved version?

In Figure 7, the attorney has prepared three prior drafts of a document that eventually will be distributed to third parties. When the fourth draft is approved for release, and expectations of confidentiality with respect to that draft are relinquished, should the

111. There is a limited area of waiver, however, where courts can be critiqued for misinterpreting the scope of waiver. This is where documents such as government reports, prospectuses, or patent applications are prepared for dissemination to third parties.

112. *See* *United States v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1988) (stating that a key determinant in deciding whether an attorney-client relationship exists is the client’s intent and whether he reasonably believed the communication to be confidential).

113. This is why the decisions and actions of the client that were based on legal counsel’s recommendations are not protected by the privilege. *See, e.g.*, *United States v. Freeman*, 619 F.2d 1112, 1119-20 (5th Cir. 1980) (“An attorney’s involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all the incidents of such a transaction.”); *Bank of N.Y. v. Meridien Biao Bank Tanz., Ltd.*, No. 95 CIV.4586 (SS), 1996 WL 474177, at *2 (S.D.N.Y. Aug. 21, 1996) (“[T]o the extent that a document, in whole or in part, deals with the operations of BNY, that portion will not be covered by the attorney-client privilege even if the underlying policy is shaped by advice of counsel.”); *Stout v. Illinois Farmers Ins. Co.*, 150 F.R.D. 594, 611 (S.D. Ind. 1993) (explaining that “[t]he attorney-client privilege is not so broad as to cover all of the client’s actions taken as a ‘result . . . of communications between attorney and client’”) (citation omitted); *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 204 (E.D.N.Y. 1988) (“It is not the decision itself that is privileged but the confidential communications to and from the attorney and client that resulted in that decision.”).

scope of the resulting privilege waiver extend to the three previous drafts? A number of courts have said yes.¹¹⁴ These courts have held that when a document is being prepared by an attorney for the purpose of being disclosed to third parties, there can be no reasonable expectation of confidentiality in the communications leading to the creation of the final product.¹¹⁵ In effect, the expectation of confidentiality has been forfeited. Moreover, these

114. See, e.g., *United States v. Under Seal (In re Grand Jury Proceedings)*, 33 F.3d 342, 354-55 (4th Cir. 1994) (declining to follow the lead of *Schenet v. Anderson*, 678 F. Supp. 1280, 1283-84 (E.D. Mich. 1988), which held that preliminary drafts of documents intended to be made public could be protected by the attorney client privilege); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1358 (4th Cir. 1984) (“[I]t is irrelevant that no prospectus was ever actually issued in this case. The significant fact is that the information given the [attorney] was to assist in preparing such prospectus which was to be published to others and was not intended to be kept in confidence.”); *United States v. Under Seal*, 748 F.2d 871, 877 (4th Cir. 1984) (holding that drafts of documents relating to the purchase of another business, a public transaction, and which contain information that could reasonably be expected to be imparted to third parties were not protected by the privilege); *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) (“When information is transmitted to an attorney with the intent that the information will be transmitted to a third party (in this case on a tax return), such information is not confidential.”); *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976) (“[C]ourts have refused to apply the privilege to information that the client intends his attorney to impart to others.”); *United States v. Johnson*, 465 F.2d 793, 795 (5th Cir. 1972) (agreeing “that the attorney-client privilege cannot apply because all that was sought were documents of a type designed to be disclosed to third parties”); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Inc.*, No. 95C0673, 1996 WL 732522, at *3 (N.D. Ill. Dec. 9, 1996) (holding that a draft of a purchasing agreement was not within the privilege); *Burroughs Wellcome Co. v. Barr Labs., Inc.*, 143 F.R.D. 611, 618 (E.D.N.C. 1992) (holding that draft patent applications are not privileged information); *Dudley v. Ski World*, No. IP87-1025C, 1989 WL 73208, at *2 (S.D. Ind. 1989) (“[A]ny communications between Ski World or its officers and directors and [Ski World’s attorney] which relate to the preparation of a prospectus to be used in the enlistment of investors in Ski World are not privileged and are discoverable by the plaintiff.”); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 516 (M.D.N.C. 1986) (“Preliminary drafts of letters or documents which are to be published to third parties lack confidentiality.”); *United States v. Willis*, 565 F. Supp. 1186, 1207 (S.D. Iowa 1983) (recognizing that documents designed to be disclosed to third parties are not privileged and holding that drafts of corporate documents, real estate documents, contracts, and leases could not be privileged).

Somewhat inconsistently, the court in *Saxholm AS v. Dynal, Inc.*, 164 F.R.D. 331 (E.D.N.Y. 1996), concluded that the draft patent application prepared for approval of the client was not privileged, but the preceding communications from the client of information to be incorporated into that draft were protected. See *id.* at 336. If there is no expectation of confidentiality in the draft opinion, because the patent attorney serves as a conduit of information to the patent office, the client could not reasonably have an expectation of confidentiality in his communication to the attorney from which the draft is prepared. It is illogical to conclude that the client only loses an expectation of confidentiality when an act occurs over which the client has no control—the incorporation of the information into the draft. On appeal, the district judge affirmed the magistrate’s order on the ground that the proponent asserted blanket claims for “draft patent applications” without supporting materials establishing the expectation of confidentiality and other elements of the privilege for each. See *Saxholm AS v. Dynal, Inc.*, No. 94-CV-2409 (ARR), 1996 U.S. App. LEXIS 16927, at *1 (E.D.N.Y. Aug. 8, 1996) (affirming the “Report and Recommendation” of a magistrate judge without any further opinion on expectation of confidentiality).

115. See *id.* (citing numerous court decisions that support the proposition that documents intended to be disseminated to third parties are not protected by attorney-client confidentiality).

decisions hold that the client never had a reasonable expectation of confidentiality.¹¹⁶ Both conclusions are unrealistic and unfair.

To conclude that the disclosure of an attorney's final written product, after a series of exchanges with the client, results in the loss of all privilege claims for all prior exchanges would destroy the privilege protection in a large percentage of instances where legal assistance is rendered. All drafts of civil complaints, leases, and contracts, as well as prospectuses, patent applications, and government reports would have no privilege protection after the client decided to file a claim. This would strike at the very heart of the privilege because it would make clients wary of being open and candid when responding to the attorney's drafts.¹¹⁷

More fundamentally, however, if the conclusion about relinquishing reasonable expectations of confidentiality were applied logically, the resulting waiver could not be limited to *written drafts*. This conclusion would require the disclosure of *all oral exchanges* as well. After all, drafts are nothing more than written forms of what otherwise could have been oral communications and, at the very least, are often the product of those exchanges. The logic, therefore, leads to the destruction of the privilege in all consultations leading to the initiation of a civil action by the drafting and filing of a formal complaint. No court has ever gone so far. Written communications that were confidential when made, and part of an attempt to obtain legal assistance, should remain as protected as the client's oral communications to counsel that precede the attorney's drafting and filing of a legal complaint¹¹⁸ or patent application.¹¹⁹

116. See *supra* note 103.

117. Alternatively, clients would instruct their attorneys not to prepare written drafts, or to destroy them as successive drafts were created.

118. See *In re Feldberg*, 862 F.2d 622, 629 (7th Cir. 1988) (contending that many cases confuse expectations about documents with expectations about communications, and arguing that clients usually do not anticipate disclosure of their conversations); see also *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir. 1984) (determining that the attorney-client confidentiality surrounding drafts of documents is not waived when the client sends the final draft of a document to another party because the clients have an intention of confidentiality while sharing the drafts with attorneys, which reflects a request for legal advice and that intention is not diminished by the possibilities that the final draft of a document may be distributed); *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968) (emphasizing the fact that a client who gives information to an attorney so that the attorney may prepare for civil litigation does not necessarily waive attorney-client privilege if some of the information provided by the client was made public); *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 474 (S.D.N.Y. 1996) ("A client may intend to direct or permit the release of the final version of a document while still intending that his communications with his attorney prior to the finalization of the document remain confidential."); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C897, 1995 WL 557412, at *2 (N.D. Ill. 1995) (finding that although the attorney prepared the final form of the documents for public dissemination, an attorney's drafts of letters and other documents are privileged when they are created as part of confidential communications);

In a vain attempt to address the illogic and unfairness of these waiver decisions, the court in *Andritz Sprout-Bauer, Inc. v. Beazer East Inc.*¹²⁰ permitted the privilege to protect drafts that “were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version.”¹²¹ This approach recognizes the continued expectation of confidentiality in the contents of prior drafts. However, it ignores the fact that by disclosing that the document’s previous drafts contained no additional information from either the client or the attorney, substantive information is revealed about the content of those attorney-client communications. More importantly, the decision permits this disclosure for no apparent reason. If the discovering party already has the information it wants and needs from the fourth draft, and the additional drafts that are discoverable are limited to those that will provide no additional relevant information, why are they discoverable in the first instance?

In addition, when courts deny the privilege protection to drafts solely because of their similarity to communications previously revealed, the courts focus erroneously on the information in the communication, rather than on the communication itself. As the nature and source of the information in the prior communication is irrelevant to the privilege protection, the information *not in* the prior communication also is irrelevant to the privilege status. The courts need not compare the similarities between the communications to resolve waiver questions.

Grupo Sistemas Integrales de Telecomunicacion S.A. de C.V. v. AT&T Communications Inc., No. 92 Civ. 7862, 1995 WL 102679, at *1 (S.D.N.Y. Mar. 5, 1995) (“The discussion of the ‘draft’ was a confidential attorney-client communication; even if a complaint had eventually been filed (which did not occur), that act would not have waived the attorney-client privilege as to drafts.”); *Ziemack v. Centel Corp.*, No. 92 C 3551, 1995 WL 314526, at *4 (N.D. Ill. May 19, 1995) (extending the protection of the privilege to drafts of proxy statements); *Apex Mun. Fund v. N-Group Sec.*, 841 F. Supp. 1423, 1428 (S.D. Tex. 1993) (“Under [the *Schlegel*,] rule preliminary drafts of documents and communications made between attorney and client during the drafting process are privileged Only those parts of attorney-client documents that ultimately appear in published documents are outside the privilege.”); *In re U.S. Healthcare Inc. Sec. Litig.*, No. 88-0559, 1989 WL 11068, at *2 (E.D. Pa. Feb. 7, 1989) (“[T]he only discoverable information is that which is contained in the publicly filed documents.”).

119. See *Saxholm*, 164 F.R.D. at 331.

120. See *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609 (M.D. Pa. 1997).

121. *Id.* at 633; see also *Brossard v. University of Mass.*, No. 96-1036, 1998 Mass. Super. LEXIS 679, at *23 (Mass. Super. Ct. Sept. 29, 1998) (concluding that only draft decisions on matters relating to plaintiff’s cause of action that were *substantively different* from the decision that the university ultimately sent to the plaintiff remained protected by the privilege and explaining that “[i]nsofar as the final version of letters or decisions which were ultimately sent to [the plaintiff] were identical to the drafts that [the defendant’s in-house counsel] prepared, the drafts would not be privileged, and must be disclosed”).

Drafts are the mere written equivalents of oral communications. Written drafts, therefore, should be afforded the same protection as those oral communications protected by the Second Circuit in the case of *von Bulow v. von Bulow*.¹²² In that case, Claus von Bulow, the client, consented to his attorney's disclosure of certain confidential communications relating to the client's alleged attempt to kill his wife, and the attorney used these communications to write a novel following von Bulow's acquittal.¹²³ The client's step-children later sued him and sought to discover all of von Bulow's communications with his counsel regarding the attempted murder of their mother.¹²⁴

The Second Circuit held the privilege had been waived only for the communications that had been included in the novel.¹²⁵ Because the

122. 828 F.2d 94 (2d Cir. 1987).

123. *See id.*

124. *See id.* at 96.

125. *See id.* at 102 (holding that the privilege is not waived for unpublished communications).

novel's disclosures had no material effect on either party's adversarial position, the waiver extended only to the communications that were exposed—what they were shown was all that they could get.¹²⁶

The *von Bulow* fairness standard has received widespread acceptance.¹²⁷ Once a client or his attorney waives the privilege, the scope of that waiver is *defined* roughly by the subject matter of the communication disclosed.¹²⁸ This, however, is only the first step. Thereafter, it is *refined* by the standard of fairness.¹²⁹ In many instances, as in *von Bulow*, the concern for fairness has resulted in the subject matter of waiver being narrowly limited to four corners of the instrument disclosed, or to the literal words repeated.¹³⁰

Therefore, whether evaluated from the perspective of an expectation of confidentiality, a distinction between communications and information, or waiver and its appropriate scope, drafts of a

126. See *id.* at 104 (stating that publication of attorney's book "did not result in a sweeping subject matter waiver" of attorney-client privilege).

127. See RICE, *supra* note 3, § 9:81, at 361-71. The *von Bulow* holding has been cited with approval by many courts in every conceivable context of waiver. Cf. *Lehman Bros. Commercial Corp. v. Minmetals Intern Non-Ferrous Metals Trading Co.*, No. 94 CIV. 8301, 1996 WL 345915, at *2 (S.D.N.Y. June 21, 1996) (holding that the privilege should not be stripped entirely because no legal detriment had been shown that would justify an imputed subject matter waiver of all understood communications); *Abdullah v. Sheridan Squares Press, Inc.*, No. 93 CIV. 2515, 1995 WL 413171, at *2 (S.D.N.Y. July 12, 1995) (stating that the waiver of attorney-client privilege does not apply to any undisclosed portions of the communications).

128. See *von Bulow*, 828 F.2d at 102.

129. See *id.* at 101 (using a standard of "fairness" to prevent prejudice to a party).

130. See, e.g., *United States v. Jacobs*, 117 F.3d 82, 91 (2d Cir. 1997) (mandating that disclosures made during business negotiations result in the waiver of the documents described, even though the representations were false and stating that an inaccurate statement of a privileged communication waives the privilege with respect to that communication); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) (finding that disclosure to outside auditor ends privilege); *Carter v. Rosenberg & Estis, P.C.*, No. 95 Civ. 10439, 1996 WL 695866, at *2-3 (S.D.N.Y. Dec. 4, 1996) (holding that because the defendant did not rely on a statement that was submitted to the New York State Division of Human Rights in response to a claim of sexual discrimination, that disclosure only resulted in a waiver of what was previously disclosed); *Abdullah*, 1995 WL 413171, at *2 (finding that an attorney's publication of communications between himself and his client "does not result in the waiver of the attorney-client privilege as to any undisclosed portions of such communications, or as to any other related communications concerning the same subject matter"); *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.*, No. 90 Civ. 7811, 1994 WL 392280, at *3 (S.D.N.Y. July 28, 1994) (noting the fact that courts require more detailed disclosure of advice of counsel or selective disclosure in litigation that is prejudicial to an adversary before the courts will find subject matter waiver); *National Educ. Corp. v. Martin*, No. 93 C 6247, 1994 WL 233661, at *2-3 (N.D. Ill. May 24, 1994) (finding that an attorney disclosed the existence of favorable opinion letters in correspondence about the subject of those opinions, the court concluded that this did not waive the privilege protection for those opinions because the client did not gain tactical advantages from those disclosures); *Stratagem Dev. Corp. v. Heron Int'l N.V.*, Nos. 90 Civ. 6328, 90 Civ. 7237, 1993 WL 6216, at *3 (S.D.N.Y. Jan. 6, 1993) (noting that as long as the privileged communications are not affirmatively utilized in litigation, the waiver does not extend beyond those communications actually "shared with third parties"); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974) (stating that disclosures during negotiations result in waiver of only the communications actually disclosed).

document that are being prepared for public dissemination should remain protected by the privilege even after the dissemination of the final version.

CONCLUSION

Though initially grounded in the confidentiality of the attorney-client relationship, the attorney-client privilege now draws its strength from the confidentiality and secrecy of the communications a client has with his attorney.¹³¹ Yet as the secrecy requirement becomes less important, the attorney-client privilege is evolving into a right of privacy that can be waived selectively.¹³²

The scope of the privilege is also changing. Although the privilege originally protected a client's communications to her attorney, the courts have expanded the privilege to protect responsive communications that reveal the contents of prior client communications. Currently, the privilege is being broadened to protect communications "between" the attorney and client. This step has implications that many courts have not recognized fully.

Although evolution of the privilege is inevitable, it unfortunately is being accelerated by the abandonment, rather than the re-evaluation, of fundamental principles. Consequently, the attorney-client privilege has undergone a haphazard transformation.

Fortunately, the legal community is not dependent upon the glacial revision processes of either Congress or the Judicial Conference's Advisory Committee on the Federal Rules of Evidence. Privilege is the only subject within the Federal Rules of Evidence that was left to develop under the common law.¹³³ Therefore, change, for better or for worse, will likely continue on a case-by-case basis.

131. See Rice, *supra* note 2, at 868-74.

132. See *id.* at 880.

133. See FED. R. EVID. 501. The rule states:

Except as otherwise required by Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Id.