ATTORNEY CLIENT PRIVILEGE AND THE ADMIRALTY PRACTITIONER IN THE TWENTY-FIRST CENTURY

By: Robert G. Clyne\textsuperscript{1} and Alexander P. Conser\textsuperscript{2}

I. Introduction

The attorney-client privilege is a doctrine well entrenched in the common law, well respected by the courts, and essential to the work of practicing attorneys. The application of the privilege, however, is driven largely by its policy underpinnings, and flexibly applied in accord with the factual setting in which the privilege is sought. The development of new communication technologies which the Courts have struggled to adequately address in the context of discovery disputes as well as tactics and strategies deployed by government entities designed to encourage waiver of the privilege have necessarily created new uncertainties in the application of the privilege.

This article reviews the legal underpinnings to the attorney-client privilege and its exceptions, and attempts to address how best to prepare to deal with the privilege in the modern era, while also attempting to highlight those issues perhaps unique to corporate counsel and the admiralty practitioner. Part II of this article discusses the development of the attorney-client privilege and its basic tenets, all while highlighting elements of the modern modes of communication which may or may not fit within common and traditional conceptions of the privilege. Part III of this article discusses the development of several exceptions to the attorney-client privilege, in addition to an exception to waiver of the attorney-client privilege, in an attempt to demonstrate how the core policy rationale of the privilege has previously been used to adjust to new scenarios, and may be used to do so again. Part IV of this article discusses recent developments outside the courtroom with respect to the application of attorney-client privilege in the context of criminal investigations of corporate entities. Finally, Part V of this article

\textsuperscript{1} Senior Vice President and General Counsel, American Bureau of Shipping; President, The Maritime Law Association of the United States. J.D. New York Law School; B.S. United States Merchant Maritime Academy.
\textsuperscript{2} Counsel, American Bureau of Shipping. J.D. College of William & Mary Marshall-Wythe School of Law; B.A. Texas A&M University.
discusses how the modern practicing attorney might best approach the rising challenges to the attorney-client privilege embodied by modern technology and government action, first by examining a failed attempt to address a discovery dispute involving modern communications, and then highlighting the areas in which practicing attorneys may best work to protect the privilege.

II. Development of the Attorney-Client Privilege and Modern Implications

The origins of the attorney client privilege can be traced to Elizabethan England, and its first appearance in United States courts dates to the 1820s. Since its inception, the objective of the privilege has been to encourage full disclosure by clients as a means to realize the most effective consultation. The U.S. Supreme Court has long recognized the privilege and its underlying rationale, and it is currently enshrined in the Federal Rules of Evidence and in State law equivalents. Indeed, as stated by the Supreme Court in Upjohn Co. v. United States, the attorney/client privilege “recognizes that sound legal advice or advocacy... depends upon the lawyer being fully informed by the client.”

The attorney/client privilege is designed to protect from disclosure a communication made in confidence between an attorney and a client for the purposes of seeking legal advice. Thus, the elements of the attorney-client privilege include: 1. a communication; 2. made in confidence; 3. between parties in a privileged relationship (the attorney and the client); 4. for purposes of seeking or providing legal advice. Failure to meet any one of these elements may waive privilege. Although waiver need not be intentional and may well be inadvertent, many states and courts have created means by which inadvertently disclosed communications may retain the benefits of attorney-client privilege if certain efforts are put forth to retrieve the communications – an important factor in a world in which confidentiality is the antithesis of

4 See id. at 10-11 (citing 8 J. Wigmore, Evidence §§ 2290, 2291 (3d ed. 1940)).
social media. The privilege belongs to the client alone, and may not be unilaterally waived by the attorney. While each one of these elements is seemingly straightforward, much debate and contention has developed over time, and continues to develop with the rise of social media and other modern forms of communication.

a. Communication

While “communication” is perhaps facially the most straightforward element of the attorney-client privilege, what constitutes a communication for purposes of the privilege is not necessarily clear cut, specifically, the concept of a protectable communication versus a factual transmission. Generally, court rules of evidence will define a communication broadly as any “information transmitted between a client and his or her lawyer in the course of that relationship.” However, the courts have made a distinction between the communication itself, and the facts within that communication. Simply put, the client cannot exercise privilege to avoid testifying to relevant facts within his knowledge that were communicated within the privileged communication. The privilege may not be used to shield otherwise relevant facts of the case that cannot be ascertained independently of that communication. One should not confuse this concept with the work product privilege and its exception in the event of undue hardship, which allows the disclosure of the contents of privileged document only if they are not otherwise discoverable, regardless of whether the content is a fact or not.

Thus far, debates over privileged communications have focused on content over form. However, while in a bygone era communications were simply characterized by oral conversations, written letters, or notes, the methods of modern communication are varied,

---

11 See, e.g., Cal Evid Code § 952.
13 See id. at 396 (citing State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 580, 150 N. W. 2d 387, 399 (1967)).
14 See Perry v. NCL (Bahamas) Ltd., 2011 U.S. Dist. LEXIS 142626, 2-8, 2012 AMC 527 (S.D. Fla. 2011) (holding that photographs taken of the scene of an accident, while qualifying for work product privilege, would be released due to a finding of undue hardship only because the evidence was not available elsewhere, and rejecting the attorney-client privilege as applicable).
technologically sophisticated, and ever-evolving. As already discussed above, “communication” is broadly defined to include any “information transmitted”. As new means of transmitting information have been developed, the legal profession has had to adjust in its treatment of the privilege. For example, the simple telephone and typewriter were new and revolutionary at one time, and the legal profession was forced to adjust its notion of what constituted a communication. With the advent of the digital age, it seems that forms of communication are being developed ever more rapidly. In 1997, the Supreme Court was speaking of e-mail, newsgroups, chatrooms, and the world wide web as new forms of communication affecting the legal profession. Today, methods of communication have expanded exponentially as people communicate through services such as Facebook, Twitter, Youtube, Snapchat, Texting, LinkedIn, blogs, etc. While older forms of communication dealt primarily in the oral and text content, today’s internet can transmit sound, pictures, and video. Even the text that is transmitted is evolving; people now have the ability to communicate via “emojis”, which are “small digital image[s] or icon[s] used to express an idea, emotion, etc., in electronic communication. Finally, many communications created and transmitted electronically transmit not only the actual content of the message, but also reveal details surrounding the creation of the communication itself in the form of metadata. Given the broad definition of “communication”, the courts have not yet had to grapple with the question of what forms of communication may not qualify for attorney-client privilege, but with the ever evolving landscape perhaps it is only a matter of time before a determination is that some odd new form of communication does not so qualify.

b. Confidentiality

Confidentiality is the touchstone of privilege. A communication must be made in confidence to fall within the privilege, and it is a key factor in assessing if the privilege applies.

15 See, e.g., Cal Evid Code § 952.
18 See id.
In the modern era this component of the privilege has proved to be most challenging to practitioners and the courts alike due to the ease and availability of social media and the often inherently public nature of the communications therein.\textsuperscript{23} Indeed, e-mail, Facebook, Twitter, blogs, etc. all provide their own unique mechanisms for the potential breach of confidentiality. By way of example, waiver of the attorney-client privilege 1). forwarding email chains containing otherwise privileged communications\textsuperscript{24}; 2). discussing conversations with their lawyers on a personal blog and Gmail chats\textsuperscript{25}; 3). sending emails through office email accounts where company policy provided that certain employees were to have access to all company emails.\textsuperscript{26}

In addition to the means by which communications are transmitted, new technology has dramatically changed the manner in which client information is accessed, stored and retrieved, adding an additional layer to the problem of confidentiality. In particular, protecting the confidentiality of information maintained in the cloud is proving to be most challenging. The “cloud” refers to the storing of information on the internet (essentially, third party servers off-site), rather than locally on one’s computer.\textsuperscript{27} A number of potential issues dealing with cloud computing were identified by the ABA Working Group on the Implications of New Technologies in a paper entitled “Issues Paper Concerning Confidentiality and Lawyers’ use of Technology” (September 20, 2010).\textsuperscript{28} With respect to cloud computing in the context of confidentiality concerns, the working party identified several issues, including: the increased potential for unauthorized access by the cloud company’s employees, subcontractors, or third parties (hackers); maintenance in countries with fewer legal protections for electronically stored information; unclear data ownership policies; unclear data breach notification policies; and

\textsuperscript{22} See Robles v. Trinidad Corporation, 1967 AMC 400 (denying privilege because there was no evidence that the subject records were intended to be kept confidential when the client handed them over to the attorney).

\textsuperscript{23} See THE INTERACTION OF SOCIAL MEDIA AND THE LAW AND HOW TO SURVIVE THE SOCIAL MEDIA REVOLUTION, 52 N.H.B.J. 24, 29.


\textsuperscript{26} Holmes v. Petrovich Devel. Corp., 191 Cal. App. 4\textsuperscript{th} 1047 (2011).

\textsuperscript{27} See Griffith, Eric, What is Cloud Computing, http://www.pcmag.com/article2/0,2817,2372163,00.asp (13 March 2013).

\textsuperscript{28} See http://www.americanbar.org/content/dam/aba/migrated/ethics2020/clientconfidentiality.authcheckdam.pdf.
insufficient encryption of data, among other concerns. By increasing the involvement and potential access to communications which would otherwise be privileged, cloud computing has the potential to affect the confidentiality determination by removing the reasonable expectation of privacy of such information. 

c. Between Parties in a Privileged Relationship

For a confidential communication to fall within the privilege, it must have been exchanged between an attorney and a client in an attorney-client relationship. In a one-on-one setting, there is usually little debate as to the existence of an attorney-client relationship. However, in the corporate context or where certain employees and attorneys may wear both legal and commercial hats, there may be some debate as to who is actually in the attorney-client relationship, and, therefore, whether the privilege applies between any two individual parties.

When a corporation is being represented the court will look to determine whether the communicating employee has “client” or attorney status such that his communications merit protection on behalf of the corporate entity. There have been two primary tests developed by which various courts have determined whether an individual who is part of a represented entity qualifies under the definition of “client” for purposes of the privilege: the control group test and the subject matter test. The original test, the control group test, as laid out in City of Philadelphia v. Westinghouse Electric Corp., defines the person whose communications to an attorney represent protected communications within the attorney-client relationship as any employee who “is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice or the attorney.” These individuals were most often determined to be members of senior management. The subject matter test, on the other hand, as exemplified by Harper & Row Publishers, Inc. v. Decker, holds that even if an employee is not

---

29 See id. See also http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/36_the_ethical.a
uthcheckdam.pdf.


34 423 F.2d 487, 491-492 (7th Cir. 1970).
a member of the control group, his communications to corporate counsel may be protected if that communication was at the direction of his superiors, and when that communication is of the subject matter upon which the corporate entity is seeking an attorney’s advice. A broader test, and perhaps more accommodating of the complex employee roles within a modern corporation, was the test upon which the Supreme Court ultimately based its opinion in Upjohn Co. v. United States. The Court in Upjohn specifically overturned the narrow application of the control group test, reasoning that the complexities of corporate operations in the involvement of employees at varying levels and roles to be involved in legal matters. Thus, the Court established that even the communications of lower-level employees could be protected when made at the direction of corporate superiors, based on information within the scope of the employee’s duties and where the employees were aware that the purpose of their involvement was to secure legal advice.

The privilege continues to protect communications subsequent to the termination of employment, but only to the extent that the communication concerned conduct arising out of his or her employment and which were privileged at that time. Moreover, disclosure to individuals within that corporate privilege relationship, even when those individuals may act for other parties outside of the privileged corporate relationship, does not waive the privilege with respect to those outside parties so long as the intent was not to disclose to those outside parties, but rather only to the individual acting in furtherance of his role within the corporate privilege relationship.

Even limited types of third party communications may fall within the attorney-client privilege. These generally include “communications made to agents of an attorney . . . hired to assist in the rendition of legal services.” Specifically, “the attorney-client privilege can attach to reports of third parties made at the request of the attorney or the client where the purpose of the report was to put in usable form information obtained from the client.” Thus, the privileged

---

36 See id. at 391-392.
37 See id. at 394.
39 See Am. S.S. Owners Mut. Prot. & Indem. Ass’n v. Alcoa S.S. Co., 232 F.R.D. 191, 197 (S.D.N.Y. 2005), 2005 AMC 2711 (holding that disclosure to directors who were also officers of constituent members of the membership did not equate to waiver of the attorney-client privilege by the membership).
relationship can extend to “representatives of the attorney, such as accountants; administrative practitioners not admitted to the bar; and non-testifying experts.” However, the privilege does not extend to third party witnesses who may be interviewed for the case at hand.

New technologies are playing an increased role in the creation of the attorney-client relationship. In particular, increased avenues of communications could lead to more opportunities for the creation of the attorney-client relationship. If an attorney makes himself or herself more readily available the public via social media, forums, or blogs, the attorney should anticipate the creation of the attorney-client relationship if potential clients communicate with the attorney through those means, even if in a less than formal, usual manner.

d. For the Purposes of Providing Legal Advice

Finally, for a communication to qualify for the protection of attorney-client privilege, it must have been provided for the purposes of soliciting or providing legal advice, as opposed to business, administrative or other advice. This means that communications with an attorney will not be privileged simply due to the fact that an attorney is involved. E-mail is illustrative of this issue. The mere inclusion of a lawyer in a communication is not enough to trigger the privilege.

Given the evolving role of the attorney, particularly in the setting of general/ in-house counsel, it is by no means certain that an attorney is performing a legal role or even providing legal advice. While the use of outside counsel versus in-house counsel may lend more weight to a determination that the advice was given for the purposes of providing legal advice, this is not the sole determining factor, and the focus will remain on the role played by the outside (or in-house) attorney giving the advice and whether that advice was legal in nature or not.

---

45 See id.
46 See United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, 2012 U.S. Dist. LEXIS 158944 (M.D. Fla. Nov. 6, 2012) (denying application of the privilege because the communication was not even addressed to an attorney; he was only included in the “cc” line).
When a communication contains both legal and non-legal advice, courts have established a variety of standards to determine whether that communication acquires protection under the privilege. Some courts apply the primary or predominant purpose test. Under this standard, a court will review mixed-purpose documents to determine whether the "primary purpose" of the communication was to obtain or provide legal advice.\(^{49}\) To make this determination, the court will look at such factors as the context of the communication, whether the legal purpose permeates the non-legal purpose, the extent of the recipient list, and whether legal advice was explicitly sought.\(^{50}\) It should be noted that the strictness with which the court applies this analysis may vary.\(^{51}\)

Other courts apply the "because of" test when analyzing whether the purpose of the communication was of a sufficiently legal character to merit application of the privilege. This test holds that mixed-purpose communications will be considered privileged if the communication was prepared "because of" the prospect of litigation, and would not have been created in such a form otherwise.\(^{52}\) This standard does not look at the primary or even secondary motive, but rather the totality of circumstances of the creation of the document.\(^{53}\)

### III. Exceptions to Valid Privilege and Exceptions to Valid Waiver

Even if a communication qualifies for protection under the attorney-client privilege, this is not necessarily the end of the inquiry. There are several well established exceptions to the attorney-client privilege, including the crime/fraud exception, the advice of counsel defense, the fiduciary exception, and the good cause exception. Further, there is also a noteworthy exception to waiver itself in the form of the common interest or joint defense doctrine. The case precedent

---

8, 1993); Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 671 (S.D. Ind. 1991)) (holding that outside counsel was hired to monitor the actions of claims adjusters, not provide legal advice, and therefore the attorney-client privilege did not apply).


50 See id. at 629 (citing In re CV Therapeutics, 2006 U.S. Dist. LEXIS 41568, 2006 WL 1699536, at *4).

51 See, e.g., Pittsburgh Corning Corp. v. Caldwell, 861 S.W.2d 423, 425 (Tex. App. Houston 14th Dist. 1993) (holding that if a communication contains any privileged component, the entire communication may be privileged, as legal advice inherently requires the analysis of non-legal issues). But see, e.g., In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) (requiring a “clear showing” of advice given in a legal role, to avoid the potential of trying to cloak communications in privilege simply by getting attorneys involved).


53 See id.
has yet to address these exceptions new communications technologies. Nonetheless, the courts have shown a willingness to be flexible in their application of the attorney-client privilege consistent with its underlying policy rationale, and to adapt to new situations as they arise.

a. **The Crime/Fraud Exception**

The crime/fraud exception to the attorney-client privilege is designed to prevent the client from taking advantage of the privilege to commit a crime or fraud.\(^{54}\) While it would indeed apply if the attorney was acting to further a criminal activity, this exception is more focused on the actions of the client and his or her motivations for utilizing the legal advice to be obtained, and requires no knowledge on behalf of the attorney. Stated differently, it is the mens rea of the client that determines the crime/fraud purpose.\(^{55}\) Given that the policy behind the attorney-client privilege has always been to increase the efficacy of legal representation, it is clear that this exception is in place because, without it, the overarching goal of full and complete justice would be subverted.\(^{56}\)

For the crime/fraud exception to apply, the party seeking to overcome the attorney-client privilege must first show some evidence, independent of the contents of the communication at issue, “of a factual basis adequate to support a good faith belief by a reasonable person” that examination of the communication may reveal evidence of the planning of crime/fraud activities.\(^{57}\) Only after this burden is met may the court conduct an in camera review of the communication at issue to determine whether the crime/fraud exception should apply.\(^{58}\) The exact standard of proof to be met during the course of this review to merit disclosure of the communication is not a clearly defined standard and as such, courts still wrestle with this issue.\(^{59}\)


\(^{58}\) See In re Grand Jury Subpoena, 419 F.3d 329, 343 & n.12 (5th Cir. 2005).

b. Advice of Counsel Exception

The advice of counsel exception is designed to prevent a party in litigation from using the attorney-client privilege as a mechanism “to prejudice his opponent’s case or to disclose some selected communications for self-serving purposes” while preventing the disclosure of the full communication. 60 This exception is policy driven as well. That is, the privilege “was intended as a shield, not a sword.” 61

The advice of counsel exception commonly applies in three situations: “[1] when a client testifies concerning portions of the attorney-client communication, [2] when a client places the attorney-client relationship directly at issue, and [3] when a client asserts reliance on an attorney’s advice as an element of a claim or defense.” 62 In essence the privilege will not apply in an instance where “the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit.” 63

When a part of a whole communication is used in a manner meriting application of the advice of counsel exception, the privilege with respect to additional material may also be waived. Courts apply one of two tests to determine the scope of waiver as a result of the advice of counsel exception: subject matter waiver and limited waiver. Courts following the subject matter waiver method have ruled that all communications on the same matter serve as a waiver with respect to any other communications on the same matter. 64 Meanwhile, courts following the limited waiver, as the name implies, allow for a more limited application of the scope of the waiver. Specifically, the courts will allow communications on the related subject matter to remain privileged if no unfairness will result to the adverse party; a determination to be made on a case by case basis. 65

60 United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir).
64 See, e.g., United States v. Woodall, 438 F.2d 1317, 1324-1325 (5th Cir. 1970).
65 See, e.g., Pritchard v. Country of Erie, 546 F.3d 222, 229 (2d Cir. 2008).
c. Fiduciary Exception

The fiduciary exception to the attorney-client privilege is designed to allow the privilege to operate more in-line with its underlying rationale in a specific type of business representation: the trust relationship.66 Specifically, the fiduciary exception to the privilege prevents the trustee of a trust from asserting the privilege against the beneficiaries of that trust.67 The Court in Jicarilla notes that this exception is justified for two policy reasons. First, it notes that the trustee, if and when it obtains legal advice on behalf of the trust, is operating for the benefit of the beneficiaries, who are the “real clients” of the attorney, and it would therefore not be in the spirit of the privilege to exercise it against them.68 Second, it states that the trustee’s duty to furnish trust information to the beneficiaries outweighs the trustee’s interest in the attorney-client privilege as exercised against the beneficiaries.69

To determine whether the fiduciary exception to the attorney-client privilege applies, the court will analyze the trust relationship to determine who the “real client” is with respect to the legal advice at issue. To make this determination, the court will apply a three factor test: 1) whether the legal advice was raised in the context of adversarial proceedings between the trustee and beneficiaries; 2) whether the communication at issue was intended for a purpose other than the benefit of the trust; and 3) whether the communication was funded out of the assets of the trust.70 Thus, while the fiduciary exception is treated as an exception to the privilege, a close examination of the policy reasons behind it reveals that perhaps it is not so much an exception than a detailed analysis of the “between parties in a privileged relationship” prong of the attorney-client privilege elements. While the fiduciary exception may not be as applicable in the corporate and admiralty context, examination of this exception and its rationale (along with others) is perhaps important in the sense that it shows that the court is flexible in applying the policy rationale directly to new situations and contexts as issues arise.

67 See id. at 2319.
69 See id. (citing Riggs, 355 A.2d at 714).
70 See id. (citing Riggs, 355 A.2d at 712).
d. Good Cause Exception

The good cause exception to the attorney-client privilege is similar to the fiduciary exception, but applicable in the corporate shareholder context. Specifically, this exception was developed to apply in the corporate context, where it must be taken into account that management is ultimately responsible to act in the interests of the shareholders. While this exception is not interpreted to destroy any possible exercise of attorney-client privilege by corporate management vis-a-vis shareholders, it is in furtherance of the rationale underlying the attorney-client privilege and recognizing the true beneficiary of legal advice to a corporation to afford an exception where there is a suit between management and shareholders and management is charged with acting against the best interests of the shareholders. While originally limited to the corporate shareholder context, some courts have expanded this exception to other fiduciary contexts as well, including insurance matters, joint ventures, partnerships, and pension plans.

There is no simple test to determine whether there is good cause to overcome the attorney-client privilege; instead, courts will examine a variety of factors to determine the degree of balancing of the competing interests of management and shareholders. Such factors may include, but are not limited to: 1) number of shareholder/percentage of shares involved; 2) nature of the claim; 3) desirability of the information at issue and its availability elsewhere; 4) criminality or simple illegality; 5) involvement of past or prospective actions; 6) whether the advice concerns the litigation at issue; 7) the extent of certain discovery versus fishing; and 8) risk of revelation of trade secrets. Again, while the courts are not always consistent in its rulings on a privilege, what is certain is that the courts will be flexible in the name of the underlying and basic policy rationale of the attorney-client privilege, as opposed to blindly applying precedent to factual settings for which the privilege was not designed.

---

72 See id. at 1103-1104.
73 See Article: THE PROBLEMATIC EXPANSION OF THE GARNER v. WOLFINBARGER EXCEPTION TO THE CORPORATE ATTORNEY-CLIENT PRIVILEGE, 31 Tulsa L.J. 275, 278.
75 See id.
Finally, in order to avoid confusion, it is important to distinguish the good cause exception from the undue hardship exception to the work product privilege. Unlike the good cause exception to attorney client privilege, the undue hardship exception to the work product privilege only allows the disclosure of the contents of an otherwise privileged document if it is not otherwise discoverable, regardless of whether the content is a fact or not.\(^76\)

\hspace{1cm} \textbf{e. Common Interest / Joint Defense Doctrine}

Unlike the aforementioned exceptions noted above, which operate to allow a communication otherwise protected by the attorney-client privilege to be disclosed in certain circumstances, the common interest or joint defense doctrine acts to maintain the benefits of attorney-client privilege in situations where the privilege would otherwise be waived by expanding the parties to whom the communication can be disclosed. Like the aforementioned exceptions, this doctrine has its roots in the basic policy goal of the attorney-client privilege: encouraging the most effective representation by encouraging full and complete disclosure to attorneys.\(^77\)

The joint defense and common interest doctrines are nearly identical. While the joint defense doctrine is employed between co-defendants in the criminal context, the common interest doctrine extends to cover co-parties (and sometimes even non-parties) in the civil context.\(^78\) The rationale behind both doctrines is that legal representation involving co-parties necessitating a joint defense strategy is most effective when both parties can freely exchange confidential communications without having to worry that they are waiving the attorney-client privilege.\(^79\)

To determine if the common interest/joint defense doctrine applies, the party seeking the privilege must first demonstrate that the underlying communication disclosed to the co-party was


\(^{77}\) See supra Section II, *4.


\(^{79}\) See, e.g., United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (joint defense doctrine); In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129 (Under Seal), 902 F.2d 244, 249 (4th Cir. Va. 1990) (common interest doctrine).
entitled to the attorney-client privilege when originally made. Assuming this is established, subsequent disclosures of these communications to co-parties will not waive the attorney-client privilege if: 1) those communications were made during the common interest/joint defense effort; 2) the disclosures were made during the same common interest/joint defense effort; and 3) the privilege was not otherwise waived by either party. The common interest need not be wholly identical, and neither must each of the co-parties be actually involved directly as a party in the litigation at hand.

IV. A Note on Government Corporate Investigations and the Culture of Waiver

While there are robust protections in place to prevent the forced discovery of communications qualifying for the attorney-client privilege, there is nothing to prevent the holders of the privilege from voluntarily waiving that privilege in accordance with the urgings of an outside party, for example government entities. However, so called the “voluntary” disclosure of privileged documents does not always speak to the true motivation behind the disclosure. While truly coerced waivers of the privilege are in fact invalid, in certain scenarios it may be possible to encourage waiver without that action reaching a legal finding of coercion. Thus, outside the bounds of the legal elements and exceptions defining the attorney-client privilege, corporations have faced the prospect of “encouraged” waiver of the privilege at the behest of a third party in exchange for some defined benefit.

This issue has arisen recently in the context of corporate investigations and the settlement/negotiation guidelines of the Department of Justice. More particularly, in the Holder Memo and subsequent memoranda, the Department of Justice has encouraged a culture of waiver by corporations in the context of corporate investigations and prosecutions. The Holder Memo

80 See Minebea Co. v. Papst, 228 F.R.D. 13, 16 (D.D.C. 2005) (citing In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990)).
81 See id. (citing In re Bevill, Bresler & Schulman Asset Management, 805 F.2d 120, 126 (3d Cir. 1986).
83 See, e.g., In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990) (between parent and non-party subsidiary); In re Skiles, 102 S.W.3d 323, 325 (Tex. App. Beaumont 2003) (between insurer and insured).
refers to a memorandum issued by Deputy Attorney General Eric Holder designed to set out a number of factors for DOJ officials to take into account when deciding whether or not to prosecute corporations. Among other factors, this memorandum suggested to DOJ prosecutors that a corporation’s willingness to disclose communications otherwise protected by attorney-client and/or work-product privileges pursuant to an investigation was to be considered as one of a number of factors when making the decision whether or not to prosecute. As a result of the Holder Memo and its progeny, the requests for voluntary waiver in considering prosecutorial action steadily rose over the last several years. The troubling effects of this growing culture of waiver did not escape the notice of the legal profession, and in fact was of such dire concern that the ABA formed a task force to express the dangers of eroding the attorney-client privilege through such actions. This lobbying effort, backed by former U.S. Attorneys General and other officials, including Eric Holder himself, ultimately worked to influence the scaling back of the prosecutorial guidelines related to waiver of the privilege. While lobbying efforts were ultimately used to respond to this particular challenge to the attorney-client privilege, equal efforts were made in the court setting, although with far less success.

Courts have split on the question of whether the attorney-client privilege is waived when otherwise privileged documents are voluntarily disclosed to government entities in the course of investigations in the spirit of cooperation or settlement negotiation, with the clear weight of authority holding that the privilege is indeed waived. The First, Third, Fourth, Sixth, and DC

---

88 See id.
Circuit courts have all held that voluntary disclosure to government entities pursuant to investigatory cooperation did indeed waive the attorney-client privilege for qualifying documents disclosed, holding that disclosure to a third party outside of the privileged relationship, and especially one that could likely be a potential adversary in litigation, was against the basic tenets and policy justifications of the attorney-client privilege. However, such disclosures have potentially found at least limited protection in the Eighth Circuit. The court in *Diversified Industries v. Meredith*, ultimately held that the disclosure of certain privileged information to the SEC pursuant to a subpoena resulted in limited waiver of the privilege, noting that failure to uphold the privilege in such a scenario may discourage corporations from conducting internal investigations at all. In this instance, the disclosure was made pursuant to a subpoena, rather than voluntary disclosure based upon a simple request in return for more lenient treatment. To be sure there are limits to the lengths that Courts will go to protect the privilege and, as such, it not at all certain that other courts would adopt the reasoning in *Diversified Industries*.

V. The Effect of Modern Technology on the Development of the Attorney-Client Privilege, and the Role of the Practicing Attorney in its Continued Development

Based upon precedent to date, it appears likely that courts will continue to show a willingness to adapt their treatment of the privilege to conform to the modern realities and the evolving nature of communications, technology and social media. One attempt at a novel approach to address privilege in the context of a discovery dispute is *In re Vioxx Prods. Liab. Litig.* However, as in Vioxx, these attempts are not always successful, and failure to accurately address new complexities arising out of these new privilege issues may result in accidental degradation of the privilege, rather than robust protection. As such, it is the attorney’s obligation, along with the courts to carefully consider the application of the attorney-client privilege and adapt the tests pertaining there to the realities of modern technology.

---

95 See, e.g., United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1st Cir. 1997); Genentech, Inc. v. United States International Trade Commission, 122 F.3d 1409 (Fed. Cir. 1997); Westinghouse Electric Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir. 1991); In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981).
96 572 F.2d 596 (8th Cir. 1978).
97 See id. at 611.
a. In re Vioxx: A Failed Attempt to Address Attorney-Client Privilege Concerns in Light of New Technology

In Vioxx, the court was faced with a situation resulting from the ease and commonality of use to which modern communications’ technologies lend themselves in the corporate setting: the creation of vast databases of recorded communications potentially, but not necessarily, pertaining to business and legal matters subject to the attorney-client privilege. In a time before e-mail and instant messaging employees would have to call by phone or visit other employees in person to discuss business and legal matters and those matters would therefore not necessarily be documented in written form. However, the advent of such technologies allows for employees to pass thoughts and information back and forth on a whim at the simple press of a button in a manner that inherently lends itself to tangible recordings that may be discoverable. 99 One predictable result of this new reality is that the amount of recorded communications to be evaluated for withholding during the discovery process under the attorney-client privilege may begin to exceed those of the past, even to the extent that it becomes a serious burden on the court. 100 It was this problem resulting from the application of new communications technologies that the court in Vioxx attempted to address.

In Vioxx a steering committee was established to handle discovery and pretrial matters for multidistrict litigation involving various products liability, tort, failure-to-warn, fraud, and warranty claims of many individuals and class action suits related to the prescription drug Vioxx. 101 As a part of these discovery proceedings, Merck, the manufacturer of Vioxx, submitted a privilege log which required the submission of “approximately 30,000 documents, amounting to nearly 500,000 pages” for in camera review to determine the applicability of the attorney-client privilege. 102 Faced with the understandably onerous task of reviewing all of these documents to analyze the applicability of the attorney-client privilege, and further to do so consistently, the court set about to appoint a Special Master and Special Counsel to devise a means by which the process could be more efficiently accomplished. 103 Ultimately, the decision

99 PLAYING I SPY WITH CLIENT CONFIDENCES: CONFIDENTIALITY, PRIVILEGE AND ELECTRONIC COMMUNICATIONS, 31 Tex. Tech L. Rev. 1225, 1244-1245 (describing the digital records made throughout the process of creating and sending an e-mail).


102 Id. at 791.

103 See id. at 791-792.
was made to establish a variety of categories of documents, some of which would merit a privilege determination and others of which would not, and then sort the communications into those categories for blanket privilege determinations.\textsuperscript{104} In determining the actual categories, the court was rightly concerned with the combination of legal and non-legal roles that attorneys may play in the role of in-house counsel.\textsuperscript{105} Thus, consideration had to be given to the primary purpose for which the communication was sent in determining whether it would qualify for the protection of the attorney-client privilege.\textsuperscript{106} Unfortunately, the actual categories created ill reflected this objective.\textsuperscript{107} Many of the categories purported to establish the primary purpose of the communication by examining what personnel were included on the e-mail message chain. For example, the court determined that “[w]hen e-mail messages were addressed to both lawyers and non-lawyers for review, comment, and approval we concluded that the primary purpose of such communications was not to obtain legal assistance since the same was being sought from all.”\textsuperscript{108} While in this instance the court considered the possibility that the inclusion of non-legal parties on such communications could simply be to keep those parties in the loop, that possibility was largely dismissed (or at least a presumption was made against it) and the category accepted.\textsuperscript{109} Further, the court made the questionable observation that privilege would be maintained even after those e-mails had been circulated amongst various individuals within the company, paying no mind to the fact that such individuals were possibly or even likely within the corporate “client” apparatus, and thus privilege should not be affected by such sharing.\textsuperscript{110}

Thus, while the court certainly showed a willingness and put forth an effort to address the consequences of modern communications technologies as they have affected the application of attorney-client privilege, it appears that they missed the mark in this instance. Corporate counsel, at the very least, were dissatisfied and worried by the court’s actions in Vioxx and what knock on effect it would have.\textsuperscript{111} While a few courts ended up following the practices set out in Vioxx\textsuperscript{112},

\begin{itemize}
  \item[\textsuperscript{104}] See id. at 809-813.
  \item[\textsuperscript{105}] See id. at 796-798.
  \item[\textsuperscript{106}] See id. at 798-799.
  \item[\textsuperscript{107}] See id. at 809-813. See also Spahn, Tom, Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts?, 16 STAN. J.L. BUS. & FIN. 288, 296, 299-301 (2011).
  \item[\textsuperscript{108}] In re Vioxx Prods. Liab. Litig., 501 F.Supp. 2d 789, 809 (E.D. La. 2007).
  \item[\textsuperscript{109}] See id.
  \item[\textsuperscript{110}] See id. at 809-810. See also Spahn, Tom, Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts?, 16 STAN. J.L. BUS. & FIN. 288, 300-301 (2011).
  \item[\textsuperscript{111}] See Spahn, Tom, Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts?, 16 STAN. J.L. BUS. & FIN. 288, 304-305 (2011).
\end{itemize}
many others rejected the Vioxx approach.\textsuperscript{113} Thus, as flexible as courts have been in adopting new solutions to modern problems associated with the attorney-client privilege, they are equally willing to abandon or reject such practices if the solution is ultimately deemed unsuitable.

\textbf{b. Addressing New Challenges resulting from Modern Technologies and Circumstances affecting the Attorney-Client Privilege as a Practicing Attorney}

It is an attorney’s ethical duty to maintain confidentiality with his or her client within the bounds of the law.\textsuperscript{114} To meet this obligation, it is important that attorneys are prepared to take whatever steps they can to help ensure that the attorney-client privilege remains strong, and is protected and applied correctly in accordance with the law and the new technological landscape. To do so, practicing attorneys should focus their efforts on three areas: i) understanding the modern communications’ landscape to manage the flow of attorney-client communications during the course of representation; ii) understanding the underlying policy rationale and spirit of the attorney-client privilege so that innovative solutions, methodologies, and rules may be proposed to the court; iii) supporting efforts outside of the courtroom to protect new intrusions on the privilege.

\textbf{i. Managing the Flow of Attorney-Client Communications}

The first area in which the practicing attorney may work to defend the attorney-client privilege in the face of modern technology and its novel issues is through conscientiously managing the flow of attorney-client communications during the course of a legal representation, whether it is case specific or in the context of an ongoing in-house relationship. The ABA has stated that it is the attorney’s responsibility to ensure that methods of electronic communication are reliable and secure.\textsuperscript{115} While the ABA has asserted that general electronic communications, such as e-mail, typically operate within this standard\textsuperscript{116}, it was equally noted that ethical issues


\textsuperscript{114} \textit{See} Model Rules of Professional Conduct Rule 1.6 (1983).

\textsuperscript{115} \textit{See} ABA Comm. on Lawyers’ Responsibility for Client Protection, Lawyers on Line: Ethical Perspectives in the Use of Telecomputer Communication (1986) at 67.

are presented with mining the metadata associated with any communications disclosed electronically.\textsuperscript{117} The modern attorney must be prepared to understand and stay up to date with all forms of modern communication which may be utilized for attorney-client privileged communications, and then be prepared to manage those communications in a way that will protect that privilege.

To manage attorney-client privileged communications, the practicing attorney should take steps both to inform himself and his client. The practicing attorney should stay informed of all forms of communication that may be used by a client to inadvertently waive the privilege in a public forum.\textsuperscript{118} In particular, the concept of metadata is an important one to consider, as it is generally stored unseen along with electronic documents which can pose a multitude of potential problems.\textsuperscript{119} The practicing attorney should be prepared to pass that knowledge along to his clients, so that they fully understand the potential ways in which the privilege may be unintentionally waived.\textsuperscript{120} The practicing attorney should also be prepared to manage how he and his client store privileged communications. For example, if privileged communications are to be stored in the cloud, the practicing attorney should take reasonable care to ensure that the cloud storage provider is providing the requisite level of security for those communications stored.\textsuperscript{121} In the corporate context, this process may involve the development of a corporate policy concerning the maintenance of attorney-client privilege, which defines what forms of communication are to be used, in what manner, and where confidential documents are to be stored to give the maximum effort towards qualifying for protection under the attorney-client privilege.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{118} See, e.g., \textit{Lenz v. Universal Music Corp.}, 2010 U.S. Dist. Lexis 125874 (N.D. Cal. Nov. 17, 2010) (client waived privilege by discussing conversations with her attorney on her blog).
\item \textsuperscript{119} See generally Article: The Ethics of Mining for Metadata Outside of Formal Discovery, 113 Penn St. L. Rev. 801.
\item \textsuperscript{120} See \textit{id}.
\item \textsuperscript{121} See ABA Cloud Ethics Opinions Quick Reference, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (listing and summarizing the various standards applicable to the usage of cloud storage in various states).
\end{itemize}
\end{footnotesize}
ii. Aiding the Court in Developing New Rules and Procedures

The second area in which the practicing attorney may work to defend the attorney-client privilege in the face of modern technology and its novel issues is by being prepared to aid the court with thoughtful examinations and rule proposals as to the application of the standard attorney-client privilege analysis to modern forms of communication, or the creation of new exceptions in the spirit of the policy of the attorney-client privilege to account for novel situations created by those new technologies. As highlighted in the examination of the history of the attorney-client privilege and its exceptions throughout this article, the courts have generally shown a willingness to adapt how they apply the attorney-client privilege, as long as it furthers the underlying policy of incentivizing full and complete disclosure between attorneys and clients in the interests of promoting the most efficient and accurate justice. Therefore, the practicing attorney should be prepared to take advantage of this historical trend in the courts to ensure that their client communications are protected to the fullest extent possible. This methodology has already been used by attorneys and attorney organizations in a litigation setting, as well as through the publication of articles and other opinion pieces.

With the ever-evolving options for modern communications, it is difficult to propose any one solution within this category of solutions, as new issues yet unconsidered may arise at any time. It is also important to remember that the courts are not infinitely flexible, so the practicing attorney must take care to ensure that any proposed solutions or new exceptions fit snugly within the bounds of the policy underlying the privilege. One potential problem area deals with the public release of intentionally hacked communications. While courts have generally found that the standard security features of e-mail are sufficient to maintain the requisite level of care and reasonable assumption that the communications are confidential as required by the privilege, the issue of hacking in the modern world has become far more serious and common.

---

122 Supra sections II and III.
123 See, e.g., supra section V.a., *104 (discussing the special counsel and master which assisted in developing the Vioxx methodology).
124 See, e.g., COMMENT: AN ANALYSIS OF THE TROUBLING ISSUES SURROUNDING IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE, 23 Hamline L. Rev. 289, at Part III (“Finally, Part III will provide guidance for courts when applying the privilege to mixed advice given by in-house counsel, which will afford more certainty and consistency for in-house counsel.”).
125 See supra section IV, *84.
126 See International Marine Carriers, Inc. v. United States, No. 95 Civ. 10670, 1997 WL 160371, at *3 (S.D.N.Y. Apr. 4, 1997); Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd., No. 95-C0673, 1996 WL 732522, at *7
Further, after a large scale hacking of company files, to what extent might a company have to go to recover potentially privileged documents, and when, in order to ensure that those documents would remain privileged should they ever be involved in a trial? This issue is perhaps most easily highlighted by the recent hacking of Sony Pictures Entertainment.\(^{127}\) The hack of Sony resulted in the release of a plethora of information concerning trade secrets, IP, and potentially privileged legal advice.\(^{128}\) In response to this release and hoping to make an effort to protect confidential information and the attorney-client privilege, Sony distributed a letter threatening ethics complaints against any lawyers who fail to purge those communications from their systems.\(^{129}\)

While it seems perhaps ethically correct that the fruits of such illegal actions should not result in the waiver of privilege, the sad truth is that with instances like the Sony hack becoming more prevalent, courts are bound to face the question of how they should treat such released communications in light of the hacked party’s response efforts (likely in vain) to retrieve lost communications. It will therefore be up to practicing attorneys to persuade the court consider the policy underpinnings of the attorney-client privilege correctly to these new realities of the modern age.

iii. Safeguarding the Privilege Outside the Courts

The third area in which the practicing attorney may work to defend the attorney-client privilege in the modern world is through efforts taken to safeguard the privilege from erosion outside the courtroom. As highlighted by the discussion of the Holder Memo\(^{130}\), there is always the possibility that privilege may be affected outside the courts by governmental or other entities, through means that cannot find an adequate fix in the court’s application of the privilege. Therefore, the practicing attorney should always be alert to potential challenges to privileged

---


130 See supra section IV.
documents outside the courtroom, and be ready to respond in whatever manner best fits the particular situation.

As the issue of the Holder and subsequent memoranda show, the holder of the attorney-client privilege may ultimately be encouraged to waive that privilege in exchange for some benefit, if the seeker cannot gain access by other means. In that instance, the legal profession responded most effectively not through court action, but rather by working with government parties to highlight the negative consequences of their actions and raising the issue and the potential consequences into the public spotlight. While individual attorneys in individual cases may not have the clout necessary to solve such problems alone, using professional organizations such as the ABA, working directly with governmental entities to inform on the potential consequences of encouraging the intentional waiver of the privilege, and publishing scholarly articles on potential challenges to the privilege should be means available to the practicing attorney to help combat such threats.

VI. Conclusion

While the motivation behind and application of the attorney-client privilege has not significantly changed since its original adoption by courts in the U.S., the world surrounding the privilege has continued to change which has necessitated applications in new contexts. Developments in communication technology and encouragement to waive the privilege challenge the original policy rationale behind the attorney-client privilege. However, the treatment of the attorney-client privilege by the courts over time and the responsiveness of the government in recognizing the need to alleviate the ill effects of the culture of waiver, foster optimism that with the right management practices, modern practicing attorneys can direct their efforts towards effectively protecting the privilege as such new challenges arise.

See supra section IV.